# General court confirms that the ACER's board of appeal cannot review non-binding opinions

*Technology (FIRST DEFENSE AEROSOL PEPPER PROJECTOR)*, T-262/09, EU:T:2011:171, paragraph 92 and the case-law cited).

**70.** In the light of that case-law, first, the applicant's argument that the Board of Appeal of ACER should have carried out an assessment of the substance of the evidence submitted to it must be rejected. The obligation to state reasons does not mean that the Board of Appeal of ACER, after finding that the appeal before it is inadmissible, is obliged to adjudicate on the substance of that application, which, naturally, cannot influence its decision. In that regard, in the contested decision, the Board of Appeal of ACER considered that the administrative appeal against the opinion in question was inadmissible. It cannot therefore be criticised for not having examined all the arguments put forward by the applicant as regards the substance.

**71.** Secondly, contrary to what the applicant claims, the Board of Appeal of ACER did not merely dismiss the administrative appeal as inadmissible on the ground that the opinion in question is intermediary and preparatory, but explained, in paragraphs 20 to 39 of the contested decision, the reasons why it considered the administrative appeal to be inadmissible. The Board of Appeal of ACER, first, analysed the legal basis on which the opinion in question was based before examining whether it was binding. Moreover, the Board of Appeal explained that it was authorised, in accordance with Article 19 of Regulation No 713/2009, to adjudicate only on decisions taken by ACER, namely acts which, for the purposes of Regulation No 713/2009, have binding legal effects. Next, it set out the reasons why, in its view, the opinion in question was devoid of any binding legal effect. Finally, it concluded that the opinion in question was not binding.

**72.** It follows that the reasons stated in the contested decision are sufficient for it to be understood why the Board of Appeal of ACER considered that the opinion in question produced no binding legal effects and that the appeal submitted to it was inadmissible.

**73.** Thirdly, in so far as the applicant claims generally, in the context of its first plea in law, that the Board of Appeal of ACER did not examine the evidence and legal arguments submitted by the applicant concerning its claim that the opinion in question had effects on market participants, it is sufficient to note that it has provided no explanation as to what, in its view, the evidence and arguments that that Board of Appeal failed to examine are and in what respect the reasoning in the contested decision is inadequate in that regard. That unsubstantiated claim must therefore be rejected as unfounded.

**74.** It follows that the reasoning of the contested decision enabled the applicant to ascertain the reasons of the Board of Appeal of ACER for rejecting the appeal before it in the present case and the Court to exercise its power of review. The third plea in law must therefore be rejected as unfounded.

**75.** It follows from all the foregoing that the present action must be dismissed in its entirety.

**Costs**

**76.** Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the ACER has applied for costs and the applicant has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by ACER.

**77.** In accordance with Article 138(1) and (3) of the Rules of Procedure, the Czech Republic, the Republic of Poland, the Republic of Austria and PSE must bear their own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

**1. Dismisses the action;**

**2. Orders Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control) to bear its own costs and to pay those incurred by the Agency for the Cooperation of Energy Regulators (ACER);**

**3. Orders the Czech Republic, the Republic of Poland, the Republic of Austria and Polskie Sieci Elektroenergetyczne S.A. to bear their own costs.**

**General Court confirms that the ACER's Board of Appeal cannot review non-binding opinions**

(...)

## Note – Noot

### 1. Introduction

The legal issue posed by the presently annotated case is of a purely procedural nature: can the European Agency for the Cooperation of Energy Regulators' (ACER) Board of Appeal review the ACER's opinions on the compliance of national regulators' decisions with EU law? This question was posed to the General Court when the Austrian energy regulator (E-Control) challenged the ACER Board of Appeal's decision on the inadmissibility of E-Control's challenge before it of ACER Opinion 09/2015. This procedural question is not just of interest to the practitioners in the field of the internal energy market but to those of a host of other areas of EU law in which EU agencies have been established and where (in some cases) actions directed against (certain) decisions of these agencies first need to be brought before an internal Board of Appeal before proceedings may be brought before the EU General Court. As a prelude to discussing the decisions of the General Court and the Board of Appeal, it is useful to sketch the substantive issue around which the cases revolved, since it relates to a key step in the creation of a genuine internal electricity market.

### 2. Background

Although the Court of Justice of the European Union has ruled that electricity is a good and therefore comes under the internal market rules on free movement of goods,[1] the creation of an internal market for electricity has been more cumbersome than for other

1. See Case C-393/92, *Almelo*, ECLI:EU:C:1994:171, para. 28.

goods. The reason for this is that electricity is not just an ordinary commodity. Electricity cannot be (efficiently) stored under current technology and a balance between generation (i.e. production) and load (i.e. consumption) is therefore required at all times. In addition, there is no genuine 'European' transmission network to service the European internal market. Instead, and for obvious historic reasons, the transmission networks are still very much developed along national lines.

As the ACER further noted in the Opinion challenged before the ACER Board of Appeal:

*In Europe, wholesale electricity markets are structured in bidding zones, featuring equal prices within them. Within each bidding zone, any consumer is allowed to contract power with any generator without limitations and hence disregarding the physical reality of the transmission network. This simplification, which aims at facilitating trade within each bidding zone, is however often made at the expense of electricity trading between bidding zones. For the latter TSO's indeed apply capacity allocation methods, through which they, ex-ante and most of the time, limit the amount of available cross-zonal capacity (i.e. net transmission capacities NTCs) to ensure that physical flows, including inside zones, remain within the network operational security limits.*[2]

For the establishment of a functioning European internal market for electricity, the proper configuration of the different bidding zones making up the larger internal market is of course essential. As a result, the boundaries of bidding zones should not be set in stone, which is also why the Commission's 2015 CACM network code, adopted pursuant to Regulation 714/2009,[3] has prescribed a review of the existing bidding zones configurations.[4] This review is currently underway and is expected to be finalised in 2018.[5] Today, the bidding zones, again for historic reasons, largely coincide with national boundaries. One of the major exceptions in this regard is the single German-Austrian bidding zone.

The important point here is that this configuration of bidding zones is not simply a technical issue. As the quoted passage of the ACER Opinion above suggests, the bidding zones, or pricing zones, are called as such because wholesale market prices are equal within them and it is assumed that bidding zones are not congested, meaning there are no constraints on transactions within a single zone, regardless of the actual physical capacity of and flows on the transmission network in that zone.[6] In the German-Austrian bidding zone especially Austria has greatly benefited from Germany's *Energiewende*, since renewable energy produced by North-German windfarms ensures low(er) wholesale electricity prices for Austria. In reality however, the transmission network connecting Northern Germany to Austria cannot accommodate these transactions. As a result, around 59% of the physical flows resulting from exchanges between Germany and Austria are not actually passing by the German-Austrian border.[7] Electric currents following the path of least resistance means that these exchanges bypass the congested parts on the direct line between Germany and Austria and pass through the networks of other countries in Central and Eastern Europe (CEE), notably Poland, Czechia, Slovakia and Hungary. Such so-called loop flows, which are not controlled by capacity calculation and allocation, since they are scheduled to be intra-zone (and not inter-zone) transactions, may pose serious risks to the network security of these countries and result in welfare losses.

### 2.1. ACER Opinion 09/2015

Under Article 7(4) of its establishing regulation,[8] the ACER has the competence to deliver opinions at the request of the Commission or a national regulator on the compliance of a decision by (another) national regulator with EU legislation.[9] In 2014 the Polish regulator requested the ACER to deliver such an opinion on a series of decisions adopted by its counterparts of Slovenia, Slovakia, Austria and Hungary approving the methods of allocation of cross-border transmission capacity in the CEE region. Logically, these decisions only governed the allocation of cross-border transmission capacity between the different bidding zones in the CEE (cf. within one bidding zone there are no restrictions on transmissions). But according to the Polish regulator, these decisions could not be adopted without addressing the problem which the congested German-Austrian connection poses for the network in the CEE region.

In its opinion of 23 September 2015, the ACER first found that the Polish regulator's request fulfilled the requirements of Article 7(4) of the ACER Regulation and subsequently agreed with the Polish regulator on the question whether the German-Austrian exchanges resulted in congestion problems in the CEE region.[10] As to the question whether, in light of this established fact, the national regulators' decisions ought to have provided for capacity allocation on the German-Austrian border, the ACER scrutinised the relevant EU legal framework. It concluded that Regulation 714/2009 requires national authorities and Transmission System

2. ACER Opinion 09-2015 on the compliance of NRAs' decisions approving methods of cross-border capacity allocation in the CEE Region, p. 6.
3. Regulation (EC) 714/2009 of the European Parliament and of the Council on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, O.J. 2009 L 211/15.
4. See Article 32 of Commission Regulation (EU) 2015/1022 establishing a guideline on capacity allocation and congestion management, O.J. 2015 L 197/24.
5. See Answer given by Mr Arias Cañete on behalf of the Commission to written Parliamentary Question E-001929-17 by MEP Barbara Kappel.
6. See ENTSO-E, Technical Report on the Bidding Zones Review Process, 2 January 2014, p. 5; ACER Opinion 09-2015, p. 6.
7. ACER, Decision 06/2016 on the ENTSO's proposal for the determination of capacity calculation regions, p. 12
8. Regulation (EC) 713/2009 of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators, O.J. 2009 L 211/1.
9. More specifically, with the EU legislation constituting the third energy package.
10. ACER Opinion 09-2015, pp. 16-28.

Operators (TSOs) to tackle congestion problems and prescribes capacity allocation to be implemented in cases of structural congestion.[11] Crucially then, the ACER noted that "*a common congestion management procedure coordinated by the relevant TSOs is not an end in itself, but should address these (negative) [congestion] effects effectively.*"[12] Thus, national regulatory authorities do not fulfil their duties under EU law by simply co-ordinating capacity allocation and instead they have to ensure that their co-ordination has the effect of addressing congestion issues. Since the ACER found that there were no viable alternatives to a co-ordinated capacity allocation procedure to tackle the problem at the German-Austrian border, the agency finally opined that the implementation of such a procedure was indeed required under EU law, inviting the CEE regulators and TSOs to act accordingly within a period of 4 months.[13]

### 2.2. ACER Board of Appeal decision A-001-2015

On 23 November, Energie-Control Austria (E-Control), the Austrian national regulator, filed an appeal against the ACER's opinion before the ACER's Board of Appeal. E-Control was required to pass by the Board of Appeal, rather than going directly to the General Court, since Article 19(1) of the ACER Regulation, dealing with the appeals before the Board of Appeals, provides:

*Any natural or legal person, including national regulatory authorities, may appeal against a decision referred to in Articles 7, 8 or 9 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.*

While Article 19(1) of the ACER Regulation seems to provide natural and legal persons with a possibility (cf. 'may'), this is actually a remedy that should be exhausted before turning to the EU Courts, since Article 263(5) TFEU provides that "*[a]cts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.*"

Unfortunately for E-Control, the Board of Appeal rejected the action as inadmissible on the ground that ACER's opinion adopted pursuant to Article 7(4) could not be qualified as a 'decision referred to in Articles 7, 8 or 9.' In this regard, the Board of Appeal observed that its jurisdiction was narrowly defined in the regulation.[14] The Board of Appeal subsequently noted that "*[i]t is settled case-law that in order to ascertain whether a measure is a challengeable act it is necessary to look at its substance*",[15] following which it quoted the Court's jurisprudence on this issue, concluding that that jurisprudence applies "*mutatis mutandis, to measures brought before the Board of Appeal.*"[16] Still, according to E-Control the Opinion clearly had legal effects in its respect, since it was required by the ACER to review its original decision within a timespan of four months.[17] Yet, the Board of Appeal noted that the agency's opinion did not impose any specific duties on the national regulators and only *invited* them to undertake further action.[18]

Less convincingly, the Board of Appeal further noted that in case of non-compliance with the opinion, the ACER does not have sanctioning or enforcement powers. Instead under the ACER Regulation, it is then up to Commission to draw the necessary conclusions from the refusal of a national authority to follow up on the agency's invitation.[19] However, this fails to convince since principally the binding nature of an act cannot depend on whether an enforcement mechanism is available to the author of the act.

The Board of Appeal subsequently confused the infringement procedure (of Article 258 TFEU) and the action for annulment (of Article 263 TFEU). Thus, the Board of Appeal found that if the Commission would bring an infringement procedure against Austria, the agency's opinion would be a preparatory act for the Commission's decision. It then noted the Court's jurisprudence on the possibility to scrutinise the (external) legality of preparatory acts in proceedings brought against final decisions.[20] However, the latter jurisprudence does not relate to actions under Article 258 TFEU and seems irrelevant since the Court cannot in any event scrutinise the decision pursuant to which the Commission decides to bring infringement proceedings against a Member State;[21] a point which the Board of Appeal later raises itself to again find that an opinion (regardless whether adopted by an agency or the Commission) cannot establish a Member State's non-compliance with EU law since such a finding can only be made by the Court itself.[22]

11. ACER Opinion 09-2015, p. 29.
12. ACER Opinion 09-2015, p. 32.
13. ACER Opinion 09-2015, pp. 42-44.
14. ACER Board of Appeal, Decision A-001-2015, para. 20.
15. *Ibid.*, para. 21.
16. *Ibid.*, para. 24.
17. *Ibid.*, para. 25.
18. *Ibid.*, paras 29-30.
19. *Ibid.*, paras 31-32.
20. *Ibid.*, paras 34-36.
21. Case 415/85, *Commission v. Ireland*, ECLI:EU:C:1988:320, paras 8-9. Of course, the Board of Appeal was correct in noting that E-Control (through its Member State) will have the chance to defend itself and its interests before the CJEU should the Commission decide to start infringement proceedings (see para. 37), but this question is unrelated to the Court's established jurisprudence on the review of preparatory acts.
22. ACER Board of Appeal, Decision A-001-2015, para. 38.

### 3. The actions before the General Court (T-671/15 and T-63/16)

Simultaneously to bringing proceedings before the ACER Board of Appeal and in light of the questionable admissibility before the Board of Appeal, E-Control also challenged the ACER's opinion before the General Court. In its order of 19 October 2016 however, the General Court dismissed the action as inadmissible for essentially the same reason as the Board of Appeal had done, albeit pursuant to a more convincing reasoning. Thus the General Court noted that the ACER's opinion merely invited the regulators to take action and therefore did not produce any binding legal effects,[23] that the contested opinion was properly adopted pursuant to Article 7(4) of the ACER Regulation,[24] and that there were no incidental legal effects flowing from the opinion either.[25]

Subsequently, on the 29 of June 2017 the General Court ruled on E-Control's (second) action challenging the decision of the ACER Board of Appeal.[26] Although evidently linked to the first case before the General Court, the legal question was slightly different.

In the first case, the General Court was asked whether ACER Opinion 09/2015 constituted a challengeable act under Article 263 TFEU. In the second case, the General Court was asked whether ACER Opinion 09/2015 was an act challengeable before the ACER Board of Appeal, i.e. whether the Board of Appeal had properly understood its own jurisdiction. In principle, these are not necessarily identical questions since the jurisdiction of the Board of Appeal is defined by the EU legislature in EU secondary legislation while the jurisdiction of the EU Courts is determined by primary law. To put it concretely: nothing prevents the EU legislature from allowing actions before an internal Board of Appeal of an EU agency which would be inadmissible if brought before the General Court (or Court of Justice) pursuant to Article 263 TFEU.

The fact that the legal questions in the two proceedings before the General Court nonetheless seem identical is because the ACER Board of Appeal in Decision A-001-2015 applied the case law of Article 263 TFEU *mutatis mutandis* to answer the question on its own jurisdiction as defined in Article 19 of the ACER Regulation.

In the second proceedings before the General Court, E-Control in essence argued that the Board of Appeal had erred by failing to qualify ACER Opinion 09/2015 as a decision referred to in Article 19(1) of the ACER Regulation. To argue their cases, both E-Control and the ACER relied on much the same arguments they already put before the Board of Appeal and the General Court in the earlier proceedings.

The General Court noted that under Article 4 of the ACER Regulation the Agency is empowered to adopt opinions and recommendations vis-à-vis the EU institutions, TSOs and national authorities and to adopt individual decisions pursuant to Articles 7, 8 and 9 of the ACER Regulation. Crucially, the General Court linked this part of ACER's mandate to Article 288 TFEU noting that the latter Article provides *"that a decision is to be binding in its entirety, while an opinion or recommendation has no binding force."*[27]

This part of the Court's reasoning effectively decided the case in favour of the ACER. After all, it may be recalled here that Article 19 of the ACER Regulation allows 'decisions' of the ACER adopted pursuant to Article 7, 8 or 9 of the Regulation to be challenged before the Board of Appeal. By transposing Article 288 TFEU's definition of the instrument of the 'decision', the General Court ruled out that the reference to 'decisions' in Article 19 of the ACER Regulation ought to be understood in a generic sense (which would have potentially widened the jurisdiction of the Board of Appeal).

The General Court subsequently verified whether Opinion 09/2015 was properly adopted as an opinion pursuant to Article 7(4) of the ACER Regulation and concluded that it was not a disguised decision.[28] Explicitly referring back to the reasoning in its order of 19 October 2016, the General Court also rejected E-Control's arguments to the effect that the opinion had incidental legal effects making it challengeable before the Board of Appeal:[29] the factual opinion of the ACER did not (and could not) alter the legal position of a national regulatory authority.

In the remainder of its judgment, the General Court rejected further pleas of E-Control alleging that the Board of Appeal had infringed (i) both its right to challenge the legality of the opinion and its right to be heard, by dismissing its appeal as inadmissible and (ii) its duty to state reasons in failing to explain how the opinion's legal effects were insufficient to bring about a change in E-Control's legal position. Notably in regard of the first of these pleas, the General Court recalled the Courts' established jurisprudence pursuant to which the conditions defined in Article 263 TFEU need to be applied in respect of the principle of effective judicial protection (enshrined in Article 47 of the Charter) but without this resulting in those admissibility conditions being set aside.[30] The transposition of this case law to a different procedural setting (i.e. the proceedings before the Board of Appeal) was

23. Case T-671/15, *E-Control v. ACER*, ECLI:EU:T:2016:626, paras 20-48.
24. *Ibid.*, paras 67-88.
25. *Ibid.*, paras 49-66.
26. While a different chamber of the General Court ruled on E-Control's second action, the juge-rapporteur was the same in both cases.
27. Case T-63/16, *E-Control v. ACER*, ECLI:EU:T:2017:456, para. 37. It is of interest to note that Article 288 TFEU equally provides: *"To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions."* This could have been read, *a contrario*, that only the institutions (but not EU agencies like the ACER) may adopt such decisions, recommendations and opinions.
28. Case T-63/16, *E-Control v. ACER*, ECLI:EU:T:2017:456, paras 40-49.
29. *Ibid.*, paras 50-54.
30. *Ibid.*, para. 59.

a logical result of the General Court earlier transposing the notion of a challengeable act from Article 263 TFEU to Article 19 of the ACER Regulation. Further, since Article 19(4) of the ACER Regulation provides that the Board of Appeal is to examine the well-foundedness of an action and hear the parties "*[i]f the appeal is admissible*", the General Court found that the Board of Appeal is not required to hear parties if it rejects an appeal as inadmissible.

## 4. Further comment

The General Court's ruling, which has not been appealed before the Court of Justice, is an important clarification of the jurisdiction of the ACER's internal Board of Appeal and by extension of the internal Board of Appeal system set up for a number of other EU agencies.[31] In this regard it may be noted that for those EU agencies with an important decision-making function the EU legislature has decided to establish such internal independent administrative review bodies.[32] Typically, the relevant provisions of the agencies' establishing acts (read together with Article 263 TFEU) prescribe that non-privileged parties (in the sense of Article 263 TFEU) are required to exhaust the remedies before the agency's Board of Appeal before they can bring proceedings before the General Court.

As the ACER Board of Appeal noted in Case A-001-2015, its jurisdiction is narrowly defined. This goes for the Boards of Appeal of the other agencies as well. The establishing act of such an EU agency typically identifies the acts challengeable before the Board of Appeal by *exhaustively* listing those acts' legal bases.[33] As noted above, for the ACER these are Articles 7, 8 or 9 of the ACER Regulation. Acts not adopted pursuant to these legal bases (even if they are binding) cannot be challenged before the Board of Appeal. This results in a rather complex system of judicial protection: institutions and Member States can challenge an agency decision directly before the General Court while non-privileged parties may have to challenge the very same act before the Board of Appeal (and show that they are either addressee of that decision or are individually and directly concerned by it). Whether they have to do so will depend on whether the legal basis of that act is explicitly listed by the EU legislature as coming within the Board of Appeal's jurisdiction. Otherwise they have to go directly to the General Court as well.

This contorted (and restrictive) way of defining the Boards' jurisdiction has been criticised,[34] especially in light of the raison d'être of the system of Boards of Appeal.[35] Thus the Board of Appeal is not just a miniature court but rather a specialised administrative review body, comprising both legal and technical expertise. This allows for a more profound scrutiny of agency decisions than the marginal review which the EU judge would exercise. After all, the judges, not being experts in the substantive area on which the agency is active, will refrain from second guessing the agency's assessments and will merely scrutinise the external legality of a contested decision. In contrast, the Board of Appeal can look at the internal legality of a decision and it may furthermore "*exercise any power which lies within the competence of the Agency, or it may remit the case to the competent body of the Agency.*"[36] Where the General Court can justify a marginal review in light of an agency's discretionary powers, a Board of Appeal cannot do so, since it may exercise the same powers as the agency itself. The limited jurisdiction of the Boards of Appeal then means that the full potential of an independent internal review is not realised.[37]

This critique should of course not be read as a critique on the decisions of the General Court and the Board of Appeal. It is clear that the ACER's opinion was not a challengeable act under Article 263 TFEU and it was equally permissible for the Board of Appeal to find (and for the General Court to confirm) that Article 19(1) of the ACER Regulation does not permit the Board to review opinions adopted pursuant to Article 7(4) of that regulation. While the legislature's choice for such a restricted jurisdiction may be deplored, the Board of Appeal and the General Court cannot be faulted with interpreting the Board's mandate as intended by the EU legislature.

### *4.1. Implications of the clean energy package*

Under the clean energy package proposed by the Commission in November 2016,[38] the jurisdiction of the Board of Appeal would effectively be enlarged to take into account the new powers granted to ACER pursuant to the clean energy package. The new Article 29 of the recast ACER Regulation would provide that the Board may hear appeals against decisions

31. On the system of the Boards of Appeal, see Merijn Chamon, 'Les agences décentralisées et le droit procédural de l'UE', (2016) 52 *Cahiers de droit européen* 2, pp. 555-561; Paola Chirulli and Luca De Lucia, 'Specialised adjudication in EU administrative law: the Boards of Appeal of EU agencies', (2015) 40 *European Law Review* 6, pp. 832-857. Focusing on the ECHA Board of Appeal, see Marcus Navin-Jones, 'A Legal Review of EU Boards of Appeal in Particular the European Chemicals Agency Board of Appeal' (2015) 21 *European Public Law* 1, pp. 143-168.
32. These agencies are the Community Plant Variety Office (CPVO), the European Union Intellectual Property Office (EUIPO), the European Aviation Safety Agency (EASA), the European Union Agency for Railways (ERA), the European Chemicals Agency (ECHA), the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA) (these three agencies share one single Board of Appeal) and the Single Resolution Board (SRB).
33. The only exception here is the Board(s) of Appeal of the EUIPO, the jurisdiction of which is defined *ratione personae*: the regulation identifies the internal EUIPO bodies the decisions of which are challengeable before the Board of Appeal.
34. See Merijn CHAMON, "Les agences décentralisées et le droit procédural de l'UE', (2016) 52 *Cahiers de droit européen* 2, pp. 566-567.
35. This raison d'être is actually twofold for the EUIPO. In addition to allowing a more profound review, a Board of Appeal is also necessary for the EUIPO given the sheer number of appeals lodged against that agency's decisions. Without the EUIPO Boards of Appeal, the General Court would become paralysed.
36. See Article 19(5) of the ACER Regulation. The Boards of Appeal of the SRB, ESMA, EBA and EIPOA do not have this power.
37. Note however that the Boards of Appeal of the SRB, ESMA, EBA and EIOPA are also competent to hear complaints on agencies' refusals to access for documents.
38. For the specific proposal amending the ACER Regulation, see European Commission, COM (2016) 863 final.

adopted pursuant to Articles 4 to 14 of the recast regulation. This is remarkable, especially in light of the presently annotated case, since e.g. the new Article 4 (Article 6 of the present ACER Regulation) deals with the tasks of the ACER as regards the co-operation between TSOs and only provides that the ACER may adopt opinions and recommendations vis-à-vis the TSOs, Commission, Parliament and Council. It is unclear then which 'decision' adopted by the ACER pursuant to the new Article 4 would be challengeable before the Board of Appeal, unless of course the 'decisions' in the new Article 29 do not equate with 'decisions' as referred to in Article 288 TFEU (anymore). The new Article 2 of the proposal which lists the types of acts ACER can adopt (current Article 4) also contains a hint to this effect. Today, Article 4 refers to "*individual decisions in the specific cases referred to in Articles 7, 8 and 9*" which corresponds one-to-one with the Articles defining the Board of Appeal's jurisdiction in Article 19. Under the Commission's proposal however ACER could adopt "*individual decisions in the specific cases referred to in Articles 6, 8, and 11*" which does not align anymore with the Articles identified in the new Article 29 (which refers to Articles 4 to 14). This begs the question whether the reference to the new Article 4 in the new Article 29 will remain inoperative.[39] If not, the ACER Board of Appeal could be seized of actions challenging the validity of non-binding acts.[40]

A second interesting change proposed by the Commission in relation to the Board of Appeal is that the period in which the Board of Appeal has to adopt a decision (and which starts to run from the lodging of the application) is prolonged from two to four months.[41] While this will result in longer proceedings, parties would still be better off than before the General Court, which is another advantage of the Board of Appeal system. Apart from this second change, the Commission's proposal would not alter the current functioning of the Board of Appeal.

## 5. The substantive issue: capacity allocation at the German-Austrian border

Finally, given the scope of the *Revue*, it is fitting to come back to the substantive problem at issue in the annotated case. As noted above, a review of the bidding zones in the internal market is currently still ongoing. This review will almost certainly result in the requirement of splitting up the German-Austrian bidding zone and may result in the splitting up of other large bidding zones (notably Poland and France) as well as the merger of smaller bidding zones.[42] Without waiting for this review process however, the German regulator in October 2016 already tasked the four German TSOs to prepare a management plan for the German-Austrian border.[43] To pre-empt a unilateral German move, E-Control subsequently sat down together with the German regulator to flesh out a deal to cap the capacity at the German-Austrian border at 4.9 Gigawatts starting from October 2018.[44] This decision will effectively break the single bidding zone, resulting in diverging wholesale market prices in Germany and Austria.[45]

## 6. Concluding remarks

In *E-Control* v *ACER* (T- 63/16) the General Court has confirmed that the ACER's Board of Appeal can only review binding decisions but not opinions. The Court further rejected the argument that ACER's factual assessments in its opinions affect the legal position of national regulators. An admissible action before the Board of Appeal (or the General Court itself) cannot therefore lie on that ground either.

Although it would be possible to broaden the jurisdiction of a Board of Appeal to encompass challenges against non-binding acts, this is not the choice which the EU legislature has made. While the Commissions' proposals on the clean energy package foresee a broadening of the jurisdiction of the ACER Board of Appeal, this is so because of the extra powers foreseen for the ACER and it is doubtful whether the changes are also intended to broaden the type of acts challengeable before the Board of Appeal.

*Merijn CHAMON*
*Postdoctoral Fellow of the Research Foundation – Flanders (FWO) at Ghent European Law Institute, Ghent University (Jean Monnet Centre of Excellence)*

## Cour de cassation, 23 mars 2017

**RG :** C.15.0498.F

**Siège :** M. Regout, A. Jacquemin, M.-Cl. Ernotte, M. Lemal, D. Batselé
**Avocat général :** Ph. de Koster
**Avocats :** Mes P.-A. Foriers, B. Maes, S. Nudelholc, P. Lefèbvre

39. Note that the new recital 27 still seems to rule out the possibility of challenging non-binding acts before the Board of Appeal, since it provides that an appeal is available 'where the agency has decision-making powers' and that the 'decisions of the Board of Appeal can be subject to appeal before the Court'.
40. Whether this would mean that decisions of the Board of Appeal in such cases could not be challenged anymore before the General Court is unclear. Since the opinion of the agency would either be confirmed or reformed by the Board of Appeal, the resulting act would remain a non-binding opinion of the agency that cannot be challenged under Article 263 TFEU.
41. See Article 29(2) as proposed by the Commission in COM (2016) 863 final. Other Boards of Appeal do not have a time limit to decide a case, apart from the Joint Board of Appeal of the ESMA, EBA and EIOPA (2 months) and the Board of Appeal of the SRB (one month).
42. ICIS, ENTSO-E mulls electricity bidding zone splits in France and Poland, 11 April 2017.
43. Bundesnetzagentur Pressemitteilung, Bundesnetzagentur fordert Engpassmanagement an der deutsch-österreichischen Grenze, 28 October 2016.
44. E-Control Press Release, E-Control: German-Austrian electricity trade safeguarded, 15 May 2017.
45. See Argusmedia, Germany-Austria power zone split special report, pp. 1-2 (http://www.argusmedia.com/~/media/files/pdfs/white-paper/germany-austria-zone-split-white-paper.pdf?la=en).

**Parties :** Coditel Brabant, Association intercommunale d'électricité du Sud du Hainaut, Conférence des régulateurs du secteur des communications électroniques, Proximus, Mobistar, Publifin, Nethys, Brutélé, Telenet

Communications électroniques – Décision de la Conférence des régulateurs du secteur des communications électroniques (CRC) – Recours devant la Cour d'appel de Bruxelles – Notion de pleine juridiction – Accès aux pièces du dossier – Vices formels de la décision de la CRC – Limites sur le pouvoir d'annulation de la Cour d'appel – Principe d'impartialité – Décision prise par consensus au sein d'un organe collégial de la CRC – Transposition de la directive « accès » (2002/19/CE) et de la directive « cadre » (2002/22/CE) en Communauté française – Compétences du Collègue d'autorisation et de contrôle du Conseil supérieur de l'audiovisuel

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(...)

**I. La procédure devant la Cour**

Le pourvoi en cassation est dirigé contre l'arrêt rendu le 13 mai 2015 par la cour d'appel de Bruxelles.
Le conseiller Michel Lemal a fait rapport.
L'avocat général Philippe de Koster a conclu.

**II. Les moyens de cassation**

Les demanderesses présentent cinq moyens libellés dans les termes suivants :

**Premier moyen**

***Dispositions légales violées***

*– article 6, § 1er, de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950 (ci-après la « CEDH »), approuvée par la loi du 13 mai 1955 et, en tant que de besoin, cette loi d'approbation ;*
*– articles 3.5, 4 et 5.3 de la directive 2002/21/CE du Parlement européen et du Conseil du 7 mars 2002 relative à un cadre réglementaire commun pour les réseaux et services de communications électroniques (directive « cadre »), telle que modifiée en dernier lieu par la directive 2009/140/CE du Parlement européen et du Conseil du 25 novembre 2009 ;*
*– article 288 du Traité sur le fonctionnement de l'Union européenne (à savoir le Traité instituant la Communauté économique européenne du 25 mars 1957, approuvé par la loi du 2 décembre 1957, tel que modifié en dernier lieu par le Traité de Lisbonne du 13 décembre 2007 modifiant le Traité sur l'Union européenne et le Traité instituant la Communauté européenne, approuvé par la loi du 19 juin 2008), ci-après le « TFUE », et, en tant que de besoin, les lois d'approbation précitées ;*
*– article 149 de la Constitution ;*
*– principes généraux du droit, dits principes de bonne administration, incluant le principe général du droit relatif aux droits de la défense et le principe général du droit du respect du contradictoire (audi alteram partem) ;*
*– principe général du droit de la primauté du droit international (y compris le droit européen) directement applicable sur les normes de droit interne ;*
*– article 8 de l'accord de coopération du 17 novembre 2006 entre l'État fédéral, la Communauté flamande, la Communauté française et la Communauté germanophone relatif à la consultation mutuelle lors de l'élaboration d'une législation en matière de réseaux de communications électroniques, lors de l'échange d'informations et lors de l'exercice des compétences en matière de réseaux de communications électroniques par les autorités de régulation en charge des télécommunications ou de la radiodiffusion et la télévision, approuvé par la loi du 27 décembre 2006, le décret de la Communauté flamande du 4 mai 2007, le décret de la Communauté française du 2 juillet 2007 et le décret de la Communauté germanophone du 25 juin 2007, et, en tant que de besoin, ces normes d'approbation, ci-après « l'accord de coopération du 17 novembre 2006 » ;*
*– article 19, alinéa 1er, de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges ;*
*– article 190, § 3, alinéa 3, du décret de la Communauté flamande du 27 mars 2009 relatif à la radiodiffusion et à la télévision (tel que modifié par le décret du 13 juillet 2012) ;*
*– article 94 du décret de la Communauté française sur les services de médias audiovisuels, coordonné le 26 mars 2009 (avant sa modification par le décret du 1er février 2012) ;*
*– article 2, § 5, de la loi du 17 janvier 2003 concernant les recours et le traitement des litiges à l'occasion de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et télécommunications belges ;*
*– articles 1319, 1320 et 1322 du Code civil.*

***Décisions et motifs critiqués***

*L'arrêt attaqué rejette la demande de production de pièces formulée par [la première demanderesse] et déclare non fondés les recours en annulation introduits par elle contre les deux décisions de la Conférence des régulateurs des communications électroniques (ci-après la CRC) du 1er juillet 2011 relatives à la région bilingue de Bruxelles-Capitale et à la région de langue néerlandaise.*
*Ces décisions sont fondées sur l'ensemble des motifs de l'arrêt attaqué, tenus pour être ici expressément reproduits, et spécialement sur les motifs suivants :*
*« (II). Quant à l'accès au dossier administratif et à la demande de production de pièces émanant de [la première demanderesse].*
*64. [La première demanderesse] se plaint de ce que les principes du contradictoire et du respect des droits de la défense ont été violés au cours de la procédure administrative qui a mené à l'adoption des deux décisions qu'elle attaque, dès lors que celles-ci se fondent sur des données la concernant notamment mais qualifiées de confidentielles et auxquelles elle n'avait pas accès.*
*La CRC rétorque qu'elle est tenue de garantir la confidentialité des informations qui lui sont fournies et qu'il y a lieu de rechercher un équilibre entre la confidentialité et les droits de la défense.*
*Elle ajoute que les chiffres relatifs à la situation de [la première demanderesse] ont été communiqués par elle-même et que ceux concernant les autres opérateurs bénéficient de la même confidentialité dont a bénéficié [la première demanderesse] à l'égard des siens, ce que [la première demanderesse] conteste.*