Action brought on 27 January 2017 — Austrian Power Grid v ACER

(Case T-53/17)

(2017/C 095/30)

Language of the case: English

Parties

Applicant: Austrian Power Grid AG (Vienna, Austria) (represented by: H. Kristoferitsch and S. Huber, lawyers)

Defendant: Agency for the Cooperation of Energy Regulators

Form of order sought

The applicant claims that the Court should:

— Annul the following parts of the Decision of the Agency for the Cooperation of Energy Regulators No 06/2016 of 17 November 2016 on the Electricity Transmission System Operator's proposal for the determination of the Capacity Calculation Regions:

  — Article 1 of the Decision in conjunction with

    — Annex I, Article 1, paragraph 1, letter c;

    — the word 'also' and the text block 'for the purposes of capacity allocation on the affected bidding zone borders until the requirements described in Article 5(3) of this document are fulfilled' in Annex I, Article 2, paragraph 2, letter e;

    — Annex I, Article 5, paragraph 1, letter s;

    — Annex I, Article 5, paragraph 3;

    — Annex I, Map No 3;

  — Article 2 of the Decision;

  — Annex IV;

  — Annex V;

— ACER shall bear the costs.

Pleas in law and main arguments

In support of the action, the applicant relies on five pleas in law.

1. First plea in law, alleging that ACER lacks the competence to introduce new bidding zone borders and capacity allocation.

   — The applicant puts forward that ACER has no competence to introduce new bidding zone borders or capacity allocation in a procedure for the determination of the Capacity Calcul Region (CCR) as specified in Article 15 of the CACM regulation ([1]), respectively in a decision based on Article 8(1) of the ACER-Regulation ([2]). Also, so the applicant claims, the indication that the contested decision may be revised as indicated in its Article 2 (which in itself is unlawful and appealed) may not make up for this lack of competence.

2. Second plea in law, alleging that the contested decision violates Regulation (EC) No 714/2009 and the CACM Regulation in several respects.

   — The applicant puts forward that ACER wrongfully applied the legal definition of congestion and that the DE-AT interconnector is not congested and thus may not be subject to capacity allocation.

— The applicant further puts forward that splitting the common electricity market of Germany and Austria is diametrically opposed to the objectives pursued by Regulation (EC) No 714/2009 ([3]) and violates the principle that internal congestions may not be shifted to national borders.

— The applicant finally puts forward that the decision is factually incorrect and applies the statutory criteria for the creation of a new bidding zone border in a wrongful manner, especially due to the fact that the DE-AT border is not structurally congested, that ACER does not consider alternative bidding zone borders, that less invasive technical measures would have been available, that the contested decision does not take into account future developments, that the decision violates the specification that bidding zones shall be of permanent nature and that ACER misjudges the nature of loop flows.

3. Third plea in law, alleging that the contested decision violates European Union primary law.

— The applicant puts forward that the contested decision violates the principle of proportionality because less intrusive but equally suitable measures were not considered and enacted.

— The applicant further puts forward that the contested decision violates the fundamental freedoms, as the artificial separation of the joint Austrian-German electricity market results in quantitative restrictions on the trade in electricity between both Member States. In this respect, so the applicant states, the contested decision violates the free movement of goods enshrined in Articles 34 and 35 TFUE. Furthermore, according to the applicant, the limitations on transfer capacity resulting from the introduction of a bidding zone border and a capacity allocation mechanism unjustifiably impose restrictions on the applicants' freedom to provide services (Article 56 TFUE).

— Finally, the applicant puts forward that the contested decision violates EU competition law as separating the joint German-Austrian electricity market by introducing a bidding zone and a capacity calculation mechanism (CAM) amounts to market splitting, which is in violation of Article 101 TFUE.

4. Fourth plea in law, alleging that in issuing the decision, ACER has violated several procedural requirements.

— In this context, the applicant puts forward that in erroneously basing its decision on Article 15 of the CACM Regulation, ACER consequently followed the wrong procedure for the creation of new bidding zone borders and for the introduction of CAMs.

— The applicant further puts forward that the application submitted by the Austrian regulator, E-Control, requesting that the All TSOs CCR Draft be amended was not dealt with in conformity with the procedure provided for under Article 9(12) of the CACM Regulation.

— The applicant further alleges that ACER exceeds its competence by declaring that the non-binding Opinion 09/2015 issued in September 2015 has binding effect. Further, so the applicant claims, as the Opinion that was declared binding did not form part of the consultation procedure, the Claimant's procedural rights were fundamentally violated.

— The applicant further puts forward that ACER's file for the preparation of the contested decision lacks technical studies, analyses and in-depth assessments. The applicant claims that either the Agency provided the applicant with significantly incomplete information and, by doing so, violated the applicant's right to full access to the case file according to Article 41 of the Charta of Fundamental Rights, either the Agency did not at all prepare and/or consult technical expertise and analyses in order to put the contested decision on a factually sound basis (which would equally amount to a severe procedural error).

— Finally, the applicant puts forward that the contested decision is based on facts that have not been sufficiently clarified since the Agency has in particular — but not only- failed to make observations as to where structural congestion exists in the joint German-Austrian market area and where this would to be managed most efficiently; to what extent loop flows take place and affect the German-Austrian border; what effects current and pending measures relating to network expansion and improving network security have; how much of the electricity flowing to Austria via other Member States subsequently continues to flow from there to Germany.

5. Fifth plea in law, alleging a failure to state reasons.

(1) Commission Regulation (EU) 2015/1222 of 24 July 2015, establishing a guideline on capacity allocation and congestion management (OJ L 197, p. 24).
(2) Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, p. 1).
(3) 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 L 211, p. 15).

Action brought on 1 February 2017 — Grupo Orenes v EUIPO — Akamon Entertainment Millenium (Bingo VIVA! Slots)

(Case T-63/17)

(2017/C 095/31)

Language in which the application was lodged: Spanish

Parties

Applicant: Grupo Orenes, SL (Murcia, Spain) (represented by: M. Sanmartín Sanmartín, lawyer)

Defendant: European Union Intellectual Property Office (EUIPO)

Other party to the proceedings before the Board of Appeal: Akamon Entertainment Millenium, SL (Barcelona, Spain)

Details of the proceedings before EUIPO

Applicant for the trade mark at issue: Other party to the proceedings before the Board of Appeal

Trade mark at issue: European Union figurative mark containing the word elements 'Bingo VIVA! Slots' — Application for registration No 13 468 251

Procedure before EUIPO: Opposition proceedings

Contested decision: Decision of the Second Board of Appeal of EUIPO of 7 November 2016 in Case R 453/2016-2

Form of order sought

The applicant claims that the Court should:

— annul the contested decision;

— order EUIPO to bear its own costs and pay the applicant's costs.

Pleas in law

— Infringement of Articles 64, 75, 76 of Regulation No 207/2009 read in conjunction, where appropriate, with Article 8 (1)(b) of that regulation and Rules 50 and 52 of Regulation 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark and also the case-law of the Court of Justice interpreting all those provisions.

— Failure to make a proper overall comparison of the signs.