Reports of Cases

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

7 September 2022*

(Energy – Internal market in electricity – Regulation (EU) 2019/942 – Decision of the Board of Appeal of ACER – Action for annulment – Act not open to challenge – Inadmissibility – Competence of ACER – Article 8 of Regulation (EC) No 713/2009 – Article 6(10) of Regulation 2019/942 – Article 9(12) of Regulation (EU) 2015/1222 – Applicable law – Regulation (EU) 2019/943)

In Case T-631/19,

Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA), established in Bonn (Germany), represented by H. Haller, N. Gremminger, L. Reiser, V. Vacha and C. Dietz-Polte, lawyers,

applicant,

v

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

defendant,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of V. Tomljenović, President, V. Kreuschitz, F. Schalin, P. Škvařilová-Pelzl (Rapporteur) and I. Nõmm, Judges,

Registrar: S. Jund, Administrator,

having regard to the written part of the procedure, in particular:

– the application lodged at the Registry of the General Court on 21 September 2019;

– the defence, the reply and the rejoinder lodged at the Registry of the General Court on 16 December 2019 and 30 January and 14 April 2020 respectively;

– the decision of the General Court, on a proposal of its Second Chamber, to refer the case to a Chamber sitting in extended composition, pursuant to Article 28 of the Rules of Procedure of the General Court;

* Language of the case: German.

– the decision of the General Court (Second Chamber, Extended Composition), on a proposal from the Judge-Rapporteur, to put written questions to the parties by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, to which those parties responded within the prescribed time limits;

– the decision of the President of the General Court to designate another Judge to complete the Chamber because a member of the Second Chamber (Extended Composition) was unable to sit in the case,

further to the hearing on 17 November 2021,

gives the following

Judgment

1 By its action under Article 263 TFEU, the applicant, Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA), seeks, first, annulment in part of Decision No 02/19 of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 21 February 2019 on the proposals of the transmission system operators of the Core capacity calculation region for the regional design of the day-ahead and intraday common capacity calculation methodologies ('the initial decision') and, second, annulment of Decision A-003-2019 of the Board of Appeal of ACER of 11 July 2019 dismissing its appeal against the initial decision ('the decision of the Board of Appeal').

Background to the dispute

2 Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (OJ 2015 L 197, p. 24) sets out a series of requirements for cross-zonal capacity allocation and congestion management on the day-ahead and intraday markets in the electricity sector. Those requirements include, in particular, the setting of a common coordinated capacity calculation methodology ('CCM') in each capacity calculation region ('CCR'), in accordance with Section 3, entitled 'Capacity calculation methodologies', of Chapter 1 of Title II of Regulation 2015/1222. That section of the regulation contains Articles 20 to 26, Article 20 setting out the rules relating to the 'introduction of flow-based capacity calculation methodology'.

3 In accordance with Article 9(1) and Article 20(2) of Regulation 2015/1222, the transmission system operators ('TSOs') of each CCR are required to adopt a proposal for a CCM in their respective CCRs and to submit it to the relevant national regulatory authorities ('NRAs') for approval.

4 Under Article 9(10) and (12) of Regulation 2015/1222, the relevant NRAs then attempt to reach agreement and take a decision on the TSOs' proposed CCM or the version amended by the TSOs at the request of those NRAs. Under Article 9(11) and (12) of Regulation 2015/1222, where the relevant NRAs have not been able to reach such an agreement, ACER is to adopt a decision concerning the TSOs' proposal for a CCM or the amended version of that proposal, in accordance with Article 6(10) 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), formerly Article 8(1) of 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 2009 L 211, p. 1).

5 In the present case, on 15 September 2017 the TSOs of the Core CCR (comprising Belgium, the Czech Republic, Germany, France, Croatia, Luxembourg, Hungary, the Netherlands, Austria, Poland, Romania, Slovenia and Slovakia), under Article 9(7) and Article 20(2) of Regulation 2015/1222, submitted two proposals to the NRAs of that CCR for approval, relating to the draft regional day-ahead CCM and the draft regional intraday CCM respectively, prepared in accordance with that regulation.

6 On 9 March 2018, under Article 9(12) of Regulation 2015/1222, the NRAs of the Core CCR requested two amendments relating to the day-ahead proposal and the intraday CCM proposal respectively.

7 On 4 June 2018, under the first sentence of Article 9(12) of Regulation 2015/1222, the TSOs submitted amended versions of the two proposals for day-ahead and intraday CCMs (collectively, 'the two amended CCM proposals') to the NRAs of the Core CCR. The last of those NRAs received the amended proposals on 19 June 2018.

8 By letters of 20 July and 21 August 2018, the Chair of the Core Energy Regulators' Regional Forum ('CERRF'), on behalf of all the NRAs of that region, informed ACER, in essence, that they had not been able to reach a unanimous agreement under Article 9(12) of Regulation 2015/1222 to approve the two amended CCM proposals, or to request ACER to extend the deadline of two months within which they had to take a decision, from the last submission of those proposals, or to request it to adopt a decision itself on the two amended CCM proposals.

9 On 18 September 2018, the NRAs of the Core CCR sent ACER a 'non-paper of all [the NRAs of the Core CCR] on the Core CCR TSOs' regional design of the [the two amended CCM proposals]' ('the document of 18 September 2018'), informing ACER of their common and dissenting positions, in line with the letters from the Chair of the CERRF referred to in paragraph 8 above. They stated in particular that the two amended CCM proposals failed to take into account all the amendments requested by the NRAs, that those proposals were not sufficiently detailed or fully consistent and compliant with Regulation 2015/1222 and that they lacked both clear, transparent and harmonised definitions and defined and justified thresholds or values. They added that 19 of the 29 separate points comprising the two amended CCM proposals had been approved by the NRAs, suggesting that ACER should take account of that circumstance, whereas 10 had not been approved.

10 Under Article 9(12) of Regulation 2015/1222, since there was no agreement among the NRAs of the Core CCR on the two amended CCM proposals, ACER was obliged, in accordance with Article 8(1) of Regulation No 713/2009, to adopt a decision on those proposals.

11 Following a public consultation on the two amended CCM proposals and after cooperating with all the NRAs and TSOs concerned, ACER adopted the initial decision, under Article 9(12) of Regulation 2015/1222. By that decision, it adopted the Core CCR day-ahead and intraday CCMs, as included in Annexes I and II to that decision.

12 On 23 April 2019, under Article 19 of Regulation No 713/2009, the applicant lodged an appeal against the initial decision before the Board of Appeal of ACER ('the Board of Appeal').

13 By the Board of Appeal decision, that board dismissed the appeal against the initial decision as unfounded.

Forms of order sought

14 The applicant claims that the Court should:

– primarily, annul the provisions listed below of the initial decision and of the decision of the Board of Appeal in so far as concerns those provisions:

  – Article 5(5) to (9) of Annex I to the initial decision,

  – the second half of the sentence in Article 10(4) of Annex I to the initial decision and Article 10(5) of that annex,

  – the second sentence of Article 16(2) of Annex I to the initial decision and Article 16(3)(d)(vii) of that annex,

  – Article 5(5) to (9) of Annex II to the initial decision,

  – Article 17(3)(d)(vii) of Annex II to the initial decision,

  – all the provisions of Annexes I and II to the initial decision which refer expressly to the provisions listed above;

– in the alternative, annul the initial decision and the decision of the Board of Appeal in their entirety;

– order ACER to pay the costs.

15 ACER contends that the Court should:

– dismiss the action in its entirety;

– order the applicant to pay the costs.

Law

Admissibility

16 ACER contends that the action should be dismissed as inadmissible in part, to the extent that it challenges the initial decision.

17 First, it submits, in essence, that, having regard to the fact that the Board of Appeal is competent to examine decisions adopted by the agency itself, such as the initial decision, and to the rule that internal remedies must be exhausted, which applies to ordinary applicants, such as the applicant,

only the decision of the Board of Appeal can form the subject matter of an action for annulment. Second, in any event, since the two-month time limit for bringing an action for annulment of the initial decision under Article 263 TFEU had expired when the present action was brought, the action has been brought out of time and is, therefore, manifestly inadmissible.

18 The applicant disputes ACER's arguments. First, it asserts that the requirement of effective judicial protection means that both the decision of the Board of Appeal and the initial decision are subject to judicial review. Second, the applicant disputes that the time limit for bringing an action for annulment against the initial decision has expired, since it was required to exhaust the internal appeal procedure before the Board of Appeal before it could bring an action before the Courts of the European Union.

19 At the outset, it should be noted that, as can be seen from paragraph 14 above, the applicant is seeking annulment of both the initial decision and the decision of the Board of Appeal.

20 Next, first, it should be observed that, as the NRA of the Federal Republic of Germany, the applicant is a legal person within the meaning of the fourth paragraph of Article 263 TFEU. As regards actions brought by legal persons, the fifth paragraph of Article 263 TFEU states that 'acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.'

21 Second, according to settled case-law, procedural rules are generally taken to apply from the date on which they enter into force (see judgment of 26 March 2015, *Commission* v *Moravia Gas Storage*, C-596/13 P, EU:C:2015:203, paragraph 33 and the case-law cited).

22 Since the present case concerns the EU body competent in the energy sector, it is appropriate to refer to Regulation 2019/942, which replaced Regulation No 713/2009 and entered into force, in accordance with Article 47 thereof, on 4 July 2019, that is to say, before the present action was brought, on 21 September 2019, in the period between the adoption of the initial decision on 21 February 2019 and the adoption of the decision of the Board of Appeal on 11 July 2019. That regulation lays down, inter alia, ACER's internal operating and procedural rules.

23 Since Regulation 2019/942 contains no derogation from the transitional rule described in paragraph 21 above, it must be found that on the date on which the present action was brought, as at which the admissibility of the action must be assessed (see, to that effect, judgment of 22 June 2016, *Whirlpool Europe* v *Commission*, T-118/13, EU:T:2016:365, paragraph 49, and order of 21 November 2019, *ZW* v *EIB*, T-727/18, not published, EU:T:2019:809, paragraph 27 and the case-law cited), the procedural rules applicable to the action and which determine whether it is admissible were those laid down in Regulation 2019/942.

24 Third, in relation to the requirements for bringing an action for annulment before the Court of Justice of the European Union against both the initial decision and the decision of the Board of Appeal, it follows from Article 28(1) and Article 29 of Regulation 2019/942, read in the light of recital 34 of that regulation, that natural and legal persons wishing to appeal against a decision of ACER addressed to them or which is of direct and individual concern to them may appeal to the Board of Appeal and that, where such a possibility exists, they will be entitled to challenge before the General Court only the decision of that board.

25 Last, Article 29 of Regulation 2019/942 states that 'actions for the annulment of a decision issued by ACER pursuant to [that regulation] may be brought before the Court of Justice [of the European Union] only after the exhaustion of the appeal procedure referred to in Article 28 [of that regulation].'

26 Article 28(1) and Article 29 of Regulation 2019/942, read in the light of recital 34 of that regulation, lay down the specific conditions and arrangements concerning the actions for annulment referred to in the fifth paragraph of Article 263 TFEU, as those conditions and arrangements were adopted by the EU legislature in the legislative act setting up ACER, that is to say, Regulation 2019/942. Accordingly, exhaustion of the internal appeal procedure established in Article 28 of Regulation 2019/942 and referred to explicitly in Article 29 of that regulation by its very nature means that the EU judicature intervenes, where appropriate, only to verify the final outcome of the internal appeal procedure, that is to say, to examine the decision issued after that internal remedy has been exhausted and, therefore, the decision of the Board of Appeal (see, by analogy, judgment of 28 January 2016, *Heli-Flight* v *EASA*, C-61/15 P, not published, EU:C:2016:59, paragraphs 81 and 82).

27 Where an internal appeal has been lodged against a decision issued by ACER, an action for annulment of that decision may therefore be found to be admissible only if it concerns the decision of the Board of Appeal dismissing that internal appeal (see, by analogy, judgment of 28 January 2016, *Heli-Flight* v *EASA*, C-61/15 P, not published, EU:C:2016:59, paragraph 84) or, as the case may be, confirming the initial decision. Consequently, the pleas in law and arguments in the present action which are based on irregularities relating to the initial decision and which cannot be interpreted as being directed also against the decision of the Board of Appeal must be rejected as ineffective, since the EU judicature can rule only on the legality of the latter decision (see, to that effect and by analogy, judgment of 11 December 2014, *Heli-Flight* v *EASA*, T-102/13, EU:T:2014:1064, paragraph 32).

28 In the present case, the applicant stated, in paragraph 84 of the application, that the present action was directed against the initial decision, in the form it took after the decision of the Board of Appeal. Accordingly, since the decision of the Board of Appeal is based on the grounds stated in the initial decision, and indeed confirms those grounds, whether implicitly or explicitly, all the pleas in law and arguments in the present action that are directed against those grounds must be found to be fully effective for the purpose of reviewing the legality of the decision of the Board of Appeal and, therefore, to support the application for annulment in so far as it is directed against the decision of the Board of Appeal, which is the only application that is admissible. Conversely, the application for annulment must be rejected as inadmissible in so far as it is directed against the initial decision.

Substance

29 The applicant raises, in essence, six pleas in law in support of the present action. The first plea alleges that ACER infringed Article 9(7) and (12) of Regulation 2015/1222 by exceeding the limits of its competence. The second plea alleges, in essence, an error of law in determining the applicable law, in that the Board of Appeal should have agreed to review the legality of the initial decision in the light of Articles 14 to 16 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). The third plea alleges a number of infringements of Regulation 2019/943. The fourth plea alleges infringement of Regulation 2015/1222. The fifth plea alleges a breach of the principle of proportionality. The sixth plea alleges a breach of the principle of non-discrimination.

The first plea, alleging that ACER infringed Article 9(7) and (12) of Regulation 2015/1222 by exceeding the limits of its competence

30 The applicant submits that, by adopting the initial decision, ACER exceeded the limits of its competence. It asserts in that respect, first, that, according to Article 9(7) and (12) of Regulation 2015/1222, ACER's competence is subordinate and subsidiary competence, because ACER became competent only when and to the extent that the NRAs were unable to reach agreement on a decision on the two amended CCM proposals. The applicant emphasises that other language versions of Article 9(12) of Regulation 2015/1222, such as the English version, are worded more openly than the German version to which ACER refers. Second, according to the applicant, the purpose of the legislation is to achieve common CCMs, which does not mean that ACER can disregard partial agreements reached by the NRAs or the requirements they propose. ACER should therefore have given consideration to any partial agreements between the NRAs and should have adopted a decision only on the remaining points of disagreement between them. Third, the applicant explains that, in their letter of 20 July 2018, the NRAs formally informed ACER that they had not reached full agreement on a number of key elements of the two amended CCM proposals, and that they would subsequently provide it with more details of the discussions that had taken place between them on those key elements and on a number of other issues, which they then did in the document of 18 September 2018. This means that when ACER received that letter, it was already aware of all the positions of the NRAs and only 10 points, specified by the NRAs in the document of 18 September 2018, were submitted to ACER for it to adopt a decision on them. ACER therefore erred when, in the initial decision, it adopted a decision on points that, as is apparent from the document of 18 September 2018, had not been submitted to it for a decision. Fourth, the applicant emphasises that the initial decision disregarded the principle of subsidiarity according to which, generally, all the EU institutions must act with restraint when exercising the competences attributed to them and, in particular, ACER must not disregard partial agreements reached and requirements proposed by NRAs.

31 ACER disputes the applicant's arguments and contends that the first plea should be rejected. According to ACER, the Board of Appeal was correct to find in its decision that it was competent to adopt the initial decision and that in doing so had acted within the limits of its competence.

32 In the present case, in accordance with the finding on the admissibility of the present action and the effectiveness of the pleas raised in support thereof, in paragraph 28 above, it must be determined whether the Board of Appeal erred in law by failing to find in its decision that, by adopting the initial decision, ACER exceeded the limits of its competence, as the applicant had claimed in support of the appeal brought before it.

33 It is apparent from the case-law on the rules governing the competence of EU institutions, bodies and agencies that the provision which forms the legal basis of an act and empowers an EU institution to adopt the act must be in force on the date on which the act is adopted (see judgments of 26 March 2015, *Commission* v *Moravia Gas Storage*, C-596/13 P, EU:C:2015:203, paragraph 34 and the case-law cited, and of 3 February 2011, *Cantiere navale De Poli* v *Commission*, T-584/08, EU:T:2011:26, paragraph 33 and the case-law cited).

34 When the decision of the Board of Appeal, which is the only act whose legality the applicant is entitled to challenge in the present action (see paragraph 28 above), was adopted, that is to say, on 11 July 2019, Regulation 2019/942 was already in force and applicable and had replaced Regulation No 713/2009, which applied previously (see paragraph 22 above). Furthermore, Regulation 2015/1222 had also been in force and applicable, in accordance with Article 84 thereof, since

14 August 2015, that is to say, the twentieth day following its publication in the *Official Journal of the European Union* on 25 July 2015. Article 6(10) of Regulation 2019/942, formerly Article 8 of Regulation No 713/2009, and Article 9(12) of Regulation 2015/1222 empowered ACER to decide on or adopt individual decisions, within six months, on regulatory issues or problems having effects on cross-border trade or cross-border system security within the competence of the NRAs, such as adopting the day-ahead and intraday CCMs of each CCR, if the competent NRAs had not been able to reach agreement within the period given to them in which to do so or if the competent NRAs had sent it a joint request to do so. On the date on which the Board of Appeal adopted its decision, only those provisions were capable of providing a legal basis for that decision.

35 In order to examine the present plea, it is therefore necessary to interpret Article 6(10) of Regulation 2019/942, formerly Article 8 of Regulation No 713/2009, and Article 9(12) of Regulation 2015/1222, in order to determine whether those provisions were capable of providing a basis for ACER's competence to adopt the final Core CCR day-ahead and intraday CCMs, as contained in Annexes I and II to the decision of the Board of Appeal.

36 It should be noted in that regard that, according to settled case-law, in interpreting provisions of EU law, it is necessary to consider not only their wording but also their context and the objectives pursued by the rules of which they form part (see judgments of 11 July 2018, *COBRA*, C-192/17, EU:C:2018:554, paragraph 29 and the case-law cited, and of 28 January 2020, *Commission* v *Italy (Directive combating late payment)*, C-122/18, EU:C:2020:41, paragraph 39 and the case-law cited).

37 In the present case, as they were obliged to do under Article 9(1) and (7)(a) and Article 20(2) of Regulation 2015/1222, the TSOs of the Core CCR submitted proposals for day-ahead and intraday CCMs for that CCR to all the NRAs of that CCR for approval. According to Article 9(10) of Regulation 2015/1222, the NRAs were required to take a decision on those proposals within six months from the date on which they were received by the last of the NRAs concerned. However, since those NRAs requested modifications of the CCM proposals concerned, as a result of which the TSOs submitted the two amended proposals for day-ahead and intraday CCMs to them for approval, under Article 9(12) of that regulation, the NRAs had an additional two months following their submission in which to take a decision on those amended proposals. It has been established that the NRAs of the Core CCR were unable to reach agreement on those amended proposals within that period granted to them, as the Chair of CERRF informed ACER by letters of 20 July and 21 August 2018.

38 Accordingly, as ACER correctly argues, its competence to decide on or adopt a final decision on the two amended proposals for day-ahead and intraday CCMs was based in the present case on the circumstance, referred to in Article 6(10) of Regulation 2019/942 and Article 9(12) of Regulation 2015/1222, that the NRAs of the Core CCR had not been able to reach agreement on those proposals within the two-month period given to them in which to do so.

39 However, first, it is not apparent from the wording of Article 6 of Regulation 2019/942, formerly Article 8 of Regulation No 713/2009, or Article 9 of Regulation 2015/1222 that, when exercising such competence, apart from its obligation under Article 6(11) of Regulation 2019/942 to consult the NRAs and the TSOs concerned when preparing its decision, ACER was bound by the observations submitted by them. Specifically, it does not emerge from those provisions that ACER's competence is confined to the points on which the NRAs were not able to reach agreement. On the contrary, in Article 6(10) of Regulation 2019/942, formerly Article 8(1) of Regulation No 713/2009, and Article 9(12) of Regulation 2015/1222 the 'regulatory issues' or the

'case' initially falling within the competence of the NRAs before coming under the competence of ACER because those authorities are unable to reach agreement are understood as an inseparable whole that is referred, globally, to the NRAs and then to ACER, without any such distinction being drawn. In the light of their wording, Article 6 of Regulation 2019/942, formerly Article 8 of Regulation No 713/2009, and Article 9 of Regulation 2015/1222 must therefore be interpreted as meaning that, if the competent NRAs are unable to reach agreement on all aspects of the regulatory matter put before them within the period given to them in which to do so, ACER is empowered to adopt a decision on that matter itself, and its competence is not limited to the questions or specific aspects around which the disagreement between those NRAs crystallised.

40 That finding is not called into question by the applicant's argument that the wording of the English version of Article 9(12) of Regulation 2015/1222, according to which ACER is empowered to adopt a decision on the TSOs' proposals 'where the competent regulatory authorities have not been able to reach an agreement' gives credence to the idea that ACER's competence is limited to the aspects of the regulatory matter at issue on which the NRAs have failed to reach agreement.

41 It should be noted in that respect that, according to settled case-law, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be given priority over the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all EU languages (see judgment of 6 June 2018, *Tarragó da Silveira*, C-250/17, EU:C:2018:398, paragraph 20 and the case-law cited). Where there is a divergence between the various language versions, a provision of EU law must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (see, to that effect, judgment of 7 July 2016, *Ambisig*, C-46/15, EU:C:2016:530, paragraph 48 and the case-law cited).

42 In the present case, it should be noted that the English version of the text quoted in paragraph 40 above sets out a rule that is not substantially different from that apparent from the other language versions, such as the Czech, German and French versions, which state, respectively, that ACER is competent to adopt a decision 'pokud příslušné regulační orgány nedokážou … dosáhnout dohody', 'falls es den Regulierungsbehörden nicht gelingt, … eine Einigung … zu erzielen' and 'lorsque les autorités de régulation compétentes ne sont pas parvenues à un accord'. The wording of those other language versions corroborates an interpretation of that provision with the meaning set out in paragraph 39 above.

43 Second, that literal interpretation of Article 6(10) of Regulation 2019/942, formerly Article 8 of Regulation No 713/2009, and of Article 9(12) of Regulation 2015/1222 is borne out by the context and the objectives pursued by the rules of which those provisions form part, as clarified by the *travaux préparatoires* of that legislation.

44 In that regard, it is apparent from the explanatory memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing an Agency for the Cooperation of Energy Regulators (COM(2007) 530 final), which gave rise to Regulation No 713/2009, that the provisions in the proposal were based inter alia on the observation that 'although the internal market for energy [had] developed considerably, a regulatory gap [remained] on cross-border issues' and that the 'approach … which in practice usually [required] the agreement of 27 regulators and more than 30 transmission system operators to reach agreement, [was] not producing sufficient results' and had 'not [led] to real decisions on the difficult issues that now [needed] to be taken'. It had therefore been decided to create 'the Agency [which] would

complement at European level the regulatory tasks performed at national level by the regulatory authorities', including by granting 'individual decision powers'. Those powers were to be granted to ACER 'with a view to handling specific cross-border issues', including powers 'to decide on the regulatory regime applicable to infrastructure within the territory of more than one Member State', as was ultimately established in Article 8 of Regulation No 713/2009.

45 Moreover, it is apparent from the explanatory memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for the Cooperation of Energy Regulators (COM(2016) 863 final), which gave rise to Regulation 2019/942, that the provisions of the proposal were intended inter alia to contribute to 'adapting regulatory oversight to regional markets'. In particular, it no longer appeared appropriate to the new realities of those markets that 'all main regulatory decisions [were] currently taken by national regulators, even in cases where a common regional solution [was] needed, and that 'regulatory oversight therefore [remained] fragmented, leading to a risk of diverging decisions and unnecessary delays'. It was therefore considered that 'strengthening the powers of ACER for those cross-border issues which [required] a coordinated regional decision would contribute to faster and more effective decision-making on cross-border issues', and it was noted that 'national regulators, deciding within ACER on those issues through majority voting, would remain fully involved in the process'. The fact that ACER was assigned 'limited additional competences' was held to be in accordance with the principle of subsidiarity, in so far as those competences were assigned 'in those areas where fragmented national decision-making on issues with cross-border relevance would lead to problems or inconsistencies for the internal market'. It was also considered to be in accordance with the principle of proportionality, since 'ACER [was] to be given additional tasks, especially in the regional operation of the energy system, all whilst keeping the [NRAs'] centre role in energy regulation'. That is the context in which the proposal for a regulation, in Chapter I, defined 'a number of new tasks for ACER … concerning the supervision of Nominated Electricity Market Operators and related to the approval of methods and proposal related to generation adequacy and risk preparedness'. Those new tasks entrusted to ACER were enshrined in particular in Article 6(10) of Regulation 2019/942.

46 It follows from the explanatory memorandums to those proposals for a regulation that the EU legislature clearly intended to make decision-making on difficult cross-border issues, on which decisions nevertheless needed to be taken, faster and more efficient, by strengthening ACER's individual decision-making powers in a manner compatible with keeping the central role of the NRAs in energy regulation.

47 That strengthening also reflects a number of the objectives pursued by Regulation No 713/2009 and Regulation 2019/942. As noted in recital 10 of Regulation 2019/942, formerly recital 5 of Regulation No 713/2009, the Member States must cooperate closely and eliminate obstacles to cross-border exchanges of electricity and natural gas with a view to achieving the objectives of the EU energy policy, and an independent body, that is to say, ACER, was established to fill the regulatory gap at EU level and to contribute towards the effective functioning of the internal markets for electricity and natural gas. Accordingly, as stated in recital 11 of Regulation 2019/942, formerly recital 6 of Regulation No 713/2009, ACER must ensure that regulatory functions performed by the NRAs are properly coordinated and, where necessary, completed at EU level. As indicated in recitals 33 and 34 of Regulation 2019/942, formerly recitals 18 and 19 of Regulation No 713/2009, ACER therefore has autonomous decision-making powers enabling it to perform its regulatory functions in an efficient, transparent and reasoned manner and, above all, independently of electricity and gas producers, TSOs and consumers. When exercising those

powers it must ensure that those decisions comply with EU energy law, and is subject to review by the Board of Appeal, which is an integral but independent part of ACER, and by the Court of Justice of the European Union.

48 It follows that ACER has been vested in particular with autonomous regulatory and decision-making powers, which it exercises with complete independence and on its own responsibility, so that it can act in place of the NRAs where they are unable, through their voluntary cooperation, to issue individual decisions on issues or specific cases within their regulatory competence. As indicated in recitals 11 and 45 of Regulation 2019/942, formerly recitals 6 and 29 of Regulation No 713/2009, ACER accordingly becomes competent to adopt decisions, with complete independence and on its own responsibility, on regulatory issues or matters that are significant for the effective functioning of the internal markets in electricity and natural gas, only where and to the extent that, in accordance with the principles of subsidiarity and proportionality laid down in Article 5 TEU, it has not been possible satisfactorily to achieve the objectives pursued by the European Union through cooperation by the Member States concerned, in the absence of global agreement reached by their NRAs on regulatory issues or cases that initially fell within their competence.

49 The rationale of the underlying scheme of Article 6 of Regulation 2019/942, formerly Article 8 of Regulation No 713/2009, and Article 9 of Regulation 2015/1222 is that where the NRAs, at Member State level, have not been able, within the period given to them in which to do so, to issue an individual decision on regulatory issues or on matters within their competence, which are significant for the effective functioning of the internal markets in electricity, such as developing the regional CCMs provided for in Article 9(1) and (7)(a) and Article 20(2) of Regulation 2015/1222, competence to adopt that decision vests in ACER, and it is not envisaged that part of that competence may be retained at national level by the NRAs, for example in relation to certain regulatory issues or certain aspects of the matter at issue on which they were able to reach agreement.

50 Furthermore, since ACER exercises its competence with complete independence and on its own responsibility, the Board of Appeal is correct to state, in paragraph 157 of its decision, that it cannot be bound by the position taken by the competent NRAs on certain regulatory issues or certain aspects of the matters put before them on which they were able to reach agreement, in particular where in the Board's view that position is not compliant with EU energy law. Nor, in the present action, has the applicant in fact disputed that assessment by the Board of Appeal.

51 In addition, since ACER has been given autonomous decision-making powers to perform its regulatory functions efficiently, Article 6 of Regulation 2019/942, formerly Article 8 of Regulation No 713/2009, and Article 9 of Regulation 2015/1222 must be understood as empowering ACER to amend the proposals from the TSOs in order to ensure that they comply with EU energy law, before they are approved. That power is vital in enabling ACER to perform its regulatory functions efficiently since, as the Board of Appeal correctly observed in paragraph 150 of the contested decision, there is no provision of Regulation 2019/942, formerly Regulation No 713/2009, or of Regulation 2015/1222 that establishes – as the first and second sentences of Article 9(12) of Regulation 2015/1222 do, in relation to the NRAs – that ACER may request the TSOs to amend their proposal before it approves it. Those provisions in fact apply only in the context of the procedure for coordination and cooperation between various NRAs, within the meaning of Article 9(10) of Regulation 2015/1222, in order to facilitate an agreement between them, and not in relation to the autonomous decision-making power that vests in ACER, under the third sentence of Article 9(12) of that regulation, where there is no such agreement.

52 Last, it should be noted that in Regulation 2019/942, formerly Regulation No 713/2009, the autonomous decision-making powers granted to ACER were rendered compatible with the NRAs' continuing central role in energy regulation, since, under the first subparagraph of Article 24(2) of that regulation, formerly Article 17(3) of Regulation No 713/2009, ACER, in the person of its director, issues or adopts its decisions only after obtaining the favourable opinion of the Board of Regulators, on which all the NRAs are represented alongside the European Commission and on which each member has a vote, and which adopts decisions by a two-thirds majority, as established in Article 21 and Article 22(1) of that regulation, formerly Article 14 of Regulation No 713/2009.

53 Both the purpose of Article 6 of Regulation 2019/942, formerly Article 8 of Regulation No 713/2009, and of Article 9 of Regulation 2015/1222 and the context of which those provisions form part therefore confirm that, if the competent NRAs are unable to reach agreement on all aspects of the regulatory matter put before them within the period given to them in which to do so, ACER is empowered to adopt a decision on that matter itself, without prejudice to the NRAs retaining their central role through the favourable opinion of the Board of Regulators, and without ACER's competence being limited to the specific aspects around which the disagreement between those NRAs crystallised.

54 Third, the circumstances of the present case do not cast doubt on that interpretation of Article 6 of Regulation 2019/942, formerly Article 8 of Regulation No 713/2009, and Article 9 of Regulation 2015/1222.

55 In the first place, it is apparent from Article 9(1) and (7)(a) and Article 20(2) of Regulation 2015/1222 that each of the regional CCMs is understood as an indivisible set of rules intended to give rise to a single approval by the competent regulatory authorities. The Board of Appeal was therefore correct to state, in paragraph 156 of its decision, that 'it may not be possible to effectively decide on a given (disagreed upon [by the NRAs]) aspect without revising another (agreed upon [by those NRAs]) aspect, given the potential interaction and cross-effects between the various aspects'. Furthermore, the applicant has neither challenged that assessment by the Board of Appeal in the present action nor, a fortiori, demonstrated that in the present case the regulatory issues or the aspects of the day-ahead and intraday CCMs on which the NRAs of that CCR were able to reach agreement, as the document of 18 September 2018 purportedly evidenced, were severable from the other issues or aspects addressed in those CCMs.

56 In the second place and in so far as the applicant refers, in that regard, to the content of the document of 18 September 2018, it should be noted that it is a document issued by the NRAs which is not legally binding on ACER and can have no effect on determination of the scope of Article 6 of Regulation 2019/942, formerly Article 8 of Regulation No 713/2009, or of Article 9 of Regulation 2015/1222, or of the scope of ACER's competences or duties under those provisions. In any event, the content of the document of 18 September 2018 does not bear out the applicant's claim that it specifically distinguished the regulatory issues or aspects of the Core CCR day-ahead and intraday CCMs on which the NRAs of that CCR were able to reach agreement from those on which they failed to agree within the period given and which, as such, fell within ACER's competence.

57 In the document of 18 September 2018 the NRAs of the Core CCR in fact stated, on a purely informal basis, that the TSOs' proposals relating to the day-ahead and intraday CCMs of that CCR did not meet all the requirements of Regulation 2015/1222 and were 'far from being enforceable' and that, accordingly, the NRAs could not approve them in their current state. They

also noted that those proposals were not based on clear, transparent and accurate definitions and well-defined and justified thresholds and values. Those observations attest to the fact that the failure by the competent NRAs to approve the TSOs' proposals relating to the Core CCR day-ahead and intraday CCMs was, in the present case, due less to the existence of disagreements between those NRAs on certain issues or certain specific points of those CCMs than to a serious overall problem of compliance with Regulation 2015/1222 identified in the proposals submitted to them by the TSOs.

58 Furthermore and in any event, it is clear from the document of 18 September 2018 that the NRAs of the Core CCR referred less in that document to the existence of disagreements between them on certain regulatory issues or certain specific points of the day-ahead and intraday CCMs of that CCR and more to the fact that it was impossible to reach a comprehensive agreement on all such issues or aspects. Certain issues were indeed referred to in that document, both among the points of agreement and among the points of disagreement. These included the methodology for selecting critical network elements and contingencies, which are used in capacity calculation, the inclusion of long-term allocated capacities and the capacity validation methodology. Accordingly, even assuming that certain regulatory issues or specific points of the day-ahead and intraday CCMs for that CCR were severable from the others, the fact remains that in the present case the points on which the NRAs of the Core region agreed or disagreed in relation to the day-ahead and intraday CCMs of that CCR were not coterminous with clearly defined regulatory issues or aspects of those CCMs.

59 Last, it is clear from the content of the document of 18 September 2018 that the NRAs of the Core CCR were expecting ACER, when exercising its competence, to monitor whether and ensure that the Core CCR day-ahead and intraday CCMs included the necessary rules to prevent any undue discrimination between internal exchanges and exchanges between bidding zones, as required under Article 21(1)(b)(ii) of Regulation 2015/1222, a regulatory issue on which they had not been able to reach a comprehensive agreement. Pursuit of such an objective could however involve reviewing and, if necessary, amending the capacity calculation rules to ensure that they were consistent with the rules specifically intended to prevent any discrimination between internal and cross-zonal exchanges. It is furthermore apparent from information in the file that this did in fact occur in the present case, since the provisions of Annexes I and II to the initial decision, which the applicant disputes, were adopted in order to ensure compliance with the principle of non-discrimination in internal and cross-zonal exchanges. This demonstrates, once again, that the points of agreement or disagreement between the NRAs of the Core region in relation to the day-ahead and intraday CCMs of that CCR were not necessarily coterminous with clearly defined regulatory issues or aspects of those CCMs.

60 In the third and last place, as regards the applicant's complaint alleging breach of the principle of subsidiarity, it should be noted that the applicant does not set out, in support of that complaint, any detailed argument capable of demonstrating any such breach. In the present case, the initial decision and the decision of the Board of Appeal were adopted following the procedures laid down in Regulation No 713/2009 and Regulation 2015/1222, which establish, in accordance with the principles of conferral, subsidiarity and proportionality set out in Article 5 TEU and as recital 29 of Regulation 2019/942 now reiterates, that ACER becomes competent to adopt individual decisions on regulatory issues or matters that initially fell within the competence of the NRAs only in clearly defined circumstances, on issues that are strictly related to the purposes for which it was established (see paragraphs 37 and 48 above). Specifically, those procedures ensure that ACER acts only on a subsidiary basis in respect of the NRAs, where they have been unable to reach an agreement on regulatory issues or matters that are significant for the effective

functioning of the internal markets for electricity (see paragraph 48 above). In any event, it should be noted that, as already indicated in paragraphs 52 and 53 above, in Regulation 2019/942, formerly Regulation No 713/2009, the decision-making powers granted to ACER were rendered compatible with the continuing central role of the NRAs, through the favourable opinion of the Board of Regulators. The applicant's complaint alleging breach of the principle of subsidiarity must therefore be rejected.

61 In the light of all the foregoing considerations, it must be held that the Board of Appeal did not err in law by failing to find, in its decision, that ACER exceeded the limits of its competence, when it adopted the initial decision, by determining the points of the Core CCR day-ahead and intraday CCMs mentioned in the document of 18 September 2018 as being points on which the NRAs of that CCR had reached agreement.

62 Consequently, the first plea must be rejected as unfounded.

The second plea, alleging that the Board of Appeal erred in law in determining the applicable law, in that it should have agreed to review the legality of the initial decision in the light of Articles 14 to 16 of Regulation 2019/943

63 The second plea alleges that the Board of Appeal erred in law, in its decision, in essence on the ground that it failed to review the legality of the initial decision in the light of Articles 14 to 16 of Regulation 2019/943, of which ACER itself should have taken account in the initial decision.

64 In the first place, the applicant complains that the Board of Appeal, in essence, failed to apply Articles 14 to 16 of Regulation 2019/943, even though those provisions were in force when it adopted its decision. It recalls that the legality of EU acts is reviewed on the basis of the legal and factual situation existing at the time the act was adopted. It observes that Regulation 2019/943 entered into force on 4 July 2019, that is to say, after the initial decision was adopted but before the decision of the Board of Appeal was adopted. Furthermore, according to the applicant, the present action is directed against the initial decision, as confirmed by the decision of the Board of Appeal, that is to say, in essence, against two decisions that are one and the same for legal purposes. The Board of Appeal was therefore obliged to apply Regulation 2019/943, and with all the more reason since, in its decision, it conducted a full independent re-examination of the case, and was therefore in a position to take into account new legal developments that had occurred in the meantime, such as the entry into force of Articles 14 to 16 of Regulation 2019/943.

65 In the second place, the applicant claims, first, that in the initial decision ACER breached the principle of sincere cooperation between the EU institutions. It submits that, when ACER adopted the initial decision, it was already aware in detail of the material requirements contained in Articles 14 to 16 of Regulation 2019/943. According to the applicant, first of all, the initial decision was made when the legislative process was at an advanced stage, at which time those articles had been defined and adopted by all the competent committees of the Council of the European Union and of the European Parliament. Next, the press had already published detailed reports of the new Regulation 2019/943. The applicant also states that, by email of 4 February 2019, it drew ACER's attention to the requirements set out in Articles 14 to 16 of Regulation 2019/943 and to the fact that it was uncertain whether the Core CCR day-ahead and intraday CCMs that ACER planned to adopt complied with those requirements. Last, the applicant states that, although the initial decision contained several references to the provisions

of the new Regulation 2019/943, those references related to aspects that supported the position of ACER, which was therefore taking future EU law into account arbitrarily and selectively and was, therefore, breaching the principle of sincere cooperation.

66 Second, the applicant complains that ACER breached the principles of legal certainty and the protection of legitimate expectations, in the initial decision. It asserts that, according to the case-law (judgment of 22 January 1997, *Opel Austria* v *Council*, T-115/94, EU:T:1997:3), the principle of legal certainty may, with a number of limitations, require that future legal acts be taken into account, in particular where the act is foreseeable, sufficiently certain and incompatible with the legislation to be adopted.

67 Third, the applicant rejects as ineffective ACER's line of argument based on a potential breach of the principle of non-retroactivity. According to the applicant, it is necessary, first, to distinguish the implementation of future EU law from an obligation on the EU institutions to include in their decisions future developments of law that are already foreseeable and, second, to refrain from adopting measures that conflict with higher ranking future legal acts.

68 ACER disputes the applicant's arguments and contends that the second plea should be rejected. In the first place, it submits that, when it examined the initial decision, the Board of Appeal was required to assess whether, in that decision, it had erred when determining the applicable law. It asserts that it was required to adopt its decisions on the basis of the factual situation and the legal provisions existing at the time they were adopted. On the date on which the initial decision was adopted, Regulation 2019/943, and in particular Articles 14 to 16 of that regulation, were not yet in force and had not even been finally approved by the EU legislature. It therefore acted correctly by not basing the initial decision on Regulation 2019/943, in particular on Articles 14 to 16 of that regulation, and, consequently, the Board of Appeal was correct not to examine that decision in the light of those articles, on which the applicant relied in its appeal before the Board of Appeal. ACER also contests the applicant's arguments to the effect that the Board of Appeal's review of the initial decision was an autonomous review. Under Article 28(5) of Regulation 2019/942, the Board of Appeal was not competent either to replace the initial decision with its own decision or to determine the case itself. As regards the applicant's argument based on the fact that the Board of Appeal took into account, in its decision, new legal developments that occurred after the initial decision was adopted, that circumstance does not mean that the Board of Appeal was obliged to assess whether the initial decision was compatible with certain provisions of Regulation 2019/943 that came into force after that decision was adopted.

69 In the second place, ACER contends, first, that, when the initial decision was adopted, the legislative process relating to Regulation 2019/943 was still under way and that that regulation did not form part of the legal order in force, so that it could not know whether that regulation would in fact be adopted, and much less what its terms would be and the exact date it would be adopted. According to ACER, it was neither obvious nor foreseeable that the initial decision may have been incompatible with certain provisions of Regulation 2019/943 that were adopted subsequently. ACER therefore could not base the initial decision on those provisions. In addition, ACER maintains that it is irrelevant whether or not it was aware of the legislative proposals at the time it adopted the initial decision and that it referred in that decision to the proposal for a new regulation.

70 Second, ACER submits that, unlike the situation in the case that gave rise to the judgment of 22 January 1997, *Opel Austria* v *Council* (T-115/94, EU:T:1997:3), in the present case, Regulation 2019/943 had not been adopted when it adopted the initial decision and that it therefore had no

certainty either as to its exact content or as to the date on which it would come into force. The Board of Appeal was therefore correct to find in its decision that the solution applied in the judgment of 22 January 1997, *Opel Austria* v *Council* (T-115/94, EU:T:1997:3), could not be transposed to the present case.

71 Third, the principles of legal certainty and the protection of legitimate expectations were not breached in the present case because, according to ACER, when it was adopted, the initial decision contained clear provisions the application of which was foreseeable to the persons concerned.

72 Fourth, ACER emphasises that the principles of sincere cooperation, institutional balance, the protection of legitimate expectations and legal certainty prevent it from disregarding the law in force and adopting a decision on the basis of mere legislative proposals.

73 In the present case, it is common ground that, in its appeal to the Board of Appeal, the applicant relied on the existence of differences or inconsistencies between the Core CCR day-ahead and intraday CCMs that had been approved by ACER in the initial decision and the requirements governing the adoption of such CCMs under Articles 14 to 16 of Regulation 2019/943.

74 In its decision, the Board of Appeal rejected the complaints thus put forward before it by the applicant on the grounds that Articles 14 to 16 of Regulation 2019/943 were irrelevant for the purpose of reviewing the legality of the initial decision, adopted by ACER, since that regulation was not yet applicable when that decision was adopted.

75 Since, in support of its second plea, the applicant has specifically alleged an infringement of the relevant provisions of Regulation 2019/943, when examining that plea it must be determined whether the Board of Appeal erred in law in not reviewing, in its decision, the legality of the Core CCR day-ahead and intraday CCMs that had been approved by ACER in the initial decision in the light of the requirements governing the adoption of those CCMs under Articles 14 to 16 of Regulation 2019/943.

76 It should be noted in that respect, first, that Regulation 2019/943, according to recital 1 thereof, recasts 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), in accordance with Article 70 thereof. Second, in accordance with recital 4 thereof, the purpose of Regulation 2019/943 is to establish rules to ensure the functioning of the internal market for electricity.

77 Specifically, Articles 14 to 16 of Regulation 2019/943 fall within Section 1, entitled ‘Capacity allocation’ of Chapter III, entitled ‘Network access and congestion management’ of that regulation. They concern the ‘bidding zone review’ (Article 14), ‘action plans’ (Article 15) and ‘general principles of capacity allocation and congestion management’ (Article 16) respectively. Those articles therefore govern capacity allocation on the markets in day-ahead and intraday cross-border exchanges in electricity and, accordingly, dictate the requirements to be taken into consideration when day-ahead and intraday CCMs are adopted. As a result, those articles, in principle, contain the rules of substantive law governing the adoption of those CCMs.

78 Furthermore, it should be borne in mind that a new rule of law applies from the entry into force of the act introducing it and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects, and to new legal situations. It is

otherwise, subject to the principle of the non-retroactivity of legal acts, only if the new rule is accompanied by special provisions which specifically lay down its conditions of temporal application (see judgments of 14 May 2020, *Azienda Municipale Ambiente*, C-15/19, EU:C:2020:371, paragraph 57 and the case-law cited, and of 15 June 2021, *Facebook Ireland and Others*, C-645/19, EU:C:2021:483, paragraph 100 and the case-law cited; see also, to that effect, judgment of 3 September 2015, *A2A*, C-89/14, EU:C:2015:537, paragraph 37 and the case-law cited).

79 Regulation 2019/943 was adopted on 5 June 2019 and, since it was published on 14 June 2019, it entered into force on 4 July 2019, in accordance with Article 71(1) thereof, that is to say, after the initial decision was adopted, which occurred on 21 February 2019, and before the decision of the Board of Appeal was adopted, on 11 July 2019. It should be added that, under the second subparagraph of Article 71(2) of Regulation 2019/943, by way of an exception to the general principle under the first subparagraph of Article 71(2) of that regulation that the regulation applies from 1 January 2020, Articles 14 and 15 thereof apply from the date on which that regulation came into force, that is to say, from 4 July 2019. The same is true of Article 16 of Regulation 2019/943, for the purposes of the specific application of Article 14(7) and Article 15(2) of that regulation. It is clear from the foregoing that, when the initial decision was adopted, Articles 14 to 16 of Regulation 2019/943 had not yet entered into force or become applicable, whereas they had, admittedly with certain limits with regard to Article 16, when the Board of Appeal adopted its decision.

80 In the present case, the legal situation at issue is ACER's final adoption of the day-ahead and intraday CCMs the legality of which is being disputed in the present proceedings.

81 It should be noted in that respect that the procedural provisions in Article 28(5) of Regulation 2019/942, which were applicable in the present case in accordance with the case-law cited in paragraph 21 above, conferred power on the Board of Appeal to confirm the initial decision or to remit it to ACER in the event of disagreement. Those provisions introduced a change from those previously in force, in Article 19(5) of Regulation No 713/2009, under which the Board of Appeal was authorised either to exercise any power lying within the competence of ACER, or to remit the case to the competent body of ACER. Under the procedural arrangements arising from Regulation 2019/942, the Board of Appeal can no longer itself amend the initial decision brought before it, as it could previously. That fact nevertheless does not alter the scope and extent of the review it conducts of that decision.

82 It must be considered that, as under the previously applicable procedural arrangements, decisions issued by the Board of Appeal following the procedures laid down by Regulation 2019/942 replace the decisions initially issued by ACER (see, to that effect and by analogy, judgment of 28 January 2016, *Heli-Flight* v *EASA*, C-61/15 P, not published, EU:C:2016:59, paragraph 84). Where, as in the present case, an appeal is lodged before the Board of Appeal against a decision of ACER concerning day-ahead or intraday CCMs, it is the decision of the Board of Appeal confirming that decision that definitively establishes ACER's position on that methodology, following a full examination by the Board of Appeal of the situation at issue, in fact and in law, in the light of the law applicable when it makes its decision.

83 It follows from the foregoing that the CCMs the legality of which is being challenged in the present proceedings were finally adopted by ACER on the date on which the Board of Appeal adopted its decision confirming that the Core CCR day-ahead and intraday CCMs that had been approved by ACER in the initial decision were lawful, that is to say, on 11 July 2019.

84 It follows that, on the date on which Articles 14 to 16 of Regulation 2019/943 entered into force and became applicable, that is to say, on 4 July 2019, the Core CCR day-ahead and intraday CCMs had not yet been finally adopted by ACER. Accordingly, on that date, the situation at issue in the present case, as defined in paragraph 80 above, had to be analysed as a future, and therefore new, legal situation or, at least, a situation that had arisen but not become definitive under the old law, within the meaning of the case-law cited in paragraph 78 above, and the new rules of substantive law laid down by those articles and contemporaneous with them had to apply immediately to it.

85 Accordingly, when the Board of Appeal adopted its decision, it was obliged to determine whether the Core CCR day-ahead and intraday CCMs that had been approved by ACER in the initial decision could lawfully be confirmed in the light of the new rules governing the adoption of those CCMs, arising from Articles 14 to 16 of Regulation 2019/943, since those rules were already applicable (see paragraph 79 above).

86 Any other outcome could give rise to the paradoxical situation in which ACER, through its Board of Appeal as the case may be, could introduce into the legal system methodologies which, when they are finally adopted, are, first, based on legislation that no is longer applicable and, second, do not comply with new legislation that has become applicable in the meantime.

87 In the light of the foregoing, it must be held that the Board of Appeal erred in law in its decision by failing to determine whether the Core CCR day-ahead and intraday CCMs that had been approved by ACER in the initial decision complied with the requirements of Articles 14 to 16 of Regulation 2019/943 which the applicant had specifically relied on in its appeal to that Board, since those requirements were applicable. It was only by answering that question that the Board of Appeal could decide, in the light of the new rules of substantive law that applied, under Articles 14 to 16 of Regulation 2019/943, whether to refer the adoption of the Core CCR day-ahead and intraday CCMs back to ACER so that it could render them compliant with those rules, or to confirm that the CCMs that had been approved by ACER were lawful in accordance with those rules, by a decision which would then replace the initial decision.

88 The second plea, alleging that the Board of Appeal erred in law in its decision when it determined the law applicable to the situation at issue, which may have affected the validity of that decision, must therefore be upheld.

89 Consequently, the decision of the Board of Appeal must be annulled, without it being necessary to examine the other pleas and complaints put forward by the applicant.

Costs

90 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.

91 Since ACER has essentially been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Annuls Decision A-003-2019 of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 11 July 2019;**

2. **Dismisses the remainder of the action as inadmissible;**

3. **Orders ACER to pay the costs.**

Tomljenović Kreuschitz Schalin

Škvařilová-Pelzl Nõmm

Delivered in open court in Luxembourg on 7 September 2022.

[Signatures]