

ANNOUNCEMENT OF APPEAL¹

Case:	A-002-2022
Appellant:	RWE Supply & Trading GmbH
Appeal received on:	28 April 2022
Subject matter:	Appeal against ACER's decision of 25 February 2022 on the amendment to the methodology for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the imbalance netting process.
Keywords:	Price limits on balancing energy markets
Contested decision Number:	No. 3/2022
Language of the case:	English

¹ Announcement published in accordance with Article 9 of Decision BoA No1-2011 Laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of the Energy Regulators.

Remedy sought by the Appellant (including procedural requests)

The Appellant requests the Board of Appeal:

- to remit the case to the competent body of ACER;
- to annul the contested decision in its entirety or to declare the decision void *ipso iure*;
- to indicate that ACER:
 - (i) must simply deny the TSOs' proposal to introduce price limits of +/- 15.000 €/MWh; and
 - (ii) is prohibited from establishing transitional price limits on balancing markets that do not fulfil the minimum requirements under Article 30 (2) EB Regulation.

If and when the BoA remits the case to ACER without annulling the decision or declaring the decision void *ipso iure*, the appellant respectfully requests the BoA to:

- suspend the application of the contested decision on the basis of Article 28 (3) ACER Regulation in joint reading with Article 27 of the Rules of Procedure; or
- alternatively, order ACER to suspend the application of the contested decision on the basis of Article 21 (3) of the Rules of Procedure.

Pleas in law and main arguments

The contested decision was adopted on 25 February 2022 and published on 28 February 2022.

The appellant contests ACER's decision in its entirety, particularly the lawfulness of the transitional price limits adopted by ACER according to Article 1 of the Contested Decision and Article 3 of Annex I to the Contested Decision. The appellant's claims and arguments can be summarized as follows:

1. ACER's power to adopt individual decisions is limited by the procedural and substantive requirements set out in Regulation 2019/942 ('EB Regulation') in joint reading with Commission Regulation (EU) 2017/2195 ('EB Regulation'). Article 5 (2) (b) ACER Regulation entitles ACER to approve or revise a TSOs' proposal to introduce or to amend methodologies for pricing balancing energy pursuant to Article 30 (1) and (5) EB Regulation. By contrast, ACER has no power to introduce or amend such methodologies upon its own initiative. Consequently, ACER's competence to revise does not arise if the TSOs have not submitted a proposal at all or if they have only submitted a proposal that is not subject to Article 5 (2) ACER Regulation, but rather forms an *aliud*. A proposal to introduce or amend price limits on balancing markets only forms part of a proposal to introduce or to amend methodologies for pricing balancing energy if the proposal satisfies the minimum requirements as set out in Article 30 (2) EB Regulation. A proposal to establish price limits different from price limits in the sense of Article 30 (2) EB Regulation cannot be part of a proposal pursuant to Article 30 (1) EB Regulation; neither can such a proposal be part of other methodologies subject to Article 5 (2) (b) ACER Regulation. Rather, a proposal to introduce such price limits is equivalent to the non-existence of any proposal at all. Hence, price limits contrary to Article 30 (2) EB Regulation are neither approvable nor revisable under Article 5 (2) (b) ACER Regulation.

As ACER correctly found, the TSOs' proposal of 2 June 2021 to establish permanent price limits of +/- 15.000 €/MWh falls short of the minimum requirements set out in Article 30 (2) EB Regulation: the TSOs did not propose technical, but rather regulatory price limits (first limb). Moreover, the TSOs did not identify that such price limits are needed for the functioning of the market (second limb). Consequently, the TSOs submitted a proposal that is not provided for in the EB Regulation and, hence, neither approvable nor revisable under Article 5 (2) (b) ACER

Regulation. Thus, ACER had no power to revise it; nor was ACER entitled to adopt price limits upon its own initiative. Consequently, the transitional price limits that have been adopted by ACER are illegal, since the TSOs' failed to submit a revisable proposal in the first place.

2. Assuming, *arguendo*, that the TSOs had submitted a proposal to amend technical price limits according to Article 30 (2) EB-Regulation, ACER did not simply revise but rather dismissed that proposal and, at its own initiative, introduced transitional price limits which are, according to ACER's own reasoning, of no technical nature in the sense of Article 30 (2) EB-Regulation. It is also for this reason that ACER acted beyond its competences. As a consequence, ACER's decision cannot be founded upon Article 5 (2) (b) ACER Regulation.
3. In any event, the decision is unlawful as it is incompliant with the requirements set forth in Article 30 (2) EB Regulation. Price limits that do not satisfy these requirements, violate Article 10 (1) of Regulation EU 2019/943 ('Electricity Regulation') and are, hence, illegal. The transitional price limits that have been adopted by ACER fall outside the scope of Article 30 (2) EB Regulation and therefore infringe Article 10 (1) Electricity Regulation: ACER itself admits that the price limits that have been adopted are not justifiable under Article 30 (2) EB Regulation (first limb). The appellant shares ACER's view, since the transitional price limits at issue are of a non-technical nature (second limb). In any case, such price limits are not needed for an efficient functioning of the market (third limb). Moreover, they are disproportional to the technical price limits that are applicable to intraday markets, thus also falling foul of the second sentence of Article 30 (2) EB Regulation (fourth limb).
4. When revising a TSOs' proposal, ACER is not only bound to the prerequisites laid down in Article 30 (2) EB Regulation but must also ensure compliance with the purpose of the EB Regulation as well as the objectives that are inherent to the ACER Regulation, namely the contribution to market integration, non-discrimination, effective competition and the proper functioning of the market. This follows from Article 5 (6) ACER Regulation. ACER failed to do so: The transitional price limits that have been adopted intervene into the free formation of prices and create barriers to enter the balancing energy markets. Hence, they contradict the EB Regulation's objective to open the balancing energy market to spot market participants that are not active in the balancing capacity market; likewise, they undermine the objectives to foster effective competition and to enhance efficiency on balancing markets as provided for in Article 3 (1) (a)-(b) EB Regulation. Correspondingly, they are also incompatible with the ACER Regulation's objectives to contribute to effective competition and to the proper functioning of the market. Hampering isolated participation in the balancing energy market undermines the aim to facilitate participation in demand response as provided for in Article 3 (1) (f) EB Regulation. Furthermore, intervening in the free formation of prices is contrary to Article 3 (b) Electricity Regulation which in turn is part of the objectives of the EB Regulation. In a nutshell: ACER violated Article 5 (6) ACER Regulation as it failed to ensure compliance with the purpose of the EB Regulation as well as the objectives specific to the ACER Regulation.
5. Pursuant to Article 14(7) ACER Regulation, Article 296 TFEU and Article 41(2)(c) of the Charter of Fundamental Rights of the European Union ('the Charter'), ACER has an obligation to provide sufficiently reasoned decisions. ACER, however, failed to do so: first, ACER did not indicate the legal basis of the transitional price limits that have been adopted. ACER admitted that the transitional price limits that have been adopted cannot be based on Article 30 (2) EB Regulation. Instead, ACER justified such price limits by reference to Articles 19 to 22 EB Regulation. When analysing Article 19 to 22 EB Regulation, it is, however, unclear as to why these provisions shall

contain a legal basis for establishing transitional price limits that are contrary to Article 30 (2) EB Regulation (first limb). Second, the contested decision is unduly reasoned as it does not disclose the fundamental factual considerations underlying ACER's decision to establish transitional price limits (second, third and fourth limb).

6. Deriving from Article 41 of the Charter and pursuant to Article 14 (6) ACER Regulation, ACER must respect the parties' right to be heard. Before taking any individual decision, ACER must therefore inform any party concerned of its intention to adopt that decision. ACER infringed the appellant's right to be heard: ACER did not inform the appellant and other parties concerned of its intention to adopt transitory price limits amounting to +- 15.000 €/MWh and applying for a period of 48 months. Rather, ACER shared this intention only with the TSOs, ENTSO-E and the regulatory authorities of the member states.

Further information

More information on the appeal procedure can be found on the 'Appeals' section of the Agency's website:

https://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Procedural-Documents.aspx