

ANNOUNCEMENT OF APPEAL¹

Case:	A-003-2022
Appellant:	Uniper Global Commodities SE
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:	Electricity Balancing Guidelines, methodology for pricing balancing energy, (transitional) price cap, lack of legal basis, ACER's competences, ACER's power of revision, objectives of EB-CN, duty to state reasons
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:

- declare the Appellant's appeal well-founded and remit the case to the competent body of ACER in accordance with Art. 28 (5) ACER Regulation;
- declare that ACER Decision 03/2022 of 25 February 2022 is invalid *ipso jure* or to annul that Decision in its entirety as ACER exceeded its powers in the Decision and there is no legal basis for setting a transitional price limit at all;
- indicate that ACER has to deny ENTSO-E's proposal as even according to ACER's analysis it does not comply with the requirements of the EB Regulation and the Electricity Regulation.

Pursuant to Art. 20 {3} (d) of the Board of Appeal's Rules of Procedure, to require ACER to disclose to the Appellant, in un-redacted form, the documents relating to ACER's consultation of TSOs, ENTSO-E, and the national regulatory authorities in relation to the contested decision, in particular copies of the documents recording ACER's views on the consultation comments and the contested decision, including copies of all templates and drafts recording ACER's views on the Decision.

Pleas in law and main arguments

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

The Appellant contests the Agency's decision. The Appellant's claims and arguments can be summarised as follows:

1. *First plea*: Infringement by ACER of Article 5 (1), Article 5 (2) (f) and Article 6 (3) of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing, as amended on 23 February 2021, ("EB Regulation") in acting beyond its competence by taking a decision that is completely different in substance from the proposal provided by the TSOs for approval:

- Art. 5 (1) clause 2 EB Regulation allows that "*before approving the terms and conditions or methodologies, the Agency or the relevant regulatory authorities shall revise the proposals where necessary*". However, the decision remains an approval decision, which must therefore remain related to the application and its essential content. Revisions within the meaning of Art. 5 (1) clause 2 EB Regulation are therefore, as also follows from recital 17 of the ACER Regulation, only those which are "necessary to take into account the evolution of the market without substantially changing those network codes and guidelines or creating new competences of ACER".
- However, according to ACER's own assessment, the TSOs' proposal was "substantially revised" (Contested Decision, para. 54). ACER rejected the legal basis invoked by the TSOs and explicitly did not set a technical price limit. The proposed decision text and its recitals were also almost entirely replaced. Therefore, ACER has exceeded its competences. Due to the clear allocation of competence by the EB Regulation, ACER does not have sufficient competence to set a price limit in the form of a four-year transitional arrangement instead of a requested technical price limit pursuant to Art. 30 (2) EB Regulation. Moreover, by setting something genuinely different from what the TSOs have consulted and proposed, ACER has disregarded the consultation procedure under Art. 10 EB Regulation.

2. *Second plea*: The EB Regulation lacks a legal basis for the establishment of a transitional regime:

- Neither the TSOs nor ACER are authorized to set a regulatory price limit in the context of a

transitional regime. Apart from Art. 30 (2) EB Regulation, there is no legal basis for technical price limits in the EB Regulation. Nor is there any apparent legal basis for price limits other than technical ones- in particular regulatory price limits.

- On the contrary, such a price limit violates Art. 10 of the Regulation (EU) 2019/943 of 5 June 2019 on the internal market for electricity ("Electricity Regulation").

3. *Third plea*: ACER has not sufficiently reasoned its decision to set a transitional price limit.

- ACER's decision lacks of an adequate statement of reasons and therefore does not comply with Art. 14(7) ACER-Regulation.
- Neither is it explained which effect is pursued by setting the transitional price cap and how it is evaluated with regard to the objectives of the EB Regulation, nor is the design of the price cap, i.e. the amount of the price cap and period of validity, substantiated in more detail.
- Likewise, ACER has not conducted any investigation of its own to verify the TSOs' claims but rather refers unspecifically to TSOs' statements.

4. *Fourth plea*: By setting a transitional price limit, ACER has violated the objectives laid down in Art. 3 EB Regulation:

- The decision is contrary to the objective under Art. 3(1) (a) EB Regulation of enhancing effective competition among balancing energy providers.
- The decision at least delays the achievement of the objective formulated in Art. 3 (1) (b) EB Regulation of the establishment of effective national and European balancing energy markets.
- Due to the limited option to price in opportunity costs, frictions between the intraday market and the balancing energy market are accepted by ACER. This contradicts the objective of the "consistent functioning of day-ahead, intraday and balancing markets" set out in Art. 3(1) (d) EB Regulation.

5. *Fifth plea*: By setting a transitional price cap, ACER has violated the principle of proportionality, which is laid down in Art. 3 (2) (a) EB Regulation and is also one of the general principles of EU law. ACER fails to demonstrate and is unable to demonstrate that the price limit set is suitable, necessary and appropriate to achieve objectives accepted by the EB Regulation.

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