

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

of 8 December 2021

Case number: A-012-2021

Language of the case: English

Appellant: European Network of Transmission Operators for Electricity, Association Sans But Lucratif ('aisbl') ("ENTSO-E")

Represented by: Sonya Twohig, Secretary-General of ENTSO-E and its legal representative, Peter WILLIS (Bird & Bird LLP)

Defendant: European Union Agency for the Cooperation of Energy Regulators ("ACER")

Represented by: Christian ZINGLERSEN and its legal representatives Pierre GOFFINET, Mediona SHEHU and Laure BERSOU (Strelia cvba/srcl)

Application for: ruling that the appeal is well-founded, remittal of Decision No. 08/2021 of 29 June 2021 on the definition of System Operation Regions (SOR) adopted by the ACER

The Board of Appeal, composed of K. WIDEGREN (Rapporteur), A. BIONDI, P. EECKHOUT, K. SARDI, M. SUPPONEN and M. PREK (Chair)

ADOPTS THE FOLLOWING DECISION:

A. *Procedural steps relevant for the decision*

1. On 29 June 2021, ACER ("the Defendant") adopted Decision No. 08/2021 ("the Contested decision").
2. On 26 August 2021, the ENTSO-E ("the Appellant") submitted an appeal against the Contested Decision. The Appellant requests the Board of Appeal to rule that the Appellant's appeal is well-founded, and to remit to the competent body of ACER Article 1 of the Contested Decision and Article 3 of Annex I to the Contested Decision insofar as they include ENTSO-E's proposed SWE SOR in the Central Europe SOR and fail to define a separate SWE SOR; the Appellant also requests the Board of Appeal to provide to the competent body of ACER sufficient reasoning as to the correct interpretation of the relevant provisions of Regulation 943 to enable it to make a new decision in accordance with Article 28(5) of Regulation 942 and Article 21(2) of the Rules of the ACER Board of Appeal. The appeal was assigned the case number A-012-2021.
3. On 5 October 2021, in light of the Defendant's reasoned application, the Chair granted an extension of the deadline to file the defence until 27 October 2021.
4. On 13 October 2021, the Appellant filed a request with the Registry, requesting the Chair to prescribe certain procedural measures. In its request, the Appellant set out that its request "follows the notification by ACER to ENTSO-E on 17 September 2021 that it intends to withdraw Decision No 08/2021, with a view to adopting a replacement SOR Decision". The Appellant also clarified that it did not withdraw its appeal at this stage.

5. On 18 October 2021, the composition of the Board of Appeal changed. The change was made public on ACER's website at <https://www.acer.europa.eu/the-agency/organisation-and-bodies/board-of-appeal/boa-members>.
 6. On 19 October 2021, the Defendant adopted Decision No. 13/2021 of 19 October 2021, by which it withdrew the Contested decision.¹ It is stated in point 13 of that decision that it was appropriate to withdraw the Contested decision and to immediately reopen the proceedings in accordance with the general principle of law permitting the withdrawal of an unlawful decision and the principle of good administration, and that "*in the reopened proceedings, ACER intends to focus on the part of the SOR definition subject to appeal in Case A-012-2021, namely of including the SWE CCR in the Central Europe SOR and not defining a separate SWE SOR*" and that "*ACER will observe all the procedural rights of ENTSO-E and will fully take into account the BoA Decision, trying to expedite the procedure where possible*".
 7. On 20 October 2021, the Defendant filed its observations with the Registry on the Appellant's request for procedural measures of 13 October 2021. These observations stated that the measures requested by the Appellant were either unlawful or inappropriate with respect to the appeal proceedings in Case A-012-2021 and had to be rejected.
 8. On 25 October 2021, the Chair requested the Appellant and the Defendant to express their views on the consequences of the withdrawal of the Contested decision.
 9. On 27 October 2021, the Defendant submitted its defence to the Registry.
 10. On 8 November 2021, both Parties submitted their observations on the consequences of the withdrawal of the Contested decision.
 11. On 11 November 2021, the Chair adopted Order No.2 on the confidentiality of certain information, in which certain of the Defendant's requests for confidential treatment were granted, non-confidential version of Documents, communicated by the Defendant to the Registry, were ordered to be served upon the Appellant, while the decision on the remainder of the requests of the Appellant of 13 October 2021 was reserved for the decision of the Board of Appeal.
 12. On 16 November 2021, the Registry notified the Chair's Order No. 2 to the Appellant and the Defendant.
 13. On 16 November 2021, the written procedure was closed.
 14. On 25 November 2021, the Board of Appeal held an on-line public oral hearing.
- B. Summary of the requests and arguments of the parties concerning the contentious questions***
15. The Appellant does not dispute the right of the Defendant to withdraw the Contested decision.

¹https://extranet.acer.europa.eu/Official_documents/Acts_of_the_Agency/Individual%20decisions/ACER%20Decision%2013-2021%20withdrawing%20Decision%2008-2021%20on%20the%20definition%20of%20system%20operation%20regions.pdf

16. The parties disagree on the consequences of the withdrawal, especially on the persistence of the interest of the Appellant in the continuation of the proceedings. The Appellant claims that the case-law of the Court of Justice of the EU establishes that, where a contested decision is replaced during the course of appeal proceedings, the proceedings are not automatically terminated, and that where the applicant has an interest in the proceedings continuing and they retain a purpose, the proceedings may continue. In the Appellant's view, the proceedings remain entirely purposeful because continuing them is the most efficient way of resolving the subject-matter of the appeal. Consequently, the Appellant requests that the proceedings continue. The Defendant opposes these requests and refutes the argumentation presented.
17. The Defendant contests the well-foundedness on the benefits that could be drawn from the remainder of requests for procedural measures of the Appellant, especially concerning the stay of the proceedings.
18. To support their requests and arguments, the parties made references to numerous cases of the EU courts in which those courts were called to judge on the questions related to withdrawal of administrative decisions, lawful and unlawful, favourable or unfavourable to the applicants.

C. Assessment by the Board of Appeal

19. Taking into account the specific circumstances of the case, the Board finds that:
 - a. the present case is the first in which the Defendant withdrew its decision;
 - b. the new decision that would replace the Contested decision has not been adopted before the end of the oral hearing that was held on 25 November 2021;
 - c. there is no directly applicable case law of the EU courts in the present circumstances, where the Contested decision was not modified or replaced in the course of pending proceedings. The case-law to which the Appellant refers concerns different factual and legal situations.
20. The Contested decision is legally inexistent because it has been withdrawn. As the present appeal is directed against a non-existent act, it has by consequence lost its subject-matter.
21. The withdrawal of the Contested decision rendered the continuation of the proceedings devoid of purpose: the Board of Appeal cannot confirm a decision that is deemed not to exist, nor can it remit such a non-existent decision to the Defendant.
22. The Board of Appeal has carefully examined the arguments of the parties, put forward in their written submissions as well as during the oral hearing, relating to the interest of the Appellant in the continuation of the present proceedings and on extending them to the new decision which is yet to be adopted by the Defendant. In this regard, the Board of Appeal finds that the Appellant does not demonstrate having a sufficient interest of its own in the continuation of the proceedings. The Appellant cannot successfully invoke a general interest in the continuation of the proceedings as it does not act as representative of a general interest.

23. Exceptional circumstances justifying that the current proceedings would not become devoid of purpose and where the Appellant would none the less retain a sufficient interest in obtaining a decision do not exist in the present case.
24. In light of the fact that the appeal has become devoid of purpose as a consequence of the withdrawal of the Contested decision and that there is no longer a need to adjudicate, the remainder of the request for procedural measures submitted by the Appellant on 13 October 2021 have become devoid of purpose and there is no longer any need to decide on them.
25. It follows from the above that there is no need to decide on the Appeal and that the case A-012-2021 should be closed.

DECISION

On those grounds,

THE BOARD OF APPEAL

Hereby decides:

1. There is no need to decide on the Appeal.
2. There is no need to decide on the remainder of the procedural measures, requested by the Appellant on 13 October 2021.
3. The Case A-012-2021 is closed.

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

Ljubljana, 8 December 2021.

M. PREK
Chair of the Board of Appeal

S. VAONA
Registrar