



## Board of Appeal

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### **The Board of Appeal dismisses as inadmissible the appeals brought by E-Control and Austrian Power Grid seeking the annulment of ACER's Opinion No 09/2015**

On 23 November 2015, the Board of Appeal received two appeals, lodged by the Austrian energy regulator E-Control and by the Austrian Power Grid (APG), seeking the annulment of ACER (the Agency) 's Opinion No 09/2015 of 23 September 2015 on the compliance of National Regulatory Authorities (NRAs)' decisions, approving the methods of allocation of cross-border electricity transmission capacity in the Central-East Europe (CEE) region, with Regulation (EC) No 714/2009. The Opinion was adopted having regard to the respective provisions of Regulation (EC) No 713/2009 of 13 July 2009 (the ACER Regulation) and, in particular, Articles 7(4) and 17(3) thereof.

In the Opinion, the Agency concluded that there is currently structural congestion on the DE-PL, DE-CZ and CZ-AT interconnectors as well as on network elements within Germany, that the cross-border exchanges between Austria and Germany are physically realised partly through those structurally congested interconnectors and internal network elements, and that they have a significant impact on those structural congestions.

Therefore, the German-Austrian interconnector should be considered to be usually and structurally congested according to Regulation 714/2009 on conditions for access to the network for cross-border exchanges in electricity. According to the Opinion, it thus requires the implementation of a capacity allocation method, in accordance with the Guidelines.<sup>1</sup>

Therefore, the Agency invited the CEE National Regulatory Agencies (NRAs) and Transmission System Operators (TSOs) to commit, within the following four months, to the implementation of a coordinated capacity allocation procedure on the German-Austrian border. The German and the Austrian NRAs and TSOs were also invited to evaluate whether additional interim measures coordinated at regional level are needed until a coordinated capacity allocation procedure on the German-Austrian border is implemented.

The appeals by E-Control and APG were directed in particular against the establishment of such a capacity allocation procedure on the German / Austrian border, arguing *inter alia* that such a procedure would artificially split the currently integrated electricity market between Germany and Austria and require the respective NRAs to limit cross border flows of electricity between Austria and Germany.

The appeals have been registered under the case numbers A-001-2015 and A-002-2015.

Applications for leave to intervene in support of E-Control were filed by Österreichs E-Wirtschaft,<sup>2</sup> Vereinigung der Österreichischen Industrie (the Federation of Austrian Industries),<sup>3</sup> VERBUND AG, the

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<sup>1</sup> Guidelines on the management and allocation of available transfer capacity of interconnections between national systems contained in Annex I of Regulation 714/2009.

<sup>2</sup> Seventeen statements by market actors in Austria were lodged in support of the intervention submitted by Österreichs E-Wirtschaft.

<sup>3</sup> One statement was submitted in support of this intervention.



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European Federation of Energy Traders, Mondi AG and EXAA Abwicklungsstelle für Energieprodukte AG. An application for leave to intervene was also filed in support of both E-Control and APG by Wirtschaftskammer Österreich.<sup>4</sup>

Applications for leave to intervene in support of the Agency were filed in both cases by the Regulatory Office for Network Industries of Slovakia, Polski Komitet Energii Elektrycznej (Polish Electricity Association - PKEE), Polskie Sieci Elektroenergetyczne Spółka Akcyjna (PSE SA); Towarzystwo Obrotu Energią (TOE, Polish Association for Energy Trading), and the President of the Polish Energy Regulatory Office - ERO)(Urząd Regulacji Energetyki - URE)

Regulation (EC) No 713/2009 governing ACER limits reviews by its Board of Appeal to appeals against ACER individual decisions or measures having equivalent legal effects. As regards the two appeals, the Board of Appeal found that even if the Agency not only adopted an Opinion on compliance with the existing Guidelines but also invited the NRAs concerned to adopt very concrete and specific measures such as the implementation of a capacity allocation procedure within a detailed schedule, this does not transform the Opinion into a binding measure with direct legal effects. Even if the Board of Appeal fully appreciates the importance of the issues raised, the Opinion therefore does not fall under the power of review of the Board of Appeal.

Therefore, the Board of Appeal has dismissed the applications as inadmissible (and has therefore not given a ruling on the substantial claims of both appeals nor on the applications for leave to intervene and statements in intervention lodged in both cases).

The non-confidential version of the decisions will be made available under the case numbers A-001-2015 and A-002-2015 on the Board of Appeal website once any confidentiality issues have been resolved.

Questions should be directed to: [BoA@acer.europa.eu](mailto:BoA@acer.europa.eu)

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<sup>4</sup> Fifty-two statements by market actors in Austria were lodged in support of the intervention submitted by Wirtschaftskammer Österreich.