

IV. ANNOUNCEMENT OF APPEAL²

Case	N/A
Appellant:	PRISMA European Capacity Platform GmbH (Schillerstraße 4, 04109 Leipzig, Germany) /"PRISMA"/
Appeal received on	14 December 2018
Subject matter	Appeal against the Decision of the Agency for the Cooperation of Energy Regulators (Trg republike 3, 1000 Ljubljana, Slovenia) /"ACER"/ No 11/2018 of 16 October 2018 on establishing the capacity booking platform to be used at "Mallnow" interconnection point and "GCP" virtual interconnection point
Keywords	establishing the capacity booking platform to be used at "Mallnow" interconnection point and "GCP" virtual interconnection point, transparency, non-discrimination
Contested decision Number:	11/2018
Language of the case	English

Remedy sought by the Appellant


The Appellant requests the Board of Appeal to:

1. revise the Decision No 11/2018 of 16 October 2018 adopted by the Agency for the Cooperation of Energy Regulators on establishing the capacity booking platform to be used at "Mallnow" interconnection point and "GCP" virtual inter-connection point and establish PRISMA European Capacity Platform GmbH as capacity booking platform to be used at "Mallnow" interconnection point and "GCP" virtual interconnection point;

in eventu

2. annul the Decision No 11/2018 of 16 October 2018 adopted by the Agency for the Cooperation of Energy Regulators on establishing the capacity booking platform to be

² Announcement published in accordance with Article 9 of Decision BoA No1-2011 Laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of the Energy Regulators.

Date of Submission:	Name:	Signature
14 December 2018	Dr Christian Haellmigk	

used at "Mallnow" interconnection point and "GCP" virtual inter-connection point and remit the case to the competent body of the Agency for the Cooperation of Energy Regulators.

Furthermore, the Appellant requests the Board of Appeal to

3. order the Agency for the Cooperation of Energy Regulators to grant PRISMA European Capacity Platform GmbH the right to inspect the Agency for the Cooperation of Energy Regulators' files relating to the Decision No 11/2018 of 16 October 2018 in relation to the following information:
 - a) the quality criteria scores of the participating tenderers, in event, the quality criteria scores of only PRISMA European Capacity Platform GmbH; and
 - b) the assessment of each of the quality criteria related to the participating tenderers' offers, in event, the assessment of each of the quality criteria related to PRISMA European Capacity Platform GmbH's offer;

and to

4. suspend the application of the Decision No 11/2018 of 16 October 2018 adopted by the Agency for the Cooperation of Energy Regulators on establishing the capacity booking platform to be used at "Mallnow" interconnection point and "GCP" virtual inter-connection point.

Pleas in law and main arguments

The contested decision was adopted on 16 October 2018.

The Appellant contests the Agency's decision. The Appellant's claims and arguments can be summarized as follows:

In order to select a capacity booking platform to be used at "Mallnow" interconnection point and "GCP" virtual inter-connection point in accordance with Article 37(3) CAM NC, the Agency determined selection and award criteria to be fulfilled by the capacity booking platform operating the respective interconnection points. The Agency then invited three capacity booking platforms, Operator Gazociągów Systemowych GAZ-SYSTEM S.A. - acting as the GSA Platform /"GSA"/, FGSZ Natural Gas Transmission Closed Company Limited - acting as the Regional Booking Platform /"RBP"/ and PRISMA European Capacity Platform GmbH, to submit their offers and assessed the offers based on the above-mentioned selection and award criteria.

Both, the Agency's selection procedure and decision lack compliance with core principles of the Treaty on the Functioning of the European Union, in particular the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency. The

Date of Submission: 14 December 2018	Name: Dr Christian Haellmigk	Signature: 
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Agency's selection procedure and decision fail to provide a certain level of transparency and discriminate against the unsuccessful tenderers:

1. Failure to disclose the method of evaluation

The Agency failed to disclose the method of evaluation by not revealing how it would assess the degree of fulfilment of each of the award criteria and by only determining the scale of points after the tenderers submitted their offers and thereby violated the principle of transparency.

2. Failure to allocate weighting to sub-sub-criteria

The Agency failed to allocate the relative weighting to each sub-sub-criterion before the tenderers submitted their offers and thereby violated the principles of transparency and non-discrimination

3. Failure to provide evaluation benchmarks

The Agency failed to provide evaluation benchmarks for several sub-sub-criteria for the assessment of the performance of the tenderers and thus did not comply with the principle of transparency.

4. Failure to correctly implement the weighting rules

The Agency failed to correctly implement the weighting rules by choosing a scale of points that does not lead to the weighting of the price criterion and the quality criteria as announced in the Agency's offer letter.

5. Failure to correctly award points to GSA


The Agency failed to correctly award points to GSA and thereby discriminated the Appellant because GSA did not provide sufficient evidence or evidence of a level inferior to that of the Appellant.

6. Failure to correctly award points to the Appellant

The Agency failed to correctly award points to the Appellant as it did not consider all documentation submitted by the Appellant.

7. Discrimination of the Appellant by Article 5 of the Contested Decision

The Agency discriminated the Appellant by not imposing conditions and obligation on

Date of Submission: 14 December 2018	Name: Dr Christian Haellmigk	Signature: 
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GSA in relation to the implementation of a governance structure in Article 5 of the decision.

8. Violation of the right to inspect the Agency's files

The Agency violated the Appellant's rights to have access to its files by not disclosing the quality criteria scores of the participating tenderers and the assessment of each of the quality criteria related to the participating tenderers' offers.

Further information

More information on the appeal procedure can be found on the 'Appeals' section of the Agency's website:

http://www.acer.europa.eu/The_agency/Organisation/Board_of_Appeal/Pages/default.aspx

Date of Submission: 14 December 2018	Name: Dr Christian Haellmigk	Signature: 
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