

Announcement of appeal¹

Case	A-004-2017
Appellant:	Vorarlberger Übertragungsnetz GmbH (Gallusstraße 48, A-6900 Bregenz, Austria) /"VUEN"/
Appeal received on	17 January 2017
Subject matter	Appeal against the Decision of the Agency for the Cooperation of Energy Regulators (Trg republike 3, 1000 Ljubljana, Slovenia) /"ACER"/ No 06/2016 of November 17th 2016 on the Electricity Transmission System Operators Proposal for the Determination of Capacity Calculation Regions
Keywords	determination of capacity calculation regions, configuration of bidding zones, lack of competence
Contested decision	ACER Decision No 06/2016 of 17 November 2016
Language of the case	English

Remedy sought by the Appellant

The Appellant requests the Board of Appeal to:

- (1) to annul the following parts and provisions of the Decision of the Agency for the Cooperation of Energy Regulators No. 06/2016 of 17 November 2016 on the Electricity Transmission System Operators' proposal for the determination of the Capacity Calculation Regions:
 - i. Article 1 of the Decision in conjunction with
Annex I Article 1, para. 1 letter c;
the word "also" and the text block "for the purposes of capacity allocation on the affected bidding zone borders until the requirements described in Article 5(3) of this document are fulfilled" in Annex I Article 2, para. 2 letter e;
Annex I, Article 5, para. 1 letter s;
Annex I, Article 5, para. 3;
Annex I Map No 3;
 - ii. Article 2 of the Decision;
 - iii. Annex IV;
 - iv. Annex V;
 - v. Any other provisions of the Decision that explicitly or implicitly impose or recognize the introduction of a bidding zone border and capacity allocation on the DE-AT border;

¹ 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.

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In eventum

- (2) to take all evidence necessary to fully assess and appraise the facts of the case, especially technical expertise on the question whether or not the DE-AT interconnector is physically congested and whether or not there is a structural congestion within Germany and to replace the Decision of the Agency for the Cooperation of Energy Regulators No. 06/2016 of 17 November 2016 on the Electricity Transmission System Operators' proposal for the determination of the Capacity Calculation Regions by a decision on the merits of the case not stipulating the introduction of a bidding zone border between Austria and Germany or the introduction of a capacity allocation at the DE-AT border.

In eventum

- (3) to annul the Decision of the Agency for the Cooperation of Energy Regulators No. 06/2016 of 17 November 2016 on the Electricity Transmission System Operators' proposal for the determination of the Capacity Calculation Regions in its entirety and to remit the case back to the competent body of the Agency under the interpretative order that
- a) no bidding zone border between Austria and Germany may be introduced;
 - b) neither the Appellant nor other TSOs may be obliged to introduce capacity allocation on the DE-AT border.

Pleas in law and main arguments

VUEN considers the Opinion as neither complying with procedural rules nor with substantial rules of primary and secondary EU-law. This is due to the following reasons:

- A. ACER lacks the competence to introduce new bidding zone borders and capacity allocation

ACER has no competence to introduce new bidding zone borders or capacity allocation in a procedure for the determination of the CCR as specified in Article 15 of the CACM-Regulation, respectively in a decision based on Article 8(1) of the ACER-Regulation. Also the indication that the Decision may be revised as indicated in its Article 2 (which in itself is unlawful and appealed) may not make up for this lack of competence.

- B. The CCR-Decision violates Regulation (EC) 714/2009 and the CACM-Regulation in several respects:

1. ACER wrongfully applied the legal definition of "congestion". In fact the DE-AT interconnection is not congested and thus may not be subject to capacity allocation.
2. Splitting the common electricity market of Germany and Austria is diametrically opposed to the objectives pursued by Regulation (EC) No 714/2009 and violates the principle that internal congestions may not be shifted to national borders.
3. The Decision is factually incorrect and applies the statutory criteria for the creation of a new bidding zone border in a wrongful manner, especially due to the fact that
 - the DE-AT border is not structurally congested;
 - ACER does not consider alternative bidding zone borders;
 - less invasive technical measures would have been available;

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the Decision does not take into account future developments;

the Decision violates the specification that bidding zones shall be of permanent nature;

ACER misjudges the nature of loop flows.

C. The CCR-Decision violates European Union primary law:

1. The Decision violates the principle of proportionality because less intrusive but equally suitable measures were not considered and enacted.
2. The Decision violates the fundamental freedoms: The artificial separation of the joint Austrian-German electricity market results in quantitative restrictions on the trade in electricity between both countries. In this respect, the CCR decision violates the free movement of goods enshrined in Articles 34 and 35 TFEU. Furthermore, the limitations on transfer capacity resulting from the introduction of a bidding zone border and a capacity allocation mechanism unjustifiably impose restrictions on the Appellant's freedom to provide services (Article 56 TFEU).
3. The Decision violates EU-competition law: separating the joint German-Austrian electricity market by introducing a bidding zone and a CAM amounts to market splitting, which is in violation of Art 101 TFEU; the CCR decision is also unlawful for this reason.

D. In issuing the Decision, ACER has also violated the following procedural requirements:

1. In erroneously basing its decision on Article 15 of the CACM Regulation, ACER consequently followed the wrong procedure for the creation of new bidding zone borders and for the introduction of CAMs.
2. The application submitted by the Austrian regulator, E-Control, requesting that the All TSOs CCR Draft be amended was not dealt with in conformity with the procedure provided for under Article 9(12) of the CACM Regulation.
3. ACER exceeds its competence by declaring that the non-binding Opinion 09/2015 issued in September 2015 has binding effect. Further, as the Opinion that was declared binding did not form part of the consultation procedure, the Appellant's procedural rights were fundamentally violated.
4. ACER's file for the preparation of the CCR-Decision lacks technical studies, analyses and in-depth assessments. Either the Agency provided the Appellant with significantly incomplete information and, by doing so, violated the Appellant's right to full access to the case file according to Article 41 of the CFR. Or the Agency did not at all prepare and/or consult technical expertise and analyses in order to put its CCR-Decision on a factually sound basis (which would equally amount to a severe procedural error).
5. The Decision is based on facts that have not been sufficiently clarified since the Agency has in particular – but not only – failed to make observations as to

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where structural congestion exists in the joint German-Austrian market area and where this would have to be managed most efficiently;

to what extent loop flows take place and affect the German-Austrian border;

what effects current and pending measures relating to network expansion and improving network security have;

how much of the electricity flowing to Austria via other Member States subsequently continues to flow from there to Germany.

6. ACER insufficiently reasoned its Decision

Further information

The rules for the appeal procedure and other background information are available on the following section of the Agency's website:

http://www.acer.europa.eu/The_agency/Organisation/Board_of_Appeal/Pages/Rules-of-procedure.aspx