

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

16 July 2020

*(Application for annulment – ACER Decision No. 01/2020 – Admissibility - Competence of  
ACER – Proportionality – Duty to state reasons)*

<b>Case number</b>	A-003-2020 (consolidated)
<b>Language of the case</b>	English
<b>Appellants</b>	TenneT TSO B.V. ('TenneT' or 'Appellant I') Represented by: Arjan Kleinhout and Koen Orbons (De Brauw, Blackstone, Westbroek N.V.), representatives. Vereniging Energie-Nederland ('Appellant II') Represented by Nynke Geerts (Coupry B.V.), representative.
<b>Defendant</b>	European Union Agency for the Cooperation of Energy Regulators (‘the Agency’ or ‘ACER’) Represented by: Christian Zinglensen, Director / Pierre Goffinet, Emmanuel Van Nuffel and Laure Bersou (Daldewolf S.C.R.L).
<b>Application for</b>	The revision or annulment of the Decision of the Agency for the Cooperation of Energy Regulators No. 01/2020 of 24 January 2020 on the Methodology to determine Prices for the balancing energy that results from the activation of balancing energy bids (‘Decision No. 01/2020’ or ‘Contested Decision’).

## THE BOARD OF APPEAL

composed of Andris Piebalgs (Chairperson), Mariusz Swora (Rapporteur), Nadia Horstmann, Jean-Yves Ollier, Michael Thomadakis and Yvonne Fredriksson (Members).

**Acting Registrar:** Ronja Linßen

gives the following

### Decision

#### *I. Background*

##### *Legal background*

1. In a power system, demand should be equal to supply at all times or, in other terms, the system frequency must be maintained close to its nominal value. Each transmission system operator ('TSO') has to carry out a real-time balance to avoid any frequency deviation, capable of triggering a system collapse or blackout. Electricity balancing is needed because, after careful planning, producers, suppliers and traders may often find themselves out of balance and exposed to TSOs' balancing and settlement regime.
2. Balancing energy (the real-time adjustment of balancing resources to maintain the system balance) is provided by Balancing Service Providers (BSPs) and can be provided either in real-time or secured in advance as balancing reserve products, 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. Three types of balancing reserve products are available, which are part of a sequential process based on successive layers of control. These are: (i) Frequency Containment Reserves ('FCR'), Frequency Restoration Reserves ('FRRs') and Replacement Reserves ('RR'). FRR are a type of balancing reserves allowing for a frequency restoration process. FRRs can be activated either manually (mFRR), e.g. by a phone call, or automatically by means of an automated system in which auctions are made using algorithms (aFRR). Frequency restoration processes are (jointly) operated by the TSO or TSOs operating in a Load-Frequency Control Area ('LFC' area).
3. The market players have a responsibility to balance the system through the balance responsibility of market participants, namely the Balance Responsible Parties (BRPs), who are financially responsible for keeping their own position (sum of injections, withdrawals

and trades) balanced over a given timeframe (the imbalance settlement period or `ISP`). In case of remaining positive and negative imbalances (deviations between generation, consumption and commercial transactions), BRPs need to pay an imbalance charge to the TSOs.

4. In a single EU Internal Electricity Market, the wide variety of balancing market designs existing in Europe is generally perceived as an important barrier for their integration and the cause of unnecessary complexities for cross-border trade<sup>1</sup>.
5. Regulation (EU) 2017/2195<sup>2</sup> ('EB NC') establishes, therefore, an EU-wide standardised set of technical, operational and market rules to govern the functioning of electricity balancing markets<sup>3</sup> in order to ensure an optimal management and coordinated operation of the European electricity transmission system, while supporting the achievement of the Union's targets for penetration of renewable generation, as well as providing benefits for customers. The EB NC, applicable to TSOs, Distribution System Operators ('DSOs'), BRPs and BSPs, seeks to give full shape to the Third Energy Package<sup>4</sup>.
6. The EB NC sets out rules for the procurement of balancing capacity, the activation of balancing energy and the financial settlement of BRPs. It also requires the development of harmonised methodologies for the allocation of cross-zonal transmission capacity for balancing purposes. Such rules are aimed at increasing the liquidity of short-term markets by allowing for more cross-border trade and allowing for a more efficient use of the existing grid for the purposes of balancing energy. As balancing energy bids will compete on EU-wide balancing platforms, it will also have positive effects on competition<sup>5</sup>.
7. The EB NC lays down a detailed guideline on electricity balancing including the establishment of common principles for the procurement and the financial settlement of FCR, FRR and RR and a common methodology for the activation of FRR and RR<sup>6</sup>.

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<sup>1</sup> Commission Staff Working Document, Impact Assessment of 23 November 2017, SWD(2017)383 final, p. 17

<sup>2</sup> Commission Regulation (EU) No 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing.

<sup>3</sup> Recital 5 of the EB NC.

<sup>4</sup> EU regulatory package aimed at improving the functioning of the internal energy market and resolving certain structural problems, covering the areas of unbundling, independent regulators, ACER, cross-border cooperation and open and fair retail markets. Composed of: (i) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC; (ii) Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity; (iii) Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; (iv) Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005; (v) Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

<sup>5</sup> Recital (5) of the EB NC.

<sup>6</sup> Article 1(1) of the EB NC.

8. In addition, to facilitate balancing energy market integration, the EB NC foresees the creation of common European platforms to enable the exchange of balancing energy from FRR and RR and to operate the imbalance netting (‘IN’) process<sup>7</sup>. The EB NC requires that all TSOs develop implementation frameworks for these European platforms - the RR implementation framework (‘RRIF’), the aFRR implementation framework (‘aFRRIF’), the mFRR implementation framework (‘mFRRIF’) and the IN implementation framework (‘INIF’) - which are based on common governance principles and business processes<sup>8</sup>.
9. These common European Platforms perform different functions: (i) the activation optimisation function (‘AOF’), which takes, *inter alia*, demands, the common merit order lists and cross-zonal capacities as input and determines the amount of energy exchange between LFC areas, aiming to ensure the activation of the most cost-efficient bids through an optimisation algorithm; (ii) the TSO-TSO settlement function (‘TTSF’), which calculates the settlement between TSOs of intended energy exchanges as a result of the cross-border processes; and (iii) the capacity management function (‘CMF’), 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. The cross-zonal capacity calculation function (‘CCCF’), which calculates the capacity across zones, may be added if deemed efficient when implementing the methodology for cross-zonal capacity calculation within the balancing timeframe in accordance with Article 37(3) of the EB NC.
10. As highlighted in the Annual Report of ACER and the Council of European Energy Regulators (‘CEER’) on the Results of Monitoring the Internal Electricity and Gas Markets in 2016<sup>9</sup>, the core element of the EB NC is an efficient exchange of balancing services, which will provide the legal framework for integrating national balancing markets. In an earlier Annual Report, ACER and CEER highlighted the benefits of EU integration of balancing markets through increasing the cross-border exchanges of balancing energy (including imbalance netting), “*which are estimated at several hundred million euros per year and may even be higher in view of the ambitious decarbonisation objective of the EU energy market.*”<sup>10</sup>

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<sup>7</sup> Recital (10) of the EB NC.

<sup>8</sup> Articles 19(2), 20(2) and 21(2) and 22(2) of the EB NC.

<sup>9</sup> Annual Report of ACER and the Council of European Energy Regulators (‘CEER’) on the Results of Monitoring the Internal Electricity and Gas Markets in 2016, 6 October 2017, p. 49.

<sup>10</sup> Annual Report of ACER and the Council of European Energy Regulators (‘CEER’) on the Results of Monitoring the Internal Electricity and Gas Markets in 2014, 30 November 2015, p. 16.

11. The EB NC seeks to foster cross-border trade in balancing energy within the EU. The integration of balancing markets is aimed at enhancing the efficiency of the European balancing markets, whilst creating a level-playing field.
12. Recital 2 of the EB NC states: *“The Energy Union aims to provide final customers – household and business – with safe, secure, sustainable, competitive and affordable energy. Historically, the electricity system was dominated by vertically integrated, often publicly owned, monopolies with large centralised nuclear or fossil fuel power plants. The internal market for electricity, which has been progressively implemented since 1999, aims to deliver a real choice for all consumers in the Union new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices and higher standards of service, and to contribute to security of supply and sustainability. The internal market for electricity has increased competition, in particular at the wholesale level, and cross-zonal trade. It remains the foundation of an efficient energy market.*
13. Recital 3 of the EB NC reads: *“The Union's energy system is in the middle of its most profound change in decades and the electricity market is at the heart of that change. The common goal of decarbonising the energy system creates new opportunities and challenges for market participants. At the same time, technological developments allow for new forms of consumer participation and cross-border cooperation.”*
14. The integration of balancing markets at EU-level foreseen by the EB NC is a gradual, bottom-up process, in which, at different points in time, various stakeholders – in essence the TSOs, the national regulatory authorities (‘NRAs’) and the Agency - are required to take formal steps to attain certain goals set by the EB NC.
15. In the step-based integration process of the EB NC, pursuant to Articles 4(1) and 5(2) of the EB NC, all TSOs were required, by one year after the entry into force of the EB NC - i.e. by 18 December 2018 -, to develop common proposals on (i) the methodology for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the IN process in accordance with Article 30(1) of the EB NC; (ii) the aFRRIF in accordance with Article 21 of the EB NC and (iii) the mFRRIF in accordance with Article 20 of the EB NC.
16. All TSOs’ Proposals were submitted for approval to all NRAs, who were required by Article 5(6) of the EB NC to reach an agreement and take a decision on All TSOs’ Proposals within six months after the receipt of the proposals by the last relevant NRA.
17. According to Article 5(7) of the EB NC, when all NRAs fail to reach an agreement within the six months deadline, or upon the NRAs’ joint request, the Agency shall adopt a decision on All TSOs’ Proposals within six months from the end of previous six months period or

from the date of referral by the NRAs, acting under Article 6(10)(b) of Regulation (EU) 2019/942<sup>11</sup> (‘ACER Regulation’). By virtue of Article 5(7) of the EB NC, all NRAs jointly requested the Agency to adopt a decision in their stead on All TSOs’ Proposals in accordance with Article 6(10)(b) of the ACER Regulation.

18. Consequently, the Agency adopted three decisions on All TSOs’ Proposals: (i) Decision No. 01/2020 on the methodology to determine prices for the balancing energy that results from the activation of balancing energy bids, which is the Contested Decision; (ii) Decision No. 02/2020 on the aFRRIF<sup>12</sup> and (iii) Decision No. 03/2020 on the mFRRIF.
19. The Agency adopted these decisions on the basis of Article 6(10)(b) of the ACER Regulation.
20. Article 6(10)(b) of the ACER Regulation states that the Agency shall be competent to adopt individual decisions as specified in the first subparagraph - ACER shall be competent to adopt individual decisions on regulatory issues having effects on cross-border trade or cross-border system security which require a joint decision by at least two regulatory authorities, where such competences have been conferred on the regulatory authorities under certain legal acts -- in the following situations: (..) “(b) on the basis of a joint request from the competent regulatory authorities”.
21. Article 6(11) of the ACER Regulation provides that, when preparing its decision pursuant to paragraph 10, the Agency shall consult the NRAs and TSOs concerned and shall be informed of the proposals and observations of all concerned TSOs.
22. Article 6(12)(a) of the ACER Regulation further states that “Where a case has been referred to ACER under paragraph 10, ACER: (a) shall issue a decision within six months of the date of referral, or within four months thereof in cases pursuant to Article 4(7) of this Regulation or point (c) of Article (59)(1) or point (f) of Article 62(1) of Directive (EU) 2019/944”.
23. The Contested Decision has to be in compliance with Article 30 of the EB NC, entitled *Pricing for balancing energy and cross-zonal capacity used for exchange of balancing energy or for operating the imbalance netting process*. Article 30 of the EB NC not only requires a pricing methodology for FR and RR balancing energy (Article 30(1) of the EB NC) but also a pricing methodology for cross-zonal capacity used for the exchange of balancing energy or for operating the IN process (Article 30(3) of the EB NC).

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<sup>11</sup> 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.

<sup>12</sup> Annex 6 to the Defence.

24. According to Article 30(1) of the EB NC, the pricing methodology for FR and RR balancing energy shall:

- “a. be based on marginal pricing (pay-as-cleared);*
- b. define how the activation of balancing energy bids activated for purposes other than balancing affects the balancing energy price, while also ensuring that at least balancing energy bids activated for internal congestion management shall not set the marginal price of balancing energy;*
- c. establish at least one price of balancing energy, for each imbalance settlement period;*
- d. give correct price signals and incentives to market participants; and*
- e. take into account the pricing method in the day-ahead and intraday timeframes.”*

25. The prices referred to in Article 30(1)(c) of the EB NC are cross-border marginal prices (‘CBMP’). CBMPs are calculated per market time unit (‘MTU’).

26. According to Article 30(3) of the EB NC, the pricing methodology for cross-zonal capacity used for the exchange of balancing energy or for operating the imbalance netting process shall be consistent with the requirements under Regulation (EU) 2015/1222<sup>13</sup> (‘CACM’), and:

- “a. reflect market congestion;*
- b. be based on the prices for balancing energy from activated balancing energy bids, determined in accordance either with the pricing method pursuant to paragraph 1(a), or if applicable, the pricing method pursuant to paragraph 5;*
- c. not apply any additional charges for the exchange of balancing energy or for operating the imbalance netting process, except a charge to compensate losses if this charge is also taken into account in other timeframes.”*

#### *Facts giving rise to the dispute*

27. On 12 September 2018, all TSOs published their initial Pricing Methodology Proposal, entitled *“All TSOs’ proposal on methodologies for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the imbalance netting process pursuant to Article 30(1) and Article 30(3) of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing”* (‘All

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<sup>13</sup> Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management.

- TSOs' Pricing Methodology Proposal') for a public consultation, which lasted until 13 November 2018.
28. On 18 December 2018, all TSOs submitted the initial All TSOs' Pricing Methodology Proposal to all NRAs for their approval, in accordance with Articles 4(1) and 5(2) of the EB NC. All TSOs' Pricing Methodology Proposal was received by the last NRA on 11 February 2019. The Proposal foresaw in its Article 6 an aFRR MTU per optimisation cycle of the AOF.
  29. By a letter dated 24 July 2019, the Chair of the Energy Regulators' Forum, on behalf of all NRAs, informed the Agency that they had jointly agreed, within the 6 month timeframe, to request the Agency to adopt a decision on All TSOs' Pricing Methodology Proposal pursuant to Article 5(7) of the EB NC. The Agency received the aforementioned letter on that same day.
  30. The letter was accompanied by a document entitled "*Non-paper of all Regulatory Authorities agreed at the Energy Regulators' Forum on the All TSOs' Proposal on Methodologies for Pricing Balancing Energy and Cross-Zonal Capacity used for the Exchange of Balancing Energy or Operating the Imbalance Netting Process pursuant to Article 30(1) and 30(3) of the EB NC*" ('All NRAs' Non-Paper') dated 23 July 2019.
  31. As regards the pricing for aFRR balancing energy, some NRAs were of the opinion that the aFRR MTU had to be set per optimisation cycle and, whereas other NRAs were of the opinion that the aFRR MTU had to be set per ISP<sup>14</sup>.
  32. The Agency submitted All TSOs' Pricing Methodology Proposal to public consultation on 28 October 2019, which lasted until 18 November 2019. The results of the public consultation are attached as Annex II to the Contested Decision.
  33. From July 2019 until December 2019, the Agency closely collaborated with all NRAs and TSOs and further consulted on All TSOs' Pricing Methodology Proposal during teleconferences, meetings and written exchanges
  34. On 22 January 2020, the Board of Regulators of the Agency delivered a favourable opinion on the draft Decision of the Agency's Director.
  35. On 24 January 2020, the Agency issued Decision No. 01/2020 on the methodology to determine prices for the balancing energy that results from the activation of balancing energy bids (the 'Contested Decision') in accordance with Article 6(10)(b) of Regulation (EU) 2019/942. Annex I to the Contested Decision contains the methodology for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or

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<sup>14</sup> Annex 3 to Appellant I's Appeal, All NRAs' Non-Paper, p. 171-174



operating the imbalance netting process (the 'Pricing Methodology'). It is important to highlight that the Agency did not have to amend the initial All TSOs' Pricing Methodology Proposal of 18 December 2018 in that respect, given that this proposal already foresaw an aFRR MTU per optimisation cycle<sup>15</sup>.

### *Procedure*

36. On 23 March 2020, the Board of Appeal of the Agency received two (2) appeals, namely A-003-2020 by Appellant I and A-006-2020 by Appellant II submitted against the Contested Decision.
37. On 31 March 2020, the announcement of appeal was published on the website of the Agency.
38. On 24 April 2020, the Board of Appeal merged appeals no. A-003-2020 and A-006-2020, being similar in their contents, into Appeal A-003-2020 (consolidated).
39. On 22 April 2020, the Registrar communicated the composition of the Board of Appeal to the Parties.
40. On 4 May 2020, ACER filed its Defence with the Registry requesting the BoA to dismiss the appeal.
41. On 28 May 2020, Appellant I and Appellant II filed their Replies to the Defence with the Registry.
42. On 10 June 2020 the Agency submitted its Rejoinder to the Registry.
43. On 17 June 2020, the written part of the proceeding was closed.
44. The Board of Appeal held an oral hearing on 18 June 2020. Some questions posed by the Board of Appeal were not answered orally during the hearing but were answered in writing on 19 June 2020, as was duly authorised by the Board of Appeal's Registrar during the oral hearing.

### *Main arguments of the Parties*

45. Appellant I requests the Board of Appeal to (i) annul Article 7 of Annex I (Pricing Methodology) of the Contested Decision; and (ii) to order the Agency to adopt a new decision on the aFRR MTU<sup>16</sup>.

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<sup>15</sup> Annex Ia to the Contested Decision.

<sup>16</sup> Appellant I's Appeal, p. 5 and 18.

46. Appellant I disagrees with the duration of the aFRR MTU set by the Agency per optimization cycle. Appellant I's claims can be summarized as follows<sup>17</sup>:
- a. Firstly, Appellant I argues that the aFRR MTU per optimization cycle is not compliant with Article 30(1)(c) of the EB NC, as the text of this provision should be interpreted as meaning at least one price for each entire ISP of 15 minutes. In addition, it claims that the aFRR MTU as set by the Agency is not compliant with Article 45 of the EB NC, nor is it a true marginal price as required by Article 30(1)(a) of the EB NC.
  - b. Secondly, Appellant I adduces that the Contested Decision does not give the right price signals and incentives to market participants and, on the contrary, leads to more distortion on the market.
  - c. Thirdly, Appellant I claims that, even if an aFRR MTU per optimization cycle was compliant with the boundary conditions of the EB NC, the Contested Decision results in an unnecessary and disproportionate restriction of Appellant I's ability to continue applying the Dutch Grid Code in a way that still complies with the EB NC.
  - d. Fourthly, Appellant I argues that the Agency uses the wrong definition of "market congestion" and that, therefore, the Contested Decision is based on a wrong starting-point.
  - e. Finally, Appellant I claims that the Contested Decision suffers from a failure to adequately state the reasons why it believes that the aFRR MTU should be equal to the optimization cycle.
47. The Agency argues that Appellant I's arguments are unfounded. It therefore requests the Board of Appeal to dismiss the Appeal in its entirety as unfounded.
48. Appellant II requests the Board of Appeal to remit the Contested Decision to the competent body of the Agency<sup>18</sup>.
49. Appellant II's claims can be summarized as follows<sup>19</sup>:
- a. Violation of the general principles and goals of several EU Regulations such as effective competition, transparency, well-functioning wholesale markets, stimulation of optimisation between the highest overall efficiency and lowest total costs for all parties involved and accessibility of all kind of market parties;
  - b. Violation of several EU principles such as proportionality subsidiarity and non-discrimination.

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<sup>17</sup> Appellant I's Appeal, p. 5 and 6.

<sup>18</sup> Appellant II's Appeal, para 89.

<sup>19</sup> Appellant II's Appeal, pp. 3-20 and Annex III.

50. The Agency argues that Appellant II's arguments are unfounded. It therefore requests the Board of Appeal to dismiss the Appeal in its entirety as unfounded.

## *II. Admissibility*

### *Admissibility of the appeal*

#### *Ratione temporis*

51. Article 28(2) of Regulation (EU) 2019/942 provides that “[t]he appeal shall include a statement of the grounds for appeal and shall be filed in writing at ACER within two months of the notification of the decision to the person concerned, or, in the absence thereof, within two months of the date on which ACER published its decision”.

52. Appellant I's Appeal was submitted on 23 March 2020, challenging ACER Decision No. 01/2020, which was published on its website on 28 January 2020. The Appeal was received by the Registry by e-mail on 23 March 2020 and it contained the statement of grounds

53. Appellant II's Appeal was submitted on 24 March 2020, challenging ACER Decision No. 01/2020. The Appeal was received by the Registry by e-mail on 24 March 2020 and it contained the statement of grounds.

54. Therefore, the Appeals are admissible *ratione temporis*.

#### *Ratione materiae*

55. Article 28(1) of Regulation (EU) 2019/942 provides that decisions referred to in Article 2(d) may be appealed before the Board of Appeal.

56. The Contested Decision was issued on the basis of Article 6(10)(b) of Regulation (EU) 2019/942, read in conjunction with Article 5(7) of Regulation (EU) 2017/2195, following a consultation with the concerned NRAs and TSOs.

57. Therefore, since the Appeals fulfil the criterion of Article 28(1) of Regulation (EU) 2019/942, the Appeals are admissible *ratione materiae*.

#### *Ratione personae*

58. Article 28(1) of Regulation (EU) 2019/942 provides that “[a]ny 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.”

59. Article 15(1)(d) of the Board of Appeal Rules of Procedures provides that “[t]he grounds on which an appeal shall be ruled inadmissible shall include the following: (...) the appellant is neither an addressee of the decision contested by the appeal nor able to establish direct and individual concern according to Article 28(1) of Regulation (EU) 2019/942”<sup>20</sup>.
60. In accordance with Article 2 of the Contested Decision, Appellant I is one of the addressees of the Contested Decision. Appellant I’s Appeal is therefore admissible *ratione personae*.
61. The Board of Appeal finds that Appellant II does not have *locus standi* to challenge the Contested Decision, and that its Appeal is inadmissible *ratione personae*, for the reasons set out below<sup>21</sup>.
62. The Board of Appeal observes, from the outset, that the language of Article 28(1) of Regulation (EU) 2019/942, insofar as it refers to “*direct and individual concern*”, is identical to the language of Article 263(§4) TFEU and should be interpreted in accordance with case-law concerning the latter provision. This conclusion is required, not only by the identity of the textual element, but also by a teleological and systematic approach to the interpretation of the provision in question. The interests and rights being protected are exactly the same as those protected by Article 263(§4) TFEU, meaning that it would be unjustified for one provision to have a broader scope than the other. The exhaustion of the appeal before the Board of Appeal has been established by Regulation (EU) 2019/942<sup>22</sup> as a mandatory preliminary step to be able to exercise of the right of appeal before the General Court of the European Union (‘GCEU’), given that the Board of Appeal is a special appeal instance foreseen by Article 263(5) TFEU. It would be illogical if a person were entitled to challenge a decision of the Agency before the Board of Appeal, but then not be able to challenge that decision before the GCEU.

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<sup>20</sup> See, in this regard, Case T-123/17 Exaa v ACER EU:T:2018:568, para 23; and Case T-146/17 Mondi v ACER EU:T:2018:570, para 22.

<sup>21</sup> This is the second time the Board of Appeal has deemed an appeal to be inadmissible *ratione personae*. The first time this occurred, although based on different legal issues than the one discussed presently, was in Decision of the Board of Appeal of 17 March 2017 in case A-001-2017 (consolidated), concerning Appellant II (Verbund AG), paras 47-53. Verbund AG did not challenge that decision on inadmissibility before the GCEU. See also the refusal by the Board of Appeal of the right to intervene, based *inter alia* based on a *ratione personae* approach – Decision of the Board of Appeal of 17 February 2007, in case A-001-2017 (consolidated), followed by Case T-123/17 Exaa v ACER EU:T:2018:568 and by Case T-146/17 Mondi v ACER EU:T:2018:570.

<sup>22</sup> Article 29 of Regulation (EU) 2019/942.

63. This interpretation has been confirmed by the Court. Indeed, in one case, when the GCEU was confronted with an appeal challenging a decision of the Board of Appeal which found an appeal to be inadmissible, the GCEU did not deem it necessary to discuss whether the Board of Appeal had been wrong to dismiss admissibility under Article 28(1) of Regulation (EU) 2019/942 (or rather, its predecessor), but instead limited itself to discussing admissibility of the appeal before the GCEU under Article 263(§4) TFEU<sup>23</sup>. In a second case, the GCEU explicitly applied its case-law relating to Article 263(§4) TFEU to the determination of conditions for admissibility of an appeal under Article 19 of Regulation (EC) 713/2009 (predecessor to Article 28(1) of Regulation (EU) 2019/942), doing so “*by analogy*”<sup>24</sup>. And the Court has also stated that the conditions for the right to intervene in proceedings before the Board of Appeal should be interpreted harmoniously (by analogy) with the clarifications provided by the case-law for the right to intervene before the GCEU<sup>25</sup>.
64. It is settled case-law that “*an interest in bringing proceedings is an essential and fundamental prerequisite for any legal proceedings (...) and must, in the light of the purpose of the action, exist at the stage of lodging the action, failing which the action will be inadmissible. The interest in bringing proceedings must continue until the final decision (...)*”<sup>26</sup>.
65. Appellant II is an association registered with the Chamber of Commerce under Dutch Law. It presents itself as “*a collective representative association of energy producers, traders and retailers in the Netherlands*”<sup>27</sup>, and its website states that it includes as members nearly all parties that produce, supply and trade electricity, gas and heat in the Netherlands, a list of which is disclosed on its website<sup>28</sup>.
66. As indicated above, Article 2 of the Contested Decision contains a list of its addressees, which are all TSOs in the European Union, in a total of 41, including TenneT TSO B.V., the TSO in the Netherlands.
67. Appellant II is not a TSO. None of Appellant II’s members are TSOs. Specifically, in what concerns the Netherlands, TenneT is not a member of Appellant II. Accordingly, and

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<sup>23</sup> Case T-671/15 E-Control v ACER EU:T:2016:626, paras 18-20.

<sup>24</sup> Case T-63/16 E-Control v ACER EU:T:2017:456, paras 59-62.

<sup>25</sup> Case T-123/17 Exaa v ACER EU:T:2018:568, para 26; and Case T-146/17 Mondi v ACER EU:T:2018:570, para 25, referring to clarifications previously provided in Case T-63/16 E-Control v ACER EU:T:2016:644, para 16.

<sup>26</sup> Case T-332/17 E-Control v ACER EU:T:2019:761, para 30 (and case-law quoted therein); Case T-333/17 Austrian Power Grid v ACER EU:T:2019:760, para 36.

<sup>27</sup> Appellant II’s Appeal, p. 1.

<sup>28</sup> See <https://www.energie-nederland.nl/>.

despite Appellant II's unfounded assertions to the contrary<sup>29</sup>, Appellant II is not an addressee of the Contested Decision. Also, none of its members is an addressee of the Contested Decision. Neither Appellant II nor any of its members are legally required to, or can, implement the Contested Decision.

68. In its Appeal, Appellant II merely stated that "*it can be considered an addressee of the [Contested] Decision*", with no additional information or argument<sup>30</sup>. Having observed that this was not the case, and even though the Agency did not challenge the admissibility of Appellant II's Appeal<sup>31</sup>, the Board of Appeal raised the issue *ex officio*<sup>32</sup> and, on 26 March 2020, invited Appellant II to specify its direct and individual concern which entitled it to challenge the Contested Decision.

69. Appellant II responded on 30 March 2020<sup>33</sup>, arguing that:

- a) it is a legal person;
- b) it can be considered as an addressee of the Contested Decision.
- c) it can be considered at least as a third party with a direct and individual concern, given that the members of Appellant II are "market participants", as defined in article 2(25) of Recast Regulation (EU) 2019/943, for who balancing energy has a core impact on their activities, which allegedly means "*the direct and individual concern of the members of [Appellant II] is given*", as it is "*representing the Dutch commercial value chain*" and "*has therefore a direct interest in this subject and with the Decision*";
- d) its Appeal is admissible "*as a representative organization of energy producers, traders and retailers in the Netherlands*", under EU case-law concerning "*an action for annulment brought by an association entrusted with defending the collective interests of its members*", stating specifically that all three scenarios set out in the case-law whereby an association has *locus standi* in such proceedings are met:
  - (i) "*where this is expressly recognized to be the case in a legal provision*";
  - (ii) "*where the undertakings that it represents or some of those undertakings themselves have locus standi to bring proceedings to court*";
  - (iii) "*where it can prove an interest of its own*".

70. In relation to Appellant II's argument (a), suffice it to note that being a legal person is not, by itself, sufficient to give the Appellant *locus standi* to challenge the Contested Decision.

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<sup>29</sup> Appellant II's Appeal, p. 2.

<sup>30</sup> Appellant II's Appeal, p. 2.

<sup>31</sup> Defence, para 49.

<sup>32</sup> See, in this regard, e.g.: Case T-333/17 Austrian Power Grid v ACER EU:T:2019:760, para 28; Case C-313/90 CIRFS et al v Commission EU:C:1993:111, para 23.

<sup>33</sup> Appellant II's Reply to Admissibility (06 A-006-2020).

71. In relation to Appellant II’s argument (b), while it insists that it “*can be considered*” an addressee of the Contested Decision, it does not claim that its name is included in the list of addressees, nor does it mention a single of its members whose name is included in the list of addressees of the Contested Decision, and the Board of Appeal has confirmed that, according to the list of members available on Appellant II’s website, none of its members are an addressee of the Contested Decision.
72. In relation to Appellant II’s argument (c), the Appellant has not actually put forward any basis under which it has, itself, a direct and individual concern in challenging the Contested Decision. Rather, it has argued it has this *locus standi* because of the impact of the Contested Decision on the interests of its members. It has expressly argued that its *locus standi* derives from the representation of the interests of its members. Thus, Appellant II’s argument (c) (identified above, in para 69) actually overlaps with its argument (d) (identified above, in para 69).
73. In relation to Appellant II’s argument (d)(iii) (Appellant II, as an association, can prove an interest of its own), the Appellant has put forward no claim, separate from its arguments (d)(i) (the *locus standi* of Appellant II is expressly recognized by a legal provision) and (ii) (members of Appellant II have *locus standi* to bring procedures to court), to show it has “*an interest of its own*”<sup>34</sup>. It simply referred to its arguments relating to (d)(i) and (ii), saying its interest “*is equal to the interest of its members*”<sup>35</sup>. It should be recalled that it is settled case-law that “*it is not possible to accept the principle that an association, in its capacity as representative of a category of operators, is individually concerned by measures affecting the general interests of that category*”<sup>36</sup>. This alternative for the legitimacy of an association was developed in the context of procedural rights exercised by the association in procedure leading to the adoption of the act in question – which is not at stake in the present case –, and even then is applied restrictively<sup>37</sup>. Furthermore, the Board of Appeal does not see how Appellant II might, by itself (rather than through representation of its members), be directly and individually concerned by the Contested Decision, as these criteria have been clarified in the case-law.
74. In relation to Appellant II’s argument (d)(i) (the *locus standi* of Appellant II is expressly recognized by a legal provision), the Appellant does not actually invoke any legal provision

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<sup>34</sup> See, by analogy: Case C-6/92 FSIIIE et al v Commission EU:C:1993:913, para 17; and Case T-1/10 RENV PPG and SNF v ECHA EU:T:2014:616, para 31.

<sup>35</sup> Appellant II’s Reply to Admissibility (06 A-006-2020), section 3.3.

<sup>36</sup> Case T-196/03 EFfCl v Parliament and Council EU:T:2004:355, para 41 (and case-law quoted therein).

<sup>37</sup> See, e.g.: Case T-196/03 EFfCl v Parliament and Council EU:T:2004:355, para 42; Case C-465/16 P Council v Growth Energy et al EU:C:2019:155, paras 101-109.

which grants it *locus standi* in the present proceedings. It limits itself to invoking a right to bring proceedings to court in pursuance of Article 3(2) of its own Statutes (articles of association), which it describes as a “*legal provision*”<sup>38</sup>. It also argues that Article 82 of the Dutch Electricity Act grants it the right, as a representative organisation of parties in the electricity market in the Netherlands, to challenge decisions adopted by the Dutch NRA.

75. The Board of Appeal considers this argument as an erroneous interpretation of the case-law. When the case-law recognizes the *locus standi* of an association to bring annulment proceedings against an act of an EU Institution or Agency on the basis of the existence of a “*legal provision*”, it is referring to a provision of EU Law granting *locus standi* or a series of procedural rights<sup>39</sup> to the association to bring claims before the European Courts.
76. Appellant II has failed to identify any EU legal provision granting it the right to appeal the Contested Decision<sup>40</sup>.
77. In relation to Article 3(2) of its own Statutes, Appellant II’s interpretation would mean that any private association would have the right to bring annulment proceedings against any act of an EU Institution or Agency simply by including such a right in its articles of association. This is contrary to EU Law and case-law on *locus standi*. It would mean that this right would no longer be dependent on the existence of a specific provision of EU Law, on being an addressee or on having a direct and individual interest in challenging the act in question, as clarified in the case-law, but instead would merely be dependent on the will of private parties.
78. In relation to the second provision it mentioned (Article 82 of the Dutch Electricity Act), for the purposes of the present discussion, it is not relevant (and would always fall outside the powers of the Board of Appeal to determine) whether, under Dutch Law, Appellant II has a right to appeal decisions of the Dutch NRA before Dutch courts. The issue now facing the Board of Appeal is whether, under EU Law – *maxime* under Article 28(1) of Regulation (EU) 2019/942 – Appellant II has a right to appeal the Contested Decision before the Board of Appeal and, by analogy, whether it would subsequently be entitled to challenge the Contested Decision before the CGEU, under Article 263(§4) TFEU. *Locus standi* of an association under EU Law to challenge a decision of ACER is not dependent on, and cannot derive from, its *locus standi* under the law of a Member State to challenge decisions of the NRA of that Member State.

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<sup>38</sup> Appellant II’s Reply to Admissibility (06 A-006-2020), section 3.1.

<sup>39</sup> For example, when the association played a role in a procedure leading to the adoption of the decision (see Case T-196/03, EFfCI v European Parliament and Council of the European Union, EU:T:2004:355, para 63 and case-law quoted therein).

<sup>40</sup> See, by analogy: Case T-276/13 Growth Energy et al v Council EU:T:2016:340, paras 47-48.



79. In relation to Appellant II's argument (d)(ii) (members of Appellant II have *locus standi* to bring procedures to court), it argues that its members have *locus standi* because they “qualify as market participants according to the EB Regulation”<sup>41</sup>, and because the “changes in the methodology to determine prices for the balancing energy that results from the activation of balancing energy bids have a direct effect on the companies' costs”<sup>42</sup>. Appellant II also states that it “represents an appreciable number of undertakings active in the energy sector”, specifically, “almost 90% of the market for producers, suppliers and traders of electricity and gas and heat” in the Netherlands<sup>43</sup>.
80. It is settled case-law that “an association (...) which is responsible for protecting the collective interests of coordination centres established in Belgium is, as a rule, entitled to bring an action for annulment against a final decision of the Commission in matters of State aid only if the undertakings which it represents or some of those undertakings themselves have *locus standi* (...) or if it can prove an interest of its own”<sup>44</sup>. It follows that the admissibility to bring an action by an association set up to promote the collective interests of a category of persons depends, without prejudice to its own interest in bringing proceedings, on the question whether its members could have brought that action individually<sup>45</sup>.
81. As noted by the GCEU in an appeal concerning an act adopted by ACER: “Where an action for annulment is brought by a non-privileged applicant against a measure that has not been addressed to him, the requirement that the binding legal effects of the measure being challenged must be capable of affecting the interests of the applicant by bringing about a distinct change in his legal position overlaps with the conditions laid down in the fourth paragraph of Article 263 TFEU”<sup>46</sup>. Even in the case of the less demanding criterion for establishing a right to intervene in proceedings before the GCEU or Board of Appeal, which shares the requirement of direct concern, the Court has said (in the context of an appeal concerning an act adopted by ACER) that “[e]n principe, un intérêt à la solution de l'affaire ne saurait être considéré comme suffisamment direct que dans la mesure où cette solution serait de nature à modifier la position juridique du demandeur en intervention”<sup>47</sup>.

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<sup>41</sup> Appellant II's Reply to Admissibility (06 A-006-2020), p. 6.

<sup>42</sup> Appellant II's Reply to Admissibility (06 A-006-2020), p. 6.

<sup>43</sup> Appellant II's Reply to Admissibility (06 A-006-2020), p. 4.

<sup>44</sup> Case C-182/03 and C-217/03 Belgium et al v Commission EU:C:2006:416, para 56. See also Case C-384/16 P EUCTF v Commission EU:C:2018:176, para 87. See also Case T-251/18 IFSUA v Council EU:T:2020:89, para. 52 (and case-law quoted therein).

<sup>45</sup> Case T-196/03, EFfCI v European Parliament and Council, EU:T:2004:355, para 43.

<sup>46</sup> Case T-671/15 E-Control v ACER EU:T:2016:626, para 25 (and case-law quoted therein).

<sup>47</sup> Case T-123/17 Exaa v ACER EU:T:2018:568, para 26; Case T-146/17 Mondy v ACER EU:T:2018:570, para 25.

82. The requirements for the existence of a “*direct and individual concern*” in article 263(§4) TFEU have, since *Plaumann*<sup>48</sup>, been systematically and thoroughly clarified by the CJEU in a restrictive manner, even dismissing the GCEU’s efforts to limit those requirements and expand the universe of entities which can seek annulment of an act of an EU Institution or Agency<sup>49</sup>.
83. Beginning with the requirement of direct concern, it is settled case-law that “*for a person to be directly concerned by a Community measure, the latter must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules*”<sup>50</sup>.
84. In this case, the members of Appellant II find themselves in a position analogous to that of interveners in appeals of ACER acts that have been put before the GCEU, submitted by electricity undertakings who were not TSOs (in some cases, explicitly because the intervener feared that ACER’s decision would lead to a price increase on a market in which it was active)<sup>51</sup>. In these cases, the GCEU discussed the existence, not of a right to appeal, but of a right to intervene in the proceedings before the GCEU or the Board of Appeal, and thus whether the appellant had “*an interest in the result of the case*”. This is a less demanding criterion than the one discussed in the present case (concerning a right to appeal an act of the Agency), allowing for *ad majoris* reasoning.
85. In the first case, the GCEU noted that the contested act had been addressed to NRAs and to TSOs, and not to electricity undertakings such as the appellant<sup>52</sup>. Accordingly, just as occurs in the present case, (even assuming the contested act had created binding obligations on NRAs and TSOs) “*it would be capable of creating effects as regards the applicant for leave to intervene only to the extent that those bodies actually took the measures*” described in the contested decision, there being “*nothing automatic, therefore, as regards the impact that the realisation of those effects might have on the legal position of the applicant for*

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<sup>48</sup> Case 25/62 *Plaumann v Commission* EU:C:1963:17. See also Case C-384/16 P *EUCTF v Commission* EU:C:2018:176, para 93.

<sup>49</sup> See, e.g.: Case C-263/02 P *Commission v Jégo-Quéré* EU:C:2004:210.

<sup>50</sup> Case C-386/96 P *Dreyfus v Commission* EU:C:1998:193, para 43. See also Case T-1/10 *RENV PPG and SNF v ECHA* EU:T:2014:616, para 32 (and case-law quoted therein); and Case C-465/16 P *Council v Growth Energy et al* EU:C:2019:155, para 69. See also Case T-16/04 *Arcelor SA v European Parliament and Council of the European Union* EU:T:2010:54, para 98.

<sup>51</sup> See: Case T-63/16 *E-Control v ACER* EU:T:2016:644, para 19; Case T-123/17 *Exaa v ACER* EU:T:2018:568, para 21; Case T-146/17 *Mondi v ACER* EU:T:2018:570, para 20; Case T-332/17 *E-Control v ACER* EU:T:2018:349, para 15; Case T-332/17 *E-Control v ACER* EU:T:2018:351, para 15; Case T-333/17 *Austrian Power Grid et al v ACER* EU:T:2018:350, para 15.

<sup>52</sup> See Case T-63/16 *E-Control v ACER* EU:T:2016:644, para 20.

*leave to intervene*”<sup>53</sup>. It was further noted that, even if the contested act were binding, it would leave discretionary margin to its addressees as to its implementation, and that, in that case, the applicant failed to provide elements to show that the negative consequences it invoked of the implementation of the Agency’s act “*would, necessarily, actually and directly follow as a result of such implementation*”<sup>54</sup>. The Court also rejected that direct concern had been demonstrated in the remaining cases mentioned above. This stands in contrast to the identification of a right to intervene when ACER’s decision directly, and with no need for implementation, affected the legal position of the person requesting to intervene, and this has been proven by the person requesting to intervene<sup>55</sup>, even when such decision was addressed exclusively to NRAs and/or TSOs<sup>56</sup>.

86. Applying the Court’s above quoted reasoning by analogy to the present case, insofar as concerns the existence of “direct concern”, the Board of Appeal concludes, first, that Appellant II has failed to show that the Contested Decision affects its members directly. Any effects of the Contested Decision for Appellant II’s members are dependent on its implementation by the TSOs, within the discretionary margin allowed to them by the Contested Decision. There is, thus, no automatic impact of the Contested Decision on the legal positions of Appellant II’s members, nor has it been shown that this implementation necessarily leads to the alleged negative impact on those positions (the claimed effect of increase in prices).
87. In any case, even if there is a direct concern, *quod non*, only if it is found also that Appellant II’s members are individually affected, Appellant II’s appeal would be admissible<sup>57</sup>.
88. It is settled case-law that “[p]ersons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed”<sup>58</sup>. The fact that a person carries out a commercial or economic activity (allegedly affected by the challenged act) which

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<sup>53</sup> See Case T-63/16 E-Control v ACER EU:T:2016:644, para 20.

<sup>54</sup> See Case T-63/16 E-Control v ACER EU:T:2016:644, para 22.

<sup>55</sup> See Case T-332/17 E-Control v ACER EU:T:2018:294, paras 26-27; Case T-333/17 Austrian Power Grid et al v ACER EU:T:2017:880, paras 16 and 21 (intervener was a TSO).

<sup>56</sup> See Case T-333/17, Austrian Power Grid et al v ACER EU:T:2018:285, paras. 26-30 (intervener was a producer that was found to be directly affected by the Agency’s decision on the account that it had automatically created a bidding zone border between Germany/Luxembourg and Austria, where the producer intervened and had long-term electricity supply contracts with large consumers in Austria and Germany).

<sup>57</sup> See Case 25/62 Plaumann v. Commission EU:C:1963:17 and Case T-16/04 Arcelor SA v European Parliament and Council of the European Union EU:T:2010:54, para 98.

<sup>58</sup> Case 25/62 Plaumann v Commission EU:C:1963:17. See also Case C-384/16 P EUCTF v Commission EU:C:2018:176, para 93.

may be carried out by other persons “*is not therefore such as to distinguish the applicant in relation to the contested Decision as in the case of the addressee*”<sup>59</sup>. And “*the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it*”<sup>60</sup>. Even if a person were, at a time, *de facto* the only person carrying out an economic activity affected by an EU act, this would still not sufficiently differentiate it, given that any other economic operator could actually or potentially find itself affected in the same manner<sup>61</sup>. Even if an association represented all persons affected by a general act (which is not the case in the present proceedings), this would still not mean that its members were individually affected<sup>62</sup>. The present situation is identical to many other situations wherein the Court has already rejected the admissibility of an appeal, for lack of individual concern, by noting that the contested decision “*does not affect the interests of the applicant companies alone*”, affecting also the interests of other competing companies, of companies active on other markets, and of final customers<sup>63</sup>.

89. In this case, there are no attributes peculiar to the members of Appellant II, nor any peculiar circumstances, which differentiates them from other competing companies, or companies active on other markets or final customers, much less in all the remaining EU Member States (who are not represented by Appellant II). Nor have any such peculiar attributes been claimed to exist.
90. Even if, *ad arguendum*, the Contested Decision had direct legal consequences for the members of Appellant II, these legal consequences would result from a regulatory act with consequences for all current and potential traders on electricity markets, thus producing effects upon a category of persons determined by objective factors, i.e. any electricity operator participating in the regulated electricity balancing markets.
91. If Appellant II’s interpretation were to prevail, this would mean that, whenever an EU Institution or Agency adopted an abstract and general legal provision or a regulatory decision which could increase costs of all undertakings in the EU active in the respective economic sector, any undertaking or group of undertakings within a Member State active in that economic sector would have *locus standi* to challenge the EU legal provision or

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<sup>59</sup> Case 25/62 Plaumann v Commission EU:C:1963:17.

<sup>60</sup> Case C-384/16 P EUCTF v Commission EU:C:2018:176, para 94.

<sup>61</sup> Case C-263/02 P Commission v Jégo-Quéré EU:C:2004:210, para 46.

<sup>62</sup> Case C-384/16 P EUCTF v Commission EU:C:2018:176, para 99.

<sup>63</sup> See, e.g.: Case C-6/92 FSIIIE et al v Commission EU:C:1993:913, paras. 14-16. See also Case T-16/04 Arcelor SA v European Parliament and Council of the European Union EU:T:2010:54, paras. 104-110 and Case T-94/04, EEB and Others v Commission EU:T:2005:425, para. 53.

decision in question. This is contradicted by the interpretation of the legal requirements of *locus standi* set out in the CJEU's case-law, and would allow a broad range of appeals of EU acts under Article 263(§4) TFEU in a manner which has explicitly been refused by the CJEU throughout its history (as noted above).

92. In light of the previous, it follows that Appellant II's members are not individually concerned by the Contested Decision, with the result that there is no need to further examine and determine whether the Contested Decision is of direct concern to them.
93. Finally, the precedents invoked by Appellant are clearly distinct from the present case. In case *Belgium et al v Commission*, the contested decision adopted by the Commission refused to approve an aid scheme by the Belgium State to coordination centres established in Belgium, all of which were gathered in an association. The Court found, under its case-law on admissibility of appeals against State aid decisions, that the beneficiaries of the proposed aid had the right to appeal the Commission's decision, and so that an association of all those beneficiaries could also represent them and file an appeal. As for case *PPG and SNF v ECHA*, which is also invoked by Appellant II, the Court concluded that there was no direct concern and upheld the plea of inadmissibility, and this case does not support its view of the law<sup>64</sup>.
94. In conclusion, Appellant II's Appeal is an attempt by an association representing undertakings that produce, supply and trade electricity in the Netherlands, with no differentiating features, and only indirectly affected (in the same way as others) by a regulatory decision of an EU Agency, addressed to service providers of those undertakings, to challenge that regulatory decision because they disagree with the increase in costs which they allege the regulatory decision will cause for its members. Neither the members of such an association, nor the association itself, have an individual concern to challenge such a regulatory decision..
95. Finally, it is for the person submitting an appeal to the Board of Appeal to adduce the necessary evidence to prove that it satisfies the conditions set out in EU Law to do so<sup>65</sup>. The only evidence provided to the Board of Appeal by Appellant II in support of its appeal

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<sup>64</sup> Case T-1/10 RENV PPG and SNF v ECHA EU:T:2014:616.

<sup>65</sup> See, by analogy: Case T-332/17 E-Control v ACER EU:T:2019:761, paras 32-35; Case T-333/17 Austrian Power Grid v ACER EU:T:2019:760, para 38 and 40-41; Case T-63/16 E-Control v ACER EU:T:2016:644, para 18; Case T-123/17 Exaa v ACER EU:T:2018:568, paras 28-33; Case T-146/17 Mondi v ACER EU:T:2018:570, paras 27-32; Case T-332/17 E-Control v ACER EU:T:2018:349, paras 14 and 17-18; Case T-332/17 E-Control v ACER EU:T:2018:351, paras 14 and 17-18; Case T-333/17 Austrian Power Grid et al v ACER EU:T:2017:880, para 15; Case T-333/17 Austrian Power Grid et al v ACER EU:T:2018:285, para 16; Case T-333/17 Austrian Power Grid et al v ACER EU:T:2018:350, paras 14 and 17-19. Contrast the evidence provided in Case T-332/17 E-Control v ACER EU:T:2018:294 (para 36), Case T-333/17 Austrian Power Grid et al v ACER EU:T:2018:285 (para 36) and Case T-333/17 Austrian Power Grid et al v ACER EU:T:2017:880.

have been: a power of attorney, a proof of registration with the Chamber of Commerce, its Statutes and a presentation called “Mission 2022 Energie-Nederland”. Appellant II has, thus, not met its burden of proof to show that it, or the members whose interests it represents, are directly and individually concerned by the Contested Decision.

96. It follows from all the above that Appellant II’s Appeal must be deemed inadmissible in its entirety.

## *Merits*

### *Remedies sought by Appellant I*

97. Appellant I requests the Board of Appeal to annul Article 7 of the Pricing Methodology joined as Annex I to the Contested Decision and remit the case to the competent Agency body to replace the Contested Decision by a new Decision.

### *Pleas and arguments of the Parties*

98. The Board of Appeal observes, as a preliminary remark, that the facts contained in paras 4-21 and 55-62 of the Contested Decision are not challenged by Appellant I.

### *First plea – Setting an aFRR MTU equal to the optimisation cycle is not compliant with Article 30(1)(c) of the EB NC.*

99. Article 30(1)(c) of the EB NC stipulates that the methodology to determine prices for the balancing energy that results from the activation of balancing energy bids for the frequency restoration process and the reserve replacement process shall “*establish at least one price of balancing energy for each imbalance settlement period*”.

100. The prices referred to in Article 30(1)(c) of the EB NC are CBMPs. As set out in ENTSO-E’s Explanatory Document to All TSOs’ initial Pricing Methodology Proposal of 18 December 2018 (‘ENTSO-E’s Explanatory Document’), this means that (i) “*all balancing energy that results from the activation of standard balancing energy bids within an uncongested area is remunerated with the same marginal price for providing the same service*” and (ii) “*in case of cross-zonal capacity limitations between adjacent areas, a price split can occur meaning that in each uncongested area the highest selected bid sets*

*the marginal price for the respective area. The price for cross-zonal capacity corresponds to the price difference between the adjacent uncongested areas*".<sup>66</sup> These CBMPs are calculated by the AOF of the aFRR-Platform on the basis of the common merit order list submitted by the TSOs, the balancing energy demand (selected bids that have to be activated) and the available cross-zonal capacity<sup>67</sup>. In so doing, the AOF performs the "optimisation", which can be understood as a balancing energy market clearing<sup>68</sup> and allows for an identification of uncongested areas, i.e. areas where the exchange of balancing energy was not effectively restricted by the available cross-zonal capacity or allocation constraints<sup>69</sup>. Each of the different balancing energy products - RR, mFRR with scheduled activation, mFRR with direct activation and aFRR - have different optimisations and different CBMPs to settle BSPs<sup>70</sup>. The imbalance price to be paid by the BRPs will be based on these CBMPs per imbalance settlement period ("ISP")<sup>71</sup>.

101. Article 2(10) of the EB NC defines the ISP referred to in Article 30(1)(c) as the time unit for which BRPs' imbalance is calculated. It is the settlement period over which BRPs are financially responsible for having a balanced portfolio. According to Article 53(1) of the EB NC, the ISP will, as a general rule, be harmonized to a duration of 15 minutes in all scheduling areas by 3 years after the entry into force of the EB NC (i.e. by 18 December 2020). Recast Regulation (EU) 2019/943 on the internal market for electricity has slightly modified the timing of this harmonization, setting the ISP at the mandatory duration of 15 minutes in all scheduling areas by 1 January 2021. The harmonised length of the ISP aims at duly reflecting balancing costs and incentivising BRPs to be better balanced in order to generate fewer imbalances to be dealt with by TSOs.

102. ENTSO-E's Explanatory Document sets out that there is more than one market clearing for each ISP because of the fact that the different balancing energy products have different activation processes (scheduled, direct, manual, automatic, etc.):

- *There is one optimisation for the activation of RR balancing energy bids;*
- *There is one optimisation for the activation of mFRR with scheduled activation type;*
- *There can be more than one optimisation for the activation of mFRR with direct activation type;*

<sup>66</sup> Annex 16 to the Defence, ENTSO-E's Explanatory Document, p. 13 available at [https://consultations.entsoe.eu/markets/ebgl-art30-pp/supporting\\_documents/180912\\_Explnatory%20document%20all%20TSOs%20Balancing%20Energy%20Pricing%20Proposal.pdf](https://consultations.entsoe.eu/markets/ebgl-art30-pp/supporting_documents/180912_Explnatory%20document%20all%20TSOs%20Balancing%20Energy%20Pricing%20Proposal.pdf)

<sup>67</sup> ENTSO-E's Explanatory Document, p. 15.

<sup>68</sup> In its Rejoinder, para 20, the Agency clarifies that the fact that the validity period of the bid is equal to the ISP does not impede a clearing to take place on an optimisation cycle basis.

<sup>69</sup> ENTSO-E's Explanatory Document, p. 15.

<sup>70</sup> ENTSO-E's Explanatory Document, p. 16.

<sup>71</sup> ENTSO-E's Explanatory Document, p. 16.

• *There are 900 optimisations for aFRR activation if an optimisation cycle of 1 second is assumed (in case of a 4 second optimisation cycle there are 225 optimisations).*<sup>72</sup>

103. As set out above, CBMPs are calculated per MTU.

104. As set out by the Agency in its Contested Decision, there are two main options to define the MTU as regards aFRR<sup>73</sup>.

105. On the one hand, the aFRR MTU can be determined per optimisation cycle of a balancing exchange platform's AOF, which implies that each bid in each load-frequency area has one marginal (clearing) price (CBMP) per optimisation cycle (3 to 5 seconds). In this scenario, each bid has various prices per ISP (to be harmonised to 15 minutes by January 2021) because there are 225 optimisations per ISP assuming each optimisation lasts 4 seconds (being the average optimisation duration).

106. On the other hand, the aFRR MTU can be determined per ISP, which implies that each bid in each load-frequency area has one marginal price (CBMP) per direction after the termination of the 15 minute ISP and that this price is valid for the whole quarter-hour. In this scenario, each bid has one price per ISP, which will be equal to the imbalance price. ENTSO-E's Explanatory Document summarises it as follows: *"only one marginal price resulting from all aFRR clearings during the quarter hour for which the bid is submitted"* is used *"to value the total aFRR requested/activated during the whole validity period of 15 minutes"*<sup>74</sup>. In this option, the main difficulty resides in deciding which single price is the most suitable for the aFRR settlement<sup>75</sup>.

107. The RR and mFRR (scheduled) MTUs are unquestionably set per ISP. However, this is because there is only one market clearing for balancing energy from RR and mFRR with scheduled activation for each quarter of an hour<sup>76</sup>. However, there can be more than one market clearing for mFRR with direct activation and up to 900 market clearings for aFRR activation<sup>77</sup>. Consequently, as regards aFRR, there is a clear mismatch between the number of market clearings and the ISP<sup>78</sup>.

108. The Agency opted for an aFRR MTU determination per optimisation cycle in Article 7 of the Pricing Methodology, joined as Annex I to the Contested Decision: *"the MTU for standard aFRR balancing energy product bids (...) is equal to the optimisation cycle of the AOF of the aFRR-Platform"*.

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<sup>72</sup> ENTSO-E's Explanatory Document, p. 16.

<sup>73</sup> Contested Decision, para 56; ENTSO-E's Explanatory Document, p. 18.

<sup>74</sup> ENTSO-E's Explanatory Document, p. 37.

<sup>75</sup> ENTSO-E's Explanatory Document, p. 37.

<sup>76</sup> ENTSO-E's Explanatory Document, p. 18.

<sup>77</sup> ENTSO-E's Explanatory Document, p. 16.

<sup>78</sup> ENTSO-E's Explanatory Document, p. 16.



109. Appellant I considers, however, that the aFRR MTU should have been determined per ISP. Appellant I argues that setting an aFRR MTU per optimisation cycle of the AOF of the aFRR-Platform (instead of an aFRR MTU per ISP) is contrary to Article 30(1)(c) of the EB NC.
110. The reasoning of Appellant I is based on three different arguments, which are set out in Sub-Pleas 1.1 to 1.3) below.

*1.1 Setting an aFRR MTU equal to the optimisation cycle is not compliant with Article 30(1)(c) of the EB NC.*

111. Article 2(10) of the EB NC defines the ISP as the time unit for which balance responsible parties' imbalance is calculated. According to Article 53(1) of the EB NC, the ISP will, as a general rule, be harmonized to a duration of 15 minutes in all scheduling areas by 3 years after the entry into force of the EB NC (i.e. by 18 December 2020). Recast Regulation (EU) 2019/943 on the internal market for electricity has slightly modified the timing of this harmonization, setting the ISP at the mandatory duration of 15 minutes in all scheduling areas by 1 January 2021.
112. Article 30(1)(c) EB NC requires that at least one price of balancing energy be set per ISP. The expression "*at least*" means, according to the Oxford English Language Dictionary "*not less than, at the minimum*". Article 30(1)(c) of the EB NC sets a minimum number of prices per ISP. Neither Article 30(1)(c) nor any other provision of the EB NC limits the number of prices to one per ISP. In other terms, the EB NC sets a minimum but not a maximum number of prices per ISP.
113. Appellant I claims that only an aFRR MTU per ISP (i.e. 15 minutes) is compliant with Article 30(1)(c) of the EB NC. Appellant I argues that this is because the price to which Article 30(1)(c) of the EB NC alludes must be established for the entire duration of the ISP. Setting an aFRR MTU per optimisation cycle would, in its opinion, not comply with Article 30(1)(c) of the EB NC given that each optimisation would have its own price and that this would, therefore, not result in a single price but multiple prices applying to the entire ISP<sup>79</sup>. Appellant I argues that the expression "*at least*" in the wording of Article 30(1)(c) of the EB NC does not allow for multiple prices per ISP but only one price (for each direction, if both directions have been activated). In its opinion, this expression is aimed to allow for "*different prices for positive or negative balancing energy when there are activations in two directions in a single ISP*"<sup>80</sup>.

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<sup>79</sup> Appellant I's Appeal, para 25.

<sup>80</sup> Appellant I's Appeal, para 26.

114. In its Reply, Appellant I clarifies that it does not suggest that there is a limitation to only one or two prices per ISP but that there can be multiple prices per ISP (e.g. in case of prices per process), as long as at least one price applies for the entire duration of the ISP<sup>81</sup>. Appellant I confirmed this expressly at the Oral Hearing: “A *fundamental element of TenneT’s appeal is the non-compliance with Article 30(1)(c) EB Regulation. This provision is very short, and very simple: The "methodology shall (...) establish at least one price of balancing energy, for each imbalance settlement period". There should be at least one price that applies per that Imbalance Settlement Period (ISP) of 15 minutes. There could be more, no debate on that, but at least one price that applies for an ISP. In the Agency’s decision there is none. There are many prices, in fact an enormous amount of prices (according to the Agency: 225), but none that apply for an entire ISP of 15 minutes.*”<sup>82</sup>

115. In Article 7 of the Pricing Methodology joined as Annex I to its Contested Decision, the Agency sets an aFRR MTU per optimisation cycle<sup>83</sup>. This is because the Agency is of the opinion that the wording of Article 30(1)(c) of the EB NC admits multiple prices per ISP. In its opinion, if it had been the intention of the legislator to limit the number of prices to one price per ISP (for each direction, if both directions have been activated), this limitation would have expressly been included in the EB NC, which is not the case<sup>84</sup>. This is reflected in Recital (6) of the Pricing Methodology joined as Annex I to the Contested Decision: “*This pricing methodology requires that at least one price is established for each MTU and that the MTU is shorter than or equal to the imbalance settlement period, hence satisfying the requirement for at least one price of balancing energy for each imbalance settlement period*”<sup>85</sup>.

116. First, the Board of Appeal observes that neither Article 30(1)(c) nor any other provision of the EB NC limits the number of prices to one per ISP. The EB NC sets a minimum but not a maximum number of prices per ISP. The pricing methodology could therefore establish multiple prices for each product for each IPS, as long as the remaining conditions were met.

117. Second, the Board of Appeal observes that the issue was discussed by All NRAs’ Non-Paper – a relevant document despite its non-binding nature - in which some NRAs were of the opinion that the aFRR MTU had to be set per optimisation cycle and others were of the opinion that the aFRR MTU had to be set per ISP. The Board of Appeal observes, however,

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<sup>81</sup> Appellant I’s Reply, para 15

<sup>82</sup> Summary Minutes of the Oral Hearing of 18 June 2020 in case A-003-2020 (consolidated), p. 5.

<sup>83</sup> See also Contested Decision, para. 47.

<sup>84</sup> Defence, paras 76-77.

<sup>85</sup> Recital 6 of the Pricing Methodology in Annex I to the Contested Decision.

that none of the NRAs invoked the argument of the textual interpretation of the wording “*at least*” of Article 30(1)(c) of the EB NC in order to support an aFRR MTU per ISP, but arguments related to effects on the market<sup>86</sup>.

118. In this context, the Board of Appeal notes that all NRAs are represented in the Agency’s Board of Regulators. Hence, NRAs play a key role in the Agency’s decision-making process, which functions as a platform for continued cooperation between the NRAs to arrive at the necessary decision, under the auspices of the Agency<sup>87</sup>. Indeed, the Agency’s Director would not have been able to take the Contested Decision without first obtaining a favourable opinion of the Board of Regulators<sup>88</sup>. Moreover, if the Board of Regulators would not have been in accordance with an aFRR MTU per optimisation cycle in Article 7 of the Pricing Methodology, it could also have provided comments on or amendments to the Director’s draft Pricing Methodology, which the Director would have been required to take into account by virtue of Article 24 of Regulation (EU) 2019/942. However, at the Oral Hearing, the Agency confirmed that no formal request for amendment was submitted during the internal process<sup>89</sup>. Any deviation by the Director would have had to be duly motivated. Yet, the Board of Regulators did nothing of the kind, instead issuing a favourable opinion to the draft Pricing Methodology of the Agency’s Director at ACER’s 88<sup>th</sup> Board of Regulators Meeting of 22 January 2020. This opinion was adopted with the favourable votes of all NRAs but one.

119. Third, as set out above, there are up to 900 (or on average 225) optimisation cycles per ISP. Hence, setting an aFRR MTU per optimisation cycle implies that there will be multiple - up to 900 (or on average 225) - prices per ISP. This is because each market clearing leads to setting a price for each participating load-frequency control areas. These multiple prices prove to be in line with the interpretation of Article 30(1)(c) of the EB NC, which requires at least one price per ISP but does not by any means limit balancing energy prices to one price per ISP. In other terms, the EB NC allows setting various prices per ISP, as foreseen by Article 7 of the Pricing Methodology. Within a harmonised ISP of 15 minutes, there will be up to 900 aFRR market clearings and resulting marginal prices for each load-frequency control area, depending on the duration of the optimisation cycle<sup>90</sup>.

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<sup>86</sup> Annex 3 to Appellant I’s Appeal, All NRAs’ Non-Paper, p. 171-174.

<sup>87</sup> Article 21 of Regulation (EU) 2019/942.

<sup>88</sup> Recital 36 and Article 24 of Regulation (EU) 2019/942.

<sup>89</sup> Summary Minutes of the Oral Hearing of 18 June 2020 in case A-003-2020 (consolidated), p. 23.

<sup>90</sup> ENTSO-E’s Explanatory Document, p. 37.

At the Oral Hearing, Appellant I did not deny that there are up to 900 or on average 225 optimisation cycles per ISP when questioned by the Board of Appeal<sup>91</sup>.

120. This interpretation has expressly been acknowledged by all TSOs in the initial All TSOs' Pricing Methodology Proposal of 18 December 2018, in which a finer granularity of aFRR prices than the ISP was endorsed<sup>92</sup>. An aFRR MTU was set per optimisation cycle of PICASSO's AOF: "*Article 6 Additional Provisions for the Pricing of Standard aFRR Balancing Energy Product Bids: (1) The BEPP for standard aFRR balancing energy product bids is equal to the optimisation cycle of the AOF (..)*".<sup>93</sup> In so doing, ENTSO-E explained that the pricing methodology, including the periodicity of setting the price, had to be consistent with the congestions identified within each process and that this would not have been ensured if the MTU was set at 15 minutes. Indeed, by contrast with RR and mFRR, there are 900 market clearings per 1 second optimisation cycle or 225 market clearings per average 4 second optimisation cycle for aFRR activation<sup>94</sup>. An aFRR MTU per optimisation cycle has therefore been set to address the mismatch between the number of market clearings and the ISP.

121. Fourth, the Board of Appeal notes that neither Appellant I nor any of the stakeholders invoked the argument of the textual interpretation of the wording "*at least*" of Article 30(1)(c) of the EB NC in order to support an aFRR MTU per ISP during the decision-making process leading to the Contested Decision. At the Oral Hearing, Appellant I explained that it did not consider it necessary to raise this point because it considered that "*Tennet's interpretation was always in line with the EB Regulation*"<sup>95</sup>.

122. Finally, Appellant I invokes a historic interpretation of the EB NC in its Appeal and its Reply<sup>96</sup>. It alleges that a previous draft of the EB NC did not contain the wording "*at least*" and that the introduction of the wording "*at least*" was intended "*to allow different prices for positive and negative balancing energy when there were activations in two directions in a single ISP*". It joins as Annex 8 to its Reply a draft version of the EB NC

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<sup>91</sup> Summary Minutes of the Oral Hearing of 18 June 2020 in case A-003-2020 (consolidated), p. 25.

<sup>92</sup> In the initial All TSOs' Pricing Methodology Proposal, the concept MTU was denominated Balancing Energy Pricing Period or BEPP.

<sup>93</sup> ENTSO-E, "All TSOs' Proposal on methodologies for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the imbalance netting process pursuant to Article 30 (1) and Article 30 (3) of Commission Regulation (EU)" (2018), [https://consultations.entsoe.eu/markets/ebgl-art30-pp/supporting\\_documents/180912\\_All%20TSOs%20Balancing%20Energy%20Pricing%20Proposal%20.pdf](https://consultations.entsoe.eu/markets/ebgl-art30-pp/supporting_documents/180912_All%20TSOs%20Balancing%20Energy%20Pricing%20Proposal%20.pdf), p.8.

<sup>94</sup> ENTSO-E's Explanatory Document, p. 16.

<sup>95</sup> Summary Minutes of the Oral Hearing of 18 June 2020 in case A-003-2020 (consolidated), p. 24.

<sup>96</sup> Appellant I's Appeal, para. 26 and Reply, paras 22-23 and Annex 8. Appellant I confirmed this allegation in response to a question by the Board of Appeal during the oral hearing, see Summary Minutes of the Oral Hearing of 18 June 2020 in case A-003-2020 (consolidated), p. 22.

of 26 October 2015 which contains, as regards a former version of Article 30(1)(c) of the EB NC - former Article 42(1)(c) of the said draft -, the introduction of the wording “at least” (“at least a price of balancing energy for each imbalance settlement period”), the following comment by the UK TSO, National Grid: “Commented [NG38]: Issue 5: Introducing “at least a” before price allows a variety of different pricing methodologies, from one marginal price per CMO to cross-product marginal pricing”<sup>97</sup>.

123. The Board of Appeal finds, in line with the Agency, that the above-mentioned comment confirms the possibility of a “variety of different pricing methodologies”<sup>98</sup>.

124. In the light of the above, the Board of Appeal agrees with the Agency’s Defence that Article 30(1)(c) of the EB NC, according to which at least one price of balancing energy be set per ISP, should be interpreted - both linguistically and legally - as to mean that the EB NC allows for the setting of more than one price per ISP.

125. The Board of Appeal therefore finds that Article 7 of the Pricing Methodology in Annex I to the Contested Decision duly complies with the condition of Article 30(1)(c) of the EB NC that at least one price is established for each ISP.

*1.2 In order to be able to settle the volume as meant in Article 45 of the EB NC per the entire ISP, it is necessary to have one balancing energy price for the entire ISP.*

126. Article 45 of the EB NC requires TSOs to establish a procedure for the calculation of the activated volume of balancing energy at least per ISP. It reads as follows:

*“Balancing energy calculation*

*1. As regards the settlement of balancing energy for at least the frequency restoration process and the reserve replacement process, each TSO shall establish a procedure for:*  
*(a) the calculation of the activated volume of balancing energy based on requested or metered activation; (b) claiming the recalculation of the activated volume of balancing energy.*

*2. Each TSO shall calculate the activated volume of balancing energy according to the procedures pursuant to paragraph 1(a) at least for: (a) each imbalance settlement period; (b) its imbalance areas; (c) each direction, with a negative sign indicating relative withdrawal by the balancing service provider, and a positive sign indicating relative injection by the balancing service provider.*

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<sup>97</sup> Annex 8 to Appellant I’s Reply, p. 44, “Article 42 Pricing method for balancing energy”.

<sup>98</sup> In its Rejoinder, para 87, ACER adds that at the time of the discussion of the draft EB NC of 26 October 2015, the length of the validity of the bids, constituting the Common Merit Order List (which is related to a specific platform, e.g. the aFRR-Platform), had not yet been decided and could have been fixed for a shorter period than 15 minutes for aFRR balancing energy, which confirms the possibility of an aFRR MTU per optimisation cycle.

3. *Each connecting TSO shall settle all activated volumes of balancing energy calculated pursuant to paragraph 2, with the concerned balancing service providers.*”

127. Appellant I claims that setting an aFRR MTU per optimisation cycle does not comply with Article 45 of the EB NC, highlighting that this provision “*refers to “volume” per ISP (singular) rather than “volumes” per ISP (plural)*” and that, “*in order to be able to settle this “volume”*” (and not “volumes” in plural) “*per the entire ISP, it is necessary to have one balancing energy price for that entire ISP*”<sup>99</sup>.

128. The Agency argues in its Defence that Article 45 of the EB NC only provides for an obligation on TSOs to calculate the activated volume of balancing energy at least per ISP, but does not impede TSOs to calculate the activated volume of balancing energy for several periods within the same ISP (even though Article 45(2) of the EB NC refers to balancing energy “volume” and not balancing energy “volumes” per ISP)<sup>100</sup>. The Agency claims furthermore that the balancing energy volume will be the sum of volumes of all optimisation cycles within the same ISP (i.e. the sum of the results of the multiplication of the accepted bid volume per optimisation cycle and the clearing price per optimisation cycle), therefore, not violating Article 45(2) of EB NC<sup>101</sup>.

129. First, the Board of Appeal notes that Article 45 of the EB NC contains a general obligation on TSOs to calculate and settle balancing energy and requires them to calculate balancing energy volume per ISP, even though, within the boundaries of compatibility with the common pricing methodology, the methodology for this calculation is left to the TSOs. Indeed, while the pricing methodology is a common proposal of all TSOs, the EB NC clearly puts the methodology to determine balancing energy volume to be settled with the BSPs at national level. Indeed, the EB NC foresees that the methodology to calculate balancing energy volume and imbalance adjustment is part of the national terms and conditions which are developed by TSOs at national level and are approved by NRAs<sup>102</sup>. This is reflected in Article 18(5)(h) of the EB NC: “*The terms and conditions for BSPs shall contain: (...) (h) the rules for the determination of the volume of balancing energy to be settled with the balancing service provider pursuant to Article 45*”. However, these national terms and conditions for BSPs have to comply with articles 45 to 49 of the EB NC, which define requirements for balancing energy settlement with BSPs.

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<sup>99</sup> Appellant I’s Appeal, para. 27.

<sup>100</sup> Agency’s Defence, para 103.

<sup>101</sup> Agency’s Defence, para 103.

<sup>102</sup> ENTSO-E’s Explanatory Document, p. 9.

130. Second, the Board of Appeal observes that the issue was discussed by all NRAs in their Non-Paper, in which the NRAs advocating an aFRR MTU per optimisation cycle claimed that this was compliant with Article 45 of the EB NC, whereas the NRAs advocating an aFRR MTU per ISP claimed that an aFRR MTU per optimisation cycle infringed Article 45 of the EB NC<sup>103</sup>.
131. Third, the Board of Appeal observes that the fact that Article 45 of the EB NC requires that balancing energy volume be calculated per ISP does not imply that the aFRR CBMP be set per ISP.
132. Fourth, the Board of Appeal finds that the use of the word “volume” in singular, instead of the word “volumes” in plural does not imply that Article 45 of the EB NC implicitly requires that aFRR CBMPs be set per ISP. Semantically, the singular form of mass nouns, such as energy, may be used to designate its compound plural.
133. Finally, the Board of Appeal observes that the burden of proof rests with Appellant I<sup>104</sup> and that Appellant I does not evidence how setting aFRR CBMPs per optimisation cycle renders it technically impossible to calculate aFRR volumes and settle per ISP. It is perfectly possible to calculate activated aFRR volumes per ISP whilst invoicing BSPs for these volumes on the basis of prices that have been determined per optimisation cycle. At the Oral Hearing, when questioned by the Board of Appeal, Appellant I confirmed that setting aFRR CBMPs per optimisation cycle does not render it technically impossible to calculate imbalance prices, but renders it more difficult<sup>105</sup>.
134. The Board of Appeal therefore finds that Article 7 of the Pricing Methodology in Annex I to the Contested Decision is not contrary to Article 45 of the EB NC.

*1.3 A system setting an aFRR MTU equal to the optimisation cycle would no longer be a true marginal price system as required by Article 30(1)(a) of the EB NC.*

135. According to Article 30(1)(a) of the EB NC, the methodology to determine prices for the balancing energy that results from the activation of balancing energy bids for the frequency restoration process and the reserve replacement process shall “*be based on marginal pricing (pay-as-cleared)*”. The EB NC’s requirement to use marginal pricing goes hand in hand with the EB NC’s objective to foster effective competition on the balancing energy markets, ensuring a level-playing field between market participants<sup>106</sup>. Article 30(1)(a) of

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<sup>103</sup> Annex 3 to Appellant I’s Appeal, All NRAs’ Non-Paper, p. 172-173.

<sup>104</sup> Board of Appeal Decisions A-001-2017 (para 111), A-001-2018 (para 53), A-002-2018 (para 100), A-004-2019 (para 306), A-006-2019 (para 84).

<sup>105</sup> Summary Minutes of the Oral Hearing of 18 June 2020 in case A-003-2020 (consolidated), p. 23.

<sup>106</sup> Recitals 5, 6 and 8 and Articles 3.1.(a), 25.6(a), 44.1(g), 60.2(d) and 61.2(c) of the EB NC.

the EB NC expressly foresees marginal pricing or pricing based on the “pay-as-cleared” principle, which implies that there will be a single price for all BSPs per clearance. This is opposed to pricing based on the “pay-as-bid” principle, whereby each BSP is paid according to its bid price and the price of consumption is the weighted average of all BSPs’ bids.

136. As set out in ENTSO-E’s Explanatory Document, in case of marginal pricing, all BSPs whose bids are activated receive the price of the marginal bid<sup>107</sup>. Hence, marginal pricing directs the merit order of generation so that the balancing energy product with the lowest marginal cost is the first to be taken into account while the product with the highest marginal cost is the last, with a marginal price lying at the intersection of demand (volume requested by the TSOs to reduce the residual imbalance between the total electricity injections and withdrawals) and supply (all the aFRR balancing energy bids) that is the same for all BSPs. Marginal pricing implies that the average price for balancing energy will equal the marginal price and that, consequently, appropriate incentives to the BSPs are given to provide the requested volume of balancing energy. Pay-as-bid schemes imply, by contrast, a higher level of uncertainty because BSPs are not able to predict the bids of other BSPs or how the merit order is determined. As a result, in pay-as-bid schemes, BSPs will usually add a risk margin to the price of their bids. As set out in ENTSO-E’s Explanatory Document, *“under marginal pricing and the assumption of perfect competition, BSPs’ optimal strategy is to bid their marginal costs which ensures the maximisation of their earnings and the efficiency of the auctions. Therefore, it is expected that bid prices are lower compared to other pricing schemes (i.e. pay-as-bid). Moreover, marginal pricing reduces the complexity of bidding for BSPs in auctions compared to bidding under pay-as-bid schemes that require forecast skills and dedicated tools. As such, marginal pricing makes the participation of new entrants easier and reduces the operating costs.”*<sup>108</sup>

137. Appellant I argues that aFRR pricing per optimisation cycle does not amount to a true marginal price system as required by the EB NC. In its view, a true marginal pricing system requires that the aFRR MTU is set at the duration of the ISP, since under marginal pricing BSPs determine their bid prices - which are per ISP – *“in the expectation that no balancing energy will be settled at a price less than the bid price of each individual activated bid and that all balancing energy from all activated bids for that ISP and bidding zone will be*

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<sup>107</sup> ENTSO-E’s Explanatory Document, p. 13.

<sup>108</sup> ENTSO-E’s Explanatory Document, p. 13.



*settled at the same price*<sup>109</sup>. Given that aFRR pricing per optimisation cycle creates 225 marginal prices over the ISP (assuming the optimisation is of an average duration of 4 seconds) and that these marginal prices are averaged into one composite price for the ISP, Appellant I claims that the aFRR pricing per optimisation cycle creates multiple marginal prices over the ISP and that these marginal prices, averaged into one composite price for the ISP, are not truly marginal prices but rather a weighted average price based on a number of sub-periods<sup>110</sup>.

138. Appellant I also alleges that volumes corresponding to the AOF optimisation cycles are “*not directly delivered*”, there being a latency, firstly, between the AOF calculated volumes and the actual activation by the connecting TSO and, secondly, between the latter activation and the BSPs concerned. In its opinion, this latency implies that CBMPs calculated per optimisation cycle apply to “*volumes selected in the past*”<sup>111</sup>.

139. The Agency states that it sets an aFRR MTU per optimisation cycle of the AOF function of the aFRR-Platform precisely to guarantee a truly marginal pricing methodology. The Agency adds that, in so doing, it follows the TSOs’ initial Proposal of 18 December 2018. In its response to the Public Consultation, the Agency explained that “*defining the aFRR MTU equal to the optimisation cycle is the only way to ensure that marginal pricing (pay-as-cleared) is implemented as required by Article 30(1)(a). This is because the market is cleared every optimisation cycle with different aFRR demands and different cross-border exchanges*”<sup>112</sup>. At the Oral Hearing, the Agency set out that, as per its Rejoinder (example on p.22) “*we demonstrated numerically that marginal pricing principle is not respected in case of MTU not equal to optimization cycle but to longer period*”<sup>113</sup>.

140. In its Defence<sup>114</sup>, the Agency explains that the latency brought forward by Appellant I is not caused by the decision to set the aFRR MTU per optimisation cycle, but inherent to the choice of a central control model for the aFRR-Platform, as described in ACER’s Decision No. 02/2020<sup>115</sup>. The said decision expressly sets out that under a control demand model “*there will be systematic and persistent differences between the bids selected by the [AOF] and the bids activated by the TSOs locally. This is because of the time delay as described above and because each [LFC] controller operates on aFRR bids with different activation*

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<sup>109</sup> Appellant I’s Appeal, para 28.

<sup>110</sup> Appellant I’s Appeal, para 30.

<sup>111</sup> Appellant I’s Appeal, para 29.

<sup>112</sup> Response to the Public Consultation on the Methodology to Determine Prices for the Balancing Energy that results from the Activation of Balancing Energy Bids (‘Response to the Public Consultation’), Annex II to the Contested Decision, p. 7.

<sup>113</sup> Summary Minutes of the Oral Hearing of 18 June 2020 in case A-003-2020 (consolidated), p. 25.

<sup>114</sup> Agency’s Defence, para 67.

<sup>115</sup> Annex 6 to the Defence, Decision No. 02/2020, paras 132 and 133.

times”<sup>116</sup>. The Agency adds that setting an aFRR MTU per ISP would not remedy the latency caused by the choice of the control demand model<sup>117</sup>. The Agency stresses that the TSOs chose a control demand model (as opposed to a control request model) in order to reduce risks from an operational security perspective<sup>118</sup>.

141. First of all, the Board of Appeal observes that the essence of the controversy between Appellant I and the Defendant resides in a dichotomy between, on the one hand, reflecting the results of optimisation algorithms at the scheduling stage in aFRR pricing, ensured by a MTU per optimisation cycle, and, on the other hand, reflecting the actual physical delivery in aFRR pricing, ensured by a MTU per ISP.

142. Secondly, the Board of Appeal observes that the TSOs’ initial Proposal of 18 December 2018 foresaw an aFRR MTU per optimisation cycle and not per ISP.

143. Thirdly, the Board of Appeal notes that, per definition, marginal pricing or pricing along the principle of “pay-as-cleared” intrinsically implies that pricing is linked to the clearing process and not to the physical delivery of balancing energy. Given that each optimisation cycle represents a market clearing, the Board of Appeal agrees with the Agency’s view - expressed in the Contested Decision, in its Response to the Public Consultation and in its Defence - that setting an aFRR price per optimisation cycle guarantees its truly marginal nature in accordance with the EB NC. The Board of Appeal therefore agrees with the Agency’s Response to the Public Consultation, which set out that *“defining the aFRR MTU equal to the optimisation cycle is the only way to ensure that marginal pricing (pay-as-cleared) is implemented as required by Article 30(1)(a). This is because the market is cleared every optimisation cycle with different aFRR demands and different cross-border exchanges. Thereby it is incorrect to assume that the market clears every ISP and therefore the pricing is the average price over the ISP. Any resolution different than the one that is selected for the algorithm run (that calculates the price), would be a deviation from the pay-as-cleared principle.”*<sup>119</sup> The Board of Appeal notes that the Agency clearly states that it is aware that this guarantee of the marginal nature of balancing energy prices supposes that prices will represent the results of optimisation algorithms at the scheduling stage and not the actual physical delivery, given that BSPs’ bids remunerated with an aFRR price per optimisation cycle are not activated in the said optimisation cycle but in subsequent

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<sup>116</sup> Annex 6 to the Defence, Decision No. 02/2020, para 133.

<sup>117</sup> Agency’s Defence, para 71.

<sup>118</sup> Agency’s Defence, paras 68 and 69.

<sup>119</sup> Response to the Public Consultation on the Methodology to Determine Prices for the Balancing Energy that results from the Activation of Balancing Energy Bids (‘Response to the Public Consultation’), Annex II to the Contested Decision, p. 7.

optimisation cycles: *“Using the outcome of the optimisation algorithm for setting the balancing energy price ensures the implementation of the marginal pricing, but it also implies that it does not represent the actual situation.”*<sup>120</sup>

144. Fourthly, the Board of Appeal observes that ENTSO-E’s Explanatory Document explains that, given that aFRR is a *“(quasi) continuous process, the definition of uncongested areas for this process may change at any point in time, also within an ISP or the quarter of an hour for which the bid is submitted”*<sup>121</sup>. The absent marginal nature of aFRR prices set per ISP is also recognised by all TSOs in ENTSO-E’s Explanatory Document<sup>122</sup>.

145. Fifthly, the Board of Appeal finds, by contrast, that an aFRR price set per ISP would not be truly marginal, as it would not be in correlation with market clearing and hence with the “pay-as-cleared” principle, but would be in correlation with the ISP or settlement period over which BRPs are financially responsible for having a balanced portfolio. This absence of market clearing alignment would not be in accordance with the EB NC.

146. Finally, contrary to Appellant I’s allegation, the Board of Appeal does not find that the Agency *“ignores”* or *“downplays”*<sup>123</sup> any latency issue deriving from the above-mentioned dichotomy. The Board of Appeal is convinced by the Agency’s Rejoinder, which emphasizes that the Agency’s choice to set aFRR prices that reflect market clearing rather than physical delivery, and the inherent latency it creates, is in accordance with the EB NC, especially the marginal pricing principle and the reflection of market congestion<sup>124</sup>. But even more so, a choice to set aFRR prices that rather reflect physical delivery would not be in accordance with the EB NC: *“The first option (an aFRR MTU equal to the optimisation cycle) is the only option respecting the legal requirements of Article 30 of the EB Regulation concerning the marginal pricing principle, as the second one (an aFRR MTU equal to 15 minutes) does not, since it is based on the selection of one of the several marginal prices resulting during a 15 minutes period. As regards the mismatch with market congestion (..), changing the duration of the aFRR MTU (by setting it equal to 15 minutes) is also not sufficient to change all the underlying assumptions of the AOF.”*<sup>125</sup>.

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<sup>120</sup> Response to the Public Consultation, p. 11-12. On p.9, it adds that, since the market is cleared every optimisation cycle, also the bidding should be done per optimisation cycle but that this is not possible for stability reasons, would be burdensome and would not provide added value.

<sup>121</sup> ENTSO-E’s Explanatory Document, p. 15.

<sup>122</sup> ENTSO-E’s Explanatory Document, p. 37.

<sup>123</sup> Appellant I’s Reply, para 30.

<sup>124</sup> Agency’s Rejoinder, paras 1-3 and 32.

<sup>125</sup> Agency’s Rejoinder, para 32.

147. In light of the above, the Board of Appeal finds that the definition of the aFRR MTU per optimisation cycle duly complies with the requirement of Article 30(1)(a) of the EB NC that the pricing methodology be based on marginal pricing.

*Conclusion on the First Plea.*

148. It follows that the Appeal's First Plea must be dismissed as unfounded.

*Second plea – Decision No. 01/2020 does not give the right incentives and would in fact introduce distorting incentives in the market.*

149. According to Appellant I the Agency's determination of the aFRR MTU per optimisation cycle does not give the right incentives and distorts the market more than existing systems that are compliant with the EB NC (such as the Dutch Grid Code), as set out in Sub-Pleas 2.1 to 2.3<sup>126</sup>.

150. In so doing, Appellant I refers to statements issued by the NRAs who were of the opinion that the aFRR MTU had to be set per ISP (in particular by the Dutch NRA, according to Appellant I) during the discussions reproduced in All NRAs' Non-Paper<sup>127</sup>.

151. As a preliminary remark, the Board of Appeal observes that, notwithstanding its high degree of relevance, the Non-Paper is a non-binding compilation of NRAs' views, that the Non-Paper demonstrates that various NRAs disagreed on the determination of the aFRR MTU per optimisation cycle or per ISP, that the NRAs jointly requested the Agency to take the Contested Decision by virtue of Article 5(7) of the EB NC and that all NRAs with the exception of one adopted a favourable opinion to the Agency's Director's draft Contested Decision (contemplating an aFRR MTU per optimisation cycle) by qualified majority.

152. Appellant I also invokes a presentation that it made to ENTSO-E, entitled "*Potential Mark-ups in Bid Prices aFRR*", signed by Mr. Frank Nobel, which it joins as annex to its Appeal<sup>128</sup>. The Board of Appeal duly analysed the presentation in the context of this Plea.

*2.1 ACER has not taken into account the interrelationship between the balancing energy price and the imbalance price and ACER has now set the aFRR MTU before there is clarity on the imbalance pricing decision ACER is yet to take.*

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<sup>126</sup> Appellant I's Appeal, paras 31-39.

<sup>127</sup> Annex 3 to Appellant I's Appeal, All NRAs' Non-Paper, p. 172-173.

<sup>128</sup> Annex 5 to Appellant I's Appeal.

153. Article 2(12) of the EB NC defines the imbalance price as “*the price, be it positive, zero or negative, in each imbalance settlement period for an imbalance in each direction*”. This price is paid by BRPs, i.e. market participants who are financially responsible for their imbalances. Article 2(8) of the EB NC defines imbalances as an energy volume calculated representing the difference between the allocated volume attributed to the BRP and the final position of that BRP, including any balance adjustment applied to that BRP.

154. The EB NC does not harmonise the imbalance price calculation but requires further integration at EU level on this calculation in future.

155. Article 52(2) of the EB NC foresees that, within one year of the EB NC’s entry into force, all TSOs shall develop a proposal to further specify and harmonise at least:

*(a) the calculation of an imbalance adjustment pursuant to Article 49 and the calculation of a position, an imbalance and an allocated volume following one of the approaches pursuant to Article 54(3); (b) the main components used for the calculation of the imbalance price for all imbalances pursuant to Article 55 including, where appropriate, the definition of the value of avoided activation of balancing energy from frequency restoration reserves or replacement reserves; (c) the use of single imbalance pricing for all imbalances pursuant to Article 55, which defines a single price for positive imbalances and negative imbalances for each imbalance price area within an imbalance settlement period; and (d) the definition of conditions and methodology for applying dual imbalance pricing for all imbalances pursuant to Article 55, which defines one price for positive imbalances and one price for negative imbalances for each imbalance price area within an imbalance settlement period, encompassing: (i) conditions on when a TSO may propose to its relevant regulatory authority in accordance with Article 37 of Directive 2009/72/EC the application of dual pricing and which justification must be provided; (ii) the methodology for applying dual pricing.*” Article 52(4) of the EB NC provides that this TSOs’ proposal contains an implementation date no later than eighteen months after approval by all relevant NRAs in accordance with Article 5(2) of the EB NC.

156. Article 55 of the EB NC provides that each TSO shall set up rules to calculate the imbalance price and shall determine the imbalance price for each ISP, its imbalance price areas and each imbalance direction. Article 55 of the EB NC reads as follows:

*“1. Each TSO shall set up rules to calculate the imbalance price, which can be positive, zero or negative, as defined in Table 2.*

*Table 2 Payment for imbalance*

	<i>Imbalance price positive</i>	<i>Imbalance price negative</i>
<i>Positive imbalance</i>	<i>Payment from TSO to BRP</i>	<i>Payment from BRP to TSO</i>

Negative imbalance	Payment from BRP to TSO	Payment from TSO to BRP
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2. *The rules pursuant to paragraph 1 shall include a definition of the value of avoided activation of balancing energy from frequency restoration reserves or replacement reserves.*

3. *Each TSO shall determine the imbalance price for: (a) each imbalance settlement period; (b) its imbalance price areas; (c) each imbalance direction.*

4. *The imbalance price for negative imbalance shall not be less than, alternatively: (a) the weighted average price for positive activated balancing energy from frequency restoration reserves and replacement reserves; (b) in the event that no activation of balancing energy in either direction has occurred during the imbalance settlement period, the value of the avoided activation of balancing energy from frequency restoration reserves or replacement reserves.*

5. *The imbalance price for positive imbalance shall not be greater than, alternatively: (a) the weighted average price for negative activated balancing energy from frequency restoration reserves and replacement reserves; (b) in the event that no activation of balancing energy in either direction has occurred during the imbalance settlement period, the value of the avoided activation of balancing energy from frequency restoration reserves or replacement reserves.*

6. *In the event that both positive and negative balancing energy from frequency restoration reserves or replacement reserves have been activated during the same imbalance settlement period, the imbalance settlement price shall be determined for positive imbalance and negative imbalance based on at least one of the principles pursuant to paragraphs 4 and 5.”*

157. Appellant I claims that the Contested Decision does not contain a substantiated analysis of the effects of setting the aFRR MTU per optimization cycle on the balancing energy prices and the imbalance price, ignoring the interrelationship between both of them<sup>129</sup>. Appellant I adduces that this contravenes Article 3(1)(d) of the EB NC, which provides that the EB NC aims at “*integrating balancing markets and promoting the possibilities for exchanges of balancing services while contributing to operational security*”<sup>130</sup>. Appellant I argues, furthermore, that the Agency has set an aFRR MTU in the Contested Decision before there is “*clarity on the imbalance pricing decision the Agency is yet to take*”, rendering it

<sup>129</sup> Appellant I’s Appeal, para 33.

<sup>130</sup> Appellant I’s Appeal, para 33.

impossible to oversee the interaction between the way the aFRR MTU is set and the future imbalance pricing regime<sup>131</sup>.

158. In its Defence<sup>132</sup>, the Agency confirms the interrelationship between the balancing energy price and the imbalance price, quoting Article 55 of the EB NC. It explains how this interaction is taken into account by the Contested Decision and holds that, when, on 14 January 2020, the Agency received the referral to decide on “*All TSOs’ proposal of 16 July 2018 to further specify and harmonise imbalance settlement based on Article 52(2) of the EB NC*”, the draft Contested Decision – which had to be adopted at the latest on 24 January 2020 – had already been finalised. It adds that the public consultation on All TSOs’ Proposal based on Article 52(2) of the EB NC was only closed on 29 March 2020<sup>133</sup>.
159. First, the Board of Appeal notes that, by their very nature, imbalance prices are determined per ISP. The Board of Appeal refers to the definition of imbalance prices in Article 2(12) of the EB NC, quoted above.
160. Second, the Board of Appeal observes that there is an interrelationship between the pricing of balancing energy and imbalance pricing, as evidenced by Article 55 of the EB NC, quoted above. According to the EB NC, BRPs have a responsibility to balance the energy system and are financially responsible to keep their own position (injections, withdrawals and trades) balanced over the ISP. Hence, the remaining long (surplus) and short (deficit) energy positions in real-time are, respectively, the BRPs’ positive and negative imbalances. These imbalances are settled with the connecting TSO and translated into positive or negative imbalance prices. The general objective of imbalance settlement is to ensure that BRPs support the system's balance in an efficient way and to incentivise market participants in keeping and/or helping to restore the system balance<sup>134</sup>. According to Article 15(1) of the EB NC, TSOs and BRPs are required to cooperate in order to ensure efficient and effective balancing.
161. Articles 55(4)(a) and 55(5)(a) of the EB NC establish limitations on the minimum and maximum prices for negative imbalance and positive imbalance, by reference to the weighted average price for, respectively, positive or negative balancing energy. On the one hand, Article 55(4)(a) of the EB NC provides that “*the imbalance price for negative imbalance shall not be less than (...): (a) the weighted average price for positive activated*

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<sup>131</sup> Appellant I’s Appeal, para 34.

<sup>132</sup> Agency’s Defence, paras 92-93.

<sup>133</sup> At the Oral Hearing, the Agency confirmed that the Decision had not yet been adopted. It also set out that it will provide a framework for imbalance pricing, with leeway to TSOs as to its implementation. Summary Minutes of the Oral Hearing or 18 June 2020 in case A-003-2020 (consolidated), p. 17.

<sup>134</sup> Recital 17 of the EB NC.

*balancing energy from [FRR] and [RR]”*; on the other hand, Article 55(5)(a) of the EB NC provides that: *“the imbalance price for positive imbalance shall not be greater than (...): (a) the weighted average price for negative activated balancing energy from [FRR] and [RR]”*. Article 55 of the EB NC also requires all TSOs to develop rules to calculate the imbalance price and requires this imbalance price to be calculated for each ISP, its imbalance price areas and each imbalance direction.

162. The Board of Appeal observes that setting the aFRR per optimisation cycle and not per ISP has an impact on the imbalance price because the aFRR balancing energy price contributes to the imbalance settlement price. The aFRR pricing methodology therefore has a financial impact on the BRPs.
163. The Agency acknowledges in the Contested Decision that setting aFRR prices per optimisation cycle does not provide perfect incentives for BRPs to support system imbalance<sup>135</sup>. In effect, as also set out in the Response to the Public Consultation, BRPs are not provided with optimal price signals given that imbalance settlement will occur on the basis of a weighted average of CBMPs of at least 225 optimisation cycles<sup>136</sup>. However, the Agency observes that this also holds for setting aFRR prices per ISP given that perfect incentives could only be attained through cross-product pricing<sup>137</sup>. Indeed, in the Agency’s view, cross-product pricing – i.e. setting a same marginal price for all balancing energy products (aFRR, mFRR and RR) across various bids, equal to the imbalance price – would be the only scenario capable of providing perfect incentives to BRPs to support system imbalance<sup>138</sup>. ENTSO-E’s Explanatory Document illustrates cross-product pricing with an example: *“e.g. a selected upward aFRR balancing energy bid could set the price for all selected upward mFRR and RR balancing energy bids”*<sup>139</sup>.
164. However, it is impossible for the Proposal to use cross-product pricing because such pricing would apply the “pay-as-bid” principle instead of the “pay-as-cleared” principle - and not amount to marginal pricing as required by the EB NC – and would distort price signals across European Platforms for the exchange of balancing energy<sup>140</sup>. The possibility of cross-product marginal pricing has been carefully analysed by all TSOs in ENTSO-E’s Explanatory Document. However, ENTSO-E’s Explanatory Document concluded that it was *“not in line with the requirements of EB NC to provide correct price signals to market*

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<sup>135</sup> Contested Decision, para 57.

<sup>136</sup> Response to the Public Consultation, p.9.

<sup>137</sup> Response to the Public Consultation, p.9. See also ENTSO-E’s Explanatory Document, p. 38-39.

<sup>138</sup> Contested Decision, para 57. Response to the Public Consultation, p. 10.

<sup>139</sup> ENTSO-E’s Explanatory Document, p. 17.

<sup>140</sup> Contested Decision, para 57. Response to the Public Consultation, p. 10.



participants, to take into account the pricing method in the day-ahead and intraday timeframes and to reflect market congestion” for a variety of reasons (*inter alia* different technical product requirements, different gate closure times, different activation processes and lead times, different congestions, gaps between bid selection and pricing and inconsistencies with day-ahead and intraday methodologies)<sup>141</sup>. The Board of Appeal finds, therefore, that the Contested Decision sufficiently takes account of the interrelationship between the balancing energy price and the imbalance price.

165. Third, The Board of Appeal observes that imbalance pricing will, in future, be subject to harmonisation at EU level as per Article 52(2) of the EB NC, quoted above.
166. Fourth, the Board of Appeal notes that, given the marginal pricing of CBMPs foreseen by Article 30 EB NC, when the granularity is lower than the ISP – as is the case with aFRR CBMPs set per optimisation cycle - a rule is needed to reduce all these marginal CBMPs into one imbalance price. The Board of Appeal notes that theoretically the imbalance price can be calculated using either a marginal or an average of all marginal CBMPs<sup>142</sup>. In this respect, the Board of Appeal observes that all TSOs had given assurance that setting an aFRR price per optimisation cycle (i.e. with a lower granularity than the ISP) required a rule to reduce all CBMPs into an imbalance price and left TSOs with two options to this end: *“taking into account the optimisation-cycle BEPP for aFRR, TSOs are in principle left with two main options how to map the aFRR balancing energy prices in the imbalance price per ISP”*: TSOs have the option to either determine imbalance prices on the basis of maximum aFRR prices, or to determine imbalance prices on the basis of the volume-weighted average of aFRR prices<sup>143</sup>.
167. Fifth, the Board of Appeal notes that the Agency’s Defence stresses the importance, in this context, of the interaction of different European Platforms. TSOs will, at their own discretion, be able to use two separate European platforms for each of the aFRR and mFRR products respectively, with different bids and different demands by the TSOs<sup>144</sup>.

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<sup>141</sup> ENTSO-E’s Explanatory Document, p. 17.

<sup>142</sup> Technical Report “The EU Electricity Network Codes”, February 2019, Florence Institute of Regulation, European University Institute, Tim Schittekatte, Valerie Reif, Leonardo Meeus, p. 70.

<sup>143</sup> ENTSO-E’s Explanatory Document, p. 40-41 and p.70.

<sup>144</sup> Agency’s Defence, paras 91 and 146. The Defence provides the following example in para 146: *“if we consider that the price  $P_a$  of aFRR balancing energy is greater than the price  $P_m$  for mFRR balancing energy (i.e.  $P_a > P_m$ ), all the aFRR bids with price less than or equal to  $P_a$  are selected and all the aFRR bids with price greater than  $P_a$  are not selected. With the cross-product pricing, all mFRR and aFRR selected bids are remunerated at  $P_a$  (since  $P_a > P_m$ ). Since  $P_a > P_m$ , there may be some mFRR bids with price greater than  $P_m$  (which are therefore not selected), but the price of these mFRR bids is also less than  $P_a$ . So, these mFRR bids will have a price lower than the “marginal” price, but they would not be selected. On the contrary, aFRR bids with price in this range (i.e. between  $P_m$  and  $P_a$ ) will be selected. However, this would distort the incentives in the two platforms, since it is not a clear signal to BSPs to offer all their (mFRR) balancing energy or to invest in new (mFRR) units. If we assume  $P_m > P_a$ , we would arrive at the same conclusion.”*

168. Sixth, the Board of Appeal observes that the Agency was obliged, by virtue of Article 6(10) and 6(12) of Regulation (EU) 2019/942 to take the Contested Decision on the aFRR balancing energy pricing methodology, including the aFRR MTU, within six months of the date of the referral by the NRAs (24 July 2019). The Agency could therefore materially not postpone its decision-making and had to take the Contested Decision on 24 January 2020 at the latest.
169. Seventh, the Board of Appeal notes that the burden of proof is incumbent upon Appellant I<sup>145</sup> and that Appellant I does not evidence that it is technically indispensable for imbalance pricing that aFRR CBMPs be determined per ISP. Neither does Appellant I evidence how setting aFRR CBMPs per optimisation cycle renders it technically impossible to calculate imbalance prices. At the Oral Hearing, both Appellant I and the Agency confirmed that it is technically possible, albeit more difficult, to calculate the activated aFRR volumes per ISP (following Article 45 of the EB NC) and invoice the BSPs for these volumes on the basis of prices that have been determined per optimisation cycle<sup>146</sup>.
170. Finally, on any concern that a future decision on imbalance pricing would hypothetically introduce a cap on the imbalance price and allegedly discourage BSPs to participate in the balancing markets, the Board of Appeal refers to Pleas 2.2 and 2.3 below.
171. In the light of the above, the Board of Appeal finds that it cannot be sustained that the Agency did not duly take into account the interrelationship between the balancing energy price and the imbalance price or that the Contested Decision jeopardises the integration at EU level of the imbalance price.

*2.2 It can already be – and ACER should have also- foreseen that an aFRR MTU equal to the optimisation cycle gives incentives that go in the wrong direction.*

172. The Board of Appeal notes, as a preliminary observation, that the EB NC effectively requires that electricity balancing promotes competition on the concerned market and provides the right incentives to market participants.
173. Recital (2) of EB NC states that *“a well-functioning internal market in electricity should provide producers with appropriate incentives for investing in new power generation, including in electricity from renewable energy sources, paying special attention to the most isolated Member States and regions in the Union's energy market. A well-functioning*

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<sup>145</sup> Board of Appeal Decisions A-001-2017 (para 111), A-001-2018 (para 53), A-002-2018 (para 100), A-004-2019 (para 306), A-006-2019 (para 84).

<sup>146</sup> Summary Minutes of the Oral Hearing of 18 June 2020 in case A-003-2020 (consolidated), pp. 24 and 25.

*market should also provide consumers with adequate measures to promote more efficient use of energy, which presupposes a secure supply of energy”*

174. Recital (14) of the EB NC sets out that *“the pricing method for standard products for balancing energy should create positive incentives for market participants in keeping and/or helping to restore the system balance of their imbalance price area, reduce system imbalances and costs for society. Such pricing approach should strive for an economically efficient use of demand response and other balancing resources subject to operational security limits. The pricing method used in the procurement of balancing capacity should strive for an economically efficient use of demand response and other balancing resources subject to operational security limits”*.
175. Article 30(1)(d) of the EB NC provides that balancing energy and cross-zonal capacity used for the exchange of balancing energy or for operating the imbalance netting process should be priced according to a methodology that *“gives correct price signals and incentives to market participants”*
176. Similarly, Article 44(1) of the EB NC sets out, when clarifying the general settlement principles, that balancing energy settlement should *“(a) establish adequate economic signals which reflect the imbalance situation; (b) ensure that imbalances are settled at a price that reflects the real time value of energy; (c) provide incentives to balance responsible parties to be in balance or help the system to restore its balance; (d) facilitate harmonisation of imbalance settlement mechanisms; (e) provide incentives to TSOs to fulfil their obligations pursuant to Article 127, Article 153, Article 157 and Article 160 of Regulation (EU) 2017/1485; (f) avoid distorting incentives to balance responsible parties, balancing service providers and TSOs; (g) support competition among market participants; (h) provide incentives to balancing service providers to offer and deliver balancing services to the connecting TSO; (i) ensure the financial neutrality of all TSOs.”*
177. Appellant I argues that the Contested Decision does not provide correct incentives and distorts incentives to existing systems (the Dutch Grid Code). It holds that it induces BSPs to add mark-ups to their balancing energy prices<sup>147</sup>. It claims, in that respect, that (i) *“Article 44(1, e.g. sub f) EB Regulation will lead to an imbalance price that is at least as high as the balancing energy price”*; (ii) *“since Article 44(1)(b) also requires the imbalance prices should reflect “the real time value of energy”, it should also not be much higher than the balancing energy price”* and (iii) *“BSPs may therefore react wrongly to the need of the TSOs if the imbalance price is capped (which may be the case depending on ACER’s*

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<sup>147</sup> Appellant I’s Appeal, para 32.

*upcoming decision on imbalance pricing) and the balancing energy price cannot go above the level of the imbalance price, because it would then be beneficial for BSPs to make a bid but not deliver and get settled against the imbalance price which will be artificially too low”*<sup>148</sup>. It adds that the difference in time units between the balancing energy prices and imbalance prices will generate price differences in a given ISP allowing BSPs to adopt strategies at the expense of market efficiency<sup>149</sup>.

178. The issue was discussed by all NRAs in their Non-Paper. The NRAs who were of the opinion that the aFRR MTU had to be set per optimisation cycle argued that this would provide correct incentives on the market, whereas the NRAs who were of the opinion that the aFRR MTU had to be set per ISP argued that an aFRR MTU per optimisation cycle would incentivise BSPs to provide price mark-ups in their bids<sup>150</sup>.
179. The Board of Appeal observes that the Contested Decision explains that the Agency opts to define an aFRR MTU per optimisation cycle in Article 7 of the Proposal because it is more compliant with EB NC than an aFRR MTU per ISP. The Board of Appeal agrees with this finding, as will be set out in the following paragraphs.
180. First, the Agency sets out that setting an aFRR MTU per optimisation cycle does not create incentives for BSPs to increase their bid price because of the fact that auctions are performed on balancing energy exchange platforms and because, when they bid for these auctions, there is sufficient competition between BSPs given the clearances’ very short time (optimisation cycles of 3 to 5 seconds) and the marginal price that will apply to each auction. These factors deter BSPs from adding mark-ups to their bids to avoid the risk of having their bids rejected<sup>151</sup>. In their initial 2018 All TSOs’ Pricing Methodology Proposal, all the TSOs stated that *“the effective competition is also fostered by the choice of the balancing energy pricing period (BEPP) for the pricing of balancing energy from automatic frequency restoration process (aFRR) which will be equal to the AOF optimisation cycle. This approach will maximise the time periods with price convergence and lower incentives mark-ups on balancing energy bid prices motivated by limited cross-zonal capacity in areas with limited internal competition. The fostering of effective cross-border competition is a core condition to make the application of a marginal pricing approach successful.”*<sup>152</sup>

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<sup>148</sup> Appellant I’s Appeal, para 35.

<sup>149</sup> Appellant I’s Appeal, para 39.

<sup>150</sup> Annex 3 to Appellant I’s Appeal, All NRAs’ Non-Paper, p. 171-174.

<sup>151</sup> Contested Decision, para 58.

<sup>152</sup> ENTSO-E, “All TSOs’ Proposal on methodologies for pricing balancing energy and cross-zonal capacity used for the exchange of balancing energy or operating the imbalance netting process pursuant to Article 30 (1) and Article 30 (3) of Commission Regulation (EU)” (2018), <https://consultations.entsoe.eu/markets/ebgl-art30->

181. The Board of Appeal notes that the Contested Decision clearly explains that an aFRR MTU per ISP would not ensure consistency between the price that determines the optimal exchange and the price paid for this exchange. ENTSO-E's Explanatory Document illustrates this as follows: *“if the activation of a very expensive bid is requested in a LFC area because of a congestion that happened only during a very limited number of optimisation cycles, this activation will be price setting for the whole ISP in this LFC area. This discrepancy can lead to a bidding strategy where increasing the bid price leads to more earnings even if there are less activations.”*<sup>153</sup>

182. All TSOs had already underlined this feature in ENTSO-E's Explanatory Document, in which they expressly stated that an aFRR MTU per optimisation cycle:

*“• Maximises the occurrence of price convergence. Indeed, in a quarter-hour BEPP using extreme prices, a congestion between two LFC areas during a single optimisation cycle will cause a price divergence for the whole ISP. If we consider the whole PICASSO area and highly fluctuating aFRR demands, many congestions could realistically occur even during the same ISP, meaning that the price convergence might be really low for some ISPs with a quarter-hour BEPP. A higher price convergence will help in maximising the competition among the BSPs. This is seen as a critical element for markets with limited internal competition in order to efficiently apply a marginal pricing approach.*

*• Avoids arbitrarily increasing the remuneration of BSPs at the expense of the BRPs. Using the most extreme prices of the whole ISP to settle all aFRR volumes of the ISP in the quarter-hour BEPP will indeed be inappropriate in situations where these extreme prices happened for short periods of time compared to the ISP. These situations could not be qualified as scarcity situations, but more as temporary demand spikes that will in practice be filtered anyways by the dynamic of the aFRR activation process. Because this dynamic is not taken into account in the selected price determination option, it is important to opt for an optimisation cycle BEPP in order to avoid that these price spikes impact the aFRR settlement of the whole ISP.”*<sup>154</sup>

183. Second, the Agency sets out that setting an aFRR MTU per optimisation cycle ensures a more efficient signalling of congestions in cross-zonal exchanges and hence facilitates the said exchanges, which is the aim of the market integration foreseen by EB NC. Since cross-zonal exchanges are determined within each optimisation cycle, the prices driving these

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pp/supporting\_documents/180912\_All%20TSOs%20Balancing%20Energy%20Pricing%20Proposal%20.pdf, p.8.

<sup>153</sup> ENTSO-E's Explanatory Document', p. 38.

<sup>154</sup> ENTSO-E's Explanatory Document', p. 38.

exchanges should be determined by the same optimisation. An aFRR MTU per optimisation cycle hence avoids a discrepancy between congestions measured per activation, on the one hand, and price congestions, on the other hand, given that both are measured per optimisation cycle<sup>155</sup>.

184. The Board of Appeal notes that the Contested Decision cites ENTSO-E's Explanatory Document, which states that an aFRR MTU per ISP introduces "*a discrepancy (...) between the "activation"-congestion (established every optimisation cycle) and the "price"-congestion (every 15 minutes)*"<sup>156</sup>.

185. All TSOs had already underlined this feature in ENTSO-E's Explanatory Document, in which they expressly stated that an aFRR MTU per optimisation cycle:

• ***Is simple and transparent from an algorithmic perspective.*** *The price used for each time window is a good representation of the demand and congestion situation. In the case of quarter-hour BEPP, the fact that a single marginal price has to be selected for each LFC area for the whole ISP do not allow to identify the impact of congestions, whatever the way this unique price is chosen, being the extreme prices or any other price.*

• ***Avoids cases where the congestion rent is artificially increased, and cases where the congestion rent is negative.*** *The increase of the congestion rent in quarter-hour BEPP is directly related to the lower price convergence already explained above. In case the biggest price divergence is applied on the whole ISP, congestion rent is obviously increased and will apply even on parts of the quarter-hour where the AOF identified no congestions. The situation with negative congestion rent is another paradox of the quarter-hour BEPP.*"<sup>157</sup>

186. In its Defence, the Agency explains that, even if they interact, balancing energy settlement and imbalance settlement are two distinct processes<sup>158</sup>. It also clarifies that aFRR pricing per optimisation cycle "*represents a clear reference for all BSPs on the price of the marginal unit of aFRR balancing energy and would this incentivise them to offer all the balancing resources at their disposal. As the clearing price is determined by the last accepted bid, energy or capacity shortage can be indicated appropriately. Therefore, the*

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<sup>155</sup> Contested Decision, para 59.

<sup>156</sup> ENTSO-E's Explanatory Document', p. 38.

<sup>157</sup> ENTSO-E's Explanatory Document', p. 38.

<sup>158</sup> Agency's Defence, para 86: "*(i) aFRR products and mFRR products constitute separate standard balancing energy products to which TSOs should apply separate terms and conditions; (ii) TSOs will be able to use two separate European platforms for each of the aFRR and mFRR products respectively (at their own discretion, TSOs could use mainly one platform or a mix of both platforms and the proportion of use of each of the platforms would depend on their experience with the operation of their respective transmission networks); and (iii) although TSOs have to develop one pricing methodology for balancing energy products, there will be additional provisions that will apply exclusively and separately to aFRR and mFRR bids in order to determine their respective prices in case of activation*".

*auction and the resulting market clearing price in every optimisation cycle will give the correct incentives to the BSPs to bid at marginal prices”*<sup>159</sup>.

187. The Agency adds, in its Defence, that an aFRR CBMP per ISP lower than or equal to the imbalance price does not create wrong incentives to BSPs and BRPs: *“For example, assuming that the marginal costs for the mFRR balancing energy are higher than the marginal costs for the aFRR balancing energy, the (weighted average) price for aFRR balancing energy per ISP should be lower than the imbalance price in case mFRR balancing energy is activated. In this case, given that non-delivery of balancing energy by a BSP is typically accounted as an imbalance in its portfolio of BRP, the penalty for non-delivery is higher than the reward for delivery. Therefore, the BSP of aFRR would be incentivised to deliver the balancing energy. On the other hand, in case aFRR energy and imbalance energy are settled at more or less the same prices, the incentive to deliver is lower: the reward and the penalty almost net out each other. For the same reasons and because weighted average prices of balancing energy work as minimum prices (for positive balancing energy), the imbalance price will reflect the real time value of energy”*<sup>160</sup>.

188. Third, the Agency acknowledges that setting an aFRR MTU per optimisation cycle does not create perfect incentives for BRPs to support the system imbalance<sup>161</sup>. As set out above in Sub-Plea 2.1, the Contested Decision clarifies that such perfect incentives would not be attained by setting it per ISP but by using cross-product pricing, which is, however, not in compliance with the EB NC<sup>162</sup>.

189. In this regard, the Board of Appeal notes that Appellant I argues that *“the Netherlands certainly applies cross-product pricing as referred to in paragraph 57. The Dutch system has cross-product pricing and equality of balancing energy and imbalance prices give excellent incentives, fully in line with the EB Regulation”*<sup>163</sup>. The Board of Appeal also analysed Appellant I’s description of the Dutch balancing market design<sup>164</sup> and presentation to ENTSO-E, which sets out that *“avoidable mark-ups (mark-downs) in bid prices will increase (volatility of) imbalance prices, thus increasing imbalance price risks to BRPs, at a cost to consumers”*<sup>165</sup>. The Board of Appeal notes that Appellant I provided these documents in order to prove that the current Dutch market model provides the correct

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<sup>159</sup> Agency’s Defence, para 87.

<sup>160</sup> Agency’s Defence, para 92.

<sup>161</sup> Contested Decision, para 57.

<sup>162</sup> Contested Decision, para 57.

<sup>163</sup> Appellant I’s Appeal, para 38.

<sup>164</sup> Annex 6 to Appellant I’s Appeal.

<sup>165</sup> Annex 5 to Appellant I’s Appeal.

incentives on the market and, in any event, “*much better*” incentives “*than what ACER has opted for now*”<sup>166</sup>. The Board of Appeal refers to the Third Plea with respect to the analysis of the Dutch Grid Code.

190. Regarding Appellant I’s allegation that an aFRR MTU per optimisation cycle infringes Article 44 of the EB NC, the Board of Appeal agrees with the Agency’s Defence, which sets out that, even if they interact, balancing energy settlement and imbalance settlement are two distinct processes pursuant to Article 44 of the EB NC<sup>167</sup>. It also clarifies that aFRR pricing per optimisation cycle “*represents a clear reference for all BSPs on the price of the marginal unit of aFRR balancing energy and would this incentivise them to offer all the balancing resources at their disposal. As the clearing price is determined by the last accepted bid, energy or capacity shortage can be indicated appropriately. Therefore, the auction and the resulting market clearing price in every optimisation cycle will give the correct incentives to the BSPs to bid at marginal prices*”<sup>168</sup>. Appellant I expressly acknowledges this difference in its Reply: “*Obviously it is true that a distinction can be made between balancing energy and imbalance. And indeed there are two separate settlement processes*”<sup>169</sup>.

191. Finally, Appellant I also alleges that a hypothetical capping of the imbalance price in the future imbalance pricing decision based on Article 52(2) EB NC (see Sub-Plea 2.1), combined with an aFRR MTU per optimisation cycle, would create wrong incentives for BSP: “*BSP may, therefore, react wrongly to the need of the TSOs if the imbalance price is capped (which may be the case depending on [the Agency’s] upcoming decision on imbalance pricing) (...)*”<sup>170</sup>. When asked to clarify at the Oral Hearing, Appellant I set out that the Contested Decision already infringes the EB NC and that this could potentially be exacerbated by a future imbalance pricing decision<sup>171</sup>.

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<sup>166</sup> Appellant I’s Appeal, para 38.

<sup>167</sup> Agency’s Defence, para 86: “*(i) aFRR products and mFRR products constitute separate standard balancing energy products to which TSOs should apply separate terms and conditions; (ii) TSOs will be able to use two separate European platforms for each of the aFRR and mFRR products respectively (at their own discretion, TSOs could use mainly one platform or a mix of both platforms and the proportion of use of each of the platforms would depend on their experience with the operation of their respective transmission networks); and (iii) although TSOs have to develop one pricing methodology for balancing energy products, there will be additional provisions that will apply exclusively and separately to aFRR and mFRR bids in order to determine their respective prices in case of activation*”.

<sup>168</sup> Agency’s Defence, para 87.

<sup>169</sup> Appellant I’s Reply, para 39.

<sup>170</sup> Appellant I’s Appeal, para 35. See also Appellant I’s Reply, para 57.

<sup>171</sup> Summary Minutes of the Oral Hearing of 18 June 2020 in case A-003-2020 (consolidated), p.23. See also p. 8: “*TenneT is truly concerned about the effects this Decision may have on the market, depending on the upcoming imbalance pricing decision.*”



192. It is impossible for the Board of Appeal to assess the incentives for market participants depending on the hypothetical contents of a future decision of the Agency on imbalance pricing which has not been adopted at the time of the present decision, as this would require the Board of Appeal to rule on a hypothetical matter. Instead, such assessment will first be made by the Agency when adopting that decision and, second, by the Board of Appeal in the hypothetical case an appeal were to be lodged against said decision.

193. In the light of the above, the Board of Appeal finds that the Agency duly took account of the market incentives created by an aFRR MTU per optimisation cycle when adopting the Contested Decision.

*2.3 ACER wrongfully suggests that no other aFRR MTU is possible that would give the right incentives and comply with the binding principles.*

194. According to Appellant I, the Contested Decision erroneously views an aFRR MTU per optimisation cycle as being the only MTU that provides the right incentives and complies with the binding principles<sup>172</sup>. The Plea puts forward that the Agency allegedly “*displays awareness that its Decision 01 does not give the right incentives*”, but “*seeks to downplay that issue*” in para 57 of the Contested Decision<sup>173</sup>.

195. The Board of Appeal observes that, as set out above, the Contested Decision expressly describes the Agency’s assessment of the two main options to determine an aFRR MTU, i.e. either setting an aFRR MTU per optimisation cycle or setting an aFRR MTU per ISP. On balance, the Agency concludes that setting an aFRR MTU per optimisation cycle is compliant with the EB NC to a higher extent than setting an aFRR MTU per ISP<sup>174</sup>. The Board of Appeal refers to Sub-Plea 2.2 with respect to para 57 of the Contested Decision.

196. The Board of Appeal notes that the Agency does not only take account of the fact that setting an aFRR MTU per optimisation cycle does not provide wrong incentives to BSPs and ensures a more efficient signalling of congestions in cross-zonal exchanges (see above)<sup>175</sup>, but that it also takes account of the fact that setting an aFRR MTU per ISP distorts price signals and does not ensure a correct reflection of market congestion<sup>176</sup>.

197. First, the Agency sets out that a price every 15 minutes distorts the price signal because aFRR demand changes per optimisation cycle and different bids are selected in each of these short clearings. Setting a price every 15 minutes does not, therefore, correctly reflect

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<sup>172</sup> Appellant I’s Appeal Application on the Second Plea.

<sup>173</sup> Appellant I’s Appeal, para 36.

<sup>174</sup> Contested Decision, para 62.

<sup>175</sup> Contested Decision, paras 58 and 59.

<sup>176</sup> Contested Decision, paras 60 and 61.

clearances. This had already been highlighted by all TSOs in ENTSO-E's Explanatory Document<sup>177</sup>. The Agency adds that due replication of the exchanges is foreseen in all other timeframes and that an aFRR MTU per ISP would therefore deviate from the pricing methodology applied in the other timeframes<sup>178</sup>. Even though there was a disagreement between the NRAs expressed in their Non-Paper, some NRAs advocated setting the aFRR MTU per optimisation cycle because *“any price different to the clearing price in each BEPP would create incentives to deviate from the selected volumes”*<sup>179</sup> or because the aFRR MTU per ISP *“may lead to a very high imbalance price and hence high costs for BRPs even if a high volume of aFRR bids (including bids with a high bid price) is only activated for a few seconds within the ISP (e.g. one optimisation cycle) while in the remaining time of the ISP significantly fewer aFRR bids (bids with lower bid prices) are activated. That way the imbalance would be settled at a price that does not reflect the imbalance situation as required by article 44.1(a) nor contributes to price imbalances at the real time value of energy as required by article 44.1(b) of the EBGL”*<sup>180</sup>.

198. As correctly summarized in the Agency's Rejoinder, an aFRR MTU per optimisation cycle provides the *“necessary market conditions not to add mark-ups”* and *“setting a (shorter) MTU equal to the optimisation cycle maximizes the time periods with price convergence and lowers incentives to add mark-ups on balancing energy bid prices motivated by limited cross-zonal capacity in areas with limited internal competition”*, stressing that the Agency *“only sets a general European framework and it is then up to the TSOs, at their national level, to build an imbalance settlement mechanism for BSPs and BRPs and to decide on the imbalance level”*<sup>181</sup>. It adds that an aFRR MTU per ISP *“would distort price signals. It would incentivise market participants and potential new entrants to make wrong investments in costly peak units, which would ultimately cause liquidity issues since (i) the investment would not be in accordance with the real market needs and (ii) a corresponding overcapacity problem would arise”*<sup>182</sup>.

199. Second, the Agency reiterates the inconsistency of an aFRR MTU per ISP with the facilitation of cross-zonal exchanges, which requires a correct reflection of market

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<sup>177</sup> ENTSO-E's Explanatory Document', p. 38: *“An optimisation cycle BEPP (...) provides a full consistency with the AOF results and the decision of using AOF results for the pricing determination. Indeed, the AOF executes the bid selection on optimisation cycle basis, and prices are defined on the same time-period based on the aFRR demand and available cross-zonal capacity and possible congestions for this period.”*

<sup>178</sup> Contested Decision, para 60.

<sup>179</sup> Annex 3 to Appellant I's Appeal, All NRAs' Non-Paper, p. 173.

<sup>180</sup> Annex 3 to Appellant I's Appeal, All NRAs' Non-Paper, p. 174.

<sup>181</sup> Agency's Rejoinder, para 4. See also, the Agency's Defence, paras 66-74 and Rejoinder, para 37-38 on the TSOs' obligations under Article 29(5) of the EB NC to report, on an annual basis, the deviations per LFC area and per aFRR MTU, as well as the total annual volume of deviations in all LFC areas, and para 74.

<sup>182</sup> Agency's Rejoinder, para 4.

congestion as per Article 30(3)(a) of the EB NC<sup>183</sup>. Indeed, it considers that an aFRR MTU per ISP would distort the fundamental principle that cross-zonal capacity amounts to zero unless the market is congested. This is because, given that the price of cross-zonal capacity is defined as the difference between CBMPs, cross-zonal capacity prices will only reflect market congestion if these CBMPs also reflect market congestion<sup>184</sup>. Yet, as set out above, the Agency demonstrates that an aFRR MTU per ISP does not duly reflect market congestion, implying, as a consequence, that an aFRR MTU per ISP allows for non-zero cross-zonal prices in the absence of market congestion (e.g. situations in which cross-zonal capacity is almost not used). In its Response to the Public Consultation, the Agency sets out that in both methodologies, even if a delay between market scheduling and physical delivery is unavoidable regardless of the used aFRR MTU, there is a discrepancy between the congestions estimated in each optimisation cycle, on the one hand, and aFRR prices if an aFRR MTU is set per ISP, on the other hand<sup>185</sup>.

200. In its Defence, the Agency sets out that: *“In other words, the price determined during 1/225 of the relevant time would set the price for the whole period of 15 minutes. It would be like a situation where the maximum hourly price in the day-ahead market would set the market price for the whole day. This would give wrong signals to the market participants as they would believe that peak units are necessary during the whole day. It should be noted that, for the same reason, setting the aFRR MTU equal to 15 minutes would disregard the pricing method in day-ahead and intraday timeframes, in violation of Article 30(1)(e) of the EB Regulation.”*<sup>186</sup>

201. It adds that *“Also, as explained in para. 60 and 61 of the Contested Decision 01/2020, setting the aFRR MTU equal to 15 minutes would result (i) in distorted price signals due to the intertemporal character of pricing and (ii) in prices of cross-zonal capacities available for exchange of aFRR balancing energy, which would not reflect market congestion in the sense that such prices would sometimes be non-zero even if cross-zonal capacity was almost never fully utilised. This would contradict the fundamental principle that the price difference for aFRR balancing energy between bidding zones should occur only in the presence of market congestion.”*<sup>187</sup>

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<sup>183</sup> Contested Decision, para 61.

<sup>184</sup> The Contested Decision refers in its para 61 to Article 9 of the initial All TSO's Pricing Methodology Proposal, which is equivalent to Article 8 of the Contested Decision's Pricing Methodology (Annex I to the Contested Decision). See Annex Ia to the Contested Decision highlighting the Agency's amendments to the initial All TSOs' Pricing Methodology Proposal.

<sup>185</sup> Response to the Public Consultation, p.9.

<sup>186</sup> Agency's Defence, para 89.

<sup>187</sup> Agency's Defence, para 146.

202. In the light of the above, the Board of Appeal finds that the Contested Decision correctly states that a methodology using an aFRR MTU per optimisation cycle is the only methodology that provides correct market incentives whilst complying with the binding principles of the EB NC.

*Conclusion on the Second Plea.*

203. It follows that the Appeal's Second Plea must be dismissed as unfounded.

*Third plea – even if setting an aFRR MTU equal to the optimisation cycle is compliant with the requirements of the EB NC, the Contested Decision results in an unnecessary and disproportionate restriction of TenneT's ability to apply the Dutch Grid Code in a way that complies with the EB NC.*

204. According to Appellant I, the Contested Decision is in breach of ACER's EU law obligation to adhere to the EU principles of proportionality and subsidiarity<sup>188</sup>. Appellant I argues, in this respect, that *"it should at the very least keep the possibility to continue applying the rules for the settlement of BRPs as provided for by the Dutch Grid Code for The Netherlands including an aFRR MTU to be set at the duration of the ISP"*<sup>189</sup>.

205. With respect to the principle of proportionality, Appellant I argues that, by not allowing it to continue to apply *"a system that complies with the EB Regulation"* (the Dutch Grid Code) without a necessity and without an adequate motivation for such limitation of its freedom of action, the Contested Decision *"exceeded what was necessary to achieve the objective of the balancing energy prices system"*<sup>190</sup>.

206. In the Board of Appeal's consistent decision-making practice, it has been confirmed that the Agency enjoys a certain margin of discretion in the assessment of complex technical issues, but the discretionary power granted to the Agency in respect of a decision such as the Contested Decision is not unlimited. It is circumscribed by various conditions and criteria which limit the Agency's discretion, which include the requirements specifically

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<sup>188</sup> Appellant I's Appeal, paras 40-44.

<sup>189</sup> Appellant I's Appeal, para 40.

<sup>190</sup> Appellant I's Appeal, para 41.

set out in the relevant legal framework and the general principles of EU Law, including the principle of proportionality<sup>191</sup>.

207. The Board of Appeal observes that the main objective of the EB NC is the integration of electricity balancing markets to enhance the efficiency of European balancing processes<sup>192</sup>. In this context, the argument of Appellant I that the Dutch Grid System is “*fully compliant with the EB NC*”<sup>193</sup> is void: the EB NC requires integration<sup>194</sup>. Indeed, its Articles 4 and 5 require the TSOs - including Appellant I - to prepare and submit to the NRAs for their approval a common proposal on the terms and conditions or methodologies to be applied to all Member States, in particular, on the aFRR balancing energy pricing methodology (including on the aFRR MTU) and subsequently require NRAs to take a coordinated decision on the regulatory issues of this common proposal, with a possibility to jointly request the Agency to adopt this decision. The Contested Decision was adopted upon joint request of the NRAs under Article 5(7) of the EB NC and is a result of the gradual integration foreseen by the EB NC. It also goes without saying that the EB NC’s objective of integration cannot be achieved if one of the Member States continues applying national rules that diverge from the integrated framework provided for by the EB NC. Hence, the Board of Appeal finds that the Contested Decision was necessary and proportionate to attain the objective of integrating the European electricity balancing markets provided by the EB NC.

208. The Board of Appeal refers to the Agency’s Framework Guidelines on Electricity Balancing<sup>195</sup>, which clarify that “*the Network Code on Electricity Balancing shall take precedence over relevant national frameworks (legislation, regulation, codes, standards, etc.) for cross-border and market integration issues and national frameworks shall be adapted to the extent necessary, to ensure proper implementation at the national level. The Network Code on Electricity Balancing shall be without prejudice to the Member States’ rights to maintain or introduce more detailed measures, provided such measures are compatible with the provisions of the Network Code on Electricity Balancing. The Network Code on Electricity Balancing shall also be without prejudice to the Member States’ rights*

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<sup>191</sup> Board of Appeal Decisions A-001-2017 paras 69 and 114; A-002-2018, para 59; A-001-2019, paras 43, 56, 233-239; A-003-2019, para 149 and A-006-2019, paras 41 and 47.

<sup>192</sup> Article 3 of the EB NC.

<sup>193</sup> Appellant I’s Appeal, para 40. See also Appellant I’s Reply, paras 58-61 and 35. Appellant I asserts that “*the Dutch system demonstrates that it is perfectly possible to apply a true marginal pricing system that fully complies with Article 30 EB Regulation*”.

<sup>194</sup> Appellant I’s statement at the Oral Hearing that “*the EB Regulation explicitly leaves open both cross-product pricing and per-process pricing open, which is again not denied by the Agency*” (Summary Minutes of the Oral Hearing of 18 June 2020 in case A-003-2020 (consolidated), p. 11) is erroneous.

<sup>195</sup> ACER’s Framework Guidelines on Electricity Balancing of 18 September 2012, Ref: FG-2012-E-009, p.8-9.

*to establish national network codes which do not affect cross-border trade, in accordance with Article 8(7) of the Electricity Regulation, provided such national codes do not prevent the application and implementation of the Network Code on Electricity Balancing”.*

209. The Board of Appeal also refers to the ENTSO-E’s Explanatory Document on the aFRRIF<sup>196</sup>, which, in its implementation schedule, foresees that there will be national changes to market design, legislation and systems. It adds that *“the aFRRIF requires TSOs to make changes to their national terms and conditions for balancing, and commits TSOs to the necessary adjustment processes”.*

210. Finally, even though the Board of Appeal duly examined the description of the Dutch balancing market design provided by Appellant I<sup>197</sup>, it reaffirms its previous decisions<sup>198</sup> according to which it is not for the Board of Appeal to interpret the law of the Member States and that neither the Agency’s Director nor its Board of Appeal should make *ad hoc* exceptions to harmonised, Union-wide regulation of the Third Energy Package and Clean Energy for All Europeans Package in order to adapt to national regulation. Doing so would be discriminatory and contrary to the primacy and effectiveness of EU Law and the goal of creating an internal energy market. It also highlights that the Agency is not bound by the NRAs’ competences under national law because the Agency does not exercise a delegated power but a power that is directly conferred to it by the EU legislator via Regulation (EU) 2019/942.

211. With respect to the principle of subsidiarity, Appellant I argues that *“the objectives of the balancing energy prices system can be achieved (and even better achieved) by the Member States’ own system, which has already proven to be effective and efficient”*<sup>199</sup>.

212. In line with its earlier decision-making practice<sup>200</sup>, the Board of Appeal holds that the principle of subsidiarity has no relevance for the present plea. As is clearly set out in Article 5(3) TEU, the principle of subsidiarity governs the attribution of competence to the EU or to the Member States in areas of shared competence. The Agency took the Contested Decision on the basis of its exclusive competence set out in Article 6(10) of Regulation (EU) 2019/942. Given that Appellant I did not challenge the validity of Article 6(10) of

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<sup>196</sup> ENTSO-E’s Explanatory Document to All TSOs’ Proposal for the implementation framework for a European Platform for the exchange of balancing energy from frequency restoration reserves with automatic activation in accordance with Article 21 of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing, 20 April 2018, [https://consultations.entsoe.eu/markets/afrr\\_implementation\\_framework/supporting\\_documents/20180426\\_aFRRIF\\_Explanatory\\_document.pdf](https://consultations.entsoe.eu/markets/afrr_implementation_framework/supporting_documents/20180426_aFRRIF_Explanatory_document.pdf), p. 8.

<sup>197</sup> Annex 6 to Appellant I’s Appeal.

<sup>198</sup> Board of Appeal Decisions A-001-2018 and A-004-2019.

<sup>199</sup> Appellant I’s Appeal, para 42.

<sup>200</sup> Board of Appeal Decision A-001-2019, para 51.

Regulation (EU) 2019/942 on the basis of which the Contested Decision was taken, its arguments on the principle of subsidiarity are immaterial.

213. In addition, even if Appellant I would have challenged the validity of Article 6(10) of Regulation (EU) 2019/942, *quod non*, it must be reminded that the Agency was jointly requested by the NRAs, pursuant to Article 5(7) of the EB NC, to issue the Contested Decision by virtue of Article 6(10) of Regulation (EU) 2019/942.

214. Appellant I seems to argue that the Contested Decision should have been silent on the issues aFRR MTU to allow the NRAs to decide on the issue. However, the Contested Decision's silence on the issue would not have allowed for a NRAs' decision on the issue, given that the NRAs jointly referred the entirety of the methodology for pricing FR and RR balancing energy and cross-zonal capacity to the Agency. The Contested Decision's silence on the issue would rather have resulted in there being no decision at all, implicitly leaving it up to the TSOs to decide on the issue, which would be contrary to the EB NC and could not possibly be the purpose of the principle of subsidiarity in the EU legal order.

215. In the light of the above, the Board of Appeal finds that the Contested Decision does not amount to an unnecessary and disproportionate restriction of Appellant I's ability to apply the Dutch Grid Code.

216. It follows that the Appeal's Third Plea must be dismissed as unfounded.

*Fourth plea – ACER uses the wrong definition of “market congestion”.*

217. Pursuant to Article 30(3)(a) of the EB NC, the methodology for pricing of cross-zonal capacity used for exchange of balancing energy or for operating the imbalance netting process should reflect market congestion.

218. Appellant I argues that the Contested Decision relies upon an erroneous definition of market congestion when setting the aFRR pricing per optimisation cycle<sup>201</sup>. In so doing, it claims that the Agency used “*its own definition of market congestion*”<sup>202</sup>. Appellant I's reasoning is based on the argument that “market congestion” is an existing concept under EU law, which must be understood in the following manner:

(i) Appellant I considers its starting point to be Article 2(17) of Commission Regulation (EU) 2015/1222 (CACM NC) pursuant to which market congestion is defined as a “*means a situation in which the economic surplus for single day-ahead or intraday coupling has been limited by cross-zonal capacity or allocation constraints*”<sup>203</sup>;

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<sup>201</sup> Appellant I's Appeal, paras 45-47.

<sup>202</sup> Appellant I's Appeal, para 47.

<sup>203</sup> Appellant I's Appeal, para 46.

(ii) Appellant I considers that, therefore, this definition the market congestion is reserved to the product resolution in these markets (single day-ahead and intraday coupling);

(iii) then, Appellant I argues that the trade on the coupled day ahead and intraday markets is tied to the ISP by Article 8 of Recast Regulation (EU) 2019/943 on the internal market for electricity, which establishes that:

“1. NEMOs<sup>204</sup> market shall allow market participants to trade energy as close to real time as possible and at least up to the intraday cross-zonal gate closure time.

2. NEMOs shall provide market participants with the opportunity to trade in energy in time intervals which are at least as short as the imbalance settlement period for both day-ahead and intraday markets. (...)”

4. By 1 January 2021, the imbalance settlement period shall be 15 minutes in all scheduling areas, unless regulatory authorities have granted a derogation or an exemption. (...)”<sup>205</sup>

219. In its Reply, Appellant I considers that the economic surplus and the cross-zonal capacity can be determined in a period of 15 minutes and that the Agency’s reasoning is circular<sup>206</sup>: “its assumption of the economic surplus being determined on an optimisation cycle basis leads to a definition of market congestion on optimisation cycle basis, which leads to the setting of tea FRR MTU on optimisation basis. Since economic surplus is determined for the relevant time unit which should be the market time unit, this makes ACER’s argument once more circular.”

220. In its Defence, the Agency responds that the Contested Decision uses the market congestion definition set out in Article 2(17) of CACM NC, that this definition is not limited to single day-ahead or intraday coupling but has to be applied *mutatis mutandi* to balancing energy markets and that the Agency aligns the aFRR MTU with the timeframe used to calculate cross-zonal capacities by the aFRR AOF in order to determine an aFRR market congestion<sup>207</sup>.

221. Firstly, the Board of Appeal observes that the Contested Decision expressly refers to the market congestion definition of Article 2(17) of the CACM NC, i.e. “a situation in which the economic surplus for single day-ahead or intraday coupling has been limited by cross-zonal capacity or allocation constraints”. Indeed, para 61 of the Contested Decision reads

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<sup>204</sup> Nominated Electricity Market Operators (NEMOs) are power exchanges certified to organise cross-zonal electricity trade and designated by the competent authority to carry out tasks related to single day-ahead or single intraday coupling (Article 2(8) of the Recast Regulation (EU) 2019/943 on the internal market for electricity.

<sup>205</sup> Appellant I’s Appeal, para 46.

<sup>206</sup> Appellant I’s Reply, para 75.

<sup>207</sup> Agency’s Defence, paras 133-139.



as follows: “it is important that market congestion, which is defined in Article 2(17) of the Commission Regulation (EU)2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (‘CACM Regulation’) only occurs if cross-zonal capacity is fully allocated and because lack of cross-zonal capacity economic surplus is limited and prices on both sides of the bidding zone border are no longer equal.”<sup>208</sup>.

222. Secondly, the Board of Appeal observes that this Plea is, again, linked to the above-mentioned dichotomy between, on the one hand, the use of aFRR pricing that reflects the results of optimisation algorithms at the scheduling stage, ensured by a MTU per optimisation cycle, and, on the other hand, the use of aFRR pricing that reflects the actual physical delivery of balancing energy, ensured by a MTU per ISP.

223. When choosing to rely upon aFRR pricing that reflects the results of optimisation algorithms at the scheduling stage, ensured by a MTU per optimisation cycle, the Agency does so, *inter alia*, in order to ensure a more efficient signalling of congestions in cross-zonal exchanges and hence facilitates the said exchanges, which is the aim of the market integration foreseen by EB NC. Congestions need to be reflected throughout the ISP and not at the end of the ISP in order to give the correct signals to market participants. As set out above in the Second Plea, an aFRR MTU per optimisation cycle avoids a discrepancy between congestions measured per activation, on the one hand, and price congestions, on the other hand, given that both are measured per optimisation cycle<sup>209</sup>. Given that a price per optimisation cycle maximizes the time periods with price convergence and lowers incentives to add mark-ups on balancing energy bid prices motivated by limited cross-zonal capacity in areas with limited internal competition, efficiency gains will be created due to an accurate reflection of market congestion<sup>210</sup>. Recital 11(b) of the Pricing Methodology joined as Annex I to the Contested Decision reads as follows: “*The effective competition is also fostered by the choice of the MTU for the pricing of balancing energy that results from the activation of balancing energy bids for the frequency restoration process with automatic activation, which is set equal to the AOF optimisation cycle. This approach maximises the time periods with price convergence and lowers incentives to add mark-ups on balancing energy bid prices motivated by limited cross-zonal capacity in areas with limited internal competition*”<sup>211</sup>. The Board of Appeal observes that Appellant

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<sup>208</sup> Contested Decision, para 61.

<sup>209</sup> Contested Decision, para 59.

<sup>210</sup> Agency’s Rejoinder, para 10.

<sup>211</sup> Annex I to the Contested Decision, Recital 11(b).

I acknowledges that *“market congestion is related to the smallest possible time frame in which market parties can react, which is their minimum bid period”*<sup>212</sup>.

224. An aFRR MTU per ISP would, by contrast, introduce *“a discrepancy (..) between the “activation”-congestion (established every optimisation cycle) and the “price”-congestion (every 15 minutes)”*<sup>213</sup>. Indeed, an aFRR price at the end of the 15-minute ISP is not capable of reflecting flows and congestions estimated by the AOF in each optimisation cycle. Such price will therefore not reflect the market congestion occurring for each market clearing. Any congestion identified by an aFRR price per ISP could therefore not qualify as market congestion.

225. The Board of Appeal agrees, in this respect, with the Agency’s rejoinder, which states that *“the only solution for an aFRR MTU of 15 minutes not to lead to a market congestion mismatch would be to also set the optimisation cycle of the aFRR AOF equal to 15 minutes. However, this would no longer be consistent with the needs of TSOs for aFRR activation”*<sup>214</sup>. Indeed, changing the duration of the MTU neither alters the functions of the AOF nor the fact that economic surplus is maximised on an optimisation cycle basis subject to cross-zonal capacity or allocation constraints.

226. Thirdly, the Board of Appeal observes that the Contested Decision uses the definition of market congestion in a coherent fashion with the CACM NC when setting out the requirements for pricing cross-zonal capacity. The Contested Decision clearly explains in Section 6.2.8.2 that the Proposal sets the cross-zonal capacity price *“equal to the difference between the cross-border marginal prices of the respective uncongested areas, and to 0 €/MWh within an uncongested area”* and that *“the same principle also applies for the cross-zonal capacity price for the balancing energy exchange resulting from, either the imbalance netting process performed implicitly by the activation optimisation function of the aFRR-Platform, or the netting of demands in the RRPlatform and mFRR-Platform; the cross-zonal capacity price for the balancing energy exchange resulting from the imbalance netting process performed explicitly by the European Platform for the imbalance netting process, pursuant to Article 22 of the EB Regulation, is set equal to 0 €/MWh.”*<sup>215</sup>.

227. The Agency proceeds to explain that the calculation of the cross-zonal capacity price is directly linked to the CBMPs (it is the difference between CBMPs) and that, hence, the only way for it to reflect market congestion, is if it is ensured that the CBMPs also reflects

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<sup>212</sup> Appellant I’s Appeal, para 44.

<sup>213</sup> ENTSO-E’s Explanatory Document’, p. 38.

<sup>214</sup> Agency’s Rejoinder, para 8.

<sup>215</sup> Contested Decision, para 75 referring to Article 8 of the Pricing Methodology of Annex I to the Contested Decision.

market congestion<sup>216</sup>. The difference in CBMPs among the uncongested areas, which is used for the calculation of the cross-zonal capacity price, results from the limited available cross-zonal capacity that is taken into account during the calculation of the CBMP, implying that cross-zonal capacity price reflects market congestion<sup>217</sup>.

228. Fourthly, the Board of Appeal finds that the Agency correctly defines market congestion in the context of pricing methodology (i) for aFRR balancing energy products and (ii) for cross-zonal capacity used for the exchange of standard aFRR balancing energy products as occurring per optimisation cycle of the aFRR AOF, in compliance with Article 30(3)(a) and (b) of the EB NC, requiring that aFRR pricing methodology for cross-zonal capacity “reflect market congestion” and “be based on the prices for balancing energy from activated balancing energy bids”<sup>218</sup>. In this context, the Board of Appeal notes that the definition of economic surplus in the context of AOF, set out in Annex I of ACER’s Decision No. 02/2020, has not been subject to any appeal, nor by Appellant I nor by any other appellant. Economic surplus is defined as being “the sum of (i) the BSPs surplus for the aFRR platform for the relevant aFRR MTU, (ii) the TSOs surplus for the aFRR Platform, (iii) the congestion income and optionally (iv) other related costs and benefits where these increase economic efficiency for the relevant aFRR MTU. BSPs’ surplus is the sum of products between the selected volume of standard aFRR balancing energy bids and the corresponding differences between the price of these bids and the balancing energy price pursuant to Article 30(1) of the EB Regulation. TSOs’ surplus is the sum of products between the satisfied aFRR demands and the corresponding differences between the price of these demands (maximum price in case of inelastic demand) and the balancing energy price pursuant to Article 30(1) of the EB Regulation”<sup>219</sup>.

229. Fifthly, the Board of Appeal observes that the issue was discussed by All NRAs’ Non-Paper, in which some NRAs were of the opinion that the aFRR MTU had to be set per optimisation cycle and others were of the opinion that the aFRR MTU had to be set per ISP<sup>220</sup>. The Board of Appeal agrees with the former, whose statements were summarised as follows: “Additionally, and equally important, these RAs are of the opinion that the current proposal is the only mean to accurately reflect and price congestions for the aFRR process. The reason for this is that the aFRR process is a continuous process, implying that market congestions can change and evolve during each ISP, potentially in both

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<sup>216</sup> Contested Decision, para 76.

<sup>217</sup> Contested Decision, para 76.

<sup>218</sup> Agency’s Defence, para 135.

<sup>219</sup> Annex 7 to the Defence, Annex I to Decision No. 02/2020, para 2(1)(h) of the aFRRIF.

<sup>220</sup> Annex 3 to Appellant I’s Appeal, All NRAs’ Non-Paper, p. 171-174.

*directions and between LFC areas, and therefore also the configuration of the uncongested areas can change. Thus, the price for cross-zonal capacity will evolve from optimisation cycle to optimisation cycle and within the ISP.*

*Setting the BEPP equal to 15 minutes could on the contrary lead to the situation in which bids and TSO demands are settled as if there was a congestion, even though this congestion was not present when the bids were activated. This is because a unique price per ISP cannot reflect more than one configuration of uncongested areas and the consequence is a welfare transfer between TSOs/BRPs and BSPs.*

*On the other hand, setting a price every optimization cycle would reflect the changes of the available cross zonal capacity and the configuration of the uncongested areas and price scarcity accurately. Thus, according to these RAs, the only way to price cross zonal capacity to reflect market congestions, as required by EBGL article 30(3)(a), is to define the BEPP equal to the optimisation cycle.”<sup>221</sup>*

230. Additionally, with respect to Appellant I’s allegation that the definition of market congestion of the CACM NC only applies to single day-ahead or intraday coupling, the Board of Appeal agrees with Appellant I that the CACM NC’s scope is limited to the day-ahead and intraday markets<sup>222</sup> and does not refer to electricity balancing markets. However, the Board of Appeal agrees with the Agency that this scope necessarily implies that any general concept defined within the CACM NC, such as the market congestion definition, unavoidably also relates to the day-ahead and intraday markets<sup>223</sup>. The Board of Appeal observes that the CACM NC was adopted in 2015, at a time when the EB NC had not yet been adopted (the EB NC was adopted in 2017). Hence, any application of the market congestion definition to the Contested Decision must be carried out *mutatis mutandi*. According to the CACM NC’s definition, an aFRR balancing market congestion means, *mutatis mutandis*, a situation in which the economic surplus for aFRR energy exchanges (as a result of cross-border activation) has been limited by cross-zonal capacity or allocation constraints<sup>224</sup>.

231. Finally, on the alleged circular nature of the Agency’s reasoning, the Board of Appeal observes that the assumption that the economic surplus is determined on an optimisation cycle basis stems from Decision 02/2020 on the aFRRIF, which literally follows the All

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<sup>221</sup> Annex 3 to Appellant I’s Appeal, All NRAs’ Non-Paper, p. 173.

<sup>222</sup> Article 1(1) of the CACM NC.

<sup>223</sup> Defence, para 134.

<sup>224</sup> Defence, para 134. The Agency clarifies that “aFRR energy exchanges” should be read as meaning the process where aFRR demands from TSOs are matched with bids (from BSPs) from the aFRR common merit order list and aFRR cross-zonal capacity is allocated simultaneously for different bidding zones in the aFRR markets.

TSOs' Proposal of 18 December 2018 with respect to its Article 11<sup>225</sup>. This assumption cannot be altered by a change in the duration of the MTU and, as set out above, setting an optimisation cycle to 15 minutes would no longer be consistent with the needs of TSOs for aFRR activation, which, as Appellant I acknowledges, is a (quasi) continuous process<sup>226</sup>.

232. The Board of Appeal finds, consequently, that the Agency used the correct definition of market congestion in its Contested Decision.

233. It follows that the Appeal's Fourth Plea must be dismissed as unfounded.

*Fifth plea – Decision No. 01/2020 suffers from failure to adequately state reasons.*

234. Appellant I argues that the Contested Decision does not give any real explanation or reasoning on why ACER believes the aFRR MTU should be equal to the optimisation cycle. Appellant I holds that ACER merely responds to points raised against its viewpoint without properly stating reasons of its own, which is not sufficiently to comply with the standard set under EU law. Appellant I adds that ACER's statements are, in addition, unconvincing<sup>227</sup>.

235. The Board of Appeal confirms that the Agency has a duty to duly reason its decisions. This obligation is specifically foreseen in Article 14(7) of Regulation (EU) 2019/942, stating that "*individual decisions of ACER shall state the reasons on which they are based for the purpose of allowing an appeal on the merits*". This duty to duly reason also derives from Article 296 TFEU and the general principles of EU Law, including Article 41(2)(c) of the Charter of Fundamental Rights and has been confirmed by consistent case-law of European Courts<sup>228</sup>. Pursuant to this duty, the reasoning followed by the Agency must be disclosed in a clear and unequivocal fashion, firstly to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and to verify

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<sup>225</sup> See also Agency's Rejoinder, paras 1-3 and 24-27. Article 11(1), (2), (3) and (5) of All TSOs' Proposal of 18 December 2018 on the aFRRIF stipulate that: (1) *The inputs to the optimisation algorithm are: (a) the common merit order list, (b) the aFRR demands, (c) the aFRR cross-border capacity limits calculated in accordance with Article 4 of this aFRRIF;* (2) *the objective functions of the optimisation algorithm are: (...) (c) third priority: maximise the economic surplus, (d) fourth priority; minimise the amount of the automatic frequency restoration power interchange on each aFRR balancing order;* (3) (...) (c) *the automatic frequency restoration power interchange on an aFRR balancing border or set of aFRR balancing borders shall not exceed the aFRR cross-border capacity limits calculated in accordance with Article 4 of this aFRRIF;* (...) (5) *the outputs of the optimisation algorithm are: (a) the automatic frequency restoration power interchange on the aFRR balancing borders as defined in the Article 147 of the SOGL, (...) (e) the prices for aFRR balancing energy determined using the methodology proposed in accordance with Article 30(1) of the EGBL, (f) prices for cross-zonal capacity used for the exchange of standard aFRR balancing energy products determined using the methodology proposed in accordance with Article 30(3) of the EGBL"*

<sup>226</sup> ENTSO-E's Explanatory Document, p. 15.

<sup>227</sup> Appellant I's Appeal, paras 48-50.

<sup>228</sup> Case T-700/14 *TVI v Commission* EU:T:2017:447, para 79.

whether or not the decision is well founded and, secondly, to permit the European Courts to exercise its power to review the lawfulness of the measure<sup>229</sup>.

236. The Contested Decision contains a detailed explanation in Section 6.2.5.3 entitled “*Duration of the aFRR MTU*” as to why Article 7 of the Contested Decision’s Pricing Methodology sets an aFRR MTU equal to the optimisation cycle of the AOF of the European Platform for the exchange of energy from aFRR. Far from being succinct, the explanation of Section 6.2.5.3 covers 2 full pages of the decision (pages 16-18). In addition, other sections of the Contested Decision provide grounds to understand the Agency’s position and the reasons behind it, such as section 6.2.a entitled “*Assessment of the requirements for the number of balancing energy prices per ISP*” or 6.2.10.1 entitled “*Alignment with MTU*”.
237. The explanation in Section 6.2.5.3 is the logical result of the Agency’s previous consultative labour in its decision-making process, during which some stakeholders had put forward two main options, namely an aFRR MTU per optimisation cycle or an aFRR MTU per ISP (these options had also been analysed in All NRAs’ Non-Paper, evidencing disagreement on the matter<sup>230</sup>). In the Contested Decision, the Agency logically explains why it opted for one methodology over the other in its Pricing Methodology attached as Annex I.
238. It is important to highlight that the Agency did not have to amend the initial All TSOs’ Pricing Methodology Proposal of 18 December 2018 in that respect given that this Proposal already foresaw an aFRR MTU per optimisation cycle<sup>231</sup>.
239. The Board of Appeal observes that the Contested Decision not only explains in great detail the choice made in the Agency’s Pricing Methodology as to the appropriate aFRR MTU, but also observes that the Pricing Methodology is joined as Annex I to the Contested Decision together with a marked-up version of the TSOs’ initial Pricing Methodology Proposal of 18 December 2018 (Annex Ia) and a comprehensive Response of the Agency to the Public Consultation, which addressed the appropriateness of the aFRR MTU in its Question 2, in relation to which the respondents’ views and Agency’s response cover 8 pages (Annex II, p. 5-12).
240. Finally, Appellant I’s Appeal expresses dissatisfaction with the duly stated reasons set out in paras 57-61 of the Contested Decision. The Board of Appeal observes that this plea

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<sup>229</sup> Case C-350/88 *Delacre and Others v Commission* ECLI:EU:C:1990:71, paras 15 and 16; Case T-217/01 *Forum des migrants v Commission* ECLI:EU:T:2003:106, para 68; and Case T-183/00 *Strabag Benelux v Council* EU:T:2003:36, para 55.

<sup>230</sup> Annex 7 to Appellant I’s Appeal, All NRAs’ Non-Paper, p. 171-174.

<sup>231</sup> Annex Ia to the Contested Decision.

precisely evidences that the Agency provided Appellant I with a clear and unequivocal reasoning, which Appellant I was able to understand and is now able to rebut, even though it is dissatisfied with its content. The reasons underpinning paras 57-61 of the Contested Decision, which were clearly and unequivocally explained by the Agency in its decision and throughout the process leading-up to the Contested Decision, have been dealt with in Sub-Pleas 1.3, 2.1, 2.2 and 2.3 above.

241. Furthermore, Appellant I's Reply adds a non-exhaustive overview of incorrect statements in the Agency's Defence<sup>232</sup>.

242. The Board of Appeal finds that the arguments put forward by Appellant I evidence its dissatisfaction or discontent with the reasons that the Agency set out in the Contested Decision in a clear and unequivocal fashion rather than an absence of duly stated reasons or impossibility for Appellant I to understand these reasons.

243. The Board of Appeal concludes that the Agency did not fail to adequately state reasons in its Contested Decision.

244. It follows that the Appeal's Fifth Plea must be dismissed as unfounded.

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<sup>232</sup> Appellant I's Reply, para 81.

## DECISION

On those grounds,

### THE BOARD OF APPEAL

Hereby dismisses the appeal of Appellant II as inadmissible, dismisses the appeal of Appellant I for annulment as unfounded and confirms the Contested Decision.

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 Appellant I as the case may be.

SIGNED



Andris Piebalgs

Chairperson of the Board of Appeal

SIGNED



Ronja Linßen

Acting Registrar of the Board of Appeal