

CASE NOTES

Judicial Protection in the EU Energy Market: Standing Criteria and the Reviewability of ACER Decisions after the 2025 General Court's Judgments

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Abstract

This paper analyses the General Court's judgments of 25 June 2025 (RWE and Uniper) regarding the reviewability of ACER regulatory acts. The General Court endorsed a “hybrid approach,” excluding acts of general application from the jurisdiction of the Board of Appeal and subjecting them solely to judicial review under Article 263(4) TFEU. The study highlights how this interpretation creates significant procedural gaps and bureaucratic burdens for private parties. By contrasting these rulings with the more flexible standing criteria recently adopted by the Court of Justice (e.g., *Nicoventures Case*), the paper argues that the current framework fragments the EU system of judicial protection and undermines the principle of procedural economy in highly technical sectors.

Keywords: ACER; effective judicial protection; Plaumann doctrine; regulatory acts; standing criteria

I. Introduction

Among the various actors operating within the energy market landscape, the European Union Agency for the Cooperation of Energy Regulators (hereinafter “ACER”) undoubtedly plays a prominent role.^{1,2} Established in March 2011 as part of the Third Legislative Package for the EU internal gas and electricity market,³ its primary mission is to foster cooperation between the national energy regulatory authorities of EU Member States,

¹ This contribution constitutes an updated and expanded version of the op-ed “Rethinking Standing for Regulatory Acts: A Critical Look at the ‘ACER Judgments’ (T-95/23 and T-96/23)” (2025) (79) *EU Law Live* 5.

² In this *Journal*, several Authors have (critically) examined ACER's role and powers of action within the regulatory market: see, for example, J-T Godin, M Polet and A Jamar De Bolsée, “Implementing REMIT: What a Legal Analysis Tells about the (Regulatory) Role of ACER” (2018) (9) (2) *European Journal of Risk Regulation* 192; M Maggetti, “Interest Groups and the (Non) Enforcement Powers of EU Agencies: The Case of Energy Regulation” (2019) 10 (3) *European Journal of Risk Regulation* 458. See also RJ Heffron “Shared Governance: ACER and the Roles of the National Energy and Competition Regulators in the EU” in P Cameron and R Heffron (eds), *Legal aspects of EU energy regulation* (Oxford, Oxford University Press 2016) p 49; AL Klopčič, B Rončević and T Besednjak Valič, “The Key Player or Just a Paper Tiger? The Effectiveness of ACER in the Creation and Functioning of the EU's Internal Energy Market” (2022) (35) (9) *The Electricity Journal* November 1.

³ Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, *OJ L*-211 of 14.08.2009, pp. 1-14, repealed and replaced by Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019, *OJ L*-158 of 14.06.2016, pp. 22-53 (hereinafter ‘the ACER Regulation’).

thereby helping to ensure the proper functioning of the European single market for electricity and natural gas.⁴

As part of the diverse prerogatives and statutory competences conferred upon it,⁵ ACER is empowered to adopt, in specific instances, binding individual decisions.⁶ Pursuant to Article 28(1) of the ACER Regulation, two categories of persons may lodge an appeal against such decisions: (i) the addressees of the decisions; (ii) persons who are directly and individually concerned by them. From a drafting point of view, the provision is (almost completely) identical to the one once set out in Article 230(4) TEC – that is, the version prior to the wording amended by the Treaty of Lisbon.⁷ As is well known, the latter introduced the possibility of challenging regulatory acts (i.e., acts of general application of a non-legislative nature⁸) that directly concern the applicant and do not entail any implementing measures. Article 29 of the ACER Regulation specifies that actions for annulment before the Court of Justice may only be brought after the internal administrative appeal procedure has been exhausted. This provision lacks the explicit clarification found, for example, in Article 94(1) of the “ECHA Regulation”⁹ regarding direct appeals to the General Court or the Court of Justice. Nevertheless, such a right is implicit. As clarified by case law, “[...] only decisions taken by the Board of Appeal or, in cases where no right lies before the Board of Appeal, by ACER, may be contested before the Court in accordance with Article 263 TFEU.”¹⁰

In this context, for individual decisions that can be challenged before the ACER Board of Appeal (hereinafter “BoA”), a “filter” applies – namely, the mechanism provided for by Article 58a of the Court Statute. The latter, in short, provides that an appeal before the Court shall be admissible only if it raises “an issue that is significant with respect to the unity, consistency or development of Union law,” while the burden of proof lies with the appellant,

⁴ The general objectives and tasks of ACER are set out, respectively, in Article 1(2) and Article 3 of the ACER Regulation. The specific tasks are governed by Articles 4 to 12 of the same Regulation.

⁵ ACER is responsible, *inter alia*, for monitoring the security of energy supply among its various duties. Such a function has been further expanded and strengthened by the 2019 Clean Energy for All Europeans Package (available online at the following link: <https://op.europa.eu/en/publication-detail/-/publication/b4e46873-7528-11e9-9f05-01aa75ed71a1/language-en?WT.mc_id=Searchresult&WT.ria_c=null&WT.ria_f=3608&WT.ria_e=v=search>). These monitoring activities are consolidated into an annual report on the security of electricity supply in the EU, the latest of which (relating to 2024) was published in November 2025 (available online at the following link: <<https://www.rinnovabili.it/wp-content/uploads/2025/11/ACER-2025-Security-of-EU-electricity-supply.pdf>>). The reports provide an in-depth analysis of the status of key sectors and set out recommendations for Member States on how to strengthen such security.

⁶ These are the decisions referred to in Article 2(d) of the ACER Regulation. The individual decisions can be viewed and are regularly updated at the following link: <<https://www.acer.europa.eu/documents/official-documents/individual-decisions>>.

⁷ For an analysis of the (case-law and legislative) process that led to this amendment see C Burelli “Le misure di esecuzione ex articolo 263, quarto comma, TFUE a dieci anni da Lisbona. Effettivo ampliamento della legittimazione a impugnare dei soggetti privati?” (2020) (19) *Federalismi.it* 301, at pp. 302–4.

⁸ As notoriously established in the *Inuit* judgment: see Case C-583/11, *Inuit Tapiriit Kanatami v Parliament and Council* [2013] ECLI:EU:C:2013:625.

⁹ Article 94(1) of the ‘ECHA Regulation’ (Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, *OJ L* 396 of 0.12.2006, pp. 1–849) reads as follows: “An action may be brought before the Court of First Instance or the Court of Justice, in accordance with Article 230 of the Treaty, contesting a decision taken by the Board of Appeal or, in cases where no right of appeal lies before the Board, by the Agency”.

¹⁰ See Case T-333/17, *Austrian Power Grid and Vorarlberger Übertragungsnetz v ACER* [2019] ECLI:EU:T:2019:760, specifically para. 32 (emphasis added).

who must submit a request for the appeal to be allowed to proceed by means of a separate document annexed to the appeal (Article 170a of the Rules of Procedure of the Court).¹¹

The General Court recently addressed the interpretation of these procedural rules regarding private parties' standing in two "twin" judgments delivered on June 25, 2025: T-95/23 (*RWE Supply & Trading v ACER*) and T-96/23 (*Uniper Global Commodities v ACER*)¹². In a context where the standing of private individuals remains a sensitive issue and ACER's role is set to expand, these decisions represent a significant intersection between the need for private parties to access justice and the increasing regulatory power of EU agencies.

The two judgments examined for the first time the issue of the appealability by private parties of regulatory acts that directly affect them and require no implementing measures before the Boards of Appeal of EU agencies (specifically, that of ACER). They provide a valuable opportunity to reconsider not only the well-trodden ground of private parties' *locus standi* within the judicial architecture of the EU¹³, but, more significantly, to clarify the scope of Boards of Appeal action in general, and, by extension, their crucial role within the EU's framework of judicial protection. Furthermore, when read in conjunction with the Court's recent ruling in Case C-731/23 P, *Nicoventures Trading*,¹⁴ they prompt an inquiry into the ongoing evolution of the case law of both the General Court and the Court of Justice regarding the *locus standi* of so-called "non-privileged" applicants.

For convenience, subsequent references will cite only the paragraphs of the judgment in Case T-96/23.

¹¹ On the filtering mechanism, see, among others, MF Orzan "Some Remarks on the First Applications of the Filtering of Certain Categories of Appeals before the Court of Justice" (2020) (42) (7) European Intellectual Property Review 426.

¹² Case T-95/23, *RWE Supply & Trading v ACER* [2025] ECLI:EU:T:2025:632, and Case T-96/23, *Uniper Global Commodities v ACER* [2025] ECLI:EU:T:2025:633.

¹³ The literature on this subject is extensive and, on the other hand, the controversial case-law regarding the standing of private individuals justifies this scholarly interest. See, without claiming to be complete, A Baav "Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court" (1974) Common Market Law Review 191; A Arnall "Private Applicants and the Action for Annulment under Article 173 of the EC Treaty" (1995) Common Market Law Review 7; S Balthasar "Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Art. 263(4) TFEU" (2010) European Law Review 542; V Barnard and O Odudu "Regulatory Acts within Article 263(4) TFEU – A dissonant Extension of Locus Standi for Private Applicants" (2011) The Cambridge Yearbook of European Legal Studies 328; A Albors-Llorens "Sealing the Fate of Private Parties in Annulment Proceedings? The General Court and the New Standing Test in Article 263(4) TFEU" (2012) The Cambridge Law Journal 52; M Eliantonio, V Backes, R Van Rhee, T Spronken and A Berlee "Standing Up for your Right(s) in Europe: A Comparative Study on Legal Standing (Locus Standi) before the EU and Member States' Courts" (2012) European Union Publications 36; R Mastroianni and A Pezza "Striking the Right Balance: Limits on the Right to bring an Action Under Article 263 (4) of the Treaty on the Functioning of the European Union" (2015) American University International Law Review 743; R Caranta "Knock, and it Shall be Opened unto you: Standing for Non-Privileged Applicants after Montessori" (2021) Common Market Law Review 163. On the more specific topic of the standing of private individuals before the Boards of Appeal of the agencies, reference may be made, among others, to C Burelli "Private Applicants' Locus Standi Before The Boards Of Appeal" (2024) *Review of European Litigation* (Special Volume edited by J Alberti, *Quo Vadis, Boards of Appeal? The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection*) 17, and to the scholarly references cited therein.

¹⁴ Case C-731/23 P, *Nicoventures Trading* [2025] ECLI:EU:C:2025:982. In this judgment, the Court of Justice revisited the controversial issue of individual concern regarding EU acts of general application. This is one of the requirements that, under Article 263(4) TFEU, must be met by a natural or legal person seeking to challenge an act that is not addressed to them and does not constitute a regulatory act lacking implementing measures. Despite Advocate General Emiliou's proposal to radically revise these standing criteria in light of the principle of effective judicial protection, the Court essentially opted for continuity, merely refining the existing framework. However, as will be discussed *infra*, § VI, the Court of Justice, while adhering to the classic *Plaumann* formula, which was not fundamentally revisited, nevertheless held the action admissible. In doing so, it set aside the General Court's judgment, which had, by contrast, more strictly found that the requirement of individual concern had not been satisfied.

II. The decisions of the board of appeal and the appellants' grounds of appeal

The judgments in question originate from the proceedings brought before the ACER's BoA by RWE Supply & Trading GmbH (Case no. A-002-2022) and Uniper Global Commodities SE (Case no. A-003-2022) against ACER's Decision No. 03/2022,¹⁵ by which ACER amended the methodology for determining balancing energy prices and the cross-zonal capacity used for the exchange of such energy.

Specifically, this methodology originally allowed for a technical price limit of approximately €99,999/MWh. In June 2021, the European Network of Transmission System Operators for Electricity (ENTSO-E) proposed lowering this cap to €15,000/MWh. Following a public consultation in which the appellants actively participated by submitting negative opinions, ACER adopted the contested Decision No. 03/2022.

By this measure, ACER formally rejected the Transmission System Operators' (TSOs) proposal to make the €15,000/MWh cap permanent but, simultaneously, introduced a temporary price limit of the same amount (€15,000/MWh) applicable for a 48-month period to exchanges on the European balancing platforms (PICASSO and MARI). For providers like RWE and Uniper, this represented a significant regulatory intervention: while the theoretical cap remained high, the practical reality of the platforms where they operate was now subject to a much lower price ceiling, directly affecting their potential revenues and market strategies.

As anticipated, that decision was expressly addressed to the so-called TSOs, namely the regulated national entities responsible for the security and stability of cross-border electricity flows. The two applicants, on the other hand, are, in short, balancing energy providers.

Without addressing the substance, ACER's BoA had rejected the two appeals due to the appellant companies' lack of standing.¹⁶ On the one hand, the companies were deemed not to be individually concerned by the contested ACER decision. According to the BoA, the decision applied indiscriminately to any operator falling within its scope, affecting the appellants merely in their objective capacity as balancing energy providers. The BoA specifically rejected the argument that being among the largest suppliers in the market or possessing prequalified status constituted a "peculiar attribute" under the *Plaumann* doctrine. It emphasised that even a significant economic impact is insufficient for individual concern if the measure applies to an objectively determined situation, encompassing all current and potential market participants (see paras 46–8 of the Case no. A-002-2022 and paras 48–50 of the Case no. A-003-2022).

On the other hand, having established that the challenged decision was a regulatory act, the BoA determined it lacked jurisdiction over the cases because Article 28(1) of the ACER Regulation did not confer upon it any competence to rule on the legality of regulatory acts.¹⁷

¹⁵ The full text is available online at the following link: <[https://eepublicdownloads.entsoe.eu/clean-documents/nc-tasks/220225_EB%20Regulation_Art.30_Amendment_ACER%20Decision%20\(1\).pdf](https://eepublicdownloads.entsoe.eu/clean-documents/nc-tasks/220225_EB%20Regulation_Art.30_Amendment_ACER%20Decision%20(1).pdf)>.

¹⁶ For a more in-depth analysis of the facts of the case, reference may be made to C Burelli "La legittimazione dei privati ad impugnare atti regolamentari: breve nota a margine di due decisioni della Commissione di ricorso ACER del 9 dicembre 2022" (2023) *Review of European Litigation* 119.

¹⁷ It is noteworthy that the BoA adopted a 'critical' tone towards the EU legislator regarding the constraints of its mandate. This is particularly striking considering that, as a general rule, Boards of Appeal tend to exercise significant self-restraint, often limiting themselves to a consistent application of the Court of Justice's case law: on this matter see C Tovo "The Boards of Appeal of Networked Services Agencies: Specialized Arbitrators of Transnational Regulatory Conflicts?" in M Chamon, A Volpato and M Eliantonio (eds), *Boards of Appeal of EU Agencies Towards Judicialization of Administrative Review?* (Oxford, Oxford University Press 2022) 43. While the ACER BoA did follow this traditional approach in its final ruling on admissibility, it nevertheless ventured further by openly denouncing a systemic legislative inconsistency – an issue that the General Court, conversely, subsequently declined to address in the same terms.

In response to these decisions, the appellants lodged an appeal before the General Court. In essence, the challenge to the BoA's findings rested on two main pillars. First, they argued that Article 28(1) of the ACER Regulation had been misinterpreted regarding the condition of "individual concern," asserting that their specific market position should have distinguished them. Second, the appellants alleged an infringement of the fourth paragraph of Article 263 TFEU, read in conjunction with the principle of effective judicial protection (Article 47 of the Charter of Fundamental Rights of the European Union, hereinafter "Charter"). While they agreed with the BoA's classification of the measure as a regulatory act, they contended that the Board erred in finding that such a nature precluded their standing. They maintained that since the internal appeal is a mandatory precondition for judicial review, a restrictive interpretation of Article 28(1) would create an impermissible "*lacuna*" in judicial protection, unduly limiting the right of access to the EU judicature for those directly concerned by ACER's regulatory acts.

The General Court, adopting a unique methodological approach – first examining the nature of the act and then the existence of individual concern, unlike under the traditional approach – confirmed the findings of the BoA.

III. The General Court's classification of ACER's decision and jurisdictional framework

The General Court noted that the appellants' arguments (particularly the last one) could be interpreted as a "dual complaint"¹⁸. This meant either an erroneous interpretation of Article 28(1) by the BoA, which would be contrary to the principles of the Charter, or an implicit plea of illegality against Article 28(1) itself for violating those same principles (indeed, much of the legal and logical substratum of these judgments, as well as the analysis thereof, revolves around the lawfulness of Article 28(1) of the ACER Regulation).

Having said that, the General Court first confirmed that ACER's initial decision, although formally addressed to specific entities, the TSOs, was a regulatory act (thus an act of general application) that directly concerned the appellants and required no implementing measures. It therefore fell within the "third hypothesis" of Article 263(4) TFEU (the category of acts appealable by private parties without needing to demonstrate individual concern, introduced by the Treaty of Lisbon¹⁹).

The General Court then recalled that Article 263(5) TFEU permits acts establishing Union bodies and agencies to establish specific conditions and arrangements for appeals brought by private parties. Exercising this power, the EU legislature, at the Commission's proposal, provided in Articles 28 and 29 of the ACER Regulation (read in conjunction with recital 34) that natural or legal persons who are addressees of ACER acts, or are directly and individually concerned by them, must first lodge an appeal with the BoA for reasons of procedural economy.²⁰

The intervening institutions (Parliament, Council and Commission) clarified that, in their view, the category of applicants falling under the "third hypothesis" of Article 263(4) TFEU was not intended to be among those permitted to appeal before the BoA. This is because ACER typically adopts "individual decisions" for which an appeal to the BoA is available. Therefore, if ACER were to adopt a regulatory act, recourse to Article 263(4) TFEU would be directly available before the General Court.²¹ The General Court accepted this position.

¹⁸ Para. 26.

¹⁹ Para. 27.

²⁰ Paras. 43–4.

²¹ Para. 45.

Indeed, Article 29 of the ACER Regulation states that “actions for the annulment of a decision issued by ACER [...] may be brought before the Court of Justice only after the exhaustion of the appeal procedure referred to in Article 28.” This provision does not explicitly state that in cases where the right to appeal before the BoA is not guaranteed, agency decisions can be challenged directly before the General Court and the Court of Justice. Nonetheless, as written above, this circumstance was to be considered implicit, also in light of the *Austrian Power Grid and Vorarlberger Übertragungsnetz* case law.

It was therefore inevitable, at least in abstract terms, that the limitations in Article 29 would be inoperative, given that Article 28(1) refers exclusively to decisions of an individual nature.

IV. The general court’s ruling on individual concern

Concerning the issue of individual concern, the General Court addressed it with great rigor, applying the classic criteria of the “*Plaumann*” case law.²² In light of the *Plaumann* judgment, persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them “by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed” (p. 107).

The General Court ruled, confirming the decisions of the BoA, that the appellants were not individually concerned by ACER’s decision. The latter, which established the methodology for balancing energy prices, being classifiable as a regulatory act, was of general application: it was addressed to abstract categories of operators (the TSOs’) rather than to specifically identified subjects.²³

Furthermore, the technical methodology established therein was then relevant to the entire market, affecting the appellant companies only in their capacity as participants in the sector and not due to specific qualities (as required by *Plaumann*). The applicants attempted to rely on the specific case law concerning State aid and concentrations, where a party may be individually concerned if its market position is substantially affected in relation to a beneficiary of the measure. However, the General Court rejected this analogy, noting that the applicants failed to demonstrate that any of their competitors on the balancing energy market derived a specific advantage from ACER’s decision. On the contrary, the measure had a “general impact,” adversely affecting all balancing energy providers in the same way.²⁴ Consequently, the fact that the appellants were major operators or suffered negative economic effects from the price limit established in the decision was not sufficient to distinguish them from the body of all other current or potential operators.²⁵

The General Court therefore rejected the appellants’ arguments based on (i) the market position;²⁶ and (ii) the substantial investments made prior to the contested decision which were allegedly “devalued” by the price limits.²⁷ Furthermore, the General Court dismissed

²² Paras 92 and ff. Case 25/62, *Plaumann & Co. v Commission* [1963].

²³ Para. 29.

²⁴ Paras 110–115.

²⁵ *Ibidem*.

²⁶ Being a large operator does not confer individual concern if the rule applies to anyone in that commercial position: paras 106–7.

²⁷ Regarding the investments made by the applicant, the General Court, at para. 109, ruled: “[w]hile it is true that case law shows that the devaluation of significant long-term investments, made and calculated taking into account the pre-existing market structure, has already been taken into consideration to determine the individual concern of a decision for an applicant. However, in the present case, even assuming that the concrete investments mentioned by the applicant were ‘devalued’ by the initial decision, in that the latter affected their depreciation,

the argument concerning their active participation in the administrative procedure – specifically their involvement in the public consultations preceding the initial decision. The judges found this argument procedurally inadmissible as an “attribute” for individual concern, since the applicants had failed to properly raise it before the BoA, bringing it forth only at the judicial stage.²⁸

V. Comment: the “hybrid approach”

It is appropriate to begin the analysis by examining what the General Court – citing the arguments of the Parliament, the Council, and the Commission – described as the “hybrid approach” taken by the EU legislature.²⁹ Under this model, as confirmed by the judges, only individual decisions are subject to the mandatory prior review of the BoA, while regulatory acts must proceed directly through ordinary judicial review before the General Court. This legislative choice,³⁰ which the General Court noted is consistent with the setup of several other EU agencies (such as ECHA, EBA and ESMA), appears far from satisfactory in terms of ensuring a specialised technical review for all ACER acts.

As the judges stated, this approach does not violate the *ACER v Aquind* precedent.³¹ Specifically, the General Court clarified that while the BoA is an appropriate means of protection, it is not the *only* one. The General Court’s reasoning for why this exclusion does not constitute a gap in protection is twofold. First, it relies on a “procedural compensation” logic: while the appellants lose the benefit of a full technical review on the merits, they gain in terms of procedural swiftness. Unlike individually concerned parties, they are not burdened by the mandatory obligation to exhaust the internal appeal (Article 29 of Regulation 2019/942), nor are they subject to the strict “filtering” mechanism for appeals before the Court of Justice under Article 58a of the Statute.³²

Furthermore, the General Court justified this difference in treatment by linking the intensity of the review to the “proximity” of the applicant to the Act. It held that the situation of a person directly concerned by a regulatory act is not comparable to that of an addressee or a “*Plaumann*-style” individually concerned person.³³ For the latter, whose legal sphere is more intensely affected, the legislature provided a specialised technical

the applicant has not provided sufficient data to conclude that this substantially affected its competitive position on the balancing energy market.”

²⁸ At paras. 121 and 122, the General Court noted that while the applicant mentioned its participation in the administrative procedure (under Art. 10 of Regulation 2017/2195 and Art. 14 of Regulation 2019/942) as a factor to establish individual concern, this circumstance had not been examined by the Board of Appeal. Since the applicant did not specifically challenge the Board’s failure to rule on this point with a clear and precise plea for annulment, the General Court held that it could not consider these “new” factual circumstances to assess individual concern.

²⁹ Para. 49.

³⁰ As noted by Chamon, the restriction of the BoA’s jurisdiction to individual decisions is not an oversight, but a conscious choice of the legislator, solidified in the 2019 revision of the ACER Regulation. Yet, this conscious choice is arguably incompatible with the need for specialised technical review of the most complex acts. See M Chamon “Scolding the EU legislator for right measure?: ACER Board of Appeal in RWE Supply & Trading GmbH v. ACER” (2023) *EU Law Live*.

³¹ Case C-46/21 P, *ACER v Aquind* [2020]. See the comment by V Charikleia “Chambres de recours des agences de l’Union européenne : quelle intensité de contrôle ?” (2021) (645) *Revue de l’Union Européenne* 8.

³² Paras. 63–5. Regarding the first *pourvoi* declared admissible pursuant to Article 58a of the Statute (and on its restrictive character), see M Coli “La Corte di giustizia si pronuncia sul primo *pourvoi* ammesso ai sensi dell’articolo 58 bis dello Statuto e conferma il carattere restrittivo del “filtro” sulle impugnazioni” (2024) (2) *Review of European Litigation* 1.

³³ Para. 60.

filter; for the former, the direct review of legality by the General Court is deemed sufficient and proportionate to their “more distant” legal connection to the measure.³⁴

By virtue of Article 263(4) TFEU, read in the light of Article 47 of the Charter, they would still have a potential two-tier judicial review.³⁵ In the General Court’s view, this direct access to the EU judicature ensures that effective judicial protection is guaranteed, even in the absence of a preliminary administrative stage as well as the principle of equality (Article 20 of the Charter) is respected because the situations are not comparable.

While this reasoning is formally consistent with the legislature’s discretion, it is appropriate to consider, first of all, whether the General Court was correct in finding that there was no unequal treatment. The principle of equality,³⁶ as is well known, requires both that comparable situations are not treated differently and that different situations are not treated in the same way. In this case, it could be argued that the two situations (challenging an individual decision versus an act of general application) are indeed different, thereby justifying differentiated treatment. But is this truly the case? Looking at the status of the appellants, rather than the nature of the act, the answer should be in the affirmative: the two situations are distinct and justify differentiated treatment, in accordance with the principle of equality. This difference in treatment, therefore, is deemed objective, proportionate and aligned with a legitimate purpose. In the light of this, limited review by the General Court is not disadvantageous for those with a less significant connection to the act.³⁷

However, from a systematic perspective, one might argue that the technical complexity of ACER’s acts – rather than the applicant’s status – should dictate the need for a BoA review. Indeed, if the purpose of the BoA is to provide a comprehensive review of complex technical facts,³⁸ then excluding regulatory acts – which often contain complex technical elements – appears to prioritise procedural status over the substantive need for expertise.

In other words, by shifting the perspective, the differentiated treatment appears less justified. Furthermore, even assuming it is indeed correct that there is no breach of the principle of equal treatment, one could argue – for reasons that go beyond the principle of equality alone – that it would nonetheless be preferable to subject regulatory acts to the review of the BoA.

First, it is clear that a “specialised” level of judicial review is lost. As is well known, and as the General Court noted,³⁹ unlike the General Court itself, which can only exercise limited review, the Boards of Appeal are empowered to conduct a comprehensive review of agencies’ complex technical or scientific assessments, thereby ensuring a fuller “on the merits” control.

While it is clear – as the General Court established⁴⁰ – that effective judicial protection is still guaranteed through the two-tier review before the EU Courts (whose scrutiny is, in any case, clearly adequate), it is, conversely, questionable whether there is not a difference in treatment that is, if not entirely unjustified, then at least unreasonable from a systematic point of view.

³⁴ Paras. 60–6.

³⁵ Para. 50.

³⁶ On this principle, see, among others, LS Rossi and F Casolari (eds), *The principle of equality in EU law* (Cham, Springer International Publishing AG 2017).

³⁷ Para. 63.

³⁸ As emphasised by Tovo (n 17 50–53), following the landmark *Aquind* ruling, it is now established that the BoA must exercise a full and intensive review. This is because a “limited review of a limited review” would fail to meet the standards of effective judicial protection, especially considering that the BoA acts as a mandatory bridge toward the EU judicature.

³⁹ Paras. 57–9.

⁴⁰ Paras. 71 and 74–5.

In fact, in abstract terms, it seems preferable to ensure that private parties have access to a highly specialised first-instance review for all agency acts, not just for some. This is for various reasons.

First, for reasons of the system's internal consistency. This approach, in fact, creates a consistency issue concerning individual decisions that cannot be challenged before the BoA because they are not explicitly listed among those appealable under Article 2(1)(d) ACER Regulation. Consequently, these decisions must be reviewed directly by the General Court. If the criterion is indeed a "significant connection to the act," then even these individual decisions should be amenable to thorough examination before the BoA. The same argument might also apply to appeals brought by so-called "privileged applicants," which similarly cannot be lodged before the BoA.

Second, this approach is also problematic in terms of (i) the efficiency of the "justice system," (ii) costs, and (iii) procedural economy – actually protected by Article 29 of ACER's founding Regulation. If an applicant is unsure about the nature of the act (is it regulatory or individual?) or about the existence of individual concern, they are forced to lodge appeals simultaneously before both the BoA and the General Court. This is not merely a "procedural complication," as the General Court states.⁴¹ Rather, it is a significant issue that entails considerable economic and bureaucratic costs, procedural inefficiency and legal uncertainty.

The General Court accepts this "complication," arguing that it would not disappear anyway because the risk of parallel appeals persists regardless: the same act, for instance, could be challenged before the General Court by a privileged applicant.⁴²

This argument, however, appears somewhat weak. The existence of such a risk (the same act being challenged before the General Court by a privileged applicant and before the BoA by a non-privileged applicant) does not preclude the possibility that the risk margin could be reduced, at least with regard to the same category of applicants.

Furthermore, consider the worst-case scenario (which occurred in this very case): where, due to an error in assessment, an appeal is lodged solely before the "wrong" body (be it the General Court or the BoA). This results in the appeal being declared inadmissible, while, in the interim, the deadline for appealing before the correct body has expired. Indeed, the alternative application for annulment of ACER's initial decision was rejected precisely for failing to meet the deadlines set out in Article 263(6) TFEU. Such a situation creates a protection gap, stemming from what appears to be an excusable error by the appellant, who is forced to undertake a complex preliminary assessment (or else duplicate their economic and bureaucratic burdens).

More generally, the argument that a thorough review is justifiable only when there is a "significant connection" to the act appears illogical. Where an agency like ACER adopts technically complex decisions, judicial policy considerations militate in favour of affording all affected parties an in-depth scrutiny that can only be secured by the Board of Appeal. This since the scrutiny afforded by the General Court is not a substitute to such in-depth review. The rules on *locus standi* before the Boards of Appeal should therefore be recast in a more generous manner.

VI. Concluding remarks

The analysis of the recent General Court's jurisprudence reveals a system of judicial protection that is fragmented. While this study focuses on ACER, the General Court's

⁴¹ Para. 72.

⁴² Para. 73.

confirmation of the “hybrid approach” provides a significant indication of how the EU legislature generally conceives the role of administrative review bodies.

In particular, the current role of the ACER’s BoA within the EU’s system of judicial protection thus appears anachronistically and illogically limited. Increasing the number of acts appealable before this body (as well as before other Boards of Appeal that face similar constraints),⁴³ particularly those of general application, could clearly lead to greater procedural efficiency, a positive expansion of protections for individuals, and, not least, a reduction in the workload of the EU Courts.

The core issue, then, is one of political expediency and the overall coherence of the judicial policy choices being made in recent years. Does it make sense to restrict the competence of the Boards of Appeal if they are the very bodies through which the General Court’s workload (and, thanks to the new Article 58a, also the Court of Justice’s) could be eased, and through which the principles of effective judicial protection and equal treatment in highly technical and scientific fields could be fully upheld? In other words: if the General Court requires a preliminary in-depth review by ACER’s BoA when dealing with disputes concerning the legality of agency acts – even those of general application that directly and individually affect the applicant – why can it forgo this review if that same act does not have individual concern? Is a mere “less significant connection to the act” truly a sufficient justification?

In response to these systemic shortcomings, one might consider how Article 28 of Regulation 2019/942 should be reassessed.⁴⁴ In light of the General Court’s restrictive rulings, the most effective and certain solution undoubtedly lies in a legislative revision. Article 28 should be rewritten to decouple the right of appeal from the “individual” nature of the act. A reformed text could grant the BoA jurisdiction over any act of ACER intended to produce legal effects vis-à-vis third parties, provided the applicant meets the standing criteria of Article 263(4) TFEU. By shifting the focus from the nature of the act to the need for technical review, the legislature would ensure that the BoA’s specialised expertise is available for all kind of acts (also complex, market-wide regulatory methodologies).

However, from a purely interpretative and prospective standpoint, one cannot entirely rule out that the BoA could, in future cases, explore a more teleological reading of its own competence. Instead of a strict adherence to the list of individual decisions under Article 2(d), the BoA could attempt to assert its jurisdiction over any ACER act that, despite its general labels, produces definitive legal effects on the rights of market participants, thereby prioritising the substance of the measure over its form.

While such an approach might risk further judicial scrutiny by the General Court, it remains a theoretically necessary step to bridge the current gap in judicial protection (also because it is well known that EU law does not recognise the principle of *stare decisis* in a strict sense).⁴⁵ Boards of Appeal – as well as the Courts themselves – retain the possibility to distinguish their cases from previous rulings or to propose novel, system-oriented interpretations, the so-called “judicial courage”, even at the risk of being overturned on

⁴³ On this matter, see the comprehensive analysis by C Burelli n 13.

⁴⁴ As Chamon argues, given the “future promotion” of Boards of Appeal to de facto specialised tribunals, driven by the revisions of Article 58a of the CJEU Statute, it is illogical not to exploit their potential for comprehensive technical review. The current legislative framework must therefore be reformed to match the judicial reality of an integrated system of remedies (Chamon n 29). On a similar note, even though prior to the introduction of the filter, see also the considerations of J Alberti *Le Agenzie dell’Unione europea* (Milano Giuffrè 2018) 205 ff.

⁴⁵ In the EU legal order, the principle of *stare decisis* does not apply; therefore, judicial precedents are not, at least formally, binding, and their application is a result of the judges’ discretionary decision, who may depart from them. However, an examination of judicial practice demonstrates that, in substance, there is a strong ‘attachment’ to precedent. On this point, see, among others, D Sarmiento, “The ‘Overruling Technique’ at the Court of Justice of the European Union” (2023) *European Journal of Legal Studies* 107.

appeal. In this sense, the BoA could still act as a catalyst for a future judicial evolution of the system).

However, it remains true that, for the sake of legal certainty, a legislative revision appears more appropriate. Article 28 should be rewritten to decouple the right of appeal from the “individual” nature of the act. A reformed text could grant the BoA jurisdiction over “any act of ACER intended to produce legal effects vis-à-vis third parties,” provided the applicant meets the standing criteria of Article 263(4) TFEU. By shifting the focus from the nature of the act to the need for technical review, the legislature would ensure that the BoA’s specialised expertise is available precisely where it is most needed: in the scrutiny of complex, market-wide regulatory methodologies.

These recent judgments, therefore, raise an important question: has the General Court lost its courage?

While it is undeniable that the Court followed the most natural and literal reading of Article 28 of the ACER Regulation – a provision whose “hybrid” structure is a deliberate, if questionable, choice of the legislature – one might wonder whether a more proactive judicial stance was possible.

The General Court, which delivered innovative and visionary legal solutions in landmark cases like *Jégo-Quéré*,⁴⁶ by filling normative gaps to ensure the effectiveness of judicial protection, now seems very distant and unwilling to replicate that approach. In the present case, a teleological and systematic interpretation of the BoA’s role could have allowed the General Court to overcome the legislative formalisms of the hybrid approach, prioritising the substantive need for expert review over the mere literal wording of the Regulation.

Academic commentary⁴⁷ has noted that in the recent dialogue between the General Court and the Court of Justice, the General Court, contrary to past trends, seems inclined to maintain a restrictive interpretation of the conditions for granting natural and legal persons direct access to a legality review of acts. Meanwhile, the Court of Justice appears more willing to “broaden” the scope of application of these criteria, recognising the standing of non-privileged applicants from an apparently “evolutionary” perspective. In other words, while the General Court seems to adhere to a formalistic interpretation of standing and admissibility, the Court of Justice has recently shown signs of a more flexible, evolutionary perspective. A clear example of this divergent trend can be found in the *Nicoventures* judgment,⁴⁸ where the Court – overturning the General Court’s ruling⁴⁹ that had declared the action inadmissible for lack of individual concern – held, on the contrary, that the conditions for standing were met.⁵⁰

⁴⁶ Case T-177/01, *Jégo-Quéré v Commissione* [2001] ECLI:EU:T:2002:112.

⁴⁷ See MT Moschetta “Il locus standi dei ricorrenti “non privilegiati” nella recente dialettica tra Tribunale e Corte di giustizia dell’Unione europea” (2023) (3) *Rivista di Diritti Comparati* 207.

⁴⁸ See the comment by M Ferri “La sentenza *Nicoventures Trading*: non ora, ma quando un ripensamento dei criteri Plaumann?” (2026) *Review of European Litigation* 1.

⁴⁹ Case T-706/22, *Nicoventures Trading e a. v Commission* [2023] ECLI:EU:T:2023:39.

⁵⁰ The Court first recalled that, based on settled case law, “the possibility of determining, with more or less precision, the number or even the identity of the persons to whom an act applies” does not imply that such persons are to be regarded as individually concerned by that act, provided that its application is based on “an objective legal or factual situation defined by the act” (para. 58). However, the Court also remarked that subjects may be considered individually concerned by an act as members of a “closed group of economic operators”, provided they are identified or identifiable at the time of the act’s adoption and “by reason of criteria specific to the members of the group” (para. 59). Such a circumstance is, in particular, detectable where the act affects rights acquired by the individual *prior* to its adoption. The Court then specified that the “closed group” test presupposes the satisfaction of a two-fold condition. First, the applicant must demonstrate that they were identified or identifiable by the author of the contested act when it was adopted; and second, that they possess “specific characteristics compared to the other persons to whom that act is intended to apply” (Ferri n 48 5). As has been observed, this is a very significant step as it has clarified the previous case law on the matter. (Ferri n 48 5).

Indeed, although the Court seemed to have adopted a “cautious” line of reasoning – in the sense that, it declined to follow the broader interpretation proposed by Advocate General Nicholas Emiliou, refraining from a full reconsideration of the *Plaumann* formula, to which it remained largely faithful – it nevertheless displayed a much more flexible attitude (and a broader interpretation) than that adopted by the General Court (also, indeed, with regard to the condition of individual concern, which was strictly and rigorously interpreted by the General Court in the judgments *de quibus*).⁵¹ The Court of Justice, while not yet ready to abandon traditional standing hurdles, is increasingly engaged in a careful calibration of these criteria, which, as the *Nicoventures* Case demonstrates, it is now more inclined to consider satisfied.

The decisions of 25 June 2025, therefore, appear to confirm this tendency noted in scholarship, highlighting the General Court’s caution in not overstepping interpretive boundaries.

By framing the “hybrid approach” as a legitimate exercise of legislative discretion, the judges effectively prioritises legal certainty and the literal wording of the Regulation over the substantive principle of effective judicial protection. However, one might argue that this judicial deference is (also legally) questionable: by accepting a less significant connection to the act as a sufficient justification for denying specialised review, the General Court risks validating an incoherent system that might fail the proportionality test.

However, the acquiescence of the parties, who did not appeal the aforementioned judgments before the Court of Justice, represents a missed opportunity for the evolution of the Union’s system of judicial protection. In a context characterised by a seemingly widening, albeit cautious, interpretation of standing criteria by the Court, a final ruling could have provided, if not decisive, at least further clarifications. This would have addressed not only the scope of individual concern (which was undoubtedly “limited” in these judgments) but also, and above all, the appealability of regulatory acts before the Boards of Appeal of the agencies. Such a ruling could have crystallised – at least theoretically – significant interpretive trends regarding the nature of agency acts and clarified a legal framework which, in the General Court’s hands, remains somewhat confusing.

Competing interests. The author declares none.

⁵¹ The same, for instance, has recently occurred in the Court’s judgment in *Nord Stream 2* – Case C-348/20 P, *Nord Stream 2 v Parliament and Council* [2022] ECLI:EU:C:2022:548 – even if with reference to the condition of direct concern. See, *amplius*, the case law cited by Moschetta (n 47).