Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 16 January 2025 [1]

Joined Cases C-281/23 P and C-282/23 P

Polskie sieci elektroenergetyczne S.A.,
RTE Réseau de transport d'électricité,
Svenska kraftnät,
TenneT TSO BV
v

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

(Appeal – Internal market for electricity – Regulation (EU) 2019/942 – Board of Appeal of ACER – Intensity of the review of ACER decisions – Regulation (EU) 2017/2195 – Balancing electricity – Transmission system operators – Establishment of European platforms for the exchange of balancing energy – European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation (aFRR platform) – European platform for the exchange of balancing energy from frequency restoration reserves with manual activation (mFRR platform) – Development and approval of the implementation frameworks for the platforms – Functions required to operate the platforms – Cross-zonal capacity for the exchange of balancing energy – ACER decision rejecting the common proposal of the system operators)

1. In these appeals, various electricity transmission system operators ('TSOs') [2] are seeking to have two judgments of the General Court of 15 February 2023, *Austrian Power Grid and Others* v *ACER* [3] and *Austrian Power Grid and Others* v *ACER* [4] ('the judgments under appeal'), set aside.

[1] Original language: Spanish.

[2] The TSOs are responsible for the operation, maintenance and, where necessary, development of the transmission system in a particular zone, and also, where applicable, for its interconnections with other systems. They must ensure that the very high- and high-voltage interconnected system has the capacity to meet, long-term, a reasonable electricity transmission demand, for the purpose of supplying the electricity to end customers or distributors, but without including the supply.

[3] T-606/20, EU:T:2023:64.

[4] T-607/20, EU:T:2023:65.

2. By those judgments, the General Court dismissed the actions for annulment brought by certain TSOs against two decisions of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER), of 16 July 2020, confirming the validity of the following decisions of that agency:

– Decision No 02/2020 of 24 January 2020 on the Implementation framework for the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation ('the aFRR platform'); [5]

– Decision No 03/2020 of 24 January 2020 on the Implementation framework for the European platform for the exchange of balancing energy from frequency restoration reserves with manual activation ('the mFRR platform'). [6]

3. The appeals raise, in short, two questions, one of a more general nature and the other of an extremely technical nature. The appeals seek to clarify whether the General Court made errors of law:

– in adjudicating on the intensity of the review (full or limited) carried out by the Board of Appeal regarding ACER Decisions No 02/2020 and No 03/2020;

– in interpreting, on the one hand, Articles 20 and 21 and, on the other, Article 37 of Regulation (EU) 2017/2195, [7] which govern, respectively, the mFRR and aFRR platforms and 'cross-zonal capacity calculation'.

I. Legislative framework

A. Regulation 2017/2195

4. Article 20 ('European platform for the exchange of balancing energy from frequency restoration reserves with manual activation') states:

'1. By one year after entry into force of this Regulation, all TSOs shall develop a proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with manual activation.

2. The European platform for the exchange of balancing energy from frequency restoration reserves with manual activation, operated by TSOs or by means of an entity the TSOs would create themselves, shall be based on common governance principles and business processes and shall consist of at least the activation optimisation function and the TSO-TSO settlement function. This European platform shall apply a multilateral TSO-TSO model with common merit order lists to exchange all balancing energy bids from all standard products for frequency restoration reserves with manual activation, except for unavailable bids pursuant to Article 29(14).

[5] Case A-001-2020 (consolidated). The abbreviation aFRR relates to the English terms 'frequency restoration reserves with automatic activation'.

[6] Case A-002-2020 (consolidated). The abbreviation mFRR relates to the English terms 'frequency restoration reserves with manual activation'.

[7] Commission Regulation of 23 November 2017 establishing a guideline on electricity balancing (OJ 2017 L 312, p. 6).

3. The proposal in paragraph 1 shall include at least:

(a) the high level design of the European platform;

(b) the roadmap and timelines for the implementation of the European platform;

(c) the definition of the functions required to operate the European platform;

(d) the proposed rules concerning the governance and operation of the European platform, based on the principle of non-discrimination and ensuring equitable treatment of all member TSOs and that no TSO benefits from unjustified economic advantages through the participation in the functions of the European platform;

(e) the proposed designation of the entity or entities that will perform the functions defined in the proposal. ….

…

4. By six months after the approval of the proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with manual activation, all TSOs shall designate the proposed entity or entities entrusted with operating the European platform pursuant to paragraph 3(e).

5. By eighteen months after the approval of the proposal for the implementation framework for a European platform for the exchange of balancing energy from frequency restoration reserves with manual activation, all TSOs may develop a proposal for modification of the European platform for the exchange of balancing energy from frequency restoration reserves with manual activation pursuant to paragraph 1. Proposed modifications shall be supported by a cost-benefit analysis performed by all TSOs pursuant to Article 61. The proposal shall be notified to the Commission.

…'

5. Article 21 ('European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation') is worded in similar terms to Article 20.

6. Article 37 ('Cross-zonal capacity calculation') provides:

'1. After the intraday-cross-zonal gate closure time, TSOs shall continuously update the availability of cross-zonal capacity for the exchange of balancing energy or for operating the imbalance netting process. Cross-zonal capacity shall be updated every time a portion of cross-zonal capacity has been used or when cross-zonal capacity has been recalculated.

2. Before the implementation of the capacity calculation methodology pursuant to paragraph 3, TSOs shall use the cross-zonal capacity remaining after the intraday cross-zonal gate closure time.

3. By five years after entry into force of this Regulation, all TSOs of a capacity calculation region shall develop a methodology for cross-zonal capacity calculation within the balancing timeframe for the exchange of balancing energy or for operating the imbalance netting process. Such methodology shall avoid market distortions and shall be consistent with the cross-zonal capacity

calculation methodology applied in the intraday timeframe established under Regulation (EU) 2015/1222.'

B. Regulation (EU) 2019/942 [8]

7. Article 6 ('Tasks of ACER as regards the regulatory authorities') states, in paragraph 10 thereof:

'ACER shall be competent to adopt individual decisions on regulatory issues having effects on cross-border trade or cross-border system security which require a joint decision by at least two regulatory authorities, where such competences have been conferred on the regulatory authorities under one of the following legal acts:

(a) a legislative act of the Union adopted under the ordinary legislative procedure;

(b) network codes and guidelines adopted before 4 July 2019 and subsequent revisions of those network codes and guidelines; or

(c) network codes and guidelines adopted as implementing acts pursuant to Article 5 of Regulation (EU) No 182/2011.

ACER shall be competent to adopt individual decisions as specified in the first subparagraph in the following situations:

(a) where the competent regulatory authorities have not been able to reach an agreement within six months of referral of the case to the last of those regulatory authorities, or within four months in cases under Article 4(7) of this Regulation or under point (c) of Article 59(1) or point (f) of Article 62(1) of Directive (EU) 2019/944; or

(b) on the basis of a joint request from the competent regulatory authorities.

The competent regulatory authorities may jointly request that the period referred to in point (a) of the second subparagraph of this paragraph be extended by a period of up to six months, except in cases under Article 4(7) of this Regulation or under point (c) of Article 59(1) or point (f) of Article 62(1) of Directive (EU) 2019/944.

Where the competences to decide on cross-border issues referred to in the first subparagraph have been conferred on the regulatory authorities in new network codes or guidelines adopted as delegated acts after 4 July 2019, ACER shall only be competent on a voluntary basis pursuant to point (b) of the second subparagraph of this paragraph, upon a request from at least 60% of the competent regulatory authorities. Where only two regulatory authorities are involved, either one may refer the case to ACER.

By 31 October 2023, and every three years thereafter, the Commission shall submit a report to the European Parliament and to the Council on the possible need to further enhance ACER's involvement in solving cases of disagreement between regulatory authorities concerning joint

[8] Regulation of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (OJ 2019 L 158, p. 22).

decisions on matters for which the competences were conferred on those regulatory authorities by a delegated act after 4 July 2019. Where appropriate, the report shall be accompanied by a legislative proposal to modify such powers or to transfer the necessary powers to ACER.'

II. Background

8. Paragraphs 2 to 18 of the judgments under appeal set out the background to both disputes, which I summarise below.

9. Following the entry into force on 18 December 2017 of Regulation 2017/2195, all TSOs, in accordance with Article 20(1) of that regulation, drafted an mFRR methodology proposal and, in accordance with Article 21(1), an aFRR methodology proposal.

10. On 18 December 2018, the TSOs, in accordance with Article 5(1) and (2)(a) of Regulation 2017/2195, sent their proposals for the aFRR and mFRR methodologies to all the national regulatory authorities ('the NRAs') for approval.

11. ACER expressed its dissatisfaction with those initial proposals and the TSOs sent it a second and then a third proposal, containing certain changes.

12. On 18 December 2019, in response to ACER's email of 17 December 2019, the TSOs sent ACER an amended version of the third aFRR proposal and the third mFRR proposal. They confirmed that a single entity (a single TSO or a company owned by TSOs) would be responsible for performing the functions specifically required to operate the aFRR and mFRR platforms, namely activation optimisation and TSO-TSO settlement, and that, as regards the performance of the capacity management function, which was a cross-platform function, it could be entrusted to another single entity (a single TSO or a company owned by TSOs).

13. On 20 December 2019, ACER finalised its draft aFRR and mFRR methodology decisions, which were communicated to the TSOs.

14. On 24 January 2020, ACER adopted Decision No 02/2020, on the aFRR methodology, and Decision No 03/2020, on the mFRR methodology.

15. On 23 March 2020, pursuant to Article 28 of Regulation 2019/942, Austrian Power Grid, ČEPS, a.s., Polskie sieci elektroenergetyczne S.A., Red Eléctrica de España, S.A., RTE Réseau de transport d'électricité and Svenska kraftnät lodged an appeal with the Board of Appeal of ACER against Decision No 02/2020, which was initially registered under number A-001-2020. TenneT TSO BV and TenneT TSO GmbH lodged an appeal with the Board of Appeal of ACER against, inter alia, Decision No 02/2020, which was initially registered under number A-004-2020. Since those appeals had the same subject matter, the Board of Appeal subsequently grouped them under case number A-001-2020 (consolidated).

16. On 16 July 2020, the Board of Appeal confirmed Decision No 02/2020, dismissing the appeals in Case A-001-2020 (consolidated).

17. The same TSOs lodged two appeals with the Board of Appeal of ACER against Decision No 03/2020, on the mFRR methodology, which were subsequently grouped and registered under case number A-002-2020 (consolidated).

18. On 16 July 2020, the Board of Appeal confirmed Decision No 03/2020, dismissing the appeals in Case A-002-2020 (consolidated).

III. Procedure before the General Court

19. On 30 September 2020, various TSOs brought two actions for annulment against the decisions of the Board of Appeal of ACER of 16 July 2020, in Cases A-001-2020 and A-002-2020, confirming ACER Decisions No 02/2020 and No 03/2020.

20. On 15 February 2023, by the judgments under appeal, the General Court dismissed those actions for annulment.

IV. The appeals before the Court of Justice

21. The appellants (Polskie sieci elektroenergetyczne, RTE Réseau de transport d'électricité, Affärsverket Svenska kraftnät and TenneT TSO) claim that the Court should:

– set aside, either in whole or in part, the judgments under appeal;

– annul, either in whole or in part, the decisions of the Board of Appeal of ACER of 16 July 2020 in Cases A-001-2020 and A-002-2020;

– order ACER to pay the appellants' costs in respect of these appeals and the proceedings at first instance before the General Court.

22. ACER contends that the Court should:

– declare the appeals inadmissible, either in whole or in part, and, in any event, manifestly unfounded, with a view to dismissing them in their entirety;

– order the appellants to bear their own costs and to pay those of ACER in these proceedings.

23. In their appeals, the appellants put forward two grounds for setting aside the judgments under appeal:

– the General Court erred in concluding that the Board of Appeal of ACER had complied with its obligation to carry out a full review and not a review limited to the manifest errors in the ACER decisions in question;

– the General Court misapplied Articles 20, 21 and 37 of Regulation 2017/2195 in its assessment of the legal bases applicable to the operation of the aFRR and mFRR platforms. It settled the dispute in favour of the position of ACER and its Board of Appeal, with an interpretation which unduly favours the powers of ACER to the detriment of the TSOs and the NRAs.

24. Before analysing each of those grounds of appeal, I shall comment on the objections to the admissibility of the appeals.

V. Admissibility

25. ACER contends that the appeals are inadmissible because:

– the grounds of appeal repeat arguments already used by the TSOs before the General Court. They imply the re-examination of questions already decided by that court, which is not permissible on appeal; [9]

– with regard to the first ground, it lacks practical implications, because the legal disagreement relates to a footnote of the decision of the Board of Appeal, in which it states that it carried out a review, limited to manifest error, of the technical elements of the decision in question. The TSOs accept that, despite that, the Board of Appeal de facto carried out a full review. If that is the case, the ground of appeal would be hypothetical, it would lack practical implications and it would not yield any advantage for them. [10]

26. The twofold objection to admissibility should be dismissed.

27. Where an appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in an appeal. If an appeal could not be based on pleas in law and arguments already relied on before the General Court, it would be deprived of part of its purpose. [11] The Court has repeatedly held that an appeal may be lodged relying on grounds which arise from the judgment under appeal itself and seeking to criticise, in law, its correctness. [12]

28. That is what occurs in this case: in addressing their grounds for annulment, the appellants identify the (alleged) errors of law which the General Court made. Raising, on appeal, errors of law relating to questions of law already dealt with at first instance is, I repeat, consistent with the logic underlying an appeal.

29. With regard to the first ground of appeal, if it were upheld, it would result in the setting aside of the judgments and, where relevant, the annulment of the decisions of both the Board of Appeal and of ACER, which would have effects on the legal situation of the appellants. The appellants, therefore, have an interest in their first ground of appeal, which is not hypothetical, being accepted. Whether it should be accepted or not is something that may be decided only following consideration of the substance.

[9] Orders of 16 March 2021, *XH* v *Commission* (C-399/20 P, EU:C:2021:205, paragraph 21), and of 12 November 2020, *Lazarus* v *Commission* (C-85/20 P, EU:C:2020:912, paragraph 39).

[10] Judgments of 13 July 2023, *D & A Pharma* v *EMA* (C-136/22 P, EU:C:2023:572, paragraphs 43 to 45), and of 27 March 2019, *Canadian Solar Emea and Others* v *Council* (C-236/17 P, EU:C:2019:258, paragraph 92).

[11] Judgments of 12 September 2006, *Reynolds Tobacco and Others* v *Commission* (C-131/03 P, EU:C:2006:541, paragraph 51); of 16 May 2002, *ARAP and Others* v *Commission* (C-321/99 P, EU:C:2002:292, paragraph 49); and of 13 July 2000, *Salzgitter* v *Commission* (C-210/98 P, EU:C:2000:397, paragraph 43).

[12] Judgments of 26 February 2020, *EEAS* v *Alba Aguilera and Others* (C-427/18 P, EU:C:2020:109, paragraph 54), and of 6 September 2018, *Czech Republic* v *Commission* (C-4/17 P, EU:C:2018:678, paragraph 24).

VI. First ground of appeal: intensity of the Board of Appeal's review of the ACER decisions

A. Arguments of the parties

30. The appellants maintain that the General Court made an error of law in concluding that the Board of Appeal of ACER carried out a full review of the decisions in question.

31. In their opinion, the General Court makes that error by ignoring the assessment of the Board of Appeal itself regarding the intensity of the review which it carried out and in examining whether or not it was a full review. By acting in that way, the General Court does not adhere to the case-law of the Court of Justice established in the judgment in *ACER* v *Aquind*. [13]

32. ACER contests those arguments.

B. Assessment

33. In the judgment in *ACER* v *Aquind*, the Court held that the Board of Appeal of ACER must carry out a *full* review, not only of the legal assessments, but also of the complex assessments of a technical, scientific or economic nature made by ACER in its decisions. The Board of Appeal cannot confine itself to conducting a *limited* review that focuses solely on the existence of manifest errors of assessment. [14]

34. It is not necessary, at this time, to set out in greater detail the reasoning which led the Court to impose that type of review on the Board of Appeal of ACER, [15] after interpreting Articles 18 and 19 of Regulation (EC) No 713/2009. [16] The settled case-law in the judgment in *ACER* v *Aquind* is not at issue in these appeals.

35. When the Board of Appeal of ACER adopted the decisions at issue here (16 July 2020), the judgment in *ACER* v *Aquind* had not yet been given. At that time, the Board of Appeal adhered to its usual practice, that is, to a limited review of the complex assessments of a technical, scientific or economic nature. Its review was limited to establishing whether the ACER decisions contained manifest errors of assessment.

36. For the General Court, the decisions challenged [17] by the TSOs suggest 'that the Board of Appeal, in accordance with its decision-making practice at the time, carried out a full review only of ACER's legal assessments in [the ACER decisions], but confined itself to carrying out a review, limited to the search for manifest errors, of [ACER's] complex factual assessments of a technical nature, recognising in that respect a certain margin of appreciation on the part of ACER'. [18]

[13] Judgment of 9 March 2023, *ACER* v *Aquind* (C-46/21 P, EU:C:2023:182; 'the judgment in *ACER* v *Aquind*', paragraphs 53 to 74).

[14] In my Opinion in that case (C-46/21 P, EU:C:2022:695, points 36 to 78), I held the same view.

[15] Regarding the work of the Board of Appeal of ACER up to 2021, see Ollier, J. and Piebalgs, A., 'The appeal procedure in the application of the EU Energy Law. Experience from ACER's Board of Appeal 2016-2021', *Robert Schuman Center Policy Paper*, 2023/06.

[16] Regulation of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ 2009 L 211, p. 1).

[17] The General Court cites footnote 83 and paragraph 193 of the Board of Appeal decision relating to Decision No 03/2020, and footnote 81 and paragraph 192 of the Board of Appeal decision relating to Decision No 02/2020.

[18] Judgments under appeal, paragraph 200. In the correlative paragraphs (192 and 193) of its decisions, the Board of Appeal stated that, from a technical perspective, deciding whether the aFRR and mFRR platforms require the function at issue is a *complex technical question* on which ACER enjoys a margin of discretion and the Board of Appeal's *[review] is limited to assessing [whether there is] a manifest error of assessment*, in line with its earlier decision-making.

37. The General Court, however, stated that:

– '… the Board of Appeal essentially focused its review on legal assessments made by ACER in [the decisions in question], with respect to which it exercised a full review' (paragraph 203 of the judgments under appeal);

– '… in the rare cases where … it was called upon to review complex technical assessments, the Board of Appeal in practice carried out a review which went beyond a mere limited review, so that, de facto, it complied with its obligations as regards the intensity of the review it was required to carry out of [the ACER decisions]' (paragraph 204 of the judgments under appeal).

38. The approach of the General Court in these two actions for annulment contrasts with the approach taken by that court in Case T-735/18, [19] which is the subject of the judgment in *ACER* v *Aquind*.

39. In Case T-735/18, the General Court accepted an observation of the Board of Appeal of ACER similar to that transcribed here and did not proceed to verify whether the Board of Appeal had, de facto, carried out a full review of the complex technical assessments.

40. Even though, in the judgment in *ACER* v *Aquind*, the Agency argued that the Board of Appeal had, in fact, carried out a full review of the complex technical questions, the Court of Justice confirmed that the General Court had not erred in law, since it was expressly stated in paragraph 52 of the decision of the Board of Appeal that it intended to limit its review (of Decision No 05/2018) to a manifest error of assessment. [20]

41. Now, conversely, the General Court takes a different approach. Instead of assuming that, as the Board of Appeal itself stated, the Board of Appeal's review of the complex technical questions was limited, the General Court *delves* into the decisions at issue to establish whether the Board of Appeal did what it stated that it had not done.

42. Following that examination, the General Court concluded that the Board of Appeal had, de facto, carried out a full and unlimited review of the complex assessments of a technical nature made by ACER. In particular, it stated that the Board of Appeal had verified that the process of continuously updating the available cross-zonal transmission capacity, in a centralised or decentralised form, was a technically required function to operate the aFRR and mFRR platforms. [21]

43. In my opinion, the General Court makes an error of law by ignoring the declaration made by the Board of Appeal. If the latter acknowledges that, with regard to the complex technical questions, it carried out a limited and marginal review of the ACER decisions in question, I do not see how that declaration can be disregarded and replaced with its opposite.

[19] Judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, EU:T:2020:542).

[20] Judgment in *ACER* v *Aquind*, paragraphs 73 and 74.

[21] Paragraph 204 of the judgments under appeal.

44. As I suggested in my Opinion in *ACER* v *Aquind* [22] and as the Court of Justice confirmed in its judgment, [23] when the Board of Appeal states that it carried out a *limited review*, confined to an assessment of manifest errors in relation to complex technical questions, of the ACER decisions, the General Court must not verify whether 'in fact' the Board of Appeal carried out a *full review* of those questions.

45. Starting from that premiss, in the present case, the General Court should have accepted the declaration of the Board of Appeal, which is the body best qualified to know what type of review it has carried out in its own decisions.

46. If, as occurs here, the Board of Appeal states that it carried out a limited and marginal review, the General Court should, without further deliberation, annul the decisions of the Board of Appeal, applying the case-law in *ACER* v *Aquind*. Following that annulment, the Board of Appeal would have to prepare new decisions, carrying out a full review of the complex technical questions. [24]

47. Where, on the other hand, the Board of Appeal states in a decision that it has carried out a full review of the legal assessments and the complex technical assessments contained in an ACER decision, the General Court must analyse the extent of that review, if the applicants believe that it does not have the required scope or that it is insufficient. If it did not do so and accepted the assessment of the Board of Appeal, the General Court would infringe the applicants' right to an effective remedy.

48. In the light of the foregoing considerations, I propose that the first ground of appeal should be upheld.

VII. Second ground of appeal: the General Court misapplied Articles 20, 21 and 37 of Regulation 2017/2195 in its assessment of the legal bases for the functions required to operate the aFRR and mFRR platforms

49. In short, according to this ground of appeal, the General Court makes an error of law in holding that, under Regulation 2017/2195, the 'function of management of cross-zonal capacity for the exchange of balancing energy' is a function required to operate the aFRR and mFRR platforms.

50. The two competing views argue, from contrasting positions, that:

– that function must be performed by the European balance allocation platforms (the view of ACER, supported by the Board of Appeal and the General Court);

[22] Points 80 and 81.

[23] Judgment in *ACER* v *Aquind*, paragraph 74.

[24] The parties concerned would be able to question that new decision and dispute it by means of an action for annulment before the General Court, guaranteeing them their right to an effective remedy.

– that function is the competence of the TSOs (the view of the appellants, which is also that held by all of the TSOs before and after ACER Decisions No 02/2020 and No 03/2020). [25]

51. From a technical point of view, it is likely that assigning that function to the European balance allocation platforms would have been an advisable option. Nevertheless, for the reasons that I shall set out below, I do not believe that was the choice made by the EU legislature, reflected in Articles 20, 21 and 37 of Regulation 2017/2195.

52. The appellants claim that the General Court has misapplied Articles 20, 21 and 37 of Regulation 2017/2195, in its assessment of the legal bases for the functions required to operate the mFRR and aFRR platforms. In their view:

– the General Court erred in concluding that capacity management, as a coordinated and centralised process across platforms for the continuous updating of available cross-zonal transmission capacity, is a function required to operate the mFRR and aFRR platforms, within the meaning of Article 20(3)(c) and Article 21(3)(c) of Regulation 2017/2195;

– Article 37 of Regulation 2017/2195 requires the TSOs to manage cross-zonal capacity for the exchange of electricity, but it does not require that capacity to be included as a required function in the development of the mFRR and aFRR platforms. Those platforms are developed under different procedures, governed by Articles 20 and 21 of that regulation.

53. The appellants divide that ground of appeal into two closely related parts:

– the General Court made an error of law in holding that the cross-zonal capacity calculation, provided for in Article 37 of Regulation 2017/2195, should be regarded as a function required to operate the mFRR and aFRR platforms, provided for in Articles 20 and 21 of that regulation. With that reasoning, it would have extended the rules under Articles 20 and 21 to the function provided for in Article 37, which contains a different set of rules;

– the General Court made another error of law in interpreting Articles 20 and 21 of Regulation 2017/2195, confusing the legal obligations of the TSOs with the rights which the TSOs are able to exercise in relation to the functions of the mFRR and aFRR platforms.

54. ACER rejects those arguments.

55. Before analysing the two parts into which the appellants divide this second ground of appeal, I consider it useful, in view of its extremely technical nature, to explain the functioning of the electricity balancing market and of the European platforms created to support cross-border connections between national electricity balancing markets.

[25] That is acknowledged by the General Court in paragraphs 142 and 143 of the judgments under appeal, as far as the proposals of the TSOs prior to ACER Decisions No 02/2020 and No 03/2020 are concerned. The TSOs subsequently continued to hold that view, as ACER acknowledges in its Decision No 14/2022 of 30 September 2022, amending the implementation framework for the mFRR platform: 'The nature of the CMF [capacity management function] as a required function pursuant to Article 12(2) of ACER Decision [No] 03/2020 is currently the subject matter of actions for annulments in case T-607/20 pending before the General Court. In that regard the TSOs [transmission system operators] mentioned that their submission in the present proceedings is without prejudice to their position, recorded in their final proposal of 18 December 2019 underlying Decision No 03/2020 of 24 January 2020, that the CMF is not a required platform function and does not fall within the scope of Articles 20, 21 and 22 of the EB Regulation' (footnote 4).

A. Preliminary observations: electricity balancing markets and European platforms for the exchange of balancing energy

56. Given their physical characteristics, there are four types of wholesale electricity market, as set out in Articles 6 to 9 of Regulation (EU) 2019/943: [26]

– day-ahead markets, on which production can be planned and traded one day in advance;

– intraday markets, on which the planned demand can be adjusted with little notice, according to the changes which occur in the production of electricity, in particular, in view of the growing proportion of energy from renewable sources, such as wind and solar;

– forward markets, the aim of which is to mitigate the volatility of spot prices. On such markets, market participants, including the owners of installations generating electricity from renewable sources, are protected from the risks arising from that volatility;

– balancing markets, established to ensure that supply and demand within the grid are always matched and the risk of blackouts is neutralised. In order to achieve that objective, it is necessary to have markets on which the TSOs can purchase the energy necessary to keep the grid balanced [27] close to the time of physical delivery.

57. As far as that last type of market is concerned, Regulation 2017/2195 establishes 'an EU-wide set of technical, operational and market rules to govern the functioning of electricity balancing markets'. [28]

58. In particular, in order to contribute to the development of the European Union's internal market in electricity, the aim of Regulation 2017/2195 is that the allocation of energy from balancing markets, which was previously done only at national level, should progressively come to be done at European level, in accordance with the timeline provided for in that regulation.

59. To that end, Regulation 2017/2195 provides for four European balance allocation platforms, [29] for each of the defined standard balancing products: [30]

– the European platform for the exchange of balancing energy from replacement reserves, known as the RR platform (Replacement Reserves Platform). Provided for in Article 19 of Regulation

[26] Regulation of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ 2019 L 158, p. 54).

[27] In point 1 of Article 2 of Regulation 2017/2195, 'balancing' is defined as 'all actions and processes, on all timelines, through which TSOs ensure, in a continuous way, the maintenance of system frequency within a predefined stability range as set out in Article 127 of Regulation (EU) 2017/1485, and compliance with the amount of reserves needed with respect to the required quality, as set out in Part IV Title V, Title VI and Title VII of Regulation (EU) 2017/1485'. See Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation (OJ 2017 L 220, p. 1).

[28] Recital 5 of Regulation 2017/2195 adds that that regulation 'sets out rules for the procurement of balancing capacity, the activation of balancing energy and the financial settlement of balance responsible parties. It also requires the development of harmonised methodologies for the allocation of cross-zonal transmission capacity for balancing purposes. Such rules will increase the liquidity of short-term markets by allowing for more cross-border trade and for a more efficient use of the existing grid for the purposes of balancing energy. As balancing energy bids will compete on EU-wide balancing platforms, it will also have positive effects on competition.'

[29] Regarding those platforms, see the website of the European Network of Transmission System Operators for Electricity (ENTSO-E), https://www.entsoe.eu/network_codes/eb/#implement, and also the website of ACER, https://www.acer.europa.eu/electricity/market-rules/electricity-balancing/balancing-energy-platforms. See also the analysis by Gröper, F. and Stamati, M., 'Network regulation and third party access', in Jones, C. and Kettlewell, W.-J., (eds.), *EU Energy Law. Vol. I: The Internal Energy Market*, 5th ed., Claeys & Casteels, Deventer, 2021, pp. 38 to 41.

[30] The stage of development of those platforms may be viewed in ENTSO-E, *ENTSO-E Market Report 2023*, pp. 37 and 38, and 65 to 78, available at https://ee-public-nc-downloads.azureedge.net/strapi-test-assets/strapi-assets/ENTSO_E_Market_Report_2023_11a344f1c1.pdf.

2017/2195, it has been developed by the TSOs to perform the replacement reserves process pursuant to Part IV of Regulation 2017/1485.[31] This platform has been developed as part of the TERRE (Trans-European Replacement Reserves Exchange) project, based on the LIBRA solution, which is a common IT system.[32] The platform has been in operation since January 2020 and its functioning is established in the Replacement Reserve Implementation Framework;[33]

– the mFRR platform. Provided for in Article 20 of Regulation 2017/2195, it has been developed as part of the Manually Activated Reserves Initiative (MARI) project and was governed by ACER Decision No 03/2020. It has been in operation since 5 October 2022 and the TSOs of the Member States are joining it progressively;

– the aFRR platform. Provided for in Article 21 of Regulation 2017/2195, it has been developed as part of the PICASSO (Platform for the International Coordination of Automated Frequency Restoration and Stable System Operation) project and was governed by ACER Decision No 02/2020. It has been in operation since 1 June 2022 and the TSOs of the Member States are joining it progressively;

– the European platform for the imbalance netting process, known as the imbalance netting platform or IN platform. Provided for in Article 22 of Regulation 2017/2195, it was established on 24 June 2021 on the basis of the International Grid Control Cooperation project.[34] The TSOs have decided to use the same IT system and communication channels for the aFRR platform and the IN platform.

60. The TSOs have designated Amprion GmbH and TransnetBW GmbH as entities responsible for the development, maintenance and operation of the mFRR and aFRR/IN platforms.[35] As ACER noted at the hearing, the TSOs were to join the platforms, progressively, during a transition period up to 24 June 2024, but in practice there have been delays to that process.[36]

61. The difference between the mFRR and aFRR platforms resides, as their names suggest, in '… whether balancing energy is triggered manually by an operator or automatically in a closed-loop manner'.[37]

[31] https://www.entsoe.eu/network_codes/eb/terre/. Replacement reserves are intended to deal with imbalances between generation and consumption which may be identified after the close of the intraday market.

[32] Regarding this platform, see the Opinion of Advocate General Kokott in *Swissgrid* v *Commission* (C-121/23 P, EU:C:2024:615), a case in which judgment has not yet been given and which relates solely to the standing of the TSO Swissgrid to bring an action for annulment against a Commission letter preventing it from taking part in the platform.

[33] The development of this platform is specified in the Implementation framework for the exchange of balancing energy from Replacement Reserves in accordance with Article 19 of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing, of 10 March 2023. See the information about it at https://www.entsoe.eu/network_codes/eb/terre/.

[34] See the information on the European platform for operating the imbalance netting process at https://www.entsoe.eu/network_codes/eb/imbalance-netting/.

[35] ENTSO-E: Explanatory document of proposals for amendment of the implementation frameworks for the European balancing platforms in accordance with Articles 20(1), 21(1) and 22(1) of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing, 31 March 2022, p. 4.

[36] See the documents aFRR-Platform Accession roadmap, of 26 September 2024, available at PICASSO_12th_Accession_roadmap_ext.pdf (eepublicdownloads.blob.core.windows.net), and mFRR-Platform Accession roadmap, of 10 October 2024, available at MARI_Accession_roadmap_OCT_2024.pdf (eepublicdownloads.blob.core.windows.net).

[37] See point 34 of Article 2 of Regulation 2017/2195.

B. First part of the second ground of appeal: confusion between the legal obligations imposed, on the one hand, by Article 37 and, on the other, Articles 20 and 21 of Regulation 2017/2195

62. The appellants claim that the General Court erred in law by holding that the cross-zonal capacity calculation should be regarded as a function required to operate the mFRR and aFRR platforms. The General Court thus extended the rules laid down in Articles 20 and 21 of Regulation 2017/2195 to the function provided for in Article 37, which contains a different set of rules.

63. According to the General Court, the Board of Appeal concluded correctly that the capacity management function is another of the functions required to operate the aFRR and mFRR platforms. The reasoning of the General Court may be summarised as follows: [38]

– the proposals for methodologies submitted by the TSOs must include the definition of the functions required to operate the aFRR and mFRR platforms;

– Regulation 2017/2195 indicates that those platforms must include at least the activation optimisation function [39] and the TSO-TSO settlement function, but the possibility of them including other functions is not excluded;

– specifically, the 'cross-zonal capacity calculation' function is one of those required for the aFRR and mFRR platforms to operate. That is the case, in particular, where the addition of such a function is necessary to produce a high-level design of those platforms that reflects common governance principles and business processes;

– the interpretation of the concept of 'function required to operate the aFRR and mFRR platforms' must take the context and also the objectives pursued by Regulation 2017/2195 into account. According to those criteria, such functions are those which, both technically and legally, appear to be *necessary* for the efficient and safe establishment and operation of such platforms;

– legally, Article 37(1) of Regulation 2017/2195 requires TSOs to update the available cross-zonal capacity, on a continuous basis, for the purpose of balancing energy exchange or imbalance netting;

– technically, as is apparent from the proposals for aFRR and mFRR methodologies developed by the TSOs, the continuous updating of that capacity, which underlies the capacity management function, is an essential input to the activation optimisation function. The latter, in turn, is a required function of the platforms to optimise the activation of the highest-ranked balancing energy bids (in the common merit order list) taking into account the limited available cross-zonal capacity;

– moreover, the capacity management function has been added to the platforms by the TSOs themselves, in order for them to meet the requirements of a high-level design in terms of efficiency and safety required by Regulation 2017/2195.

[38] Paragraphs 110 to 124 of the judgments under appeal.

[39] According to point 39 of Article 2 of Regulation 2017/2195, the 'activation optimisation function' is 'the function of operating the algorithm applied to optimise the activation of balancing energy bids'.

64. Starting from those premises, the General Court concludes: '… the function allowing for the continuous calculation and updating of the available cross-zonal transmission capacity, following a methodology harmonised with regard to all TSOs, must be considered, with regard to the objective of ensuring the efficient and secure operation of the … platform pursued by Regulation 2017/2195, as being, from both a technical and a legal point of view, a function required to operate a platform the design of which, as recalled in Article 21(3)(a) [Article 20(3)(a)] of Regulation 2017/2195, must be of a high standard and comply with common governance principles and business processes'. [40]

65. That position is reiterated in similar terms in other passages of the judgments under appeal. In particular, paragraph 122 states that '… the function of continuously updating the available cross-zonal transmission capacity, which underlies the capacity management function, and hence the capacity management function itself, should be broadly qualified as functions required to operate the … platform.'

66. My interpretation of the relationships between Article 37 and Articles 20 and 21 of Regulation 2017/2195 differs from that of the General Court. I shall refer separately to Article 37, on the one hand, and Articles 20 and 21, on the other, in order to summarise my arguments regarding the combined interpretation of those provisions.

1. Article 37 of Regulation 2017/2195

67. Article 37 of Regulation 2017/2195 lays down the legal rules for the continuous updating of the availability of cross-zonal capacity. In accordance with those rules, Article 37 of Regulation 2017/2195:

– requires TSOs, after the intraday cross-zonal gate closure time, to update, continuously, the availability of cross-zonal capacity for the exchange of balancing energy or for operating the imbalance netting process (paragraph 1);

– requires that, by five years after entry into force of that regulation, all TSOs of a capacity calculation region should develop a methodology for cross-zonal capacity calculation within the balancing timeframe for exchange energy or for operating the imbalance netting process (paragraph 3);

– provides that, before the implementation of the capacity calculation methodology pursuant to paragraph 3, TSOs are to use the cross-zonal capacity remaining after the intraday cross-zonal gate closure time (paragraph 2).

68. The requirements of Article 37 of Regulation 2017/2195 are, then, directed at the TSOs and do not contain any reference to the European balance allocation platforms (Articles 19 to 22 of that regulation).

[40] Paragraph 115 of the judgments under appeal.

69. To my way of thinking, which is similar to that of the appellants, it is necessary to distinguish between the obligations imposed on the TSOs and the functions assigned to the platforms. Regulation 2017/2195 deals with the two matters, from a systematic point of view, in different places within the text:

– Articles 20 and 21, which govern the mFRR and aFRR platforms, are included in Chapter 2 ('European platforms for the exchange of balancing energy') of Title II ('Electricity balancing market');

– on the other hand, how the TSOs are to use (Article 36) and calculate (Article 37) cross-zonal capacity is governed by Chapter 1 ('Exchange of balancing energy or imbalance netting process') of Title IV ('Cross-zonal capacity for balancing services').

70. The distinction is not only reflected in terms of systematic location within Regulation 2017/2195. Reading Article 37, it is notable that it does not contain any reference or cross reference to Articles 20 and 21. In particular, it cannot be inferred from Article 37 that cross-zonal capacity management is *required* for the functioning of the mFRR and aFRR platforms. What those platforms need is the data relating to cross-zonal balancing energy capacity available to be exchanged between the TSOs, in order to put the activation optimisation function into operation.

71. The concept of 'functions required to operate the platform' is not included among the forty-five definitions provided in Article 2 of Regulation 2017/2195. That concept appears only in Articles 20 and 21 of that regulation, and its meaning must, therefore, be determined in accordance with those provisions.

2. Articles 20 and 21 of Regulation 2017/2195

72. The first paragraph of these two articles provides that the TSOs are to submit a proposal for the implementation frameworks for the mFRR and aFRR platforms. The second paragraph specifies the following characteristics of the two platforms: (i) they must be operated by a TSO or by means of an entity created by the TSOs themselves; (ii) they must be based on common governance principles and business processes; (iii) they must include at least the activation optimisation function and the TSO-TSO settlement function; (iv) they must apply a multilateral TSO-TSO model with common merit order lists to exchange all balancing energy bids from all standard products for frequency restoration reserves with (manual or automatic) activation.

73. The proposal submitted by the TSOs must comply with those platform characteristics and include at least the elements specified in Articles 20(3) and 21(3) of Regulation 2017/2195. Those elements include '(a) the high level design of the European platform' and '(c) the definition of the functions required to operate the European platform'.

74. Activation optimisation and TSO-TSO settlement *must* be among the functions of the mFRR and aFRR platforms. Both are, therefore, functions *required* to operate the mFRR and aFRR platforms. Equally, they must also be included, as such, in the proposals submitted by the TSOs.

75. The discussion has focused on the interpretation of the expression 'at least', in Articles 20(2) and 21(2) of Regulation 2017/2195. For the General Court, the reference in both provisions to the (minimum) functions of activation optimisation and TSO-TSO settlement does not prevent ACER requiring that the platforms should, under the same heading of *functions required*, include others apart from those two.

76. In my opinion, however, that interpretation is not correct. By regarding only two as essential ('required') for their functioning, the legislature intended to establish a minimum content for the platforms with regard to functions. Of course, there is nothing to prevent others being added, such as the cross-zonal capacity management function, but deciding whether or not to add them is the responsibility of the TSOs, and ACER has no power to require them to do so.

77. The appellant TSOs do not dispute the fact that the data relating to cross-zonal capacity are necessary for the effective functioning of the balancing platforms.[41] It cannot, however, be inferred from that premiss that the calculation of those data must be carried out – as a necessary function – by the entity designated to operate the platform or by the platform itself.

78. In fact, it is Article 37 of Regulation 2017/2195 that assigns the calculation of cross-zonal capacity to the TSOs (and not to the platforms). The process of calculating and updating the data relating to the availability of that capacity is the responsibility of the TSOs.

79. The fact that such data are essential for the correct functioning of the mFRR and aFRR platforms (about which there is no disagreement between the parties) does not, I repeat, mean that the cross-zonal capacity calculations or continuous updating thereof must mandatorily be entrusted to those platforms, by a decision of ACER. The calculation of cross-zonal capacity does not, I emphasise, necessarily have to be done as a *required* function of the platforms and by the entities entrusted with operating them.

80. The questions asked by the Court of Justice at the hearing highlighted the fact that Article 37 of Regulation 2017/2195 assigns the function of generating the data on cross-zonal capacity for the exchange of balancing energy and the continuous updating of those data to the TSOs, under the supervision of the NRAs. Only the TSOs have the technical means and are in a position to produce those data, and it is, therefore, not possible to transfer the function of generating those data to a platform's algorithm. Otherwise, the security of the electricity supply, for which the TSOs are responsible in their respective territories, could be put at risk.

81. In my opinion, therefore, it is incorrect to hold that the function of generating and updating the data relating to cross-zonal balancing energy must be regarded as one of the functions required to operate the mFRR and aFRR platforms. The two platforms cannot manage cross-zonal capacity for the exchange of balancing energy, nor the updating of that capacity, even though they require those data in order to operate. The TSOs are obliged to transmit such data to the platforms individually or, if they consider it more suitable, in a centralised manner by means of a common IT module.

[41] Paragraph 32 of their appeals.

3. Arguments in favour of upholding the first part of the second ground of appeal

82. In the first place, as the General Court acknowledged,[42] the mFRR and aFRR platforms initially operated without the cross-zonal capacity management function.

83. That situation came about because the TSOs, in accordance with Article 37(3) of Regulation 2017/2195, had to develop, beforehand, a methodology for calculating cross-zonal capacity within the balancing timeframe. The TSOs decided that that function would be performed by means of an IT module, in a coordinated and centralised manner across platforms, to which end they had to set up that module in advance and organise its management.[43]

84. In the second place, as I have already noted, Article 37 of Regulation 2017/2195 lays down legal rules for the continuous updating of the availability of cross-zonal capacity and for the establishment of a methodology for calculating that capacity. Those legal rules are distinct from the rules applicable to the four European balance allocation platforms (Articles 19 to 22 of that regulation). They are different sets of rules, which reflect the choice on the part of the legislature to give them autonomous content.

85. In the third place, the decision-making procedure applied to the establishment of the mFRR and aFRR platforms differs from that used in Article 37 of Regulation 2017/2195. According to Article 5(2) of that regulation, it is the responsibility of the regulatory authorities to approve the proposals submitted by the TSOs regarding: '(a) the frameworks for the establishment of the European platforms pursuant to Articles 20(1), 21(1) …'; and '(b) the modifications of the frameworks for the establishment of the European platforms pursuant to Articles 20(5) and 21(5)'. Accordingly, ACER, at the suggestion of the TSOs, decides on the implementation frameworks and their modifications in the case of the mFRR and aFRR/IN platforms.

86. Conversely, according to Article 5(3)(f) of Regulation 2017/2195, it is the responsibility of the TSOs to propose and the NRAs of the region concerned to approve the cross-zonal capacity calculation methodology for each capacity calculation region pursuant to Article 37(3).[44] Intervention by ACER is possible in such cases, where the NRAs cannot reach an agreement or they request that that agency should decide, in accordance with Article 5(7) of Regulation 2017/2195 and the second subparagraph of Article 6(10)(b) of Regulation 2019/942.

87. The usefulness and greater efficiency of including the management of cross-zonal capacity for the exchange of balancing energy in the European platforms does not, in my opinion, justify conferring an implicit competence on ACER to classify it as function required for the functioning of the mFRR and aFRR platforms. It is the TSOs which have the technical means to calculate and update the cross-zonal capacity and it is not clear that the mFRR and aFRR platforms are able to do that work with greater efficiency. That implicit competence would, moreover, be contrary to Article 37 of Regulation 2017/2195.[45]

[42] Judgments under appeal, paragraphs 120 and 121.

[43] An explanation of that module may be found in ENTSO-E, *ENTSO-E Market Report 2023*, pp. 78 and 79.

[44] See judgment of 7 September 2022, *BNetzA* v *ACER* (T-631/19, EU:T:2022:509, paragraphs 37 to 39).

[45] See judgments of the General Court of 24 October 2019, *E-Control* v *ACER* (T-332/17, EU:T:2019:761, paragraph 69), and of 25 September 2024, *RTE* v *ACER* (T-472/21, EU:T:2024:648, paragraph 194).

88. In the fourth place, Article 37(1) of Regulation 2017/2195 requires TSOs to update, continuously, the availability of cross-zonal capacity for the exchange of balancing energy. Therefore, it imposes on each TSO the obligation to manage exchange capacity, which is essential for the cross-zonal exchange of energy to be possible. Article 37 says nothing about that function being assigned to the European balance allocation platforms.

89. It may, then, be deduced from Article 37(1) of Regulation 2017/2195 that the information regarding the balancing energy available to be exchanged between zones is supplied by each TSO. As I have already said, it is the TSOs which have the technical means to provide the data relating to available cross-zonal balancing energy capacity. Article 37(2) further advances that argument by stating that the TSOs are to use the cross-zonal capacity remaining after the intraday cross-zonal gate closure time, until the capacity calculation methodology has been developed and implemented pursuant to paragraph 3 of that article.

90. In the fifth place, Article 37(3) of Regulation 2017/2195 provides for the progressive introduction of harmonised management of the function for the management of cross-zonal capacity for the exchange of balancing energy. Specifically, it provides that, within five years, all TSOs of a capacity calculation region are to develop a methodology for calculating the cross-zonal capacity for the exchange of balancing energy. It is, therefore, the TSOs which develop that methodology and the NRAs which approve it. It is also the TSOs which are required to ensure consistency with the cross-zonal capacity calculation methodology applied in the intraday timeframe established under Regulation (EU) 2015/1222. [46]

91. Contrary to what the General Court held, it does not seem logical to me that the cross-zonal capacity management function should be assigned to the European platforms and that, on the other hand, the development of the methodology for that cross-zonal capacity should be the responsibility of the TSOs and approving it that of the NRAs. There has to be consistency between paragraphs 1 and 3 of Article 37 of Regulation 2017/2195, which, in my opinion, the judgments under appeal do not reflect.

92. The General Court does not take proper account of the relationship between Article 37(3) of Regulation 2017/2195 and Regulation 2015/1222. As I have already mentioned, the first provision requires there to be consistency between the cross-zonal capacity calculation methodology, developed by the TSOs, for balancing energy and the cross-zonal capacity calculation methodology applied in the day-ahead and intraday timeframes. Article 15(1) of Regulation 2015/1222 provides that all TSOs are to develop, jointly, a common proposal regarding the determination of capacity calculation regions, while Article 20(2) of that regulation provides that all TSOs in each capacity calculation region are to submit a proposal for a common coordinated capacity calculation methodology within the respective region.

93. Consequently, Regulation 2015/1222 does not provide for a methodology for calculating cross-zonal capacity in the day-ahead and intraday timeframes that is common to all TSOs, [47] but rather various different regional methodologies. There is no reason why cross-zonal capacity for the exchange of balancing energy has to be calculated using a single harmonised methodology that is mandatory for all TSOs.

[46] Commission Regulation of 24 July 2015 establishing a guideline on capacity allocation and congestion management (OJ 2015 L 197, p. 24).

[47] Article 21(4) of Regulation 2015/1222 states that 'all TSOs in each capacity calculation region shall, as far as possible, use harmonised capacity calculation inputs.'

94. In the sixth place, the General Court's systematic and purposive interpretation of Regulation 2017/2195 is not a decisive basis for classifying the management of cross-zonal capacity for the exchange of balancing energy as a function required to operate the mFRR and aFRR platforms.

95. To achieve the objectives established by Regulation 2017/2195 in recitals 1, 6, 7 and 10 thereof, and also in Article 3 thereof, it is sufficient for the TSOs to supply the European platforms, adequately, with data relating to the cross-zonal capacity for the exchange of balancing energy.

96. The first part of the second ground of appeal should therefore be accepted.

C. Second part of the second ground of appeal: infringement of the legal obligations of the TSOs and the rights conferred on them by Articles 20 and 21 of Regulation 2017/2195

97. In the second part of the second ground of appeal, the appellants claim that the General Court made an error of law in failing to distinguish between the obligations incumbent on them, as TSOs, with regard to the functions 'required' to operate the mFRR and aFRR platforms, on the one hand, and their right to propose the inclusion of additional functions in those platforms, on the other. They submit that, contrary to what the Board of Appeal and the General Court have accepted, ACER cannot require them to include any additional function.

98. ACER rejects that argument and contends that the interpretation set out in the judgments under appeal is legally correct.

99. The starting points for the General Court's position include the following:

– '… the revised third mFRRIF [aFRRIF] proposal, taken into account by ACER lastly, provided for the designation of a single entity in charge of the two functions required to operate the mFRR [aFRR] platform within the meaning of Article 20(3)(c) of Regulation 2017/2195, which were expressly referred to in Article 20(2) [Article 21(2)] of that regulation, namely activation optimisation and TSO-TSO settlement. Capacity management was also taken into account in the third mFRRIF [aFRRIF] proposal as a cross-platform function, the performance of which was required to operate the mFRR [aFRR] platform, even though it had not been qualified in the mFRR [aFRR] platform as a function required to operate the mFRR [aFRR] platform within the meaning of Article 20(3)(c) [Article 21(3)(c)] of Regulation 2017/2195';[48]

– '… the TSOs themselves had proposed in the revised third mFRRIF [aFRRIF] proposal, for reasons of improving coordination between balancing platforms, to designate a single entity to perform capacity management as a cross-platform function. Admittedly, unlike ACER, the TSOs had argued that capacity management was not a function required to operate each platform'.[49]

100. The General court confirms, in short, the decision of the Board of Appeal, which, in turn, upholds the ACER decisions opposing the position of the TSOs. It states that the management of cross-zonal capacity, provided for in Article 37 of Regulation 2017/2195, should be 'broadly qualified'[50] as a function required to operate the mFRR and aFRR platforms.

[48] Paragraph 135 of the judgments under appeal.

[49] Paragraph 143 of the judgments under appeal.

[50] Paragraph 122 of the judgments under appeal.

101. In my opinion, after noting that the content of this part of the second ground of appeal overlaps, to a great extent, with that of the first, the error of law made in the judgments under appeal resides, once again, in the failure to appreciate that the functions required, as a prerequisite under Articles 20 and 21 of Regulation 2017/2195, for the establishment of the mFRR and aFRR platforms are, as those provisions indicate, those of activation optimisation and TSO-TSO settlement.

102. The function of the management and continuous updating of the available cross-zonal capacity is not, I repeat, a function *required* for the functioning of the balancing platforms, but rather it is governed by a different set of rules, as laid down in Article 37 of Regulation 2017/2195.

103. By assigning the function of the management and continuous updating of cross-zonal capacity to the mFRR and aFRR platforms, contrary to the position of the TSOs, ACER essentially deprives the TSOs and NRAs of the right conferred on them by Article 37 of Regulation 2017/2195. They are thus deprived of their ability to decide, jointly, on the best way of managing that function, which, according to their proposal, was to designate a single entity to be in charge of managing capacity as a cross-platform function.

104. In the proposals submitted to ACER for the mFRR and aFRR platforms, the TSOs agreed that the capacity management function was, in fact, a cross-platform function which all such platforms would have to perform in a coordinated and centralised manner. The calculation of the cross-zonal capacity would be handled, for all the TSOs concerned, by an 'IT capacity management module' which would feed the results obtained directly into the activation optimisation function of those platforms.

105. The TSOs indicated in their proposals that they wished to retain the freedom to entrust capacity management, in a coordinated and centralised form, to an entity other than the single entity in charge of performing activation optimisation and TSO-TSO settlement. Until the capacity management function in such a coordinated and centralised form was in place, the TSOs considered that, in theory, the single entity in charge of performing activation optimisation and TSO-TSO settlement could also perform capacity management, by feeding the data that would be provided by each of the TSOs concerned into the activation optimisation function. [51]

106. As I have already set out, it is not disputed that the mFRR and aFRR platforms need the data relating to cross-zonal capacity for the exchange of balancing energy. However, those data may be supplied to the platforms by the TSOs and do not necessarily need to be managed on those platforms directly.

107. There is nothing to prevent the TSOs deciding, by common agreement, to propose the inclusion of capacity management in the mFRR and aFRR platforms, as an additional function, if that would result in greater efficiency. However, it is a decision which, according Article 37 of Regulation 2017/2195, falls within their competence and that of the NRAs, and which cannot be imposed on them by ACER under Articles 20 and 21 of that regulation.

108. The second part of the second ground of appeal should, therefore, be upheld.

[51] See judgments under appeal, paragraphs 118 and 119.

VIII. Decision in the actions for annulment before the General Court

109. Under Article 61(1) of the Statute of the Court of Justice, if the appeal is well founded, the Court of Justice must quash the decision of the General Court. In such a case, it may itself give final judgment in the matter, where the state of the proceedings so permits.

110. I propose that the Court of Justice should uphold the appeals of the TSOs and, consequently, set aside the judgments under appeal. A partial setting aside of the judgments under appeal does not seem possible to me, because the paragraphs vitiated by errors of law are crucial to those judgments. They should, therefore, be set aside in their entirety.

111. I believe, moreover, that the Court of Justice is in possession of the information necessary to give final judgment in the actions for annulment brought against the decisions at issue before the General Court.

112. For the reasons set out above, the third plea in law raised before the General Court, regarding the Board of Appeal's failure to comply with its obligation to carry out a full review of the ACER decisions, should be upheld, together with the fourth to eighth parts of the second plea in law. Accordingly, the two decisions at issue of the Board of Appeal of ACER should be annulled in their entirety.

IX. Costs

113. In accordance with Article 184(2) of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

114. In accordance with Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

115. The appellants have applied for an order for costs to be made against ACER. If, as I propose, the appeals are upheld, ACER should be ordered to pay the costs of the appeals and of the proceedings at first instance before the General Court.

X. Conclusion

116. In the light of the foregoing, I propose that the Court should:

– uphold the appeals and set aside the judgments of the General Court of 15 February 2023, *Austrian Power Grid and Others* v *ACER* (T-606/20, EU:T:2023:64), and *Austrian Power Grid and Others* v *ACER* (T-607/20, EU:T:2023:65);

– annul the decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 16 July 2020 confirming ACER Decision No 02/2020 of 24 January 2020 on the Implementation framework for the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation and rejecting the appeal brought by the electricity transmission system operators against that decision in Case A-001-2020 (consolidated);

– annul the decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 16 July 2020 confirming ACER Decision No 03/2020 of 24 January 2020 on the Implementation framework for the European platform for the exchange of balancing energy from frequency restoration reserves with manual activation and rejecting the appeal brought by the electricity transmission system operators against that decision in Case A-002-2020 (consolidated);

– order the European Union Agency for the Cooperation of Energy Regulators (ACER) to pay the costs.