

**DECISION No 13/2021
OF THE EUROPEAN UNION AGENCY
FOR THE COOPERATION OF ENERGY REGULATORS**

of 19 October 2021

**withdrawing Decision No 08/2021 of 29 June 2021 on the definition of
system operation regions**

THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 Regulators¹, and, in particular, Article 7(2)(a) thereof,

Having regard to Commission Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for Electricity, and, in particular, Article 36(3) thereof,

Having regard to the outcome of the consultation with the European Network of Transmission System Operators for Electricity ('ENTSO-E') and the regulatory authorities,

Having regard to the outcome of the consultation with ACER's Electricity Working Group ('AEWG'),

Having regard to the favourable opinion of the Board of Regulators of 13 October 2021, delivered pursuant to Article 22(5)(a) of Regulation (EU) 2019/942,

Whereas:

- (1) By Decision No 10/2020 of 6 April 2020 ('Decision No 10/2020'), ACER adopted a definition of the system operation regions ('SORs') according to Article 36 of Regulation (EU) 2019/943, thereby approving ENTSO-E's proposal of 6 January 2020 for the definition of SORs, however with amendments.

¹ OJ L158, 14.6.2019, p. 22.

- (2) Following an appeal by ENTSO-E against Decision No 10/2020, ACER's Board of Appeal remitted the case to ACER's Director by Decision A-007-2020 of 24 September 2020 ('BoA Decision'). The Board of Appeal found, *inter alia*, that Decision No 10/2020 lacked a clear and unequivocal reasoning on the compliance of ACER's amendments to the proposed South West Europe ('SWE') as well as Greece and Italy (GRIT) SORs with Article 36(1) of Regulation (EU) 2019/943, namely with the requirement to take into account the grid topology, including the degree of interconnection and of interdependency of the electricity system in terms of flows and the size of the region (see BoA Decision, paras. 84-92).
- (3) By Decision No 08/2021 of 29 June 2021 ('Decision No 08/2021'), ACER repealed its Decision No 10/2020 and adopted the definition of SORs according to Article 36 of Regulation (EU) 2019/943 as set out in Annex I to that Decision. The adopted definition of SORs approved ENTSO-E's proposal of 6 January 2020, however with amendments, in particular by integrating the SWE capacity calculation region ('CCR') and the Italy North CCR into the Central Europe SOR.
- (4) On 26 August 2021, ENTSO-E filed an appeal against Decision No 08/2021 before the Board of Appeal (case A-012-2021). ENTSO-E requested the Board of Appeal to rule that the appeal is well-founded, and to remit to the competent body of ACER Article 1 of the Decision No 08/2021 and Article 3 of Annex I to that Decision insofar as they include ENTSO-E's proposed SWE SOR in the Central Europe SOR and fail to define a separate SWE SOR (the definitions of the SORs other than the SWE region are not contested).
- (5) In this appeal, ENTSO-E claimed, *inter alia*, that ACER failed to show the calculations resulting from its methodology set out under Annex IV of Decision No 08/2021, preventing thereby ENTSO-E from assessing their correctness.
- (6) In that regard, it is to note that on 25 March 2021, *i.e.* on the last day of the period set by ACER for ENTSO-E's written comments, ENTSO-E expressed a request to have access to these calculations and their concrete results.
- (7) However, ACER omitted to give access to these calculations and the concrete results thereof. Moreover, the results of these calculations have been used in the grounds of Decision No 08/2021. Consequently, the non-disclosure could have had an influence, to the detriment of ENTSO-E, on the course of the proceedings and the content of Decision No 08/2021.²

² See Judgement of the General Court of 20 September 2018, Exaa Abwicklungsstelle für Energieprodukte / ACER, T-123/17, EU:T:2018:568, paras. 52-55; Judgement of the General Court of 20 September 2018, Mondi / ACER, T-146/17, EU:T:2018:570, paras. 41-44; and Judgement of the Court of Justice of 6 September 2017, Intel / Commission, C-413/14 P, EU:C:2017:632, para. 96.

- (8) On 17 September 2021, ACER informed ENTSO-E and the regulatory authorities of its intention to withdraw Decision No 08/2021 and invited them for comments.
- (9) Between 21 and 24 September 2021, ENTSO-E and the German, Italian and Portuguese regulatory authorities provided their views.
- (10) In its reply, ENTSO-E explained, among others, that it was neither in a position to consent to the proposed withdrawal decision nor in a position to object to it and, without prejudice to this position, that if ACER proceeded to adopt the intended withdrawal decision, it would be beneficial to the interests of legal certainty, for ACER to indicate in the recitals to the proposed decision that the purpose of replacing Decision No 08/2021 is to address only the points subject to appeal in case A-012-2021.
- (11) The German regulatory authority suggested to minimize the time gap following the withdrawal as much as possible and to clarify that the BoA Decision will be taken into full account. The Italian regulatory authority referred to uncertainties for the forthcoming approval and establishment of regional coordination centers under Article 35 of Regulation (EU) 2019/943 and asked whether it would be possible to add some statements in the withdrawal decision limiting the scope of the reopening to the questions raised by ENTSO-E's appeal. The Portuguese regulatory authority did not comment specifically on the withdrawal, but rather indicated generally support for the present SOR definition.
- (12) By advice of 1 October 2021, the AEWG 'endorsed the draft ACER Decision on withdrawing Decision No 08/2021 of 29 June 2021 on the definition of system operation regions'.
- (13) In light of the foregoing, it is appropriate to withdraw Decision No 08/2021 and to immediately reopen the proceedings in accordance with the general principle of law permitting the withdrawal of an unlawful decision and the principles of good administration.³ In the reopened proceedings, ACER intends to focus on the part of the SOR definition subject to appeal in case A-012-2021, namely of including the SWE CCR in the Central Europe SOR and not defining a separate SWE SOR. ACER will observe

³ See Judgment of the General Court of 21 February 2018, *Repower v EUIPO - repowermap.org (REPOWER)*, T 727/16, EU:T:2018:88, para. 84: 'Additionally, the general principle of law permitting the withdrawal of an unlawful decision is compatible with the principle of sound administration. It has been repeatedly held that it is lawful and in the interest of sound administrative management that an institution should correct the errors and omissions in a decision (see judgment of 15 July 2015, *Socitrel and Companhia Previdente v Commission*, T 413/10 and T 414/10, EU:T:2015:500, paragraph 176 and the case-law cited)', and para. 90: 'The case-law on the general principle of law permitting the retrospective withdrawal of an unlawful administrative act does not prescribe a particular procedure for the withdrawal of such an act'. See also Judgment of the General Court of 12 February 2020, *ZF v Commission*, T 605/18, EU:T:2020:51, para. 148; Judgement of the General Court of 27 June 2017, *Ruiz Molina v EUIPO*, T 233/16 P, EU:T:2017:435, para. 27; and Judgment of the Court of Justice of 20 June 1991, *Cargill v Commission*, C 248/89, EU:C:1991:264, para. 20.

all the procedural rights of ENTSO-E and will fully take into account the BoA Decision, trying to expedite the procedure where possible,

HAS ADOPTED THIS DECISION:

Article 1

Decision No 08/2021 of 29 June 2021 on the definition of system operation regions is withdrawn.

Article 2

This Decision is addressed to ENTSO-E.

Done at Ljubljana, on 19 October 2021.

- SIGNED -

*For the Agency
The Director*

C. ZINGLERSEN

In accordance with Article 28 of Regulation (EU) 2019/942, the addressees may appeal against this Decision by filing an appeal, together with the statement of grounds, in writing at the Board of Appeal of the Agency within two months of the day of notification of this Decision.

In accordance with Article 29 of Regulation (EU) 2019/942, the addressees may bring an action for the annulment before the Court of Justice only after the exhaustion of the appeal procedure referred to in Article 28 of that Regulation.