

DECISION OF THE BOARD OF APPEAL
OF THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS

31 May 2021

*(Application for annulment – Debit Note 4440210106 — Commission Decision (EU) 2020/2152 of 17
December 2020 - Treaty on the Functioning of the European Union – Regulation (EU) 2019/942)*

Case number	A-008-2021
Language of the case	English
Appellant	vp Energieportfolio UG (haftungsbeschränkt) (‘Energieportfolio’) Represented by: B. SCHULER, managing director
Defendant	European Union Agency for the Cooperation of Energy Regulators (‘ACER’ or ‘the Agency’) Represented by: C. ZINGLESERN, Director and V. ZULEGER, agent
Application for	The annulment of ACER Debit Note 4440210106, dated 28/01/2021 (‘Debit Note’), and Commission Decision (EU) 2020/2152 of 17 December 2020, on the fees payable to the European Union Agency for the Cooperation of Energy Regulators for the collection, processing, treatment and analysis of information reported pursuant to Regulation (EU) No 1227/2011 of the European Parliament and of the Council (‘Commission Decision’).

THE BOARD OF APPEAL

composed of composed of A. PIEBALGS (Chairperson), M. SWORA (Rapporteur), W. BOLTZ, Y. FREDRIKSSON, J. OLLIER, and M. THOMADAKIS (Members).

Deputy Registrar: S.VAONA

gives the following

DECISION

I. Background

Legal background

1. Article 31 of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (**‘ACER Regulation’**) compiles the sources of revenue of which the budget of the Agency shall be made up. These sources of revenue include (i) contributions from the European Union’s (**‘EU’**) budget,

- (ii) fees paid to ACER pursuant to Article 32 of the ACER Regulation; (iii) voluntary contributions from Member States or National Regulatory Authorities ('**NRA**'); and (iv) legacies, donations, or grants.
2. Accordingly, the Agency receives funding and contributions charged to the EU budget in accordance with the Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council ('**EU's Financial Regulation**'), which shall be the largest source of revenue, as expressly indicated in Recital 37 of the ACER Regulation. Therefore, all other sources of revenue (including the fees due to ACER) shall not exceed the amount received as a contribution from the EU budget.
 3. The purpose of the fees due to the Agency, as explained in Recital 37 of the ACER Regulation, is to improve its funding and cover its costs with regard to the services it provides as per the applicable regulations.
 4. Pursuant to Article 32(1) of the ACER Regulation, fees shall be due to ACER for the performance of the following tasks: (a) requesting an exemption decision¹ and for decisions on cross-border cost allocation²; and (b) collecting, handling, processing, and analysing of information reported by market participants or by entities reporting on their behalf pursuant to Article 8 of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency ('**REMIT Regulation**')³.
 5. Article 32(2) of the ACER Regulation entrusts the setting of the mentioned fees and the conditions of its payment to the European Commission ('**Commission**'), and establishes the requirements that it must observe when carrying out this task, which can be summarized as follows:
 - a) the fees must be set only after consulting the Administrative Board and the Board of Regulators of the Agency, after which the Commission will hold a public consultation;
 - b) the fees must be proportionate to the costs of the relevant services as provided in a cost-effective way and shall be sufficient to cover those costs; and
 - c) the fees shall be set at such a level as to ensure that they are non-discriminatory and that they avoid placing an undue financial or administrative burden on market participants or entities acting on their behalf.

¹ Article 10 of the ACER Regulation.

² Article 12 of Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009.

³ It must be noted that the information and reporting obligations set out in Article 8 of the REMIT Regulations are further developed in Implementing Regulation (EU) No. 1348/2014.

6. For this purpose, the Commission held a public consultation process between 8 June 2020 and 31 August 2020 and adopted the Commission Decision (EU) 2020/2152 of 17 December 2020 on fees due to the European Union Agency for the Cooperation of Energy Regulators for collecting, handling, processing and analysing of information reported under Regulation (EU) No 1227/2011 of the European Parliament and of the Council (**‘Commission Decision’**), setting the fees due to the Agency pursuant to Article 32(1)(b) of the ACER Regulation.
7. These fees are based on the task entrusted to ACER by the REMIT Regulation consisting in the monitoring of wholesale energy markets in the EU. As a consequence, both the REMIT Regulation and Implementing Regulation (EU) No 1348/2014⁴ establish mechanisms to provide ACER with the necessary sets of information to duly perform the previous task.
8. These sets of relevant information must be provided to the Agency by “reporting parties” or “registered reporting mechanisms” (i.e.: market participants, or entities reporting on behalf of market participants), which shall be registered directly with the Agency.
9. This obligation to be registered directly with the Agency is the circumstance that, pursuant to the Commission Decision, determines that registered reporting mechanisms be the ones who should pay the fee. Such is established in Article 4(1) of the Commission Decision.

Facts giving rise to the dispute

10. The Appellant is a registered reporting mechanism based in Germany, whose activity, according to its corporate purpose, consists in “*the development and provision of a web-based energy portfolio and reporting system and related services*”⁵.
11. On 27 November 2020, ACER sent the Appellant a fee notification announcing the issuance of a “REMIT fee”⁶ (sic.) for a specified amount, which was objected to by the Appellant on 7 December 2020.
12. On 28 January 2021, Debit note 4440210106 (**‘Debit Note’**) was issued by ACER and was notified to the Appellant. The Appellant has lodged a complaint against the Commission on 1 January 2021⁷ and wrote to ACER, on 1 February 2020⁸, “[objecting] *debit note 4440210106 and [rejecting] any liability with respect to REMIT fees*”⁹.

Procedure

⁴ Commission Implementing Regulation (EU) No 1348/2014 of 17 December 2014 on data reporting implementing Article 8(2) and Article 8(6) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council on wholesale energy market integrity and transparency.

⁵ Para 1. of the Appeal.

⁶ Para 15 of the Appeal.

⁷ Frontpage of the Appeal.

⁸ Para15 of the Appeal.

⁹ Para 15 of the Appeal.

13. On 5 February 2021, the Appellant lodged an Appeal before ACER’s Board of Appeal, seeking the annulment of the Debit Note on the basis that it lacks legal basis and is invalid. The appeal was registered under A-008-2021.
14. On 17 February 2021, the announcement of appeal, was published on the website of the Agency¹⁰.
15. On 16 February 2021, the Defendant was notified of the appeal.
16. On 15 March 2021, the Registrar communicated the composition of the Board of Appeal to the Parties.
17. On 23 March 2021, ACER filed its Defence with the Registry, requesting the Board of Appeal to dismiss the appeal.
18. On 1 April 2021, following a request of the Chair of the Board of Appeal of 25 March 2021 pursuant to Article 20(3) of the Rules of Procedure with regard to the admissibility of the Appeal, the Appellant filed its Reply with the Registry.
19. On 8 April 2021, the Registry closed the written phase of the procedure without any request for an oral hearing being filed by the parties.

Main arguments of the Parties

20. The Appellant argues that the Debit Note is invalid and should be annulled in its entirety because the Commission Decision, on which it is based, (i) is not based on the Treaty on the Functioning of the European Union (‘TFEU’); (ii) is not based on Article 32(2) of the ACER Regulation; (iii) is subject to erroneous discretion.
21. ACER argues that the appeal should be dismissed as manifestly inadmissible or, alternatively, as manifestly unfounded.

II. Admissibility

22. The Appellant argues that its appeal is admissible because: (a) the Debit Note is a matter related to the wholesale market integrity and transparency subject appeal before the Board of Appeal; (b) it is an individual decision; (c) it is a direct act of the Agency exercising its decision-making powers, as it is “*neither entitled by Article 32, para. 1, lit. (a) of [ACER Regulation] nor directly based on [the Commission Decision]*”; (d) even if the matter it concerns were deemed not to be included in Article 2(d) of the ACER Regulation, the affected natural or legal persons must be granted a right of appeal before the Board of Appeal for reasons of procedural economy; (e) the Board of Appeal is empowered to decide on the Commission Decision as it is *de facto* a decision of the Agency delegated to the Commission; and (f) an administrative remedy against the unlawful adoption of the Debit Note must be ensured.

¹⁰ http://acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Announcements%20of%20Appeal/Case%20A-008-2021%20-%20Announcement%20of%20Appeal.pdf

23. ACER argues that the appeal is inadmissible because the Debit Note is (i) not an individual decision and (ii) is not one of the decisions subject to appeal to the Board of Appeal.
24. Should the Board of Appeal agree with ACER, the appeal would be deemed inadmissible on the ground of Article 28(1) and Article 2(d) of the ACER Regulation, being the right to appeal before the Board of Appeal only applicable to individual decisions. However, considering the arguments put forward by the Appellant and the list of decisions referred to in Article 2(d), the Board of Appeal decided to examine in this case the right to appeal under the ACER Regulation considering, hypothetically and *ad arguendum*, that debit notes can be characterized as individual decisions.
25. According to Article 28(1) of the ACER Regulation, “*any natural or legal person, including the regulatory authorities, may appeal against a decision referred to in point (d) of Article 2 which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person*”. Thus, not all acts adopted by the Agency are subject to appeal before the Board of Appeal. Only those individual decisions included in Article 2(d) of the ACER Regulation may be appealed before the Board of Appeal, provided that the remaining requirements set forth in Article 28 of the ACER Regulation are cumulatively met (see also Article 15 of the Board of Appeal Rules of Procedure¹¹).
26. Article 2 of the ACER Regulation lists types of acts which may be adopted by ACER, including, in its letter (d), several types of individual decisions. The Appellant argues that the Debit Note should be deemed a decision “*on matters related to wholesale market integrity and transparency pursuant to Article 12*”. None of the other types of decisions mentioned in Article 2(d) of the ACER Regulation has been claimed by the Parties, or is deemed by the Board of Appeal, to be relevant.
27. From the outset, it must be clarified that the Board of Appeal cannot decide without a legal basis awarding it competence to do so. Article 28(1) of the ACER Regulation is a *lex specialis* and must be interpreted as such. It limits both the competence of the Board of Appeal and the rights of addressees of decisions to use the appeal procedure before the Board of Appeal for appeals concerning those individual decisions listed in Article 2(d) of the ACER Regulation. Article 28(1) cannot be interpreted in such a way that creates a right of appeal to the Board of Appeal of decisions other than those listed in Article 2(d). It cannot be read to mean that any decision adopted by ACER is subject to the procedure established therein. The Board of Appeal was set up to hear appeals of certain, specific type of ACER decisions identified in Article 2(d), for which the existence of a special Board of Appeal was deemed beneficial. There are a number of other

¹¹ Consolidated Version of the Rules of Procedure of the Board of Appeal, Board of Appeal Decision No. 1-2011, as amended on 5 October 2019 laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of Energy Regulators.

types of decisions adopted or potentially adopted by ACER which are not subject to the special procedure before the Board of Appeal, but only to the general rules on judicial review of the EU legal order. Contrary to what is argued by the Appellant, the principle of procedural economy is not, by itself, a basis for the expansion of the competences of the Board of Appeal.

28. Article 28(1) of the ACER Regulation does not include the Debit Note within the scope of decisions subject to appeal before the Board of Appeal, neither explicitly nor implicitly, or even by reference to a broader group or category of decisions that includes such debit notes. The Board of Appeal cannot extend its own competence beyond Article 28(1) of the ACER Regulation, to include acts excluded from its scope.
29. Contrary to what is argued by the Appellant, the Debit Note is not a decision referred to in Article 2(d) of the ACER Regulation. In order to be subject to appeal before the Board of Appeal, it is not enough for the Agency's decision to concern any "*matters related to wholesale market integrity and transparency*", it is necessary that those matters be "*pursuant to Article 12*". Article 12(a) of the ACER Regulation does not refer to debit notes or any type of decision on fees associated to the activities in question, and it links the activities of monitoring the wholesale markets, collection and sharing of data and establishing a European register of market participants to the provisions of Articles 7 to 12 of the REMIT Regulation. Thus, the "*matters*" which are referred to in Article 2(d) of the ACER Regulation are limited by the scope of Articles 12 of the ACER Regulation and 7 to 12 of the REMIT Regulation.
30. These Articles do not refer to the fees due to ACER for the provision of the services in question, but refer to technical and regulatory issues related to the mentioned activities. These invoices/debit notes issued by ACER have the purpose of financing the provision of services related to REMIT, but they are not based on the REMIT Regulation or on decisions that the Agency may take under the relevant REMIT provisions. Indeed, the Debit Note is regulated under Article 32 of the ACER Regulation and under Article 71 of the ACER Financial Regulation¹², as well as by the Commission Decision, and debit notes adopted under Article 32 are not included in Article 2(d). Hence, the Debit Note is not included within the scope of the individual decisions under Article 2(b) and, consequently, under Article 28(1) of the ACER Regulation.
31. Contrary to what is suggested by the Appellant, the Commission Decision is not *de facto* a decision of the Agency delegated to the Commission. Even if, *ad arguendum*, that were the case, this would not change the conclusion concerning the inadmissibility of this appeal *ratione materiae*.
32. The fact that the Appellant's grounds all focus on the Commission Decision itself is connected to the fact that the Debit Note is, as described by the Appellant, "*an act of bound*

¹² Decision 8/2019 of the Administrative Board of the Agency for the Cooperation of Energy Regulators of 21 June 2019 on the Financial Regulation of the Agency for the Cooperation of Energy Regulators.

administration”¹³. It is adopted by ACER by simply collecting information from relevant parties and applying the calculation factors determined in the Commission Decision, without any discretionary margin of ACER involved in this operation¹⁴. The Commission Decision determines not only the amount of the fees to be paid, but also the way and manner in which they are to be paid¹⁵.

33. The Board of Appeal is not empowered to assess the legality of acts of the Commission. It would not be able to declare such acts to be invalid. Moreover, unlike for example national courts adjudicating cases related to unpaid debit notes, empowered to make a referral to the CJEU to ask for a declaration of invalidity, the Board of Agency has no such option.
34. The Board of Appeal thus finds that, aside from the issue of inadmissibility, it cannot adhere to any of the Appellant’s arguments, as they all require a declaration of invalidity of the Commission Decision and the Board of Appeal is not empowered to declare it.
35. It follows from all the above that the Appeal must be ruled as inadmissible.

DECISION

On those grounds, the Appeal is deemed inadmissible.

THE BOARD OF APPEAL

Hereby dismisses the appeal as inadmissible.

This decision may be challenged pursuant to Article 263 of the Treaty on the Functioning of the European Union and Article 29 of Regulation (EU) 2019/942 within two months of its publication on the Agency website or of its notification to the Appellant as the case may be.

For the Board of Appeal



The Chairperson
Andris PIEBALGS

For the Registry



The Deputy Registrar
Stefano VAONA

¹³ Appellant’s Response, e.g. paras 119-120 and 154-155.

¹⁴ Appellant’s Response, paras 114 and 121.

¹⁵ See recital 21 of the Commission Decision: “*Since the fees are entirely determined by this Decision, which is the basis for the Agency establishing the amounts receivable (...)*”.