JUDGMENT OF THE COURT (Second Chamber, Extended Composition)

15 February 2023 (*)

(Energy – Internal market in electricity – Framework for the European platform for the exchange of balancing energy from frequency restoration reserves with manual activation – Procedure for the adoption of terms, conditions and methodologies – Rejection of the joint proposal of the system operators – Competence of ACER – Error of law – Rights of the defence – Obligation to state reasons)

In Case T‑607/20,

**Austrian Power Grid AG,** established in Vienna (Austria), and the other applicants whose names are listed in the annex, (1) represented by M. Levitt, lawyer, B. Byrne and D. Jubrail, Solicitors,

applicants,

v

**European Union Agency for the Cooperation of Energy Regulators (ACER),** represented by E. Ameye, lawyer, A. Tellidou and E. Tremmel, acting as Agents,

defendant,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed, at the time of the deliberations, of S. Papasavvas, President, V. Tomljenović, P. Škvařilová-Pelzl (Rapporteur), I. Nõmm and D. Kukovec, Judges,

Registrar: I. Kurme, Administrator,

having regard to the written part of the procedure,

further to the hearing on 7 June 2022,

gives the following

**Judgment**

1 By their action under Article 263 TFEU, the applicants, Austrian Power Grid AG and the other legal entities listed in the annex, seek the annulment of the decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 16 July 2020 confirming ACER Decision No 03/2020 of 24 January 2020 on the Implementation framework for the European platform for the exchange of balancing energy from frequency restoration reserves with manual activation ('the mFRR platform') and rejecting their appeals in Case A-002-2020 (consolidated), in so far as that decision concerns them, and the annulment of Article 1 of Decision No 03/2020 and Article 3(3) and (5)(b), Article 4(6), Article 6, Article 11(1)(c) and (2)(c) and Article 12 of the mFRR platform implementation framework, as set out in Annex I to Decision No 03/2020 ('the mFRR methodology' or 'the mFRRIF').

**Background to the dispute**

2 Following the entry into force on 18 December 2017 of Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (OJ 2017 L 312, p. 6), all the transmission system operators ('TSOs'), in accordance with Article 20(1) of that regulation, drafted an mFRR methodology proposal.

3 On 18 December 2018, the TSOs, in accordance with Article 5(1) and (2)(a) of Regulation 2017/2195, sent to all the national regulatory authorities ('the NRAs'), for approval, their proposal for the mFRR methodology ('the initial mFRRIF proposal'). Article 12 of that proposal, entitled 'Proposal for entity', provided as follows:

'1. All TSOs shall appoint one entity entrusted to operate all the functions [required for the operation] of the mFRR platform.

2. The entity shall be a consortium of TSOs or a company owned by TSOs.'

4 By letter dated 24 July 2019, the Chair of the Forum of Energy Regulators (FER), on behalf of all NRAs, informed ACER that they had jointly decided, pursuant to Article 5(7) of Regulation 2017/2195, to request ACER to decide on the initial mFRRIF proposal ('the joint request'). That letter was accompanied by a 'Non-Paper of all [NRAs] agreed at the [FER] on the [initial mFRRIF] proposal in accordance with Article 20 of [Regulation 2017/2195]' ('the NRAs' non-paper').

5 In the context of exchanges and consultations with the NRAs and the TSOs from July 2019 onwards, ACER considered that the initial mFRRIF proposal, which provided that the entity to perform the functions required to operate the mFRR platform could take the form of a consortium of TSOs, was not compatible with Regulation 2017/2195.

6 By email dated 28 November 2019, the TSOs sent ACER a second version of the mFRR methodology proposal ('the second mFRRIF proposal'). Article 12 of the second mFRRIF proposal stated that the entity responsible for performing all functions required to operate the mFRR platform would be a company owned by the TSOs. In an explanatory note attached to that email, the TSOs clarified the purpose of that article.

7 Following the review of the second mFRRIF proposal, ACER again considered that it was not compatible with Regulation 2017/2195, on the ground that it only designated the entity responsible for performing the activation optimisation function and the TSO-TSO settlement function, whereas that regulation required the designation of an entity responsible for each of the functions required to operate the mFRR platform, including functions such as capacity management, as the process for continuously updating cross-zonal capacity for balancing energy exchanges, were cross-platform functions, in so far as the available cross-zonal transmission capacity was a factor to be taken into account in each of the European balancing platforms. Furthermore, it suggested to the TSOs, in order to comply with Article 20(2) of Regulation 2017/2195, to keep the two options proposed for the entity to perform the functions required to operate the mFRR platform, namely, either a single TSO or a company owned by the TSOs.

8 By email of 13 December 2019, the TSOs, through a member of the European Network of Transmission System Operators for Electricity, sent to ACER a third version of the mFRR methodology proposal ('the third mFRRIF proposal').

9 Article 12 of the third mFRRIF proposal provided as follows:

'…

2. All TSOs shall appoint one entity entrusted to operate the [activation optimisation function] and the TSO-TSO settlement function of the [mFRR] Platform. This entity shall be a single TSO or a company owned by TSOs.

…

5. Whenever all TSOs implement a cross-platform function, all TSOs shall appoint one entity entrusted to operate such a cross-platform function, which may be different from the entity in paragraph 2.

6. By six months after the approval of the [methodology] of a European platform for the exchange of balancing energy from frequency restoration reserves with [manual/automatic] activation, all TSOs shall designate the proposed entity entrusted with operating the [capacity management function].

…'

10 By email of 17 December 2019 to the European Network of Transmission System Operators for Electricity, ACER informed the TSOs that the changes to Article 12 in the third mFRRIF proposal were still not compatible with Regulation 2017/2195. Since, according to that proposal, the functions required to operate the mFRR platform could be performed by several entities, that proposal would have to comply with the additional requirements of Article 20(3)(e) of Regulation 2017/2195, which had not been demonstrated.

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

12 On 20 December 2019, ACER finalised its draft mFRR methodology decision, which was communicated to the applicants.

13 On 24 January 2020, ACER adopted Decision No 03/2020 on the mFRR methodology, to which was attached, as Annex I, an mFRR methodology, as amended and approved by ACER ('the mFRRIF at issue').

14 Article 12 of the mFRRIF at issue provides as follows:

'…

2. All TSOs shall appoint one entity being a single TSO or a company owned by TSOs that shall be entrusted to operate the [activation optimisation function] and the [TSO-TSO settlement function] of the mFRR platform. No later than eight months before the deadline when the capacity management function shall be considered as a function required to operate the mFRR platform pursuant to Article 6(4), all TSOs shall develop a proposal for amendment of this mFRRIF, which shall designate the entity performing the capacity management function in accordance with Article 20(3)(e) of [Regulation 2017/2195] and clarify whether the mFRR platform will be operated by a single entity or multiple entities.

3. The designation of the entity will be done in accordance with Article 20(4) [of Regulation 2017/2195].

…'

15 On 23 March 2020, pursuant to Article 28 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), Austrian Power Grid, ČEPS, a.s., Polskie sieci elektroenergetyczne S.A., Red Eléctrica de España SA, RTE Réseau de transport d'électricité and Svenska kraftnät ('Group A') lodged an appeal with the ACER Board of Appeal against, inter alia, Decision No 03/2020, which was initially registered under number A-002-2020. TenneT TSO BV and TenneT TSO GmbH lodged an appeal with the ACER Board of Appeal against, inter alia, Decision No 03/2020, which was initially registered under number A-005-2020. As those cases had the same subject matter, the Board of Appeal subsequently grouped them under case number A-002-2020 (consolidated).

16 In its action, Group A, pursuant to Article 20(3)(d) of Board of Appeal Decision No 1-2011, as amended on 5 October 2019, laying down the rules of organisation and procedure before the ACER Board of Appeal, requested the latter to order ACER to disclose ('the disclosure request'), in unredacted form, a number of documents, namely, first, a copy of the assessment allegedly carried out by ACER in the context of the implementation of Article 20(5) of Regulation 2017/2195 and, secondly, a copy of the forms containing the opinions allegedly formulated by ACER's Board of Regulators on Decision No 03/2020 and the mFRR methodology, prior to their final adoption by ACER ('the contested documents'), as well as to give ACER the opportunity to comment on those documents. Group A reiterated that disclosure request by letter dated 28 May 2020.

17 On 2 June 2020, the Registry of the Board of Appeal communicated to Group A the decision by which the chairperson of that board had denied its disclosure request ('the decision denying the disclosure request').

18 By decision of 16 July 2020, the Board of Appeal adopted the contested decision, which confirmed Decision No 03/2020 and dismissed the applicants' appeals in Case A-002-2020 (consolidated).

**Forms of order sought by the parties**

19 The applicants claim that the Court should:

– annul the contested decision, in so far as it is affects them;

– annul Article 1 of Decision No 03/2020, Article 3(3) and (5)(b), Article 4(6), Article 6, Article 11(1)(c) and Article 12(2)(c) of the mFRRIF at issue;

– order ACER to pay the costs.

20 ACER contends, in essence, that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

**Law**

*Admissibility of the second head of claim in the action*

21 According to settled case-law, the conditions for the admissibility of an action laid down by Article 263 TFEU are matters of public policy and it is therefore for the Court to examine them of its own motion (see, to that effect, judgment of 16 May 2019, *Pebagua* v *Commission*, C‑204/18 P, not published, EU:C:2019:425, paragraph 28 and the case-law cited).

22 In the present case, after the parties have been invited to submit their observations in that regard, it is necessary for the Court to examine of its own motion the admissibility of the second head of claim in the action, which seeks the annulment of Article 1 of Decision No 03/2020 and several provisions of the mFRRIF at issue.

23 In that regard, it follows from recital 34, Article 28(1) and Article 29 of Regulation 2019/942 and the fifth paragraph of Article 263 TFEU, as interpreted in the light of the relevant case-law, that non-privileged applicants may only bring proceedings before the Court for the annulment of decisions adopted by the Board of Appeal (see, to that effect and by analogy, judgment of 16 March 2022, *MEKH and FGSZ* v *ACER*, T‑684/19 and T‑704/19, EU:T:2022:138, paragraphs 31 to 42).

24 In the context of the examination of the present action, the applicants, which do not have the status of privileged applicants, can only seek the annulment of the contested decision, adopted by the Board of Appeal, but not of Decision No 03/2020 and its annexes.

25 The present case should therefore be limited to a review of the legality of the contested decision, in particular in so far as it confirms Decision No 03/2020 in its entirety and the provisions of the mFRRIF at issue, in the light of the pleas in law and objections put forward by the applicants and the pleas in law and objections which should, where appropriate, be raised by the Court of its own motion in respect of the contested decision.

*Substance*

26 In support of their action, the applicants put forward three pleas in law, alleging, in essence, first, that the Board of Appeal erred in law by infringing the principle of conferral and Regulation 2019/942 in the contested decision by finding that ACER was permitted, in Decision No 03/2020, to depart, in the exercise of its competence, from the NRAs' joint request, secondly, that the Board of Appeal erred in law, in the contested decision, by failing to find that ACER, in Decision No 03/2020, had infringed Article 20 of Regulation 2017/2195, and thirdly, an infringement by the Board of Appeal, in the course of the proceedings before it, of the principle of sound administration, the principle of respect for the rights of the defence, the duty to state reasons and the legal obligations incumbent on it.

*The first plea in law, alleging that the Board of Appeal erred in law by infringing the principle of conferral and Regulation 2019/942 by finding that ACER was permitted to depart, in the exercise of its competence, from the NRAs' joint request*

27 The first plea in law is divided into two parts. The first part alleges that the Board of Appeal wrongly concluded in the contested decision that ACER had not departed from the NRAs' common position, as set out in the joint request. The second part alleges that the Board of Appeal wrongly concluded in the contested decision that, in any event, ACER was permitted to depart from the NRAs' common position as set out in the joint request.

28 The Court considers it appropriate to begin by examining the second part of the first plea in law.

29 In the context of the latter, the applicants claim, in essence, that the Board of Appeal wrongly concluded in the contested decision that ACER was permitted to depart from the NRAs' common position as set out in the joint request, although the scope of ACER's competence was defined by the joint request and that, by departing from the terms of the latter, in Decision No 03/2020, on the basis of Article 5(7) of Regulation 2017/2195 and point (b) of the second subparagraph of Article 6(10) of Regulation 2019/942, in order to pursue its policy agenda, it had acted *ultra vires*, in breach of those provisions. The fact that some of the NRAs concerned did not challenge the contested decision in that regard does not deprive the other NRAs of their right to do so.

30 First, according to the applicants, it follows from Article 6(4) of Regulation 2019/942 and from ACER's case-law and decision-making practice that ACER's decision-making competence cannot extend to points on which the NRAs have already reached agreement or have not asked it to rule. In the present case, only two points of disagreement among the NRAs mentioned in the non-paper, relating to, first, scheduled counter-activations and whether they should be allowed from the start of the implementation of the mFRR platform, and, secondly, to details on the guaranteed volume and the offers that should be part of it, in particular whether only the most expensive offers should be declared unavailable for activation by other TSOs.

31 Second, the applicants claim that, by adopting a decision which exceeded the limits of its competence, as defined by the joint request, ACER infringed the principle of conferral enshrined in Article 5(2) TEU. The mFRR methodology was adopted on the basis of Regulation 2017/2195, which is an implementing act. As can be seen from recital 16 thereof, Regulation 2017/2195 sets the limits of the competence attributed to ACER and only the European Commission could, through the comitology procedure, modify those limits. Moreover, contrary to what the Board of Appeal contends, in paragraph 108 of the contested decision, ACER did not exercise, in the present case, a competence of its own, but a competence delegated or derived from the NRAs. In accordance with the case-law, only the need to ensure the effectiveness of Regulation 2017/2195 could justify ACER exceeding the limits of the competence conferred on it. However, it would appear from paragraph 69 of the judgment of 24 October 2019, *E-Control* v *ACER* (T‑332/17, not published, EU:T:2019:761), that there would be no justification for ACER, as in the present case, to substitute its position for that of the NRAs, as expressed in the joint request, regarding the functions required to operate the mFRR platform and the entity or entities designated to perform them.

32 Third, the applicants claim that the interpretation of Article 5(2)(b) of Regulation 2019/942, adopted by the Board of Appeal in the contested decision, in order to give ACER a general power to review the TSOs' proposals submitted to the NRAs, was erroneous, in so far as that provision was not applicable to the decision-making process referred to in point (b) of the second subparagraph of Article 6(10) of that regulation and did not comply with the principle of conferral, as noted in paragraph 31 above. In the present case, the adoption of the mFRR methodology fell, in the first place, within the competence of the NRAs and, in the second place and in the absence of agreement between them or at their joint request, within the competence of ACER.

33 Fourth, the applicants consider that ACER's invocation of the allegedly 'bottom-up' nature of the regulatory process provided for in Regulation 2019/942 does not justify the fact that, in Decision No 03/2020, ACER departed from the NRAs' common position, irrespective of the favourable opinion issued by the Board of Regulators on ACER's draft decision. By Decision No 03/2020, ACER imposed on the TSOs a set of obligations which they consistently rejected and which the NRAs did not identify, in the joint request, as being points of disagreement existing between them and requiring ACER arbitration. Decision No 03/2020, as upheld by the Board of Appeal, was not only unlawful, but was also prejudicial to the TSOs. It would have deprived them of the possibility to designate a consortium of TSOs to perform the activation optimisation function and the TSO-TSO settlement function and would have required them, within a certain period of time, to include capacity management among the functions required to operate the mFRR platform and to designate one of the TSOs or a company owned by TSOs to perform that function, in accordance with Article 20(4) of Regulation 2017/2195. Under Article 20 of Regulation 2017/2195, it is for the TSOs to define the mFRR methodology and not for ACER to impose it on them, hiding behind a hypothetical possibility for the TSOs to submit a proposal for amendment of the mFRR methodology, pursuant to Article 6(3) of Regulation 2017/2195.

34 ACER contends that the second part of the first plea in law should be rejected.

35 In the present case, in accordance with the determination of the admissibility of the action and the utility of the pleas in law raised in support thereof made in paragraph 25 above, it is necessary to ascertain whether the Board of Appeal erred in law by failing, in the contested decision, to find that, in adopting Decision No 03/2020, ACER had exceeded the limits of its competence, as the applicants had alleged in support of the action brought before it.

36 In that regard, it follows from the case-law concerning the rules governing the competence of the institutions, bodies, offices and agencies of the European Union that the provision constituting the legal basis of a measure and empowering the EU institution to adopt the measure at issue must be in force at the time when the measure 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).

37 At the time of the adoption of the contested decision, which is the only act whose legality the applicants are entitled to challenge in the present action (see paragraph 25 above), namely 16 July 2020, Regulation 2019/942 was applicable. Moreover, Regulation 2017/2195 was also in force and applicable, and in accordance with Article 65 thereof, from 18 December 2017, that is to say, the 20th day following that of its publication in the *Official Journal of the European Union*, on 28 November 2017. Article 6(10) of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195 empowered ACER, within a period of six months, to decide or adopt individual decisions on regulatory issues or problems affecting cross-border trade or cross-border network security falling within the competence of NRAs, such as the adoption of the mFRR methodology, if the competent NRAs had not reached agreement within the time limit set for them to do so or if the competent NRAs had made a joint request to ACER to that effect. At the time of the adoption of the contested decision, only those provisions were capable of providing a legal basis for the decision.

38 Thus, it must be ascertained whether Article 6(10) of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195 were such as to provide a basis for ACER’s competence to definitively adopt the mFRR methodology, as set out in Annex I to the contested decision, which involves interpreting the scope of those provisions.

39 In that regard, it should be noted that, according to settled case-law, in interpreting provisions of EU law, account must be taken not only of their terms but also of their context and the objectives pursued by the legislation 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 on combating late payment)*, C‑122/18, EU:C:2020:41, paragraph 39 and the case-law cited).

40 In the present case, all TSOs have, as required under Article 5(2)(a) and Article 20(1) of Regulation 2017/2195, submitted to their NRAs for approval a proposal for an mFRR methodology, namely the initial mFRRIF proposal. According to Article 5(7) of Regulation 2017/2195 and point (b) of the second subparagraph of Article 6(10) of Regulation 2019/942, ACER was however required, in the event of a joint request from the NRAs, to take a decision on that proposal itself within six months of the date of notification of that request. It is clear that, by letter of 24 July 2019, the NRAs jointly requested ACER, pursuant to Article 5(7) of Regulation 2017/2195, to take a decision on the initial mFRRIF proposal submitted to them by the TSOs (see paragraph 4 above).

41 Thus, ACER’s competence to rule or adopt a final decision on the mFRR methodology in the present case was based on the circumstance, referred to in point (b) of the second subparagraph of Article 6(10) of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195, that all the NRAs had jointly asked it to rule on that methodology.

42 First, it does not follow from the terms of Article 6 of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195 that, in the context of the exercise of such competence and beyond the obligation incumbent on it, pursuant to Article 6(11) of Regulation 2019/942, to consult the NRAs and TSOs concerned at the stage of preparation of its decision, ACER was bound by the observations transmitted by the TSOs. In particular, it does not follow from those provisions that ACER’s competence is limited only to those aspects on which the NRAs had failed to reach agreement. On the contrary, Article 6(10) of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195 consider ‘regulatory issues’ or the ‘submitted proposals … for methodologies [by TSOs]’ as initially falling within the competence of the NRAs and then, at their joint request, falling within that of ACER as an indivisible whole, which the NRAs, and subsequently ACER, are to deal with as a whole without making such a distinction. In view of their wording, Article 6 of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195 must therefore be interpreted as meaning that, in the event of a joint request from NRAs relating to regulatory issues or proposals submitted by TSOs, ACER is empowered to rule or decide itself on those issues or proposals.

43 Secondly, that literal interpretation of Article 6(10) of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195 is supported by the context and objectives pursued by the regulation of which those provisions form part, as informed by the preparatory work of the latter.

44 In that regard, it is clear 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 led to 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), which was subsequently replaced by Regulation 2019/942, that the provisions contained therein were based, inter alia, on the finding that, ‘although the internal market for energy has developed considerably, a regulatory gap remain[ed] on cross-border issues’ and which ‘in practice usually require[d] 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 need to be taken’. For those reasons, it was decided to create ‘the Agency [which] would complement at European level the regulatory tasks performed at national level by the regulatory authorities’, in particular through the attribution of ‘individual decision[-making] powers’. Those powers were to be granted to ACER ‘with a view to handling specific cross-border issues’, in particular ‘to decide on the regulatory regime applicable to infrastructure within the territory of more than one Member State’, as finally provided for in Article 8 of Regulation No 713/2009.

45 Furthermore, the explanatory memorandum to the Proposal for a Regulation of the European Parliament and of the Council establishing an EU Agency for the Cooperation of Energy Regulators (COM(2016) 863 final) states that the provisions contained therein were intended, inter alia, to ‘[adapt] regulatory oversight to regional markets’. In particular, it no longer seemed appropriate to the new realities of these markets that ‘all main regulatory decisions [be] taken by national regulators, even in cases where a common regional solution [was] needed’ and that ‘regulatory oversight therefore remain[ed] fragmented, [which led] to a risk of diverging decisions and unnecessary delays’. For those reasons, it was considered that ‘strengthening the powers of ACER for those cross-border issues which require a coordinated regional decision would contribute to faster and more effective decision-making on cross-border issues’, noting that ‘national regulators, deciding within ACER on those issues through majority voting, would remain fully involved in the process’. The granting of ‘limited additional competences’ to ACER was considered to be in line with the principle of subsidiarity, as it intervened ‘in those areas where fragmented national decision-making on issues with cross-border relevance would lead to problems or inconsistencies for the internal market’. In addition, it was considered to be in line with the principle of proportionality, as ‘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’. It is in that context that the proposed regulation, in its ‘Chapter [I,] … defin[ed] 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 of ACER were notably formalised in Article 6(10) of Regulation 2019/942.

46 It follows from the explanatory memorandum to those proposals for a regulation that the EU legislator has a clear intention to make decision-making on difficult but necessary cross-border issues more efficient and faster by strengthening ACER’s individual decision-making powers in a way that is compatible with maintaining the central role of NRAs in energy regulation.

47 That is also in line with several of the objectives pursued by Regulations No 713/2009 and 2019/942. As noted in recital 10 of Regulation 2019/942, previously recital 5 of Regulation No 713/2009, Member States should cooperate closely and remove barriers to cross-border trade in electricity and natural gas in order to achieve the objectives of the European Union’s energy policy and an independent central body, ACER, was established to fill the regulatory gap at EU level and to contribute to the efficient functioning of the internal markets in electricity and natural gas. Thus, as stated in recital 11 of

Regulation 2019/942, previously recital 6 of Regulation No 713/2009, ACER is to ensure that the regulatory functions performed by the NRAs are properly coordinated and, where necessary, complemented at EU level. It thus has, as specified in recitals 33 and 34 of Regulation 2019/942, previously recitals 18 and 19 of Regulation No 713/2009, its own decision-making powers to enable it to perform its regulatory functions in an efficient, transparent, reasoned and, above all, independent manner in relation to electricity and gas producers, TSOs and consumers. It must exercise those powers while ensuring that its decisions comply with EU energy law, under the supervision of the Board of Appeal, which is part of ACER but independent within ACER, and of the Court of Justice of the European Union.

48 As a result, ACER has been granted, inter alia, regulatory functions and decision-making powers of its own, which it exercises independently and under its own responsibility, in order to be able to deputise for the NRAs where their voluntary cooperation does not allow them to take individual decisions on particular issues or problems falling within their regulatory competence. As stated in recitals 11 and 45 of Regulation 2019/942, previously recitals 6 and 29 of Regulation No 713/2009, ACER thus becomes competent to decide, independently and under its own responsibility, on regulatory issues or problems that are important for the efficient functioning of the internal markets in electricity and natural gas, only when and in so far as, in accordance with the principles of subsidiarity and proportionality as set out in Article 5 TEU, the objectives of the European Union cannot be sufficiently achieved by the cooperation of the Member States concerned due to a lack of overall agreement between their NRAs on regulatory issues or problems initially falling within their competence. That is particularly the case where the NRAs themselves agree that it is more appropriate for ACER itself to decide on such issues or problems.

49 Therefore, the logic of the system underlying Article 6 of Regulation 2019/942, previously Article 8 of Regulation No 713/2009, and Article 5(7) of Regulation 2017/2195 is that, where NRAs at Member State level consider it more appropriate for ACER itself to decide by individual decision on regulatory issues or a problem within their competence which are important for the efficient functioning of the internal electricity markets, such as the development of the mFRR methodology provided for in Article 20(1) of Regulation 2017/2195, the competence for the adoption of such a decision is to lie with ACER, without it being intended that part of that competence may be retained at national level by NRAs, for example for some of the regulatory issues or for some of the aspects of the issue in question on which they have reached agreement.

50 Furthermore, in so far as ACER exercises its competence independently and on its own responsibility, the Board of Appeal is right to state, in paragraph 110 of the contested decision, that it cannot be bound by the position taken by the competent NRAs on some of the regulatory issues or on some of the aspects of the problems which were submitted to them and on which they were able to agree, in particular where it considers that that position is not in conformity with EU energy law. In any event, the applicants do not contest, in the context of the present action, that assessment of the Board of Appeal.

51 In addition, to the extent that ACER has been granted its own decision-making powers to enable it to perform its regulatory functions effectively, Article 6 of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195 must be understood as authorising ACER to amend TSOs' proposals in order to ensure their compliance with EU energy law, prior to their approval. That power is indispensable for ACER to be able to perform its regulatory functions effectively, since, as the Board of Appeal rightly pointed out in paragraph 125 of the contested decision, there is no provision in Regulation 2019/942 or Regulation 2017/2195 for ACER to request TSOs to modify their proposal, prior to approval.

52 Finally, it should be noted that, in Regulation 2019/942, ACER's own decision-making powers have been reconciled with the maintenance of the central role recognised to the NRAs in the field of energy regulation since, in accordance with the first subparagraph of Article 24(2) of that regulation, ACER, in the person of its Director, is to adopt its decisions only after having received or obtained the favourable opinion of the Board of Regulators on which all NRAs are represented alongside the Commission, each member of the Board of Regulators having one vote and the Board of Regulators acting by a two-thirds majority, as provided for in Article 21 and Article 22(1) of that regulation.

53 Therefore, the purpose of Article 6 of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195 as well as the context of those provisions confirm that, in the event of a joint request by NRAs on regulatory issues or proposals submitted by TSOs, ACER is empowered to rule or decide on the matter itself, without prejudice to the continued central role of the NRAs through the assent of the Board of Regulators and without its competence being limited to the specific aspects on which the disagreement between the NRAs would have been crystallised.

54 The applicants' arguments that Regulation 2017/2195 is an implementing act, that the Board of Appeal erroneously designated the process leading to the adoption of the contested decision as 'bottom-up' or that it failed to comply with the provisions of Article 5(2)(b) of Regulation 2019/942 must be rejected as being, in any event, inoperative, inasmuch as they are not such as to alter the fact that, in the present case, Article 6 of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195 provided the Board of Appeal with a sufficient legal basis for definitively adopting the mFRR methodology, as set out in Annex I to the contested decision.

55 Third, the correctness of the interpretation of Article 6 of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195 set out in paragraph 53 above is confirmed by the application of those provisions in the present case.

56 In the first place, it follows from Article 20(1) of Regulation 2017/2195 that the mFRR methodology is designed as an indivisible regulatory package, to be approved by the relevant regulatory authorities in a single step.

57 In the second place, and in so far as the applicants refer to the content of the NRAs' non-paper, it should be observed that the latter constitutes a document, issued by the NRAs, which is not legally binding on ACER and which is not capable of influencing the determination of the scope of Article 6 of Regulation 2019/942 or of Article 5(7) of Regulation 2017/2195, or of the powers or duties of ACER arising therefrom. In any event, the content of that document does not support the applicants' claim that the NRAs' non-paper concretely distinguished the regulatory issues or aspects of the mFRR methodology on which all NRAs had reached agreement, in particular that activation optimisation and TSO-TSO settlement, but not capacity management, were functions required to operate the mFRR platform and the choice of a consortium to perform such functions was an option compatible with Article 20(2) of Regulation 2017/2195, from those on which they had not reached such agreement and as such referred to ACER for a decision.

58 In the NRAs' non-paper, the NRAs, after noting that the available cross-zonal transmission capacity should be taken into account by the activation optimisation function, noted, in a manner that was not binding on ACER, their agreement that the initial mFRRIF proposal should provide for the calculation of available cross-zonal transmission capacity to be carried out by all TSOs in a centralised and coordinated manner for all European balancing platforms and, furthermore, should be redrafted, in essence, to clarify unambiguously whether they wished to entrust a single entity or several entities to perform the functions required to operate the mFRR platform, given that a consortium of TSOs without legal personality was equivalent to a multi-entity structure. Those observations from the NRAs indicate that their agreement in this case was less about validating the articles in the initial mFRRIF proposal relating to the calculation of available cross-zonal transmission capacity and the designation of entities to perform the functions required to operate the mFRR platform than about the need for TSOs to develop the articles relating to those issues in the initial mFRRIF proposal.

59 The applicants therefore wrongly accuse ACER of disregarding the fact that the NRAs' non-paper showed that the latter were in agreement that activation optimisation and TSO-TSO settlement, but not capacity management, were functions required to operate the mFRR platform and that the choice of a consortium to perform those functions was an option compatible with Article 20(2) of Regulation 2017/2195.

60 Having regard to all the foregoing assessments, it must be held that the Board of Appeal did not err in law in that, in the contested decision, it did not find that, in adopting Decision No 03/2020, ACER had exceeded the limits of its competence by ruling on points of the mFRR methodology which had been referred to in the NRAs' non-paper as having been the subject of agreement between them.

61 Consequently, the second part of the first plea in law must be rejected as unfounded. Since examination of the second part of the first plea in law shows that ACER was, in any event, competent to rule on points of the mFRR methodology which were mentioned in the NRAs' non-paper as having been

agreed between them, it is irrelevant whether, in adopting Decision No 03/2020, ACER actually departed from the NRAs' common position, as set out in their joint request. The first part of the first plea in law must therefore be rejected as being inoperative, such that the latter plea in law must be rejected in its entirety.

*The second plea in law, alleging that the Board of Appeal erred in law by failing to find that ACER had infringed Article 20 of Regulation 2017/2195*

62 The second plea in law is divided into eight parts, which should be examined successively, if necessary by grouping them together.

– *The first part of the second plea in law, alleging that the Board of Appeal wrongly concluded that the TSOs had imposed on themselves the use of a single entity*

63 The applicants claim that the Board of Appeal wrongly concluded in paragraph 162 of the contested decision that the TSOs had imposed on themselves the use of a single entity to perform the functions required to operate the mFRR platform. That board failed to take into account the fact that the proposal to designate a single TSO, contained in the third TSO proposal, was the result of ACER's constant opposition, in the decision-making process, to the designation of a consortium of TSOs and its preference for the designation of a single legal entity, in the form of a TSO or a company created by the TSOs. ACER thus illegally imposed its position on the TSOs, under the guise of the allegedly 'bottom-up' nature of the regulatory process under Regulation 2019/942. The fact that some of the NRAs concerned did not challenge the contested decision in that regard does not deprive the other NRAs of their right to do so.

64 ACER contests the applicants' arguments and contends that the first part of the second plea in law should be rejected.

65 First, the first part of the second plea in law raises, in essence, the question whether ACER could, or even should, take into account the successive mFRRIF proposals that the TSOs had submitted to it, after it had been called upon to rule on the initial mFRRIF proposal at the joint request of the NRAs.

66 In the present case, it appears from the document, with apparent corrections, contained in Annex A.6.1 to the application as well as from paragraph 162 of the contested decision that ACER retained the initial mFRRIF proposal as the basic document on which it was called upon to decide, and then finally took into account the revised third mFRRIF proposal in order to draw up the mFRRIF at issue, the final draft of which was communicated to the TSOs on 20 December 2019 (see paragraph 12 above).

67 In that regard, there is no legal obstacle to the fact that, first, during the consultation phase to be carried out by ACER in accordance with Article 6(11) of Regulation 2019/942, TSOs successively submit to ACER one or more amended versions of their proposal initially sent to the NRAs and, secondly, in the context of that consultation, ACER takes into account the successive amendments thus made by the TSOs.

68 In the present case, it should be noted that the submission of the successive mFRRIF proposals took place at the TSOs' own initiative, in an attempt to respond to ACER's observations. In such a circumstance, it is in line with the spirit of the applicable rules and the principle of loyal cooperation, which must prevail in the context of the consultation that ACER is required to carry out, in accordance with Article 6(11) of Regulation 2019/942, that the latter took into account the last mFRRIF proposal filed by the TSOs in order to draw up the final version of its draft mFRR methodology decision, as communicated to the TSOs on 20 December 2019.

69 As the applicants themselves acknowledge, in the revised third mFRRIF proposal, finally taken into account by ACER, the TSOs had proposed to designate a single TSO, and not a structure in the form of a consortium, to perform the functions required to operate the mFRR platform.

70 Therefore, the Board of Appeal in the contested decision rightly found that ACER in Decision No 03/2020 had not imposed a single entity structure and had merely 'closely aligned the mFRR [methodology] with the third [amended mFRRIF] proposal' to reflect 'what the TSOs requested'.

71 Secondly, and in any event, contrary to the applicants' claims and as the Board of Appeal found in paragraph 176 of the contested decision, it is apparent from Decision No 03/2020 that ACER had not ruled out the possibility that the entity designated by the TSOs to perform the functions required to operate the mFRR platform might take the form of a consortium. By contrast, like the NRAs in their non-paper, ACER has always considered that, if such a form were to be chosen by the TSOs, as it does not confer legal personality on the entity in question, it could not be considered to be a single entity.

72 It should be noted that a consortium is a grouping without legal personality. In the absence of legal personality conferred on that entity, it is the TSOs, in the light of their legal personality, that continue to ensure the operation of the mFRR platform.

73 In those circumstances, it was right that, taking into account that the form of the consortium was to be considered as a multiple entity structure, corresponding to the TSOs that were members of it, the Board of Appeal, like the NRAs and ACER, considered that the TSOs had to demonstrate, in their mFRRIF proposal, that the additional requirements set out in Article 20(3)(e) of Regulation 2017/2195 were met.

74 Therefore, the argument, repeated on numerous occasions by the applicants, that ACER refused to allow the entity designated by the TSOs to take the form of a consortium and imposed its preference for a structure with a single entity, namely a single TSO or a company owned by TSOs, has no factual basis and must, in any event, be rejected as unfounded.

75 In the light of all the foregoing assessments, the first part of the second plea in law must be rejected.

– *The second part of the second plea in law, alleging that the Board of Appeal erred in law by failing to find that ACER had infringed Article 20(2) of Regulation 2017/2195*

76 The applicants claim that the Board of Appeal erred in law by failing to find in the contested decision that ACER had infringed Article 20(2) of Regulation 2017/2195 in Decision No 03/2020 by refusing the designation by the TSOs of a consortium of TSOs on the ground that Article 20(2) provides for only two options for a single entity, either a TSO or a company created by TSOs, and not a consortium. There would have been no justification for ACER to argue, in recital 83 of Decision No 03/2020, that the entity referred to in Article 20 of Regulation 2017/2195 had to have legal capacity and therefore could not be a consortium, which does not have such capacity.

77 ACER contests the applicants' arguments and contends that the second part of the second plea in law should be rejected.

78 As has already been noted in connection with the examination of the first part of the second plea in law in paragraph 71 above, ACER has never ruled out the possibility of the entity designated by the TSOs taking the form of a consortium. By contrast, ACER has consistently indicated that, if that were to be the form chosen by the TSOs, they would be multiple entities, given the lack of legal personality of the consortium, and the TSOs should demonstrate in their mFRRIF proposal that the additional requirements of Article 20(3)(e) of Regulation 2017/2195 are met.

79 In that regard, it should be noted that, pursuant to Article 12(2) of the mFRRIF at issue, as quoted in paragraph 14 above, in a first step, TSOs were required to designate a single entity, namely a single TSO or a company owned by TSOs, responsible for the activation optimisation function and the TSO-TSO settlement function. In a second step, they were, in compliance with the provisions of Article 20(3)(e) of Regulation 2017/2195, to establish a proposal for the designation of the entity in charge of performing the capacity management function and, in that regard, specify whether the functions required to operate the mFRR platform would be performed by a single entity or by multiple entities, which should be coordinated.

80 Therefore, contrary to what the applicants maintain, it is not apparent from the mFRRIF at issue that ACER rejected the consortium option.

81 Furthermore, as ACER argues, it did not add an additional requirement, namely ‘legal capacity’, to allegedly exclude the consortium option, but only invoked the lack of legal capacity of the consortium to justify that the latter should not be considered as a single entity, but multiple entities.

82 That finding of the lack of legal capacity of the consortium was explicitly noted by the NRAs in their non-paper. Thus, under the heading ‘Article 12 – Proposal for entity’, of point B, entitled ‘Issues on which the [NRAs] have reached agreement’, the NRAs indicated that they were not all in favour of the TSOs’ proposal for the designation of the entity or entities responsible for the functions required to operate the mFRR platform under Article 12 of the mFRRIF, and requested that the proposal be revised, referring to similar comments made in relation to the proposal for an implementation framework for a European platform for the imbalance netting process. In essence, the NRAs wanted TSOs to take into account that, with regard to the two options referred to in Article 20(2) of Regulation 2017/2195, if they provided for the mFRR platform to be operated by an entity set up by them, that entity should be legally separate from them and have full legal capacity. According to the NRAs, a consortium did not have such capacity, as it did not have legal personality and was therefore not a legally separate entity from the TSOs. The NRAs nevertheless had clarified that that did not preclude a consortium from operating a platform, but that in such a case the TSOs in the consortium were fully responsible for such an operation and that in the case of a multi-entity structure it should be ensured that the conditions of Article 20(3)(e) of Regulation 2017/2195 were met.

83 The applicants’ argument that ACER added the condition that the entity had its own legal capacity must therefore be rejected.

84 In any event, it should be noted that, under the provisions of Article 2(35) of Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ 2019 L 158, p. 125), a TSO is defined as ‘a natural or legal person who is responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity’. Under Article 46(3) of Directive 2019/944, TSOs are organised in one of the legal forms set out in Annex I to Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ 2017 L 169, p. 46). That annex lists the different forms of public liability companies in the Member States, all of which have legal personality, to which in particular Article 2(1) and (2) of the annex refers, concerning the scope of Section 1, entitled ‘Incorporation of the public liability company’, of Chapter II, entitled ‘Incorporation and [nullity] of the company and validity of its obligations’, of Title I, entitled ‘General provisions and the establishment and functioning of limited liability companies’. Therefore, TSOs, whether natural or legal persons, have legal personality and, thus, the legal capacity to perform, with regard to their powers and rights, the tasks entrusted to them in full independence, in accordance with the provisions of Article 47 of Directive 2019/944.

85 In those circumstances, to the extent that, under the first option, provided for in Article 20(2) of Regulation 2017/2195, the platform is operated by TSOs and, therefore, by legal persons with legal capacity, the same should not be true for the entity that the TSOs are able to create, under the second option provided for in that article.

86 Therefore, in the light of the assessments already made in paragraph 72 above, the Board of Appeal, like ACER and the NRAs, considered, without committing an error of law, that, with regard to the TSOs’ proposal to designate an entity in the form of a consortium, the latter not having legal personality and, consequently, legal capacity, it was appropriate to consider that it was not the consortium but the TSOs in the consortium that were responsible for operating the mFRR platform, so that the TSOs had to demonstrate that the additional requirements of Article 20(3)(e) of Regulation 2017/2195 were fulfilled.

87 In the light of the foregoing assessments, the second part of the second plea in law must be rejected.

– *The third part of the second plea in law, alleging that the Board of Appeal erred in law by refusing to find that ACER had infringed Article 20 of Regulation 2017/2195 on the ground that the single entity referred to in Article 12(2) of the mFRR methodology was provisional*

88 The applicants claim that the Board of Appeal appears to have considered, in the contested decision, that the infringement of Article 20(2) of Regulation 2017/2195, consisting in having imposed the designation of a single entity to perform the functions required to operate the mFRR platform, imputed to ACER, was only temporary, in so far as the TSOs always had the possibility, pursuant to Article 12(2) of the mFRRIF at issue, to propose an amendment of the latter in order to designate several entities, such as a consortium of TSOs. In any event, such a consideration was unfounded, as Article 12(2) of the mFRRIF at issue did not provide that the single entity designated to perform the activation optimisation function and the TSO-TSO settlement function could be converted into several entities. In any event, such a conversion would not have removed the infringement of Article 20 of Regulation 2017/2195 committed by ACER in Decision No 03/2020 and would have been purely theoretical since ACER would still have considered that the entity referred to in Article 20 of Regulation 2017/2195 could only be a single legal entity, and not a consortium.

89 ACER contests the applicants’ arguments and contends that the third part of the second plea in law should be rejected.

90 The applicants claim, in essence, that, by upholding Decision No 03/2020 to impose a structure with a single entity, even if provisional, in order to perform the functions required to operate the mFRR platform, the Board of Appeal infringed Article 20 of Regulation 2017/2195, and all the more so as a possible conversion of that single entity into multiple entities was theoretical, since ACER had required that the designated entity be a legal person, which would have ruled out any possibility of designating an entity taking the form of a consortium.

91 In that regard, it should be noted that, according to Article 20(2) of Regulation 2017/2195, the mFRR platform was to be operated either by the TSOs themselves or by an entity created by them. Furthermore, the proposal for the methodology that the TSOs develop, pursuant to Article 20(1) of that regulation, is to include, inter alia, according to Article 20(3)(e) of that regulation, the entity or entities proposed to perform the functions defined in the proposal and, where the TSOs propose to designate more than one entity, the proposal must demonstrate and ensure compliance with a number of additional requirements.

92 In the present case, as ACER noted in recital 83 of Decision No 03/2020, in the initial mFRRIF proposal, the TSOs had planned to appoint a consortium to perform the functions required to operate the mFRR platform. However, in recitals 84 and 85 of that decision, it found that, while a consortium did not have legal personality and, consequently, the functions required to operate the mFRR platform would be performed by the multiple TSO members of the consortium, the proposal should have demonstrated that the additional requirements set out in Article 20(3)(e) of Regulation 2017/2195 in such a case were met. The proposal did not contain such a demonstration. In recital 95 of Decision No 03/2020, ACER noted that, with regard to the terms of the revised third mFRRIF proposal, the TSOs had proposed neither a structure with multiple entities, complying with the provisions of Article 20(3)(e) of Regulation 2017/2195, nor a structure with a single entity responsible for performing all the functions required to operate the mFRR platform. Therefore, in that recital, it decided to partially accept the TSOs’ proposal, in that it provided that the activation optimisation function and the TSO-TSO settlement function would be performed by a single entity. By contrast, with regard to the capacity management function, in respect of which the TSOs had proposed that it could be performed by another entity, ACER noted that it had not been demonstrated that, in such a case, the additional requirements of Article 20(3)(e) of Regulation 2017/2195 would be met. It is in those circumstances that, in recital 96 of Decision No 03/2020, since ACER found that the designation of the entity in charge of performing the capacity management function was not yet finalised at the date of adoption of that decision and that the decision could be postponed in order to allow the TSOs to take the most efficient decision in that regard, it decided that the TSOs would submit at a later stage a proposal for a modification of the mFRR methodology in which they would designate the entity in charge of performing the capacity management function, in compliance with the additional requirements of Article 20(3)(e) of Regulation 2017/2195.

93 As ACER rightly argues, those reasons for Decision No 03/2020 reiterate the revised third mFRRIF proposal, which provided for a single TSO or TSO-owned company to be designated for the activation optimisation function and the TSO-TSO settlement function at a first stage and for the same or a different entity to perform the capacity management function at a later stage.

94 In so far as, as was found in the context of the examination of the first and second parts of the second plea in law, the applicants are wrong to claim that ACER refused the TSOs the choice of using a structure in the form of a consortium and imposed on them a structure with a single entity to perform the activation optimisation function and the TSO-TSO settlement function, they are also wrong to accuse ACER of infringing Article 20 of Regulation 2017/2195 by denying them such a choice, even if only temporarily.

95 In the light of the foregoing assessments, the third part of the second plea in law must be rejected.

– *The fourth part of the second plea in law, alleging that the Board of Appeal erred in law by wrongly finding that the inclusion of the capacity management function among the functions required to operate the mFRR platform had not been imposed on the TSOs by ACER, but resulted directly from the application of Regulation 2017/2195*

96 The applicants complain that the Board of Appeal held, in paragraph 188 of the contested decision, that ACER did not require the TSOs to include the capacity management function among the functions required to operate the mFRR platform, since that resulted directly from the application of Regulation 2017/2195.

97 First, the applicants claim that the Board of Appeal's assertion in paragraph 180 of the contested decision that the capacity management function was a required function to operate the mFRR platform was not based on any legal provision. The insertion of the words 'at least' in Article 20(2) of Regulation 2017/2195 was intended to clarify that functions other than activation optimisation and TSO-TSO settlement could be required to operate the mFRR platform, but not that such additional functions could include the capacity management function. Article 20(3)(c) of Regulation 2017/2195 required TSOs to define in their proposal the functions required to operate the mFRR platform, so ACER would not have been allowed to impose on them, as such, functions other than activation optimisation and TSO-TSO settlement, which were the only ones expressly referred to in Article 20(2) of that regulation. Consequently, the Board of Appeal erred in law, in paragraph 189 of the contested decision, by considering, in essence, that ACER could include capacity management in the functions required to operate the mFRR platform, along with the activation optimisation and the TSO-TSO settlement functions, by relying on Article 20(2) and (3)(c) of Regulation 2017/2195.

98 Secondly, the applicants submit that, contrary to the Board of Appeal's assertion in paragraphs 183, 189, 192 and 193 of the contested decision, the fact that Article 37 of Regulation 2017/2195 obliged the TSOs to continuously update the availability of cross-zonal transmission capacity did not allow capacity management to be considered a function required to operate the mFRR platform within the meaning of Article 20 of that regulation. Regulation 2017/2195 made a distinction between the specific functions required to operate European balancing platforms and the balancing components or processes of the power system. ACER's assertion to the contrary in recital 56 of Decision No 03/2020 does not have had any legal basis.

99 Third, the applicants argue that no other reason put forward by the Board of Appeal to justify ACER's inclusion of capacity management among the functions required to operate the mFRR platform can be accepted. First of all, since the IT capacity management module proposed by the TSOs was centralised across platforms, the Board of Appeal could not, in paragraph 193 of the contested decision, rely on the simple fact that the capacity management function was technically required in order to qualify it as a function required to operate the mFRR platform. Furthermore, the Board of Appeal could not, in recital 87 of Decision No 03/2020, refer to criteria based on the effectiveness of the inclusion of the capacity management function to operate the mFRR platform which it had not clearly explained. Next, contrary to what the Board of Appeal considered in paragraph 199 of the contested decision, the fact that the performance of the activation optimisation function, which was a function required to operate the mFRR platform, required a continuous update of the availability of cross-zonal transmission capacity was not sufficient to justify the qualification of capacity management as a function required for that operation, since the centralised IT capacity management module operated across platforms and could therefore not be considered as a function required to operate the mFRR platform, as such subject to compliance with Article 20 of Regulation 2017/2195. In addition, to the extent that the mFRR platform was to operate, during a transitional period of two years, before the capacity management function was introduced in the form of a centralised IT capacity management module, the Board of Appeal wrongly concluded in paragraph 200 of the contested decision that that did not call into question the qualification of capacity management as a function required to operate the mFRR platform, subject to compliance with Article 20 of Regulation 2017/2195. Finally, in so far as Regulation 2017/2195 was an implementing act, neither ACER nor the Board of Appeal had the freedom to extend its scope by including capacity management among the functions required to operate the mFRR platform, as they did in Decision No 03/2020 and in paragraphs 190 and 191 of the contested decision, by reference to the objectives listed in Article 3(1)(c) and recital 5 of that regulation. In any event, the Board of Appeal did not explain why the centralised IT capacity management module, proposed by the TSOs, was not sufficient to achieve those objectives and meet the requirements of Article 37 of Regulation 2017/2195, mentioned in paragraph 183 of the contested decision.

100 ACER contests the applicants' arguments and contends that the fourth part of the second plea in law should be rejected.

101 In order to rule on that part, it is necessary, in the first place, to examine whether capacity management constituted one of the functions required to operate the mFRR platform within the meaning of Regulation 2017/2195. That qualification is decisive for assessing whether the additional requirements of Article 20(3)(e)(i) to (iii) of Regulation 2017/2195 had to be complied with, should the TSOs propose to designate several entities to perform those different functions. In the second place, only if that first question is answered in the affirmative should the applicants' complaint that, in the present case, the Board of Appeal wrongly considered that ACER had not required the TSOs to take into account capacity management as a function required to operate the mFRR platform be examined.

102 With regard to the question whether Regulation 2017/2195 can be interpreted as meaning that capacity management is a function required to operate the mFRR platform, account must be taken not only of the terms of that regulation, but also of its context and the objectives pursued by the rules of which it forms part.

103 For the purposes of a literal interpretation, it is important to note that the notion of 'functions required to operate the [mFRR] platform' is not defined in the text of Regulation 2017/2195, in particular in Article 2 of that regulation. It is used only in Article 20 of that regulation.

104 According to Article 20(1) of Regulation 2017/2195, it is the responsibility of the TSOs to develop the mFRR methodology proposal. In that respect, Article 20(3)(a) and (c) of that regulation specifies that that proposal is to include, at least, 'the high level design of the European platform' and 'the definition of the functions required to operate the [mFRR] platform'. The latter provision should be read in conjunction with Article 20(2) of Regulation 2017/2195, which states, inter alia, that 'the [mFRR] platform operated by TSOs or by means of an entity the TSOs would create themselves, shall be based on common governance principles and business processes and shall consist of at least the activation optimisation function and the TSO-TSO settlement function'.

105 It follows from the provisions mentioned in paragraph 104 above that the activation optimisation function and the TSO-TSO settlement function should implicitly be considered as functions required to operate the mFRR platform which should, as such, be defined in the mFRR methodology proposal submitted by the TSOs. However, in so far as Article 20(2) of Regulation 2017/2195 states that the mFRR platform is to include 'at least the activation optimisation function and the TSO-TSO settlement function', that provision does not preclude that, in the context of the design of a 'high-level' mFRR platform, a function other than activation optimisation and TSO-TSO settlement, such as capacity management, also be considered as required to operate that platform and as such defined in the TSOs' mFRR methodology proposal in accordance with Article 20(2) of Regulation 2017/2195, in particular if the addition of such a function appears to be necessary to ensure a high-level design of that platform complying with common governance principles and business processes.

106 It is therefore primarily on the basis of the objectives pursued by Regulation 2017/2195 and the context of the present case that it should be identified whether capacity management should, along with activation optimisation and TSO-TSO settlement, be considered as a function required to operate the mFRR platform.

107 For the purposes of determining whether the objectives pursued by Regulation 2017/2195 allow capacity management to be considered a function required to operate the mFRR platform, it is important to recall that, as emphasised in recital 1 of that regulation, a fully functioning and interconnected internal energy market is crucial for maintaining security of energy supply, enhancing competition and ensuring affordable energy prices for all consumers. Article 3(1)(c) of Regulation 2017/2195 states, in that sense, that that regulation aims, inter alia, at integrating balancing markets and promoting opportunities for trade in balancing services while contributing to operational security. As stated in recital 10 of that regulation, the establishment of common European platforms for the implementation of the imbalance netting process and enabling the conditions for the exchange of balancing energy should facilitate such integration of balancing energy markets.

108 As explained in its recital 6, Regulation 2017/2195 also aims at ensuring the optimal management of the European electricity transmission system. Article 3(2)(c) of that regulation provides that, for the purposes of its application, Member States, competent NRAs and the TSOs are to apply the principle of optimisation between the highest overall efficiency and the lowest total costs for all parties involved.

109 It is in that context that recital 7 of Regulation 2017/2195 states that '[TSOs] should remain responsible for the tasks entrusted to them … for the development of European-wide methodologies, as well as the implementation and operation of the European-wide balancing platforms', and recital 10 of that regulation states that 'cooperation between TSOs should be strictly limited to what is necessary for the efficient and secure design, implementation and operation of those European platforms'.

110 A teleological and contextual interpretation of the notion of function required to operate the mFRR platform therefore suggests that it is a function which, both technically and legally, appears to be necessary for the efficient and safe establishment and operation of the platform.

111 Moreover, that conclusion is corroborated by a comparison of the different language versions of Article 20(3)(c) of Regulation 2017/2195, from which it emerges that the words 'required' in English or 'requis' in French have been translated, in particular in the Czech, German, Croatian, Italian, Slovak and Slovenian versions of that provision, by terms that may also have the meaning of 'nécessaire' in French or 'necessary' in English.

112 In that regard, as ACER sets out in paragraphs 138 to 143 of the statement of defence, it is not disputed by the applicants that the need continuously to update the available cross-zonal transmission capacity, which underpins the capacity management function, is both a technical reality and a legal obligation imposed on TSOs.

113 Technically, as is apparent from the successive mFRRIF proposals and, in particular, from Article 3(5)(b) thereof, within the mFRR platform, the continuous updating of available cross-zonal transmission capacity is an essential input to the activation optimisation function, which is itself a required function of the mFRR platform to optimise the activation of the highest-ranked balancing energy bids (in the common merit order list) taking into account the limited available cross-zonal transmission capacity. In order to organise balancing energy exchanges that are subject to transmission constraints and thus to optimally allocate limited transmission capacities to those exchanges, it is first necessary to be able to know and calculate the available transmission capacities. Thus, the capacity management function, in which the continuous updating of the available cross-zonal transmission capacity takes place, is a technically indispensable element for the proper functioning of the activation optimisation function. Moreover, as stated in paragraph 194 of the contested decision, the applicants do not dispute that the continuous updating of the available cross-zonal transmission capacity, which underlies the capacity management function, must be carried out and the result of that must be fed into the activation optimisation function in order for the mFRR platform to be able to be operated efficiently.

114 Legally, Article 37(1) of Regulation 2017/2195 requires TSOs, after the intraday cross-zonal gate closure time, to update the available cross-zonal transmission capacity on a continuous basis, namely, each time a portion of the cross-zonal transmission capacity is used or the cross-zonal transmission capacity is recalculated, for the purpose of balancing energy exchange or imbalance netting. Furthermore, according to Article 37(3) of Regulation 2017/2195, it was foreseen that within five years after the entry into force of that regulation, all TSOs in a capacity calculation region are to develop a methodology for cross-zonal transmission capacity calculation by the end of the balancing market. Prior to the implementation of that methodology, those TSOs were required, pursuant to Article 37(2) of that regulation, to use the remaining cross-zonal transmission capacity after the intraday cross-zonal gate closure time.

115 In view of that twofold observation, the function allowing for the continuous calculation and updating of the available cross-zonal transmission capacity, following a methodology harmonised with regard to all TSOs, must be considered, with regard to the objective of ensuring the efficient and secure operation of the mFRR platform pursued by Regulation 2017/2195, as being, from both a technical and a legal point of view, a function required to operate a platform whose design, as recalled in Article 20(3)(a) of Regulation 2017/2195, had to be of a high standard and comply with common governance principles and business processes.

116 The facts of the present case confirm that the function which allows, as part of the capacity management function, to calculate and continuously update the available cross-zonal transmission capacity for the purpose of its automatic insertion, as an input, into the activation optimisation function of the mFRR platform was indeed considered to be a function required to operate that platform, which is why the TSOs decided to add it to the mFRR platform, even if deferred to a later point in time.

117 In that regard, it should be noted that already in the initial mFRRIF proposal, the TSOs indicated in Article 3(5)(b) and (7) of that proposal, describing the high-level architecture that was to be the mFRR platform, that within the mFRR platform the continuous updating of the available cross-zonal transmission capacity was an essential input of the activation optimisation function to be calculated by each TSO in accordance with the process described in Article 4(2) of that proposal. Article 4(2) on the calculation of available cross-zonal transmission capacity as an input of the activation optimisation function explicitly described in its paragraph 5 the process of continuous updating of available cross-zonal transmission capacity as an integral part of the mFRR platform. Furthermore, Article 6(1) and (4) of the initial mFRRIF proposal, entitled 'Functions of the mFRR platform', provided that, if deemed effective when applying the methodology for calculating cross-zonal transmission capacity by the end of the balancing market, in accordance with Article 37(3) of Regulation 2017/2195, a function for calculating available cross-zonal transmission capacity could be added to that platform, the purpose of which would be to implement that methodology. Finally, Article 12 of the initial mFRRIF proposal provided that all functions of the mFRR platform would be performed by a single entity designated by all TSOs involved, which would either be a consortium of those TSOs or a company owned by those TSOs.

118 During the consultation phase on the initial mFRRIF proposal, first with the NRAs and then with ACER, a debate developed on how best to take into account in the mFRRIF the process of continuous updating of available cross-zonal transmission capacity. In the light of that debate, the TSOs agreed to amend the initial mFRRIF proposal to formally include in Articles 3, 4 and 6 of the amended proposals a reference to capacity management as a function that allows all TSOs and the mFRR platform to continuously update the available cross-zonal transmission capacity so that, at any given time, the necessary limits to the exchange of balancing energy or imbalance netting can be taken into account. That function was to be introduced within two years of the entry into force of the mFRR platform. In addition, under the optimisation principle set out in Article 3(2)(c) of Regulation 2017/2195 (see paragraph 108 above), the TSOs indicated to the NRAs and ACER their intention to adopt a coordinated and centralised approach to the process of continuously updating the available cross-zonal transmission capacity under the capacity management function for all the European platforms for the exchange of balancing energy. Their wish was that, if other platforms than the mFRR platform had the same function as capacity management, that function should be the same for all those platforms, as long as the obligation to continuously update the available cross-zonal transmission capacity was imposed on all of them. Article 12 of the revised third mFRRIF proposal submitted by the TSOs by mutual agreement provided that all functions specifically required to operate the mFRR platform would be performed by a single entity designated by all TSOs concerned and which would be either one of those TSOs or a company owned by those TSOs.

119 As can be seen from the mFRR platform governance structure reproduced in the 'Introduction' section of the revised third mFRRIF proposal, the TSOs, taking into account the fact that the obligation to continuously update the available cross-zonal transmission capacity was imposed on each of the European balancing energy exchange platforms, agreed that the capacity management function was, in fact, a cross-platform function, in the sense that it would eventually have to be carried out in a coordinated and centralised manner for all those platforms. The calculation of the cross-zonal transmission capacity available for balancing energy exchange through the mFRR platform would be handled, for all the TSOs concerned, by an 'IT capacity management module' which would feed the results obtained directly into the activation optimisation function of the mFRR platform. The TSOs indicated that they wished to retain the freedom to entrust capacity management, in that coordinated and centralised form, to an entity other than the single entity in charge of performing activation optimisation and TSO-TSO settlement. Until the capacity management function in that coordinated and centralised form is in place, the TSOs considered that, in theory, the single entity in charge of performing activation optimisation and TSO-TSO settlement could also perform capacity management by feeding the data that would be provided by each of the TSOs concerned into the activation optimisation function.

120 It follows from the above that the TSOs responsible for setting up and operating the mFRR platform, which was to be a 'high-level' platform and 'based on common governance principles and business processes', themselves decided, for reasons of efficiency, to add to the mFRR platform a function for calculating available cross-zonal transmission capacity underlying the capacity management function, as had been systematically provided for in Article 6(1) of their successive mFRRIF proposals. The mere fact that the addition of that function was delayed in time does not change the fact that, from the outset, that new function was considered to be a function required to operate a high-level mFRR platform. That delay was legally foreseen and technically necessary to take into account that, first, and in accordance with Article 37(3) of Regulation 2017/2195, TSOs had to develop a methodology for calculating cross-zonal transmission capacity by the end of the balancing market beforehand and, secondly, and to the extent that, in order to comply with the optimisation principle set out in Article 3(2)(c) of Regulation 2017/2195, those TSOs had decided that that function would be performed by an IT module, in a coordinated and centralised manner across platforms, they also had to set up that module in advance and organise its management.

121 Therefore, the argument repeatedly put forward by the applicants, in particular at the hearing, that the mFRR platform would operate for a time without a new function for continuously updating the available cross-zonal transmission capacity in a coordinated and centralised form is irrelevant since, from the outset, the addition of such a function to that platform had been planned, in order that it respond, both technically and legally, to the requirements of a high-level design, in terms of efficiency and safety, and the fact that that addition was delayed for two years, implying a suboptimal operation of the mFRR platform during that initial period, was solely due to the technical and legal constraints posed by the development of that function.

122 It must therefore be concluded that the function of continuously updating the available cross-zonal transmission capacity, which underlies the capacity management function, and hence the capacity management function itself, should be broadly qualified as functions required to operate the mFRR platform. That conclusion is also supported by the need to ensure that the required functions, namely capacity management, activation optimisation and TSO-TSO settlement, should they be performed by different entities, are performed in a coordinated, consistent and efficient manner, in line with the additional requirements of Article 20(3)(e) of Regulation 2017/2195. Thus, such a qualification does not deprive TSOs of any freedom as to the choice of the entity proposed to perform capacity management, which may be separate from the entity in charge of activation optimisation and TSO-TSO settlement. In that regard, in response to a question from the Court at the hearing, the applicants moreover failed to demonstrate, to the requisite legal standard, any relevant factual reason why the performance of the capacity management function should escape, in the present case, compliance with the additional requirements of Article 20(3)(e) of Regulation 2017/2195.

123 Moreover, the applicants have not explained, let alone established, how the fact that Regulation 2017/2195 is an implementing act could have an impact on the classification of the management of functional capacity required to operate the mFRR platform. Therefore, their arguments in that regard must be rejected as inadmissible.

124 It follows from the above assessments that the applicants' argument that the Board of Appeal wrongly considered that ACER had not required TSOs to take into account capacity management as a function required to operate the mFRR platform has no factual basis. As can be seen from paragraph 122 above, it is not Decision No 03/2020 or the mFRRIF at issue, as confirmed by the Board of Appeal in the contested decision, which required TSOs to take capacity management into account, as a coordinated and centralised process across platforms for the continuous updating of available cross-zonal transmission capacity, as a function required to operate the mFRR platform, within the meaning of Article 20(3)(c) of Regulation 2017/2195, but the latter provision, read in the light of Article 37 of that regulation. As regards the fact that ACER, confirmed by the Board of Appeal, considered that it had to assess the compliance of the revised third mFRRIF proposal submitted by the TSOs with the applicable rules, taking into account that capacity management was a function required to operate the mFRR platform, within the meaning of Article 20(3)(c) of Regulation 2017/2195, that was fully justified in the light of the latter's decision-making competence under Article 6(10)(b) of Regulation 2019/942, read in conjunction with Article 5(7) of Regulation 2017/2195 and in accordance with Article 20 of that regulation. If capacity management was a function required to operate the mFRR platform, within the meaning of Article 20(3)(c) of Regulation 2017/2195, it was necessary, to the extent that TSOs were considering designating another entity for its performance than those responsible for the performance of activation optimisation and TSO-TSO settlement, that they should demonstrate and ensure that the additional requirements of Article 20(3)(e) of Regulation 2017/2195 would be met.

125 In the light of all the foregoing assessments, the fourth part of the second plea in law must be rejected.

– *The fifth and sixth parts of the second plea in law, alleging, first, that the Board of Appeal did not adequately examine the specific pleas put forward before it concerning ACER's unlawful application of Article 20(3)(e) of Regulation 2017/2195 to capacity management and other functions required to operate the mFRR platform and, second, that the Board of Appeal wrongly concluded that Article 20(3)(e) of Regulation 2017/2195 applied to the continuous updating of available cross-zonal transmission capacity and other required functions*

126 Of the applicants, Group A, in the fifth part of the second plea in law, complains that the Board of Appeal failed to review ACER's application, in Decision No 03/2020, of Article 20(3)(e) of Regulation 2017/2195 in the light of all the specific pleas in law which it had invoked before it. As stated in Group A's submissions, capacity management was not a function required to operate the mFRR platform. Furthermore, no NRA insisted on its inclusion among the required functions listed in the initial mFRRIF proposal. Finally, the TSOs did not propose to designate an entity to perform capacity management other than the one already in charge of performing activation optimisation and TSO-TSO settlement.

127 In the context of the sixth part of the second plea in law, Group A submits that ACER unlawfully required the TSOs to include capacity management among the functions required to operate the mFRR platform and that, even assuming that Article 20(3)(e) of Regulation 2017/2195 was applicable to capacity management, it wrongly imposed on the TSOs, in Article 12(2) of the mFRRIF at issue, compliance with additional requirements, provided for in Article 20(3)(e) of Regulation 2017/2195, which would have been applicable only if the TSOs had actually decided to designate several entities to perform the functions required to operate the mFRR platform, which was not the case here.

128 ACER contests Group A's arguments and contends that the fifth part of the second plea in law should be rejected.

129 In the present case, the Board of Appeal upheld Decision No 03/2020 which required the TSOs to demonstrate that their proposal complied with the additional requirements of Article 20(3)(e) of Regulation 2017/2195, on the ground that, in its view, those TSOs had possibly considered designating an entity to perform capacity management, as a function required to operate the mFRR platform, different from the entity required to perform activation optimisation and TSO-TSO settlement.

130 In order to rule on the fifth and sixth parts of the second plea in law, it is necessary to examine whether, as Group A submits, Article 20(3)(e) of Regulation 2017/2195 applies only to the functions defined in the TSOs' proposal or, as ACER contends, whether it applies to all of the functions required to operate the mFRR platform, including capacity management.

131 Article 20(3)(e) of Regulation 2017/2195 states:

'The [mFRR methodology] proposal in paragraph 1 shall include at least:

…

(e) the proposed designation of the entity or entities that will perform the functions defined in the proposal. Where the TSOs propose to designate more than one entity, the proposal shall demonstrate and ensure:

(i) a coherent allocation of the functions to the entities operating the European platform. The proposal shall take full account of the need to coordinate the different functions allocated to the entities operating the European platform;

(ii) that the proposed setup of the European platform and allocation of functions ensures efficient and effective governance, operation and regulatory oversight [by the NRAs] of the European platform as well as supports the objectives of this Regulation;

(iii) an effective coordination and decision-making process to resolve any conflicting positions between entities operating the European platform'.

132 It is true that the first sentence of Article 20(3)(e) of Regulation 2017/2195 refers only to the 'functions defined in the proposal'. However, in the light of the wording of Article 20(3) of that regulation, the only functions to be defined in the proposal are, according to Article 20(3)(c) of the regulation, the 'functions required to operate the [mFRR] platform'.

133 Consequently, it is clear from the provisions of Article 20(3) of Regulation 2017/2195 that the application of the additional requirements set out in Article 20(3)(e) of that regulation is conditional upon the designation in the mFRR methodology proposal of more than one entity in charge of the different functions required to operate the mFRR platform, as defined in accordance with Article 20(3)(c) of that regulation.

134 In the present case, first, it should be noted that ACER in Decision No 03/2020, as well as the Board of Appeal in the contested decision, complained that the TSOs, although it had proposed to designate an entity in charge of capacity management which might be different from the entity in charge of optimising the activation and TSO-TSO settlement, had not demonstrated and guaranteed, in such a case, compliance with the additional requirements laid down in Article 20(3)(e) of Regulation 2017/2195.

135 Secondly, the revised third mFRRIF proposal, taken into account by ACER lastly, provided for the designation of a single entity in charge of the two functions required to operate the mFRR platform within the meaning of Article 20(3)(c) of Regulation 2017/2195, which were expressly referred to in Article 20(2) of that regulation, namely activation optimisation and TSO-TSO settlement. Capacity management was also taken into account in the third mFRRIF proposal as a cross-platform function, the performance of which was required to operate the mFRR platform, even though it had not been qualified in the mFRR platform as a function required to operate the mFRR platform within the meaning of Article 20(3)(c) of Regulation 2017/2195. However, in accordance with the conclusion reached in paragraph 122 above after examining the fourth part of the second plea in law, the Board of Appeal in the contested decision, like ACER in its Decision No 03/2020, was right to consider that capacity management, as provided for in Article 37 of Regulation 2017/2195, constituted a function required to operate the mFRR platform, within the meaning of Article 20(3)(c) of that regulation.

136 In the light of the foregoing assessments, it must be held that Group A has no basis for arguing that the additional requirements laid down in Article 20(3)(e) of Regulation 2017/2195 were not applicable to the capacity management function.

137 The fifth and sixth parts of the second plea in law, taken together, must therefore be rejected.

– *The seventh part of the second plea in law, alleging that the Board of Appeal wrongly concluded that capacity management should be included among the functions required to operate the mFRR platform referred to in Article 20 of Regulation 2017/2195, as a cross-platform, balancing-related function*

138 Group A complains that the Board of Appeal essentially unlawfully concluded that capacity management should be included among the functions required to operate the mFRR platform under Article 20 of Regulation 2017/2195, although it was a cross-platform, balancing-related, function. First, even if ACER had had a legal basis, which it did not identify, for including capacity management among the functions required to operate the mFRR platform referred to in Article 20 of Regulation 2017/2195, that regulation did not grant it any competence to require, as it did in Article 4(6) of the mFRRIF at issue, that capacity management should have the same content and be performed by the same entity for all European balancing platforms. Secondly, the Board of Appeal wrongly considered in paragraph 223 of the contested decision that the requirement to introduce capacity management as a cross-platform function was not a new obligation imposed by ACER. That was contradicted by ACER's arguments set out in paragraph 172 of its defence before the Board of Appeal and not confirmed by ACER's 2015 report on the objectives of energy balancing, referred to in paragraph 223 of the contested decision, which only dealt with cross-border exchanges of balancing energy and not with cross-platform functions. Nor was that confirmed by the TSOs' assessments of the effectiveness and consideration of a capacity management function common to all European balancing platforms, referred to in paragraphs 225 and 226 of the contested decision, which were formulated in relation to the centralised IT capacity management module across platforms and not to capacity management as a function required to operate all such platforms. Finally, it is irrelevant to refer in that regard to the NRAs' non-paper, as the continuous updating of available cross-zonal transmission capacity by the TSOs, in accordance with Article 37 of Regulation 2017/2195, is not a function of the European balancing platforms, so that it is carried out under the control of the NRAs, without falling under the regulatory oversight of ACER.

139 ACER contests the arguments put forward by Group A and contends that the seventh part of the second plea in law should be rejected.

140 In that regard, first, it should be noted that Articles 19 to 22 of Regulation 2017/2195 provide for the adoption of a methodology for each of the European platforms for the exchange of balancing energy, namely, respectively, the European platform for the exchange of balancing energy from replacement reserves, the mFRR platform, the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation and the European platform for the imbalance netting process. Those articles each contain similar provisions, including a paragraph 3(e), according to which, where there are several entities performing functions required to operate the European platform as defined in the relevant methodology proposal, that proposal must demonstrate and ensure compliance with three additional requirements.

141 Secondly, it should be noted that in the introduction to the third mFRRIF proposal, the TSOs explicitly stated that 'all platforms [should] use the same cross-platform capacity management function … in addition to the platform-specific functions required'. They had specified that a single entity would be responsible for performing the platform-specific functions of activation optimisation and TSO-TSO settlement, and that a single entity, in the form of a TSO or a company owned by TSOs, would be responsible for capacity management as a cross-platform function. A diagram entitled 'Governance structure', depicting two vertical zones, each corresponding to two different platforms, namely the mFRR platform and the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation, clearly identified, first, the two specific functions of each of those platforms, namely activation optimisation and TSO-TSO settlement, carried out by a single entity, and, secondly, a single entity for both platforms responsible for carrying out the capacity management function.

142 Third, it should be noted that that diagram, retitled 'Governance structure and functions', was reproduced in the revised third mFRRIF proposal, taken into account by ACER. By contrast, the TSOs had specified that capacity management was not a function required to operate the platform concerned, but a cross-platform function, added to improve coordination between them. Similarly, in the revised third mFRRIF proposal, the TSOs had indicated that they intended to 'maximise the efficiency of the platforms by establishing cross-platform functions'. They had concluded that, since capacity management was

not a function required to operate a platform, the additional requirements of each point (e) of paragraph 3 of Articles 19 to 22 of Regulation 2017/1295, in case of designation of several entities to perform such a function, were not applicable.

143 It follows from the above that, as ACER argues, the TSOs themselves had proposed in the revised third mFRRIF proposal, for reasons of improving coordination between balancing platforms, to designate a single entity to perform capacity management as a cross-platform function. Admittedly, unlike ACER, the TSOs had argued that capacity management was not a function required to operate each platform. However, in accordance with the conclusion reached in paragraph 122 above after examining the fourth part of the second plea in law, that allegation is unfounded. In any event, it is clear from the revised third mFRRIF proposal that the TSOs have themselves expressed their interest in designating a single entity to perform that function, as was also claimed by ACER and the Board of Appeal.

144 Consequently, the Board of Appeal did not err in law in upholding Decision No 03/2020, which in no way required TSOs to include capacity management, as a cross-platform function, in their mFRRIF proposal, as they themselves agreed to develop it during the consultation phase, first with the NRAs, then with ACER.

145 Consequently, the seventh part of the second plea in law must be rejected.

– *The eighth part of the second plea in law, alleging that the Board of Appeal wrongly concluded that ACER had not infringed Regulation 2017/2195, in particular Article 20(5) and Article 10 thereof, by obliging TSOs to propose an amendment to the mFRR methodology*

146 Group A complains that the Board of Appeal erred in law by concluding that the obligation imposed by ACER on the TSOs to submit a proposal for modification of the mFRR methodology was lawful, even though there was no legal basis for doing so and ACER had no competence to compel TSOs to submit a proposal for modification of that methodology. It appears from paragraphs 146 to 153 of the contested decision that, contrary to what ACER argued before it, the Board of Appeal considered that that obligation was provided for in Regulation 2017/2195 and did not derive from Decision No 03/2020. It would be contradictory for the Board of Appeal, in paragraph 150 of the contested decision, to have claimed that the public consultation on the first TSO proposal complied with Article 10 of Regulation 2017/2195, whereas neither the inclusion of capacity management among the functions required to operate the mFRR platform, nor the proposal to modify the mFRR methodology were mentioned in that proposal. Finally, in a subsequent decision of 22 December 2020 in Case A-008-2020, the Board of Appeal considered, contrary to what it had done in the contested decision, that Article 6(3) of Regulation 2017/2195 did not apply to the creation, but only to the modification, of a European balancing platform methodology.

147 ACER contests the arguments put forward by Group A and contends that the eighth part of the second plea in law should be rejected.

148 At the outset, it should be noted that, as is clear from Decision No 03/2020, and as is confirmed by the Board of Appeal in the contested decision, ACER had asked the TSOs to draw up a proposal to amend the mFRR methodology in order to designate the entity responsible for performing the capacity management function, as envisaged in the revised third mFRRIF proposal.

149 However, ACER's request was explicitly justified by the fact that capacity management was a function required to operate the mFRR platform and that, therefore, in the event that more than one entity would be responsible for the performance of the different functions required to operate that platform, the additional requirements, provided for in Article 20(3)(e) of Regulation 2017/2195, would have to be complied with.

150 In that regard, it should be noted that in recitals 90 to 98 of Decision No 03/2020 and, in particular, in recital 96 thereof, ACER formally stated that the capacity management function should be introduced, as a function required to operate the mFRR platform, but that, in order to give the TSOs time to resolve the issues related to the cross-platform nature of the capacity management function, the proposal for the entity to perform the latter could be postponed until two years after the implementation of the mFRR platform. Therefore, it requested the TSOs to make a proposal to amend the mFRR methodology in which they would designate the entity to perform the capacity management function, in line with the provisions of Article 20(3)(e) of Regulation 2017/2195.

151 In accordance with the conclusion reached in paragraph 122 above after examining the fourth part of the second plea in law, ACER and, subsequently, the Board of Appeal rightly characterised the capacity management function as a function required to operate the mFRR platform. Furthermore, in the context of the implementation of its decision-making competence on the basis of the second subparagraph of Article 6(10)(b) of Regulation 2019/942, read in conjunction with Article 5(7) of Regulation 2017/2195 and in accordance with Article 20 of the latter regulation, ACER had to indicate to the TSOs whether and, if so, under which conditions the mFRRIF proposed by the TSOs was or would be compliant with the applicable rules, in particular with regard to certain choices that remained to be made, in particular with regard to the entity that would be responsible for the performance of capacity management at the time of its introduction in a centralised form in July 2024.

152 Furthermore, the approval by ACER of the mFRR methodology proposed by the TSOs, under certain conditions relating to the fact that that methodology be completed by the TSOs, within a certain period of time, with regard to certain aspects left open, in compliance with the applicable rules, should not be confused with a proposal by the TSOs to modify that methodology itself, after its approval by the regulatory authorities. In the present case, the condition, set out in the mFRRIF at issue, that, eight months before its entry into force, the TSOs designate the entity in charge of performing the capacity management function in compliance with Article 20(4) of Regulation 2017/2195 is a condition for the very approval of that mFRRIF and not a subsequent amendment of the latter, introduced in accordance with the amendment procedure set out in Article 6(3) of Regulation 2017/2195.

153 The eighth part of the second plea in law must therefore be rejected.

154 In the light of all the assessments made of the eight parts of the second plea in law, that plea in law must therefore be rejected in its entirety.

*The third plea in law, alleging infringement by the Board of Appeal, in the course of the proceedings before it, of the principle of sound administration, the principle of respect for the rights of the defence, the obligation to state reasons and the legal obligations incumbent on it*

155 In so far as, in the context of the third plea in law, the applicants or Group A alone allege infringement by the Board of Appeal, in the course of the proceedings before it, of the principle of sound administration guaranteed by Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter'), it must be noted that they allege, more specifically, that the Board of Appeal violated its obligation to deal with cases brought before it independently, impartially and diligently, their right to be heard, their right of access to the file and the obligation to state reasons. In addition, they complain that the Board of Appeal did not fully review Decision No 03/2020 and that it erred in its interpretation and insufficiently examined the pleas in law which they had raised before it.

– *Infringement of the principles of independence, impartiality and due diligence*

156 The applicants claim that, in accordance with Article 41 of the Charter, it follows from a combined reading of recital 34 and Articles 26(2) and 28(4) of Regulation 2019/942 that actions against ACER's decisions must be examined by the Board of Appeal independently and impartially and in a conscientious and diligent manner. In the contested decision, the Board of Appeal focused on justifying Decision No 03/2020 and, in the present action, ACER did not respond to their pleas and complaints either. First, in the contested decision, the Board of Appeal contested the fact that ACER had imposed the capacity management function, although ACER itself admitted that in paragraph 208 of its defence in the proceedings before the board. In the factual part of the contested decision, it found that capacity management was a specific function of the mFRR platform, denying that they had contested that before it and repeating elements of ACER's defence. Second, while the lack of consultation organised by ACER on the revised third mFRRIF proposal had been criticised before it by Group A, the Board of Appeal, in the factual part of the contested decision, stated that ACER had been constrained by the six-

month deadline for its decision on the TSOs' proposal, which expired on 24 January 2020, and that it could not ask the TSOs to complete their proposal again. In paragraphs 163, 200 and 261 of the contested decision, without explanation or evidence, the Board of Appeal attributed a positive and subjective demeanour to ACER's conduct in that regard. Third, it was without any justification, other than to prejudice the applicants and strengthen ACER's line of defence, that the Board of Appeal, in paragraphs 177 and 202 of the contested decision, criticised the applicants for not having expressed their opposition, during the public consultation, to the choice of a single entity to perform the functions required to operate the mFRR platform. Fourth, the applicants claim that the Board of Appeal wrongly rejected their plea in the alternative, alleging infringement of the Charter resulting from ACER's failure to justify, in Decision No 03/2020, its position in favour of a single legal entity, rather than a consortium of TSOs, to perform all the functions required to operate the mFRR platform. The lack of objectivity of the Board of Appeal in that regard is apparent from the fact that it did not examine the savings of EUR 60 million in social protection costs which Group A invoked to justify the choice of a TSO consortium. Fifth, the Board of Appeal's lack of impartiality is further apparent from its fallacious reliance on the allegedly 'bottom-up' nature of the regulatory process under Regulation 2019/942 in order to shield Decision No 03/2020 from proper legal scrutiny.

157 ACER contests the applicants' arguments and contends that the present complaint should be rejected.

158 As a preliminary point, it should be noted that Article 41 of the Charter, which, by virtue of Article 6(1) TEU, has the same legal value as the Treaties, enshrines the right to sound administration. That right implies, under Article 41(1) of the Charter, inter alia, the right of every person to have his or her affairs handled impartially by the institutions, bodies, offices and agencies of the European Union (judgment of 20 October 2021, *Kerstens* v *Commission*, T‑220/20, EU:T:2021:716, paragraph 32).

159 According to the case-law, the administration is required, by virtue of the principle of sound administration, to examine carefully and impartially all the relevant elements of the case before it and to gather all the factual and legal elements necessary for the exercise of its discretion and to ensure the proper conduct and effectiveness of the procedures which it implements (see judgment of 20 October 2021, *Kerstens* v *Commission*, T‑220/20, EU:T:2021:716, paragraph 33 and the case-law cited).

160 It should also be noted that the requirement of impartiality covers, first, subjective impartiality, that is, no member of the institution, body, office or agency in charge of the case must show personal bias or prejudice and, secondly, objective impartiality, that is, the institution, body, office or agency must offer sufficient guarantees to exclude any legitimate doubt in that regard (see judgment of 20 October 2021, *Kerstens* v *Commission*, T‑220/20, EU:T:2021:716, paragraph 34 and the case-law cited).

161 The Board of Appeal was established within ACER to decide on the merits, after hearing the parties, on admissible appeals against ACER decisions, in accordance with Article 28(4) of Regulation 2019/942.

162 As provided for in recital 34 of Regulation 2019/942, the Board of Appeal is part of ACER, but is independent from the administrative and regulatory structure of the latter.

163 To that end, Article 26(2) of Regulation 2019/942 provides that the members of the Board of Appeal are to take their decisions independently and shall not be bound by any instructions. The exercise of their functions within ACER or the possibility of their removal from office are regulated in such a way as to guarantee their independence.

164 In the present case, the applicants have not adduced any evidence that the Board of Appeal infringed the principles of independence, impartiality and due diligence in adopting the contested decision, which, in essence, dealt with the question whether, in the light of the arguments raised by the parties to the proceedings before it, Decision No 03/2020 and the mFRRIF at issue were well founded and, in particular, whether they could be based on the twofold finding that capacity management was a function required to operate the mFRR platform and that, if, for that platform, the TSOs were to choose that function to be performed by an entity different from the one responsible for performing activation optimisation and TSO-TSO settlement, the additional requirements set out in the second sentence of Article 20(3)(e) of Regulation 2017/2195 would have to be met.

165 It is apparent from the contested decision that the Board of Appeal sought, in that decision, to answer the question whether or under what conditions, taking into account the information provided by the TSOs on the initial mFRRIF proposal during the consultation phase carried out by ACER with the NRAs and the TSOs, pursuant to Article 6(11) of Regulation 2019/942, and, in particular, the successive mFRRIF proposals submitted by the TSOs to ACER, the mFRRIF finally proposed by the TSOs was or would be in line with Regulation 2017/2195 and Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation (OJ 2017 L 220, p. 1), as well as other applicable rules.

166 In that context, it does not appear from the file that the Board of Appeal, in general, or some of its members, in particular, showed any bias or personal prejudice which led them to deviate from the review of the conformity of the mFRRIF proposal submitted by the TSOs with the applicable rules or that they did not decide in that regard in full independence, after consultation with the NRAs and TSOs. Similarly, it does not appear from the file that the framework in which the Board of Appeal took the contested decision did not offer sufficient guarantees to exclude, in that regard, any legitimate doubt as to its impartiality or independence.

167 The arguments put forward by the applicants before the Court do not call that finding into question.

168 Contrary to what the applicants claim, the Board of Appeal did not seek to cover up, in the contested decision, an unlawful act by ACER which consisted in imposing on TSOs, in the mFRRIF at issue, the taking into account of a function, namely capacity management, which was not required by the rules applicable for the operation of the mFRR platform. In the contested decision, the board found only that, contrary to what the applicants argued before it, capacity management should be classified as a function required to operate the mFRR platform, within the meaning of Article 20(3)(c) and (e) of Regulation 2017/2195, the inclusion of which in the mFRRIF had also been requested by the NRAs and which had, moreover, been included in the second and third mFRRIF proposals submitted by the TSOs. It then drew all the consequences that followed from that in its assessment of whether ACER was right to consider in its Decision No 03/2020 and in the mFRRIF at issue that, in the event that the TSOs entrusted the performance of that function to an entity other than the one responsible for the performance of the activation optimisation and TSO-TSO settlement, in the context of the operation of the mFRR platform, the additional requirements of Article 20(3)(c) and (e) of Regulation 2017/2195 were complied with. The fact that the Board of Appeal may have possibly erred in its interpretation of the applicable rules, carried out subject to review by the Court, is not sufficient to consider that it was partial or lacked independence in its decision.

169 Similarly, the finding of the Board of Appeal in the contested decision that the lack of consultation of the TSOs organised by ACER between the receipt of the revised third mFRRIF proposal on 18 December 2019 and the finalisation of Decision No 03/2020, adopted on 24 January 2020, was justified by the time allowed to ACER to take its decision, in no way reveals a lack of impartiality or independence on the part of that board. It merely reflects the latter's consideration of an objective fact, namely that the period of six months, after the referral, allowed to ACER to take its decision, in accordance with Article 6(12) of Regulation 2019/942, expired on 24 January 2020.

170 Moreover, the Board of Appeal's finding in the contested decision that, in the course of the procedure leading to the adoption of Decision No 03/2020, ACER had acted in a spirit of cooperation and good faith, taking into account the constrained framework, in particular in terms of time, within which it had to take that decision (see paragraph 169 above), does not reveal a lack of impartiality or independence on the part of that board, but rather the consideration, by it, of objective facts which showed that ACER had made efforts to take into account the wishes of all the TSOs, even when the solutions desired by the latter did not seem ideal. For example, the Board of Appeal put forward evidence that ACER's consideration of the two-year delay in the implementation of the capacity management function and the designation of the entity responsible for its implementation reflected its willingness to give

TSOs time to settle, in a coordinated and centralised approach at a cross-platform level, the process of continuously updating the available cross-zonal transmission capacity that underlay the capacity management function.

171 Furthermore, the finding of the Board of Appeal in the contested decision that, during the procedure leading to the adoption of Decision No 03/2020, the TSOs had not expressed, during the consultation phase prior to the adoption of that decision, their opposition to the functions required to operate the mFRR platform being performed by a structure with a single entity is also an objective fact. The applicants did not cite any extract from the TSOs' observations during that phase, in particular from Annex II to Decision No 03/2020, which would have refuted such a finding. The mere fact that the Board of Appeal took account of an objective fact in the contested decision does not reveal a lack of impartiality or independence on its part.

172 In so far as the applicants essentially criticise the Board of Appeal for not having checked whether, in Decision No 03/2020, ACER had justified its choice of a structure with a single entity to perform the functions required to operate the mFRR platform and its rejection of a structure in the form of a consortium, it should be noted that, as the Board of Appeal rightly pointed out in the contested decision, it does not appear from the file that ACER at any time required the TSOs to use a single entity structure or prevented the use of a consortium structure. ACER only drew the consequences which, in its view, resulted from the application of the existing regulations to the choices made by the TSOs in their initial mFRRIF proposal, taking into account the evolution of the TSOs' position in the various successive versions of that proposal which they submitted to ACER. In that context, it pointed out in particular that, if the TSOs were to choose the structure of a consortium, which did not have legal personality, then it would be a structure with several entities, made up of the different TSO members of the consortium, and not a structure with a single entity and, therefore, that structure would have to comply with the additional requirements provided for in the second sentence of Article 20(3)(e) of Regulation 2017/2195, which was not apparent from the initial mFRRIF proposal. It also reiterated its position that those requirements would have to be met if TSOs ultimately chose to entrust the different functions required to operate the mFRR platform to several entities. The present argument of the applicants therefore has no factual basis.

173 Finally, the applicants' argument that, in essence, the Board of Appeal invented the concept of a 'bottom-up decision-making process' in order to remove ACER's actions from legal scrutiny is also factually lacking. As already noted in paragraph 54 above, the applicants do not successfully argue that the Board of Appeal's designation of the decision-making process as 'bottom-up' was unlawful on the ground that it had no legal basis in the applicable regulation.

174 In the light of all the above assessments, the complaint of infringement of the principles of independence, impartiality and due diligence must be rejected in its entirety.

– *Infringement of the right of access to the file*

175 Group A complains that, in the contested decision, the Board of Appeal upheld the decision denying the disclosure request, which had been adopted in breach of its rights under Article 41(2)(b) of the Charter and its rights of defence. The reasons for the decision denying the disclosure request, as summarised in paragraphs 275 to 285 of the contested decision, were that, first, since ACER had not requested confidential treatment of the annexes to its defence before the Board of Appeal, Group A had access to full information on the documents exchanged between ACER and the TSOs prior to the adoption of Decision No 03/2020 and, second, while the provisions of Article 4(3) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) were applicable, in the absence of an overriding public interest justifying disclosure, Group A did not establish the necessity of such disclosure for the exercise of its rights of defence and the documents whose disclosure was requested were not sufficiently relevant to the arguments it had put forward before the Board of Appeal.

176 First, Group A considers that respect for its rights could not depend on ACER's decision whether or not to attach the documents covered by the disclosure request as an annex to its defence before the Board of Appeal. Secondly, it notes that the right of access to the file provided for in Article 41(2)(b) of the Charter, on which the disclosure request was exclusively based, is distinct and independent from the right of access to documents provided for in Regulation No 1049/2001. According to the case-law, that right could not be satisfied by selective disclosure of the documents in question, nor could it be assessed on the basis of the merits of the disclosure request. Thirdly, the Board of Appeal wrongly criticised it for not having explained why access to the documents in question was necessary for the exercise of its rights of defence. Fourthly, those documents were relevant before the Board of Appeal since, during a hearing, that board asked ACER a question directly related to their content and, in the contested decision, relied on that content to reject its action. That infringement of the right of access to the file influenced the content of the contested decision, to its detriment, in particular with regard to the question of whether capacity management should be included among the functions required to operate the mFRR platform and whether the Board of Regulators had supported ACER's position in favour of a single legal entity to perform all those functions.

177 ACER contests Group A's arguments and contends that the present complaint should be rejected.

178 As a preliminary point, it should be noted that the request made by Group A in paragraph 160(d) of its appeal to the Board of Appeal pursuant to Article 28 of Regulation 2019/942 was for that board to adopt a procedural measure, under Article 20(3)(d) of its Rules of Procedure, concerning the production of confidential versions of the documents at issue (see paragraph 16 above), which it considered to be useful for the purposes of the proceedings before the Board of Appeal against Decision No 03/2020. The non-disclosure decision must therefore be analysed as a decision, adopted by the chairperson of the Board of Appeal acting on behalf of the latter, rejecting the procedural measure requested.

179 The documents at issue related to the legislative procedure, involving TSOs, NRAs and ACER, which led to the adoption of Decision No 03/2020 and the mFRR methodology annexed to it.

180 It follows that Group A's application to the Board of Appeal was neither an application for access to the file of the proceedings before the Board of Appeal within the meaning of Article 41(2)(b) of the Charter, nor an application for access to documents within the meaning of Article 42 of the Charter and Regulation No 1049/2001.

181 In the light of the wording of Article 20 of Decision of the Board of Appeal No 1-2011, as amended on 5 October 2019, laying down the rules of organisation and procedure of the ACER Board of Appeal and an application, by analogy, of the case-law applicable to applications to the Court for measures of organisation of procedure or measures of inquiry in the context of proceedings brought before it (see, to that effect, judgments of 17 December 1998, *Baustahlgewebe* v *Commission*, C‑185/95 P, EU:C:1998:608, paragraphs 90 to 93, and of 12 May 2010, *Commission* v *Meierhofer*, T‑560/08 P, EU:T:2010:192, paragraph 61), it must be concluded that, in order to enable that board, represented by its chairperson, to determine whether such production was useful for the proper conduct of the proceedings before it, Group A had not only to identify in its application the documents requested, but also to provide the Board of Appeal with a minimum of evidence as to the usefulness of those documents for the purposes of those proceedings. The need to adopt the requested procedural measure by lifting, if necessary, the confidentiality of the documents at issue with regard to Group A was then a matter for the Board of Appeal, represented by its chairperson, to decide, and the group could, if necessary, challenge that assessment in the context of the action brought before the Court, in accordance with Article 29 of Regulation 2019/942, against the decision adopted at the end of the procedure, namely the contested decision, if it considered that the failure to adopt the procedural measure requested had an impact on the content of that decision.

182 Thus, the non-disclosure decision could lawfully be adopted by the Board of Appeal, represented by its chairperson, on the sole ground, set out in paragraphs 9 and 10 of that decision and reproduced in paragraphs 282 and 283 of the contested decision, that Group A had failed to provide it, in support of its request for procedural relief, with the minimum amount of evidence which would have substantiated the usefulness of the documents at issue for the purposes of the proceedings in question, as would have been necessary for the Board of Appeal to be able to respond favourably to its request.

183 Group A nevertheless counters that it justified the usefulness of the documents at issue for the purposes of the proceedings before the Board of Appeal in paragraphs 76 and 156 of its appeal before the latter.

184 In that regard, first, it must be noted that, in paragraph 76 of that appeal, relating to the third plea in law raised by Group A, it did not explain in any way how the copy of a possible assessment carried out by ACER in accordance with Article 20(5) of Regulation 2017/2195 and aimed at determining whether and how TSOs could perform the cost-benefit analysis necessary to support the amendment required by Article 12(2) of the mFRR methodology would have been necessary to rule on that plea, which essentially sought a finding that ACER had infringed Article 10 and Article 20(5) of Regulation 2017/2195, by exceeding its competence, by obliging TSOs to submit to it a proposal for a modification of the mFRR methodology, which it did not have the power to do pursuant to Article 6(10) of Regulation 2019/942 or Article 5(7) of Regulation 2017/2195. As the Board of Appeal, represented by its chairperson, rightly observed in paragraph 12 of the non-disclosure decision, the existence of the document the disclosure of which was requested was irrelevant for assessing, in that regard, ACER's competence under the applicable regulation.

185 Secondly, in paragraph 156 of the appeal to the Board of Appeal, relating to the seventh plea in law raised therein, read in conjunction with the first to third pleas in law, Group A did not explain in any way whatsoever how a copy of any forms containing the opinions of the Board of Regulators and ACER on Decision No 03/2020 and the mFRR methodology annexed thereto, prior to their adoption, allowing, as indicated by Group A, the content and scope of the discussions that had taken place in relation to it within ACER to be known would have been necessary in order to rule on the seventh plea in law in that action, which essentially sought a declaration that ACER had infringed Articles 6(11) and 14(6) of Regulation 2019/942 and Article 41 of the Charter by failing to sufficiently consult the TSOs and NRAs concerned prior to the adoption of Decision No 03/2020 and the mFRR methodology annexed thereto, and by failing to give sufficient reasons for that decision.

186 Therefore, in the circumstances of the present case, the Board of Appeal, represented by its chairperson, was entitled not to comply with the request for production of the documents at issue made by Group A, pursuant to Article 20(3)(d) of its Rules of Procedure, in paragraph 160(d) of its appeal before that board.

187 In the light of all the foregoing assessments, the complaint alleging an infringement of the 'right of access to the file' must be rejected in its entirety.

– *Infringement of the obligation to state reasons*

188 Group A submits that, in the contested decision, the Board of Appeal infringed its obligation to state reasons in several respects. First, that board did not give sufficient reasons for rejecting the complaint, raised in the sixth plea in law in the action brought by the group before it, that ACER had infringed the principle of proportionality in that, in Decision No 03/2020, it required TSOs to designate a single legal entity to perform the functions required to operate the mFRR platform, including capacity management, whereas that requirement was neither necessary nor appropriate to achieve the objectives set out in Article 3 of Regulation 2017/2195. Second, contrary to what it purported to do in paragraphs 246 to 263 of the contested decision, the Board of Appeal did not consider and, a fortiori, give reasons for dismissing the main argument, put forward in support of the second plea in law in the action brought before it, that ACER had made a fundamental change, after the revised third mFRRIF proposal submitted by the TSOs, by including the capacity management function in Article 12(2) of the mFRRIF at issue, about which those TSOs had not been consulted and which had not been included in the final version of ACER's draft decision.

189 ACER contests Group A's arguments and contends that the present complaint should be rejected.

190 In that regard, it is important to note that, under Article 41(2)(c) of the Charter, it is for the administration to give reasons for its decisions.

191 It is settled case-law that the statement of reasons also required by the second paragraph of Article 296 TFEU must be appropriate to the nature of the act in question and show clearly and unequivocally the reasoning of the institution which adopted the act, so as to enable the persons concerned to ascertain the reasons for the measure taken and the competent court to exercise its review. The requirement to state reasons must be assessed in the light of the circumstances of the case, in particular the content of the act, the nature of the reasons given and the interest which the addressees or other persons directly and individually concerned by the act may have in receiving explanations. It is not required that the statement of reasons specify all the relevant matters of fact and law, since the question whether the statement of reasons for an act satisfies the requirements of the second paragraph of Article 296 TFEU must be assessed not only in the light of its wording, but also of its context and of all the legal rules governing the matter concerned (see judgment of 29 June 2017, *E-Control* v *ACER*, T‑63/16, not published, EU:T:2017:456, paragraph 68 and the case-law cited).

192 However, a Board of Appeal cannot be required to provide an account which exhaustively follows one by one all the lines of argument put forward by the parties before it. The statement of reasons may therefore be implicit, provided that it enables the parties concerned to know the reasons for which the decision of the Board of Appeal was adopted and the competent court to have sufficient information to exercise its review (see judgment of 29 June 2017, *E-Control* v *ACER*, T‑63/16, not published, EU:T:2017:456, paragraph 69 and the case-law cited).

193 In the light of that case-law, first, it is necessary to reject Group A's complaint that the Board of Appeal rejected the claim alleging that the principle of proportionality was infringed by ACER without explaining how the requirement of a single entity structure to perform the functions required to operate the mFRR platform, including capacity management, was adequate to achieve the objectives pursued. Principally, the Board of Appeal denied that ACER imposed on TSOs a single entity structure to perform the functions required to operate the mFRR platform. In the alternative, it observed that ACER could not approve an mFRR methodology that it did not consider to be compliant with the applicable rules and that it was necessary and proportionate for ACER to mention in its decision the conditions for such compliance. That reasoning was sufficient to enable Group A to understand the reasoning, both principal and in the alternative, on which the Board of Appeal based its rejection, in the contested decision, of the complaint alleging infringement of the principle of proportionality by ACER and to challenge it, if necessary, before the Court. Moreover, it was sufficient to enable the Court to review, if necessary, the merits of such a rejection. In that context, Group A cannot criticise the Board of Appeal for not having responded to all the arguments it had developed before it.

194 Secondly, as regards the alleged failure to state reasons for rejecting the complaint that ACER had made a fundamental change to the wording of Article 12(2) of the mFRRIF at issue, as compared to the final version of the draft decision of 20 December 2019, by including capacity management therein as a function required to operate the mFRR platform, without the TSOs having been consulted on that change, it is apparent from the context in which Decision No 03/2020 was adopted and, in particular, its replies to their second and third mFRRIF proposals, that the TSOs could not have been unaware that ACER considered that capacity management was a function required to operate the mFRR platform and that if all the functions required to operate that platform were to be performed by more than one entity, the additional requirements set out in the second sentence of Article 20(3)(e) of Regulation 2017/2195 should be complied with.

195 Therefore, the TSOs knowingly refused to meet ACER's expectations in that regard in their revised third mFRRIF proposal, since, as it appears from the present action, some of them did not share ACER's view of the requirements that resulted from the application of the regulations governing the case at hand. It is against that background that, in the contested decision, the Board of Appeal, in response to Group A's claim that the TSOs had not been consulted on a fundamental change to the mFRR methodology introduced at the last moment by ACER, stated that the issue concerned by that change had been at the heart of the discussions between ACER and the TSOs during the consultation phase and that the TSOs had been in a position to fully discuss with ACER the positions taken by the latter, but that, given the time constraints on its decision-making power, ACER had eventually adopted the mFRRIF at issue, indicating the conditions under which the choices that would be made by the TSOs regarding the entity responsible for performing the capacity management function would comply with the applicable rules.

196 In view of the context in which it was provided, that reasoning was sufficient in the present case to enable Group A to understand the reasons why, in the contested decision, its complaint was rejected by the Board of Appeal and to challenge them, if necessary, before the Court. Furthermore, it was sufficient to enable the Court to review, if necessary, the merits of such a rejection.

197 In the light of all the foregoing assessments, the complaint alleging infringement of the obligation to state reasons must be rejected in its entirety.

– *Infringement of the Board of Appeal's obligation to carry out a full review of ACER's decisions*

198 The applicants claim that the Board of Appeal erred in law in the contested decision by failing to carry out a full review of Decision No 03/2020 in the light of the plea in law, which they had raised before it, alleging infringement of Article 20 of Regulation 2017/2195 as a result of ACER requiring TSOs to designate a single legal entity to perform the functions required to operate the mFRR platform, including the capacity management function. It is apparent from the judgment of 18 November 2020, *Aquind* v *ACER* (T‑735/18, under appeal, EU:T:2020:542, paragraphs 69 and 70), that the Board of Appeal should conduct a full review of ACER's decisions. Whereas in paragraph 169 of the contested decision the Board of Appeal clearly indicated that it should carry out a full review of the question of law raised by the applicants, in practice and in accordance with its decision-making practice, it carried out a limited review, as can be seen from footnote 83 of that decision. In practice, ACER had not shown that the Board of Appeal had carried out a full review of Decision No 03/2020 in the contested decision.

199 ACER contests the arguments put forward by the applicants and contends that the present complaint should be rejected.

200 Admittedly, as the applicants point out, the content of footnote 83 of the contested decision, as well as paragraph 193 of that decision, suggests that the Board of Appeal, in accordance with its decision-making practice at the time, carried out a full review only of ACER's legal assessments in its Decision No 03/2020, but confined itself to carrying out a review, limited to the search for manifest errors, of its complex factual assessments of a technical nature, recognising in that respect a certain margin of appreciation on the part of ACER.

201 It is apparent, in particular, from paragraph 69 of the judgment of 18 November 2020, *Aquind* v *ACER* (T‑735/18, under appeal, EU:T:2020:542), that the review carried out by the Board of Appeal of the complex technical and economic assessments contained in an ACER decision must not be confined to a limited review of the manifest error of assessment. On the contrary, based on the scientific expertise of its members, that board must examine whether the arguments put forward by the applicant are likely to show that the considerations on which ACER's decision is based are flawed.

202 Thus, as the applicants rightly point out, the Board of Appeal was required to carry out a full review of Decision No 03/2020 in the contested decision.

203 However, a careful examination of the contested decision shows that, in it, the Board of Appeal essentially focused its review on legal assessments made by ACER in its Decision No 03/2020, with respect to which it exercised a full review.

204 Furthermore, in the rare cases where, as in paragraph 193 of the contested decision, it was called upon to review complex technical assessments, the Board of Appeal in practice carried out a review which went beyond a mere limited review, so that, de facto, it complied with its obligations as regards the intensity of the review it was required to carry out of Decision No 03/2020. In the paragraph in question, the Board of Appeal, after noting that it concerned a complex technical assessment for which ACER had a margin of appreciation, nevertheless verified whether ACER was able to conclude correctly that the process of continuously updating the available cross-zonal transmission capacity, in a centralised or decentralised form, was a technically required function to operate the mFRR platform.

205 In the light of all the above assessments, the complaint alleging an infringement of the Board of Appeal's obligation to carry out a full review of ACER decisions must be rejected in its entirety.

– *An error of interpretation and insufficient examination by the Board of Appeal of the grounds raised before it*

206 Group A complains that the Board of Appeal erred in its interpretation and did not sufficiently examine the pleas in law which it had raised before it in the contested decision. First, the Board of Appeal examined the appeal it had lodged with it without understanding the scope and purpose of that appeal. Thus, contrary to what the Board of Appeal asserts in paragraphs 76, 142 and 182 of the contested decision, it contested the facts mentioned in paragraphs 81 to 98 of Decision No 03/2020 and lodged an appeal against Article 6(4) and Article 4(6) of the mFRRIF at issue. Furthermore, in paragraphs 81 to 98 of the contested decision, the Board of Appeal did not state facts, but summarised ACER's position. As to the errors made by the Board of Appeal, which were corrected by a corrigendum placed on the file in the present case, the applicants contended, by documents filed with the Registry of the Board of Appeal and placed on the file in the present case, that they were mere clerical errors, rather than substantive ones. Secondly, Group A criticises the Board of Appeal for not having drawn the consequences arising from the examination of the third plea in law which it had raised before it. In so far as the Board of Appeal had found that the obligation laid down in Article 12(2) of the mFRRIF at issue had been imposed by ACER and did not derive directly from Regulation 2017/2195, it should have upheld that plea or, failing that, set out the reasons why, notwithstanding the wording of the relevant provisions, ACER had not exceeded its jurisdiction.

207 ACER contests Group A's arguments and contends that the present complaint should be rejected.

208 With regard to Group A's complaint that the Board of Appeal did not understand the scope and purpose of the appeal it had lodged with it, it should be noted that, admittedly, in the contested decision, that board made certain errors or oversights.

209 In the first place, it is correct and, moreover, as ACER acknowledges, in paragraph 220 of the statement of defence, that the Board of Appeal wrongly stated in paragraphs 142 and 182 of the contested decision that Group A had not challenged the legality of Article 6(4) and Article 4(6) of the mFRRIF at issue before it.

210 In the second place, it is correct that the Board of Appeal stated, as a preliminary remark, in paragraph 76 of the contested decision, that Group A had not challenged before it the 'facts contained in [recitals] 81 [to] 98 of [Decision No 03/2020]', which was awkward in so far as, in those recitals, the presentation of purely factual information was intertwined with the presentation of ACER's legal interpretation of the applicable rules, which was not shared by Group A.

211 However, irrespective of the correction made on 21 December 2020, after the lodging of the application and, therefore, in the light of the present action, which was complained of by the applicants, it must be pointed out that they do not claim or, a fortiori, demonstrate that those errors in the grounds of the contested decision, which were subsequently corrected, had an impact on the operative part of that decision, so that they cannot justify annulment of the latter.

212 In any event, with regard to the criticisms directed against recitals 81 to 98 of Decision No 03/2020, it should be noted that, in those recitals, the Board of Appeal made it clear that the legal interpretation of the applicable legislation set out was that of ACER and that it was not shared by the applicants, with the result that there is no factual basis for the complaint put forward by Group A.

213 As regards Group A's criticism that the Board of Appeal failed to draw the consequences arising from its assessment of the third plea in law which it had raised before it, that criticism is based on an argument which has already been rejected in paragraph 168 above. For the same reasons, that criticism must be rejected as unfounded.

214 In the light of all the foregoing assessments, the complaint alleging an error of interpretation and insufficient examination by the Board of Appeal of the pleas in law raised before it, the third plea in law and, consequently, the present action must be dismissed in its entirety.

**Costs**

215 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by ACER, in accordance with the form of order sought by it.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Austrian Power Grid AG and the other applicants whose names are listed in the annex to pay the costs.**

Papasavvas Tomljenović Škvařilová-Pelzl

Nõmm Kukovec

Delivered in open court in Luxembourg on 15 February 2023.

E. Coulon M. van der Woude

Registrar President

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* Language of the case: English.

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1 The list of the other applicants is annexed only to the version sent to the parties.