COURT OF JUSTICE
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Judgments of the General Court in Cases T-446/21 | Commission de régulation de l'énergie v ACER, T-472/21 | RTE v ACER, T-476/21 | TransnetBW v ACER, T-482/21 | TenneT TSO and TenneT TSO BV v ACER, T-484/21 | Polskie sieci elektroenergetyczne v ACER and T-485/21 | BNetzA v ACER

Electricity transmission: the General Court annuls the decision of the Board of Appeal of ACER in so far as ACER could not derogate from the applicable legal framework when adopting the methodology for cost sharing of redispatching and countertrading for the Core region

The General Court has also clarified the legal criteria governing the determination of the scope of that methodology and other aspects thereof

The operation of the common market for electricity gives rise to congestion between two bidding zones that must be dealt with in a coordinated way. The existing mechanisms to relieve such congestion include costly remedial actions, inter alia redispatching and countertrading, the costs of which must be shared proportionately between the different electricity transmission system operators (TSOs).

On 30 November 2020, the Agency for the Cooperation of Energy Regulators (ACER) adopted, by Decision No 30/2020, the common methodology for redispatching and countertrading cost sharing ('the contested cost sharing methodology') for the 'Core' region, comprising Belgium, the Czech Republic, Germany, France, Croatia, Luxembourg, Hungary, the Netherlands, Austria, Poland, Romania, Slovenia and Slovakia. According to EU law [1], that methodology is to include cost-sharing solutions for actions of cross-border relevance.

Following appeals brought against that decision, the Board of Appeal of ACER upheld that decision on 28 May 2021.

Several national regulatory authorities (NRAs) and TSOs brought actions for annulment before the General Court of the European Union against the decision of the Board of Appeal.

In its judgments, the General Court notes that the applicants submit, inter alia, that the decision is unlawful in that ACER incorrectly set a threshold for loop flows, for the purpose of determining the part of the costs covered by the contested cost sharing methodology that must be borne by the TSO whose network accommodates loop flows, in relation to the part that must be paid by the TSO that caused those flows.

According to EU law [2], in the first place, the threshold must be analysed and determined 'for each individual bidding zone border'. Neither the TSOs nor ACER carried out the required analysis. ACER's determination of the threshold is based on a single threshold for all bidding zones in the Core region, so that no account is taken of the specific characteristics of those zones and of the borders between them. In the second place, the analysis normally required to determine the level of loop flows that could be expected without structural congestion was not carried out. In the absence of such an analysis, the threshold set by ACER cannot comply with the requirement for that threshold to correspond to the level of loop flows that could be expected without structural congestion.

Accordingly, the General Court finds that **the threshold set by ACER does not comply with those requirements under EU law**.

It cannot in principle be accepted, in the light of the principle of legality, that an agency of the European Union, such as ACER, may derogate from the applicable legal framework. However, an interest linked to effectiveness, provided that it corresponds to a real need to ensure the practical effect of the provisions in question, may justify the existence of an implicit competence authorising it to determine a threshold in a different way than that prescribed by EU law.

ACER has not established that it was necessary to adopt the contested cost sharing methodology without being able to wait for the analysis required by EU law. Consequently, ACER has not demonstrated that there was a real need to ensure the practical effect of the provisions at issue that would justify recognising that it has implicit competence. In any event, ACER's determination of the threshold is not capable of ensuring the practical effect of those provisions. **Therefore, ACER was also not entitled to determine a threshold differently** in order to comply with the time limit set for it to adopt the contested cost sharing methodology.

The General Court also finds that [3] the Board of Appeal did not state sufficient reasons for the choice of the method used for flow decomposition, which affects the sharing of costs, so that it is not possible for the applicants to ascertain the reasons for that decision or for the General Court to exercise its power of judicial review of that decision. Accordingly, the decision infringes essential procedural requirements.

The General Court therefore annuls the Board of Appeal's decision in so far as it confirms ACER Decision No 30/2020. However, the General Court rejects the pleas concerning the lawfulness of the scope of the contested cost sharing methodology and the prioritisation of loop flows in comparison with internal flows when determining the causes of congestion.

In particular, the General Court states that the Board of Appeal was correct in dismissing the appeal against the contested cost sharing methodology with regard to its scope. The General Court observes, in particular, that Article 16(13) of Regulation 2019/943 does not determine which network elements are to be included within the scope of that methodology, but refers to the sharing of the costs incurred as a result of congestion that is to be relieved in a coordinated way in order to ensure cross-zonal trade. On that point, the General Court states that the firmness of the minimum capacity of each critical network element is guaranteed in the most efficient way by optimising the remedial actions activated on all network elements with a voltage level higher than or equal to 220 kV. Thus, **the contested decision, in so far as it confirms that elements other than interconnectors are included within that scope, is not contrary to Article 74(4)(b) of Regulation 2015/1222 or to Article 16(13) of Regulation 2019/943**. Furthermore, the General Court emphasises that the inclusion of internal network elements within the scope of the methodology does not entail any incentives that run counter to the objectives of Article 16(13) of Regulation 2019/943. In that regard, the General Court states that it would, moreover, be contrary to the principle of energy solidarity to accept that a TSO should be exempted from the costs that it causes to the other TSOs on the non-critical elements of their networks with its loop flows that exceed the threshold, even if the remedial actions on those elements contribute to ensuring cross-zonal trade.

As regards the prioritisation of loop flows, the General Court finds that, in the contested cost sharing methodology, an order of priority is established for the various types of flows, under which burdening loop flows above the threshold are identified as the first contributor to any overload, while burdening internal flows are identified as only the second contributor to such an overload. In that regard, **the General Court finds that EU law [4] allows internal flows and loop flows that exceed the threshold to be treated differently for the purpose of sharing the costs of remedial actions,** and such differentiation appears to be justified by their different nature, in the context of the legislation at issue.

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

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision. The appeal will not proceed unless the Court first decides that it should be allowed to do so. Accordingly, it must be accompanied by a request that the appeal be allowed to proceed, setting out the issue(s) raised by the appeal that is/are significant with respect to the unity, consistency or development of EU law.

The full text and, as the case may be, an abstract of the judgments (T-446/21, T-472/21, T-476/21, T-482/21, T-484/21 and T-485/21) is published on the CURIA website on the day of delivery.

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[1] Article 74(1) of Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management.

[2] Article 16(13) Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity.

[3] In Case T-482/21.

[4] Article 16(13) of Regulation 2019/943.