Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

8 October 2025*

(Energy – Internal market for electricity – Guideline on electricity balancing – Article 1(6) and (7) of Regulation (EU) 2017/2195 – European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation – Non-participation of the Swiss Transmission System Operator – Appeal brought before the ACER Board of Appeal – Specific conditions and arrangements for appeals – Article 28 of Regulation (EU) 2019/942 – Inadmissibility for lack of standing to bring proceedings before the Board of Appeal – Lack of direct concern – Plea of illegality)

In Case T-558/23,

Swissgrid AG, established in Aarau (Switzerland), represented by P. De Baere, P. L'Ecluse, K. T'Syen, V. Lefever and V. Ion, lawyers,

applicant,

v

European Union Agency for the Cooperation of Energy Regulators (ACER), represented by P. Martinet and E. Tremmel, acting as Agents, and by B. Creve and T. Kölsch, lawyers,

defendant,

supported by

European Commission, represented by O. Beynet, T. Scharf, B. De Meester and C. Hödlmayr, acting as Agents,

intervener,

THE GENERAL COURT (Third Chamber, Extended Composition),

composed, at the time of the deliberations, of P. Škvařilová-Pelzl, President, I. Nõmm (Rapporteur), G. Steinfatt, D. Kukovec and R. Meyer, Judges,

Registrar: I. Kurme, Administrator,

having regard to the written part of the procedure,

* Language of the case: English.

further to the hearing on 12 March 2025,

gives the following

Judgment

1 By its action under Article 263 TFEU, the applicant, Swissgrid AG, seeks the annulment of Decision A-008-2022 of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 29 June 2023 dismissing as inadmissible the appeal against ACER's Decision 15/2022 of 30 September 2022 ('the contested decision').

Background to the dispute

2 The applicant, a public limited liability company incorporated under Swiss law, is Switzerland's sole electricity transmission system operator ('TSO').

3 In 2018, the applicant and other TSOs entered into a memorandum of understanding formalising the terms of their participation in the project aimed at establishing a Platform for the International Coordination of Automated Frequency Restoration and Stable System Operation ('Picasso').

4 On the basis of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ 2009 L 211, p. 15), the European Commission adopted Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (OJ 2017 L 312, p. 6), which provides for the establishment of common European platforms for operating the imbalance netting process and enabling the exchange of balancing energy from frequency restoration reserves and replacement reserves (recital 10) and in particular, in Article 20, a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation.

5 On 24 June 2020, ACER adopted Decision 02/2020 on the creation of a European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation ('the aFRR Platform'), including, in the annex to that decision, the framework for implementing the aFRR Platform ('the Implementation Framework').

6 Article 2(1)(l) of the Implementation Framework defined the concept of 'member TSO' as 'any TSO which has joined the aFRR platform', and Article 2(1)(m) defined the concept of 'participating TSO' as 'any member TSO using the aFRR Platform in order to exchange standard aFRR balancing energy products'.

7 Article 2(1)(n) of the Implementation Framework stated that Picasso 'is the implementation project that shall evolve into the aFRR Platform', and Article 5(2) thereof provided that 'all member TSOs shall establish the aFRR Platform implementation project, which shall be based on the implementation project Picasso that shall be transformed into the aFRR Platform implementation project after the approval of this aFRR Implementation Framework'.

8 On 1 July 2020, the member TSOs of Picasso, including the applicant, entered into the Picasso platform cooperation agreement ('the Picasso Cooperation Agreement'), which superseded the previous memorandum of understanding. That cooperation agreement is subordinated to a principal agreement regarding the balancing platforms which is common to all the platforms and also entered into force on 1 July 2020 ('the Principal Agreement').

9 By letter of 17 December 2020, the Director of the Commission's Directorate-General for Energy stated that she did not see grounds for adopting a decision which would allow Swiss participation in the European balancing platforms under Article 1(7) of Regulation 2017/2195. The applicant brought an action against that letter, which was dismissed as inadmissible by order of 21 December 2022, *Swissgrid* v *Commission* (T-127/21, not published, EU:T:2022:868). That order was set aside by judgment of 13 February 2025, *Swissgrid* v *Commission* (C-121/23 P, EU:C:2025:83).

10 On 31 March 2022, in accordance with Article 17 of the Implementation Framework, the European Network of Transmission System Operators for Electricity ('ENTSO-E') submitted to ACER a proposal for amendments to that Implementation Framework as regards the designation of the entities that would perform the functions defined therein.

11 On 30 September 2022, ACER adopted Decision 15/2022 amending the Implementation Framework. Article 1(b) of Annex I to that decision amended the definition of 'member TSO' now set out in Article 2(1)(m) of the Implementation Framework so that it now refers to 'any TSO to which [Regulation 2017/2195] applies and which has joined the aFRR Platform, including TSOs from multi-TSO [load-frequency control] areas'.

12 On 30 November 2022, the applicant lodged an appeal against that decision with the Board of Appeal of ACER.

13 By the contested decision, the Board of Appeal held that Decision 15/2022 did not constitute an act capable of affecting the applicant's legal position with the result that there was no further need to examine whether that decision was of direct and individual concern to the applicant within the meaning of Article 28(1) of Regulation (EU) 2019/942 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) and accordingly dismissed its appeal as inadmissible. The Board of Appeal:

– recalled that the admissibility of appeals under Article 28(1) of Regulation 2019/942 had to be examined in the light of the case-law on Article 263 TFEU and deduced that it was necessary to determine whether Decision 15/2022 produced binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in its legal position;

– held that it followed from Regulation 2017/2195 that only TSOs subject to EU law were authorised to participate in the platforms coming within its scope (with the exception of Swiss TSOs in respect of European platforms for the exchange of standard products for balancing energy and provided that the Commission had adopted a decision to that effect under Article 1(7) of that regulation);

– concluded from the above that, in the absence of a decision adopted by the Commission under Article 1(7) of Regulation 2017/2195, Decision 15/2022 simply applied Article 1 of Regulation

2017/2195 and the applicant's participation was dependent not on a decision of ACER but of the Commission;

– rejected the applicant's line of argument that it had been a member of the aFRR Platform prior to Decision 15/2022, pointing out that it had never been admitted as a member of that platform, that it was not an addressee of Decision 03/2020, that Regulation 2017/2195 had been applicable since 18 December 2017, and that Article 1 of that regulation had not been amended.

Forms of order sought

14 The applicant claims that the Court should:

– annul the contested decision;

– order ACER to pay the costs.

15 ACER contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

16 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

17 The applicant puts forward three pleas in law in support of its action.

18 The first plea alleges an error of law in that the Board of Appeal was wrong to interpret Regulation 2017/2195 as requiring the Commission to have adopted a decision under Article 1(7) of Regulation 2017/2195 in order for the applicant to be able to participate in the aFRR Platform.

19 The second plea alleges an error of assessment in the application of Article 28(1) of Regulation 2019/942 to the circumstances of the present case. The applicant argues that the Board of Appeal erred in finding that the appeal against Decision 15/2022 was inadmissible.

20 By its third plea, submitted in the alternative, the applicant raises a plea of illegality under Article 277 TFEU in respect of Regulation 2017/2195, in the event that that regulation should be interpreted as prohibiting EU TSOs from including it in the aFRR Platform.

The first plea, alleging an error of law in the interpretation of Regulation 2017/2195

21 The applicant criticises the Board of Appeal for having found that its participation in the aFRR Platform was possible only after the adoption of a Commission decision to that effect under Article 1(7) of Regulation 2017/2195 and that the Commission had not adopted such a decision. It submits, in essence, that the Board of Appeal should have found that its participation in that platform was possible since (i) the conditions for its participation set out in Article 1(6) had been satisfied due to the risks that excluding it from participating would pose to system security; (ii) the grounds relied on by the Commission in the letter of 17 December 2020 to refuse to authorise such participation were erroneous; (iii) the Board of Appeal must have the prerogative to verify whether the conditions for that participation are satisfied; and (iv) the order of 21 December 2022, *Swissgrid* v *Commission* (T-127/21, not published, EU:T:2022:868), dismissing as inadmissible its application for annulment brought against the letter of 17 December 2020 is not relevant. In that regard, the applicant recalled at the hearing that that order had been set aside by judgment of 13 February 2025, *Swissgrid* v *Commission* (C-121/23 P, EU:C:2025:83).

22 ACER and the Commission contend that the Board of Appeal did not err in law as alleged. ACER also argues that the applicant's line of argument submitted for the first time in the reply is inadmissible.

23 At the outset, it is necessary to reject the plea of inadmissibility raised by ACER alleging that the line of argument submitted by the applicant in its reply is inadmissible on the ground that it amounted to the submission of a new plea out of time.

24 According to Article 84(1) of the Rules of Procedure of the General Court, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a plea which constitutes an amplification of a plea previously made, either expressly or by implication, in the original application and is closely linked to it must be declared admissible. To be regarded as amplifying a plea or a head of claim previously advanced, a new line of argument must present a sufficiently close connection with the pleas or heads of claim initially set out in the application in order to be considered as forming part of the normal evolution of debate in proceedings before the Court (see judgment of 20 November 2017, *Petrov and Others* v *Parliament*, T-452/15, EU:T:2017:822, paragraph 46 and the case-law cited).

25 It is clear that, in its application, the applicant submitted, in essence, that the Board of Appeal could not rely on the fact that no decision authorising its participation in the aFRR Platform had been adopted. Therefore, by arguing, in its reply, that the Board of Appeal should have examined the substance of the Commission's position vis-à-vis its participation or, at the very least, examined whether the conditions for such participation had been satisfied, the applicant was merely developing the line of argument set out in its application.

26 Article 1 of Regulation 2017/2195, headed 'Subject matter and scope', provides in paragraph 6 that 'the European platforms for the exchange of standard products for balancing energy may be opened to TSOs operating in Switzerland on the condition that its national law implements the main provisions of Union electricity market legislation and that there is an intergovernmental agreement on electricity cooperation between the Union and Switzerland, or if the exclusion of Switzerland may lead to unscheduled physical power flows via Switzerland endangering the system security of the region.'

27 Article 1(7) of Regulation 2017/2195 provides that 'subject to the conditions of paragraph 6, the participation of Switzerland in the European platforms for the exchange of standard products for balancing energy shall be decided by the Commission based on an opinion given by [ACER] and all TSOs in accordance with the procedures set out in paragraph 3 of Article 4[; t]he rights and responsibilities of Swiss TSOs shall be consistent with the rights and responsibilities of TSOs operating in the Union, allowing for a smooth functioning of balancing market at Union level and a level-playing field for all stakeholders.'

28 In accordance with settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also its context and the objectives pursued by the rules of which it is part (see judgment of 14 March 2024, *VR Bank Ravensburg-Weingarten*, C-536/22, EU:C:2024:234, paragraph 35 and the case-law cited).

29 It is clear that it follows from both a textual and a contextual interpretation of Regulation 2017/2195 that, while Article 1(6) of that regulation sets out the situations in which Swiss TSOs may be authorised to participate in the European platforms for the exchange of standard products for balancing energy, including where there is the possibility of unscheduled physical power flows via Switzerland endangering the system security of the region, Article 1(7) lays down the procedure to be followed in order to be granted such authorisation.

30 In that regard, the wording of Article 1(7) of Regulation 2017/2195 is clear. It follows that while ACER and EU TSOs are called upon to give their opinion, it is the Commission that has decision-making power and that, when exercising that power, it not only takes into account the impact on system security, but also verifies that the rights and responsibilities of Swiss TSOs are consistent with those of EU TSOs.

31 It follows, in the first place, that the Board of Appeal was entitled to find that, in the absence of a Commission decision under Article 1(7) of Regulation 2017/2195, the applicant was not entitled to participate in the aFRR Platform, since it is common ground, first, that that platform comes within the concept of a 'European platform for the exchange of standard products for balancing energy' used in Article 1(7) of Regulation 2017/2195 and, second, that no Commission decision to that effect has been adopted.

32 In the second place and consequently, since it follows from Article 1(6) and (7) of Regulation 2017/2195 that it is for the Commission to adopt a decision on Switzerland's participation in the platforms and, in that context, to examine whether the conditions laid down in Article 1(6) of that regulation are satisfied, the applicant is wrong to criticise the Board of Appeal for not having examined whether those conditions were satisfied or whether the Commission should have adopted a decision under Article 1(7) of that regulation.

33 Similarly, it must be stated that the applicant's criticisms of the assessments set out in the letter of 17 December 2020 concerning the impact on system security resulting from its non-participation in the aFRR Platform, and the reference to the judgment of 13 February 2025, *Swissgrid* v *Commission* (C-121/23 P, EU:C:2025:83), setting aside the order of 21 December 2022, *Swissgrid* v *Commission* (T-127/21, not published, EU:T:2022:868), which had declared the applicant's action for annulment against that letter as being inadmissible, are irrelevant.

34 Even if, following the resumption of the proceedings in Case T-127/21, the General Court were to annul any refusal decision contained in the letter of 17 December 2020, such annulment would not produce effects equivalent to the adoption of a Commission decision authorising

Switzerland's participation in the aFRR Platform under Article 1(7) of Regulation 2017/2195. Pursuant to the first paragraph of Article 264 TFEU, the effects of annulment would be limited to retroactively removing that decision from the legal order. The parties would thus find themselves in the situation they were in prior to 17 December 2020, a situation characterised by the absence of a Commission decision authorising Switzerland's participation under Article 1(7) of Regulation 2017/2195.

35 In the third place, the applicant's reference to the need for ACER and the Board of Appeal to be able to examine whether the conditions for its participation in the aFRR Platform were satisfied, in order to avoid a 'grave gap in EU judicial protection', likewise cannot succeed.

36 By that line of argument, the applicant is essentially submitting that there is a lacuna in the judicial review of Article 1(6) and (7) of Regulation 2017/2195, which is contrary to a European Union based on the rule of law, its institutions, bodies, offices and agencies being subject to review of the conformity of their acts, inter alia, with the Treaty and the general principles of law (judgment of 23 April 1986, *Les Verts* v *Parliament*, 294/83, EU:C:1986:166, paragraph 23; see also judgment of 26 June 2012, *Poland* v *Commission*, C-336/09 P, EU:C:2012:386, paragraph 36 and the case-law cited).

37 In that regard, in so far as it is for the Commission to take the decision provided for in Article 1(7) of Regulation 2017/2195, it is open to the applicant, should it take the view that the Commission is wrongly refusing to adopt such a decision, to avail itself of the legal remedy provided for in Article 265 TFEU, which relates to a failure to act in the sense of a failure to take a decision or to define a position (judgment of 13 July 1971, *Deutscher Komponistenverband* v *Commission*, 8/71, EU:C:1971:82, paragraph 2; see also judgment of 19 November 2013, *Commission* v *Council*, C-196/12, EU:C:2013:753, paragraph 22 and the case-law cited).

38 Accordingly, the first plea must be rejected.

The second plea, alleging an error of assessment in the application of Article 28(1) of Regulation 2019/942 to the circumstances of the present case

39 The applicant submits that the Board of Appeal infringed Article 28(1) of Regulation 2019/942 in finding that Decision 15/2022 did not bring about a distinct change in its legal position. In the first part of the present plea, the applicant claims that the Board of Appeal failed to take into account the addition by Decision 15/2022 of a supplementary condition to its participation in the aFRR Platform, as compared to the Implementation Framework as it resulted from Decision 03/2020, since it is no longer sufficient for the applicant to obtain a decision under Article 1(7) of Regulation 2017/2195 authorising its participation; it is also necessary for it to be subject to EU law. In the second part of the present plea, the applicant submits that the Board of Appeal erred in not taking into account the effects of Decision 15/2022 on the contracts to which it is a party.

40 ACER, supported by the Commission, contends that the Board of Appeal did not infringe Article 28(1) of Regulation 2019/942. ACER also argues that the second part of the present plea is inadmissible.

41 In paragraphs 62 to 67 of the contested decision, the Board of Appeal concluded that Decision 15/2022 did not produce binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in its legal position on the grounds that (i) the applicant's legal position was not determined by Decision 15/2022, but by Regulation 2017/2195; (ii) in so far as

the applicant was not entitled to participate in the aFRR Platform under Decision 03/2020, it could not be held that Decision 15/2022 was of direct and individual concern to it; and (iii) the applicant's historical participation in platform projects or related contracts was irrelevant.

42 Article 28 of Regulation 2019/942, headed 'Decisions subject to appeal', states, in paragraph 1 thereof, that any 'natural or legal person, including the regulatory authorities, may appeal against a decision referred to in point (d) of Article 2 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'.

43 Since that provision is modelled on that relating to actions for annulment before the Court of Justice and, more specifically, on the first part of the fourth paragraph of Article 263 TFEU, it must be interpreted in the light of the case-law on the latter provision.

44 In that regard, it should be borne in mind, first, that where an action for annulment is brought by a natural or legal person, the action lies only if the binding legal effects of the contested act are capable of affecting the interests of the applicant by bringing about a distinct change in the applicant's legal position. Second, as regards, more specifically, an action for annulment brought against an act that has not been addressed to the applicant, that requirement overlaps with the conditions laid down in the fourth paragraph of Article 263 TFEU, according to which the contested act must be of direct and individual concern to the applicant (see, to that effect, judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraphs 37 and 38).

45 As regards the condition of direct concern, it is settled case-law that the condition that the act against which the action is brought must be of direct concern to a natural or legal person requires that act to affect directly the legal situation of that person and leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting solely from EU rules without the application of other intermediate rules (see judgment of 13 March 2008, *Commission* v *Infront WM*, C-125/06 P, EU:C:2008:159, paragraph 47 and the case-law cited).

46 As regards individual concern, in accordance with settled case-law, a natural or legal person other than the person to whom an act is addressed may claim to be individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, only if the act in question affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of these factors, distinguishes them individually just as in the case of the person addressed (judgment of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 223; see also judgment of 27 February 2014, *Stichting Woonlinie and Others* v *Commission*, C-133/12 P, EU:C:2014:105, paragraph 44 and the case-law cited).

47 It is in the light of those considerations that the two parts of the plea are to be examined.

The first part of the plea

48 By the first part, the applicant submits that Decision 15/2022 imposed a further condition to its participation, in addition to that requiring it to obtain a Commission decision under Article 1(7) of Regulation 2017/2195. Essentially, it argues that, even if it were to obtain a Commission

decision authorising its participation in the aFRR Platform under Article 1(7) of that regulation, it would not meet the definition of 'member TSO' set out in the Implementation Framework following its amendment by Decision 15/2022.

49 In that regard, suffice it to point out that that line of argument is based on a misinterpretation of the Implementation Framework, as amended by Decision 15/2022. The concept of 'TSO to which Regulation 2017/2195 applies' now found in the definition of 'member TSO' (see paragraph 11 above) could only be interpreted as including the applicant in the event that it obtained a Commission decision approving its participation in the aFRR Platform under Article 1(7) of Regulation 2017/2195.

50 In so far as Decision 15/2022 was adopted on the basis of Regulation 2017/2195, the provisions of the Implementation Framework, as amended by that decision, must be interpreted consistently with the provisions of that regulation, unless their meaning is clear and unambiguous and therefore requires no interpretation (see, to that effect, judgment of 15 September 2021, *Daimler* v *Commission*, T-359/19, EU:T:2021:568, paragraph 92).

51 Since Regulation 2017/2195 expressly provides for the participation of Swiss TSOs under the conditions and in accordance with the procedure laid down in Article 1(6) and (7), it necessarily follows that the concept of 'TSO to which Regulation [2017/2195] applies' appearing in Article 2(1)(q) of the Implementation Framework must be interpreted as including a Swiss TSO whose participation has been authorised under that regulation.

52 Accordingly, the first part of the second plea must be rejected.

The second part of the plea

53 By the second part, the applicant relies on the effects of the amendment of the wording of the Implementation Framework on the Picasso Cooperation Agreement in order to claim that Decision 15/2022 brought about a distinct change in its legal position.

– *Admissibility of the second part, contested by ACER*

54 ACER contends that the present part of the plea is inadmissible since the applicant has not provided a copy of the Picasso Cooperation Agreement as an annex to its application and refers to its content in a vague and general manner.

55 Under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, which is applicable to proceedings before the General Court by virtue of the first paragraph of Article 53 of that statute, and Article 76(d) of the Rules of Procedure, the application must contain the subject matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law. Those particulars must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. In order to guarantee legal certainty and the sound administration of justice, it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated coherently and intelligibly in the application itself (see, to that effect, order of 28 April 1993, *De Hoe* v *Commission*, T-85/92, EU:T:1993:39, paragraph 20 and the case-law cited). The application must, accordingly, specify the nature of the grounds on which it is based, with the result that a mere abstract statement of

the grounds does not satisfy the requirements of the Rules of Procedure. Similar requirements are called for where a submission is made in support of a plea in law (see judgment of 25 March 2015, *Belgium* v *Commission*, T-538/11, EU:T:2015:188, paragraph 131 and the case-law cited; order of 27 November 2020, *PL* v *Commission*, T-728/19, not published, EU:T:2020:575, paragraph 64).

56 The applicant, first, claims to have a contractual right to participate in the aFRR Platform under the Picasso Cooperation Agreement. Second, it submits that the Implementation Framework, as set out in the annex to Decision 15/2022, has the effect of depriving it of that contractual right. Third, it deduces from an application by analogy of the position of the General Court in the judgments of 11 July 2007, *Alrosa* v *Commission* (T-170/06, EU:T:2007:220, paragraph 39), and of 12 December 2018, *Groupe Canal +* v *Commission* (T-873/16, EU:T:2018:904, paragraphs 22 to 27), that Decision 15/2022 brought about a distinct change in its legal position.

57 That line of argument is fully in conformity with Article 76(d) of the Rules of Procedure.

58 What ACER is challenging relates rather to the applicant's lack of evidence of the factual premiss on which that line of argument is based, namely the existence of a contractual right to participate in the aFRR Platform under the Picasso Cooperation Agreement, in so far as it did not provide a copy of that agreement as an annex to its application.

59 It is correct that the applicant did not produce a copy of the Picasso Cooperation Agreement as an annex to its application. In its reply, it justified not doing so on the basis of the complexity and length of that document and on the basis that such production was unnecessary, but made an offer of evidence to that effect. Following a measure of organisation of procedure, the applicant provided the Court with a copy of the Picasso Cooperation Agreement and of the Principal Agreement.

60 Pursuant to Article 85(1) of the Rules of Procedure, 'evidence produced or offered shall be submitted in the first exchange of pleadings' and, according to Article 85(2), 'in reply or rejoinder a main party may produce or offer further evidence in support of his arguments, provided that the delay in the submission of such evidence is justified.'

61 It must be stated that the applicant justified, within the meaning of Article 85(2) of the Rules of Procedure, the delay in its offer of evidence by stating, in essence, that it considered that it was not necessary for it to demonstrate that it had a contractual right to participate in the aFRR Platform.

62 In that regard, it should be noted that, from the time of its notice of appeal before the Board of Appeal, the applicant has maintained that Decision 15/2022 affected its contractual rights, as the Board of Appeal summarised in paragraph 48 of the contested decision. However, the Board of Appeal rejected that argument as being irrelevant rather than because the applicant had failed to demonstrate the rights on which it was relying, making clear in paragraph 64 of the contested decision that historical participation in platform projects or contractual arrangements could not be relied upon in a way that undermined the specific provisions laid down in Regulation 2017/2195. The applicant could therefore reasonably take the view that it was not required to prove that it had those contractual rights, the existence of which had not been called into question by the Board of Appeal.

63 ACER's plea of inadmissibility must therefore be rejected.

– *Examination of the merits of the second part*

64 As regards the examination of the merits of the second part of the plea, it should be pointed out that the applicant is a signatory to both the Principal Agreement and the Picasso Cooperation Agreement.

65 In addition, the purpose of the contracts to which the applicant is a party is to govern the operation of the aFRR Platform in line with Regulation 2017/2195 and the Implementation Framework. Thus, it follows from a reading of the preamble to the Principal Agreement, common to all the platforms provided for by Regulation 2017/2195, that that agreement is intended to set out the framework for the reciprocal obligations of the parties with respect to the development, maintenance and operation of those platforms in accordance with the implementation frameworks adopted under that regulation. Similarly, it is apparent from the preamble to the Picasso Cooperation Agreement that it was adopted further to Regulation 2017/2195, the Implementation Framework and the Principal Agreement.

66 It does not follow, however, that the amendment of the definition of the concept of 'member TSO' resulted in the applicant being prevented from exercising its contractual rights and, therefore, directly affected its legal position within the meaning of the case-law cited in paragraph 44 above.

67 First, it should be recalled that the purpose of the aFRR Platform is to exchange standard balancing energy products from frequency restoration reserves with automatic activation.

68 Second, it is clear that, even prior to Decision 15/2022, the applicant did not have an unconditional contractual right to use the aFRR Platform for such purposes.

69 It is common ground between the parties, first, that that possibility is not open to all 'member TSOs', but only to those that can be categorised as 'participating TSOs' and, second, that the contracts to which the applicant is a party make the applicant's ability to participate in the aFRR Platform conditional on the adoption of a Commission decision under Article 1 of Regulation 2017/2195, as evidenced, in particular, by Article 8.3 of the Principal Agreement.

70 Third, in so far as, prior to Decision 15/2022, the applicant, under the contracts in question, irrespective of whether it could be categorised as a 'member TSO', did not have the contractual right to use the aFRR Platform to exchange standard balancing energy products without a Commission decision to that effect, it cannot be held that Decision 15/2022 deprived it of such a right and, therefore, directly affected its legal position within the meaning of the case-law cited in paragraph 45 above.

71 It follows from all of the foregoing that the Board of Appeal did not err in law in dismissing the appeal as inadmissible on the ground that the conditions laid down in Article 28(1) of Regulation 2019/942 were not satisfied.

72 The second part and, consequently, the second plea must therefore be rejected.

The third plea, submitted in the alternative and alleging, in essence, that Regulation 2017/2195 is unlawful

73 By its third plea, the applicant raises a plea of illegality under Article 277 TFEU against Regulation 2017/2195 should Article 1(6) and (7) of Regulation 2017/2195 be interpreted as excluding Switzerland from participating in the balancing platforms, even though such exclusion would place operational security at risk.

74 ACER contends that the third plea is inadmissible since the applicant has not brought an action for annulment against Regulation 2017/2195 and has not demonstrated that there would have been doubt as to the admissibility of such an action.

75 The Court considers that, in the circumstances of the present case, the proper administration of justice justifies ruling on the merits of the plea of illegality raised by the applicant, without it being necessary first to rule on its admissibility (see, to that effect and by analogy, judgment of 26 February 2002, *Council* v *Boehringer*, C-23/00 P, EU:C:2002:118, paragraph 52).

76 The plea of illegality consists of five parts alleging, respectively, in essence, (i) that the Commission exceeded the scope of its implementing powers; (ii) infringement of Article 3(h) and (i) and Article 6(3) of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ 2019 L 158, p. 54); (iii) infringement of Article 218(6) TFEU; (iv) infringement of Article 13(1) of the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 (OJ English Special Edition: Series I Volume 1972, p. 191; 'the Free Trade Agreement'); and (v) failure to observe the principle of prevention under customary international law.

77 ACER, supported by the Commission, contends that the plea of illegality should be rejected.

The first part of the plea

78 The applicant submits that the Commission had no competence to regulate the issue of Switzerland's participation in the aFRR Platform in Regulation 2017/2195. First, it argues that Switzerland's participation in the aFRR Platform is akin to an essential matter which cannot be the subject of an implementing act. Second and in any event, the Commission, by adopting rules on that issue, went beyond the scope of the power conferred on it by regulating a matter on which Regulation 2019/943 is silent and by granting itself unfettered discretion to decide on Switzerland's participation in the balancing platforms.

79 As a preliminary observation, it should be pointed out that the legal basis for Regulation 2017/2195 is Article 18(3)(b) and (d) and (5) of Regulation No 714/2009. In so far as it follows from the first sentence of Article 18(5) of that regulation that, as regards paragraph 3 of that article, the Commission may adopt only guidelines, its powers, in the light of the distinction made by the FEU Treaty in Articles 290 and 291 thereof between 'delegated act' and 'implementing act', come within that second category. That interpretation is confirmed by Regulation 2019/943, which recast Regulation No 714/2009, the corresponding provision of which, namely Article 61(4) to (6), expressly refers to the adoption of 'implementing acts'.

80 Under Article 291(2) TFEU, where uniform conditions for implementing legally binding Union acts are needed, those acts are to confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 TEU, on the Council of the European Union.

81 When an implementing power is conferred on the Commission on the basis of Article 291(2) TFEU, the Commission is called on to provide further detail in relation to the content of the legislative act, in order to ensure that it is implemented under uniform conditions in all Member States (see, to that effect, judgment of 15 October 2014, *Parliament* v *Commission*, C-65/13, EU:C:2014:2289, paragraph 43).

82 In accordance with the Court of Justice's settled case-law, the adoption of rules essential to a matter such as that at issue in the present case is reserved to the EU legislature and those rules must be laid down in the basic legislation. It follows that the provisions laying down the essential elements of the basic legislation, the adoption of which requires political choices falling within the responsibilities of the EU legislature, cannot be delegated or appear in implementing acts (see, to that effect, judgment of 5 September 2012, *Parliament* v *Commission*, C-355/10, EU:C:2012:516, paragraphs 64 to 66 and the case-law cited).

83 Identifying the elements of a matter which are to be categorised as essential must be based on objective factors amenable to judicial review, and requires account to be taken of the characteristics and particularities of the field concerned (see, to that effect, judgment of 5 September 2012, *Parliament* v *Commission*, C-355/10, EU:C:2012:516, paragraphs 67 and 68).

84 Furthermore, in accordance with settled case-law, the Commission provides further detail in relation to the legislative act if the provisions of the implementing act adopted by it (i) comply with the essential general aims pursued by the legislative act and (ii) are necessary or appropriate for the implementation of that act without supplementing or amending it, even as to its non-essential elements (see, to that effect, judgment of 15 October 2014, *Parliament* v *Commission*, C-65/13, EU:C:2014:2289, paragraphs 45 and 46).

85 It is clear that those conditions are satisfied in the present case.

86 As is apparent in particular from recital 1 of Regulation No 714/2009 and recital 2 of Regulation 2019/943, the objective of those regulations is the creation of an internal market in electricity on the basis of fair rules for cross-border exchanges in electricity, in order to enhance competition within the internal market for electricity. Regulation 2017/2195 is part of the effort to attain that objective, as demonstrated by recitals 1 and 10 thereof, from which it follows that that regulation seeks the integration of balancing energy markets, which should be facilitated with the establishment of common European platforms with a view to the creation of a fully functioning and interconnected internal energy market.

87 As the Court has had occasion to point out, the Swiss Confederation, by rejecting the Agreement on the European Economic Area (EEA), did not subscribe to the project of an economically integrated entity with a single market, based on common rules between its members, but chose the route of bilateral arrangements with the European Union and its Member States in specific areas. Therefore, the Swiss Confederation did not join the internal market of the European Union (judgments of 12 November 2009, *Grimme*, C-351/08, EU:C:2009:697, paragraph 27, and of 7 March 2013, *Switzerland* v *Commission*, C-547/10 P, EU:C:2013:139, paragraphs 78 and 79).

88 It is therefore clear that the exclusion of TSOs operating in Switzerland from participation in the platforms provided for in Regulation 2017/2195, without prejudice to any alternative bilateral arrangement which always remains a possibility, is fully justified in the light of the objectives pursued by Regulation No 714/2009 and, in particular, that of the creation of an internal market.

89 In that regard, it should be noted that the first of the two situations outlined by Article 1(6) of Regulation 2017/2195 relates specifically to the adoption of a bilateral arrangement with the Swiss Confederation, within the meaning of the case-law cited in paragraph 87 above, since it concerns the possibility that '[Swiss] national law implements the main provisions of Union electricity market legislation and that there is an intergovernmental agreement on electricity cooperation between the Union and Switzerland'.

90 In addition, it should be recalled that the second situation outlined by Article 1(6) of Regulation 2017/2195 concerns the possibility that 'the exclusion of Switzerland may lead to unscheduled physical power flows via Switzerland endangering the system security of the region'. It is clear that, by allowing, as an exception, the possibility of Switzerland participating unilaterally in the platforms for reasons relating to system security, the Commission merely adopted a 'necessary or appropriate' rule within the meaning of the case-law cited in paragraph 84 above, where it reconciled Switzerland's non-participation in the internal market with the need to ensure system security and reliability, which ran throughout Regulation No 714/2009 and is also to be found in Regulation 2019/943.

91 In that regard, in so far as concerns the Commission's discretion when adopting the decision contemplated by Article 1(7) of Regulation 2017/2195, it must be stated that that discretion is not incompatible with the nature of Regulation 2017/2195 as an implementing act. That discretion is inherent in the examination of the questions whether the exclusion of Switzerland may lead to unscheduled physical power flows via Switzerland, whether they are likely to endanger the system security of the region and whether the rights and responsibilities of Swiss TSOs are consistent with those of TSOs operating in the European Union. It is not akin to making a policy choice within the meaning of the case-law cited in paragraph 82 above.

92 In the light of the foregoing, it must be concluded that the Commission did not exceed the limits of its implementing powers when adopting Regulation 2017/2195.

93 The first part of the plea must therefore be rejected.

The second part of the plea

94 The applicant claims that Regulation 2017/2195, in so far as it excludes it from the aFRR Platform, is contrary to Article 3(h) and (i) of Regulation 2019/943 and Article 6(3) of that regulation.

95 First, as regards Article 3 of Regulation 2019/943, that article is headed 'Principles regarding the operation of electricity markets' and comes within Chapter II relating to the 'general rules for the electricity market'. According to that provision:

'Member States, regulatory authorities, transmission system operators, distribution system operators, market operators and delegated operators shall ensure that electricity markets are operated in accordance with the following principles:

…

(h) barriers to cross-border electricity flows between bidding zones or Member States and cross-border transactions on electricity markets and related services markets shall be progressively removed;

(i) market rules shall provide for regional cooperation where effective;

…'

96 It must be stated that there is no contradiction between the limitation of the range of TSOs that may participate in the aFRR Platform set out in Article 1 of Regulation 2017/2195 and those objectives. Participation in that platform is not the sole means of achieving the objective set out in Article 3(h) of Regulation 2019/943. In that regard, suffice it to point out that Article 13 of Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation (OJ 2017 L 220, p. 1) expressly provides that 'where a synchronous area encompasses both Union and third-country TSOs, within 18 months after entry into force of this Regulation, all Union TSOs in that synchronous area shall endeavour to conclude with the third-country TSOs not bound by this Regulation an agreement setting the basis for their cooperation concerning secure system operation and setting out arrangements for the compliance of the third-country TSOs with the obligations set in this Regulation.'

97 Similarly, while the objective of regional cooperation set out in Article 3(i) of Regulation 2019/943 may be interpreted as including cooperation with third-country TSOs, as stated, inter alia, in recital 70 of Regulation 2019/943 as regards secure system operation, that cooperation does not necessarily involve access to the platforms provided for by Regulation 2017/2195, but may take the form of agreements between the EU TSOs and third-country TSOs concerned, as demonstrated by Article 13 of Regulation 2017/1485 referred to in paragraph 96 above.

98 Second, as regards Article 6(3) of Regulation 2019/943, that provision states that 'balancing markets shall ensure operational security whilst allowing for maximum use and efficient allocation of cross-zonal capacity across timeframes'. It should be noted, however, that that objective must be reconciled with the setting of 'fair rules for cross-border exchanges in electricity, thus enhancing competition within the internal market for electricity' as provided for in Article 1(c) of that regulation and the fact that Switzerland is not a participant in the internal market. For reasons similar to those already set out in paragraphs 90 and 91 above, such reconciliation is precisely achieved by Article 1(6) and (7) of Regulation 2017/2195, in so far as it provides for the possibility of the applicant having access to the aFRR Platform on grounds relating to system security, while ensuring consistency of the rights and responsibilities of TSOs operating in the European Union with those of TSOs operating in Switzerland.

99 Accordingly, the second part of the plea must also be rejected.

The third part of the plea

100 According to the applicant, if Article 1(6) and (7) of Regulation 2017/2195 were to be interpreted as allowing the Commission to refuse to authorise its participation in the balancing platforms even if an agreement between the Swiss Confederation and the European Union were concluded, the Council decision concluding the agreement adopted under Article 218(6) TFEU could be rendered ineffective.

101 Thus, the present plea is based on the assumption that, if an agreement between the Swiss Confederation and the European Union were concluded, the Commission would be able to prevent that agreement from having effect by not adopting the decision provided for in Article 1(7) of Regulation 2017/2195.

102 However, it must be held that such an assumption is incorrect.

103 By virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union (see judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 50 and the case-law cited).

104 Furthermore, it should be recalled that a provision of an international agreement has direct effect when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, to that effect, judgments of 30 September 1987, *Demirel*, 12/86, EU:C:1987:400, paragraph 14, and of 13 September 2018, *Gazprom Neft* v *Council*, T-735/14 and T-799/14, EU:T:2018:548, paragraph 150).

105 In any event, it should be borne in mind that, in accordance with settled case-law, where the European Union has legislated in the field in question, the primacy of international agreements concluded by the European Union over instruments of secondary law means that such instruments must, so far as is possible, be interpreted in a manner that is consistent with those agreements (see judgment of 22 November 2012, *Digitalnet and Others*, C-320/11, C-330/11, C-382/11 and C-383/11, EU:C:2012:745, paragraph 39 and the case-law cited).

106 It follows that, even if the provision of any international agreement providing for Switzerland's participation does not satisfy the conditions set out in the case-law cited in paragraph 104 above, the Commission could not disregard the existence of that agreement.

107 Accordingly, the third part of the plea must be rejected.

The fourth part of the plea

108 The applicant submits that Regulation 2017/2195 constitutes a quantitative restriction on imports of electrical energy contrary to Article 13(1) of the Free Trade Agreement, applicable to electrical energy. It argues that the conditions under which Article 13(1) may be relied on before the Courts of the European Union are satisfied. Accordingly, in so far as Regulation 2017/2195 results in the applicant being prevented from submitting bids via the aFRR Platform while that regulation provides that balancing energy in the European Union may be exchanged only using balancing platforms, it is contrary to Article 13(1) of the Free Trade Agreement. Furthermore, no justification based on public security under Article 20 of that agreement is available.

109 According to Article 13(1) of the Free Trade Agreement, 'no new quantitative restriction on imports or measures having equivalent effect shall be introduced in trade between the Community and Switzerland.'

110 In the present case, it must be held that the present part of the plea must be rejected without it being necessary to examine whether the legality of Regulation 2017/2195 can be assessed in the light of Article 13 of the Free Trade Agreement.

111 First of all, it should be noted that the interpretation given to the provisions of EU law, including Treaty provisions, concerning the internal market, including Article 28 TFEU, cannot be automatically applied by analogy to the interpretation of the concepts of 'quantitative restriction' and 'measures having equivalent effect' in Article 13(1) of the Free Trade Agreement, in the absence of express provisions to that effect laid down by the agreement itself (see, to that effect, judgments of 9 February 1982, *Polydor and RSO Records*, 270/80, EU:C:1982:43, paragraphs 14 to 16; of 12 November 2009, *Grimme*, C-351/08, EU:C:2009:697, paragraph 29; and of 24 September 2013, *Demirkan*, C-221/11, EU:C:2013:583, paragraph 44). No provision to that effect is contained in the Free Trade Agreement.

112 Next, for the reasons already set out in paragraphs 86 and 87 above, it is apparent from a combined reading of recitals 1 and 10 of Regulation 2017/2195 that the creation of common platforms is part of the implementation of the internal market in electricity, that is to say, an economically integrated entity based on compliance with common rules which the Swiss Confederation has not joined, preferring instead to enter into bilateral arrangements with the European Union and its Member States in specific areas.

113 Lastly, as the Commission submits in its written pleadings, the objective and purpose of the Free Trade Agreement, as set out in Article 1 thereof, are to 'promote through the expansion of reciprocal trade the harmonious development of economic relations between the European Economic Community and the Swiss Confederation'. By contrast, the objective of the Free Trade Agreement is not to create an economic area with a homogeneous regulatory environment.

114 It follows that excluding the applicant from participating in the aFRR Platform cannot be regarded as a quantitative restriction on imports of balancing energy, or as a measure having equivalent effect, within the meaning of Article 13 of the Free Trade Agreement.

115 In any event, the applicant is not subject to compliance with the same common rules as EU TSOs and cannot, therefore, be regarded as being in a situation comparable to that of EU TSOs in relation to the objective of creating an internal market in electricity. The applicant cannot therefore meaningfully rely on the existence of arbitrary discrimination against it.

116 The fourth part must therefore be rejected.

The fifth part of the plea

117 The applicant argues, in essence, that, if Regulation 2017/2195 were to be interpreted as excluding it from participating in the aFRR Platform, that regulation would be manifestly contrary to the principle of prevention under customary international law, which the European Union is bound to observe pursuant to Article 3(5) TEU. It states that that rule of customary international law means that every State is obliged not to knowingly allow its territory to be used for acts contrary to the rights of other States. It is submitted that, in the present case, the Commission manifestly disregarded the obligation to exercise the due diligence required to prevent significant harm from arising in Swiss territory due to the numerous unscheduled physical power flows through Switzerland that could be created by an aFRR Platform operating without its participation and the ensuing congestion problems and detrimental effects.

118 First, it should be recalled that, under Article 3(5) TEU, the Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which

is binding upon the institutions of the European Union (see judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 101 and the case-law cited).

119 In that regard, it is true that, from as early as its judgment in *Corfu Channel* (*(United Kingdom v. Albania)*, 9 April 1949, I.C.J. Reports 1949, p. 22), the International Court of Justice (ICJ) has emphasised, as one of a number of general and well-recognised principles, 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'. The existence of that customary rule was reaffirmed by the ICJ, inter alia, in its judgment in *Pulp Mills on the River Uruguay* (*(Argentina v. Uruguay)*, 20 April 2010, I.C.J. Reports 2010, pp. 45 and 46, paragraph 101), from which it follows, in essence, that a person subject to international law is under a duty to act with due diligence when exercising their powers.

120 Second, it follows from settled case-law that, in order for a principle of customary international law to be relied on by an individual for the purposes of the examination by the Courts of the European Union of the validity of an act of the European Union, it is necessary, first, that it is capable of calling into question the competence of the European Union to adopt that act and, second, that the act in question is liable to affect rights which the individual derives from EU law or to create obligations under EU law in his or her regard (see, to that effect, judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 107 and the case-law cited).

121 In the present case, it cannot be ruled out that those two conditions are satisfied with regard to the applicant.

122 First, it is common ground that Switzerland is part of the Continental Europe Synchronous Area and is, de facto, geographically surrounded by the Member States of the European Union. From that perspective, it could be considered that the principle of prevention is capable of calling into question the competence of the European Union to adopt legislation capable of affecting the whole of that synchronous area, including Switzerland.

123 Second, since the applicant is the sole operator of the Swiss electricity network, in the event that its non-participation in the aFRR Platform were to result in it having to take the measures required by unscheduled physical power flows, the view could be taken that Regulation 2017/2195 creates obligations with regard to the applicant within the meaning of the case-law cited in paragraph 120 above.

124 Third, since a principle of customary international law does not have the same degree of precision as a provision of an international agreement, judicial review must necessarily be limited to the question whether, in adopting the act in question, the institutions of the European Union made manifest errors of assessment concerning the conditions for applying that principle (see judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraph 110 and the case-law cited).

125 That third condition, by contrast, cannot be considered satisfied.

126 First, as already stated in paragraphs 96 and 97 above, EU law, through Article 13 of Regulation 2017/1485, makes express provision for the conclusion of agreements between EU TSOs and third-country TSOs present within the same synchronous area. It follows that the applicant's

non-participation in the aFRR Platform in no way precludes collaboration between the applicant and EU TSOs as regards system security in the synchronous area, which, on the contrary, is encouraged.

127 Second, as already pointed out in paragraph 90 above, it should be recalled that Article 1(6) and (7) of Regulation 2017/2195 provides for the possibility of the applicant participating in the aFRR Platform, should the Commission find that 'the exclusion of Switzerland may lead to unscheduled physical power flows via Switzerland endangering the system security of the region', provided that the rights and responsibilities of Swiss TSOs are consistent with those of TSOs operating in the European Union.

128 In those circumstances, it cannot be found that the Commission manifestly disregarded the European Union's due diligence obligation under the customary rule invoked by the applicant by limiting, in principle, participation in the aFRR Platform solely to EU TSOs.

129 Accordingly, the fifth part and, consequently, the present plea and the action, must be dismissed in their entirety.

Costs

130 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. In the present case, since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by ACER, in accordance with the form of order sought by ACER.

131 In accordance with Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. The Commission must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Swissgrid AG to bear its own costs and to pay those incurred by the European Union Agency for the Cooperation of Energy Regulators (ACER);**

3. **Orders the European Commission to bear its own costs.**

Škvařilová-Pelzl Nõmm Steinfatt

Kukovec Meyer

Delivered in open court in Luxembourg on 8 October 2025.

V. Di Bucci
Registrar

S. Papasavvas
President