



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

9 March 2023*

(Appeal – Energy – Regulation (EC) No 714/2009 – Article 17 – Request for exemption relating to an electricity interconnector – Refusal decision from the European Union Agency for the Cooperation of Energy Regulators (ACER) – Regulation (EC) No 713/2009 – Article 19 – Board of Appeal of ACER – Intensity of the review)

In Case C-46/21 P

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 January 2021,

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

appellant,

the other party to the proceedings being:

Aquind Ltd, established in Wallsend (United Kingdom), represented by J. Bille, C. Davis, S. Goldberg and E. White, Solicitors,

applicant at first instance,

THE COURT (Fifth Chamber)

composed of E. Regan, President of the Chamber, D. Gratsias, M. Ilešič (Rapporteur), I. Jarukaitis and Z. Csehi, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2022,

gives the following

* Language of the case: English.

Judgment

- 1 By its appeal, the European Union Agency for the Cooperation of Energy Regulators (ACER) seeks to have set aside the judgment of the General Court of the European Union of 18 November 2020, *Aquind v ACER*, (T-735/18, ‘the judgment under appeal’, EU:T:2020:542), by which the General Court annulled Decision A-001-2018 of the Board of Appeal of ACER (‘the Board of Appeal’) of 17 October 2018 (‘the decision at issue’), by which Decision No 05/2018 of ACER of 19 June 2018 refusing a request for exemption relating to an electrical interconnector connecting the electricity transmission systems in the United Kingdom and France (‘Decision No 05/2018’) was upheld.
- 2 By its cross-appeal, Aquind Ltd asks the Court to uphold the judgment under appeal.

Legal context

- 3 Recital 19 of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ 2009 L 211, p. 1), which was in force until 3 July 2019, stated:

‘Where [ACER] has decision-making powers, interested parties should, for reasons of procedural economy, be granted a right of appeal to a Board of Appeal, which should be part of [ACER], but independent from its administrative and regulatory structure. In the interest of continuity, the appointment or renewal of the members of the Board of Appeal should allow for partial replacement of the members of the Board of Appeal. The decisions of the Board of Appeal may be subject to appeal before the Court of Justice of the European Communities.’

- 4 Article 3 of Regulation No 713/2009, entitled ‘Composition’, provided:

‘[ACER] shall comprise:

...

(d) a Board of Appeal, which shall exercise the tasks set out in Article 19.’

- 5 Article 18 of that regulation, entitled ‘Board of Appeal’, provided in paragraph 1:

‘The Board of Appeal shall comprise six members and six alternates selected from among current or former senior staff of the national regulatory authorities, competition authorities or other national or Community institutions with relevant experience in the energy sector. The Board of Appeal shall designate its Chairman. The decisions of the Board of Appeal shall be adopted on the basis of a qualified majority of at least four of its six members. The Board of Appeal shall be convened when necessary.’

- 6 Article 19 of that regulation, entitled ‘Appeals’, provided:

‘1. Any natural or legal person, including national regulatory authorities, may appeal against a decision referred to in Articles 7, 8 or 9 which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.’

2. The appeal, together with the statement of grounds, shall be filed in writing at [ACER] within two months of the day of notification of the decision to the person concerned, or, in the absence thereof, within two months of the day on which [ACER] published its decision. The Board of Appeal shall decide upon the appeal within two months of the lodging of the appeal.

...

4. If the appeal is admissible, the Board of Appeal shall examine whether it is well founded. It shall invite the parties as often as necessary to the appeal proceedings to file observations on notifications issued by itself or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make ... oral presentations.

5. The Board of Appeal may, in accordance with this Article, exercise any power which lies within the competence of [ACER], or it may remit the case to the competent body of [ACER]. The latter shall be bound by the decision of the Board of Appeal.

6. The Board of Appeal shall adopt and publish its rules of procedure.

...'

7 Article 20 of that regulation, entitled 'Actions before the Court of First Instance and the Court of Justice', provided:

'1. An action may be brought before the Court of First Instance or the Court of Justice, in accordance with Article 230 [EC], contesting a decision taken by the Board of Appeal or, in cases where no right lies before the Board of Appeal, by [ACER].

2. In the event that [ACER] fails to take a decision, proceedings for failure to act may be brought before the Court of First Instance or the Court of Justice in accordance with Article 232 [EC].

3. [ACER] shall be required to take the necessary measures to comply with the judgment of the Court of First Instance or the Court of Justice.'

8 Regulation No 713/2009 was repealed by 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). Article 28(2) of that regulation provides that the Board of Appeal is to decide upon the appeal within four months of the lodging of the appeal.

Background to the dispute

9 The background to the dispute was set out by the General Court in paragraphs 1 to 13 of the judgment under appeal and, for the purposes of the present proceedings, may be summarised as follows.

10 On 17 May 2017, Aquind, the project promoter for a proposed electricity interconnector connecting the electricity transmission systems in the United Kingdom and France, submitted a request under Article 17 of Regulation (EC) No 714/2009 of the European Parliament and of the

Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ 2009 L 211, p. 15) for an exemption for that proposed interconnector.

- 11 That request was submitted to the French and United Kingdom regulatory authorities, namely the Commission de régulation de l'énergie (CRE) and the Office of Gas and Electricity Markets Authority (OFGEM), respectively, which, having failed to reach an agreement on that request, forwarded it to ACER in accordance with Article 17(5) of Regulation No 714/2009, in order to have ACER take the decision itself.
- 12 By Decision No 05/2018, ACER refused Aquind's request on the ground that one of the conditions necessary for obtaining such an exemption was not satisfied, in the present case the condition laid down in Article 17(1)(b) of that regulation, according to which the level of risk attached to the investment must be such that the investment would not take place unless an exemption is granted.
- 13 On 17 August 2018, Aquind brought an appeal against that decision before the Board of Appeal which upheld the decision by the decision at issue.

The action before the General Court and the judgment under appeal

- 14 By application lodged at the Registry of the General Court on 14 December 2018, Aquind brought an action for annulment of the decision at issue, on the ground, inter alia, that the Board of Appeal erred in finding that it could limit its review to manifest errors of assessment and that Aquind first had to request and obtain a cross-border cost allocation decision, in accordance with Article 12 of Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations No 713/2009, No 714/2009 and (EC) No 715/2009 (OJ 2013 L 115, p. 39) before a decision could be taken under Article 17 of Regulation No 714/2009.
- 15 By the judgment under appeal, the General Court annulled the Board of Appeal's decision, after upholding Aquind's ninth plea in law, alleging insufficient scrutiny by the Board of Appeal of Decision No 05/2018, and, for the sake of completeness, its fourth plea in law, alleging misinterpretation of the relationship between Article 17(1) of Regulation No 714/2009 and Article 12 of Regulation No 347/2013, which it also upheld. Consequently, the General Court annulled the decision at issue and dismissed the action as to the remainder.
- 16 In support of its ninth plea, Aquind claimed, in essence, that the Board of Appeal, during the examination of its appeal, had limited its review to a review of ACER's alleged manifest error of assessment when it adopted Decision No 05/2018. Such a limited review is contrary to Article 19(5) of Regulation No 713/2009.
- 17 Relying on reasoning divided into four separate parts, the General Court held, in paragraphs 50 to 71 of the judgment under appeal, that, as Aquind submitted in its ninth plea, the Board of Appeal's limitation of the intensity of its review of ACER's decision on a request for exemption under Article 17(1) of Regulation No 714/2009 was wrong in law.
- 18 In the first place, the General Court held, in essence, in paragraph 51 of the judgment under appeal that the establishment of the Board of Appeal reflected the intention of the European Union's legislature to provide for a mechanism of appeal within the agencies of the European

Union where those agencies have been given significant decision-making powers over complex technical or scientific issues which directly affect the legal situation of the parties concerned. The system of appellate bodies is an appropriate means of protecting the right of those parties in circumstances where review by the EU judicature must be limited to examining whether the exercise of the broad discretion in the assessment of complex scientific, technical and economic facts available to agencies has been vitiated by a manifest error of appraisal or a misuse of powers.

- 19 In the second place, in paragraphs 52 to 58 of the judgment under appeal, the General Court examined the provisions relating to the organisation and powers of the Board of Appeal and found, at the end of that analysis, that that appellate body was not established in order to confine itself to a limited review of complex technical and economic assessments.
- 20 First, the General Court stated, in paragraph 53 of the judgment under appeal, concerning the composition of the Board of Appeal, that Article 18(1) of Regulation No 713/2009 provides that the Board of Appeal is to comprise six members and six alternates selected from among current or former senior staff of the national regulatory authorities, competition authorities or other national or EU institutions ‘with relevant experience in the energy sector’. The EU legislature thus intended to provide the Board of Appeal with the necessary expertise to allow it to carry out assessments of complex technical and economic facts relating to energy. The General Court stated that this was also the objective pursued when other EU agencies were established, such as the European Aviation Safety Agency (EASA) or the European Chemicals Agency (ECHA), whose Boards of Appeal are composed of experts holding qualifications which reflect the specific nature of the areas concerned.
- 21 Second, as regards the powers conferred on the Board of Appeal, the General Court held, in paragraph 54 of the judgment under appeal, that those powers, set out in Article 19(5) of Regulation No 713/2009, also pointed towards a review of complex factual and economic evidence, in that, under that provision, the Board of Appeal may either exercise the same powers as those conferred on ACER or remit the case to the competent body of that agency, that body then being bound by the decision of the Board of Appeal. That provision therefore confers on the Board of Appeal a power of discretion in the exercise of which it must assess whether the evidence which it has at its disposal following the examination of the appeal allows it to adopt its own decision.
- 22 In paragraph 55 of the judgment under appeal, the General Court inferred from this that not only does the Board of Appeal have all the powers conferred on ACER itself, but that, if it chooses to remit the case, it is capable of influencing the decisions taken by ACER, in so far as ACER is bound by the reasoning of the Board of Appeal.
- 23 Furthermore, according to the General Court, it follows from Article 19(1) of Regulation No 713/2009 that, unlike the EU judicature, the Board of Appeal has jurisdiction, by way of a review of expediency, to annul or replace ACER’s decisions solely on the basis of technical and economic considerations.
- 24 Third, the General Court found, in paragraphs 57 and 58 of the judgment under appeal, that, as regards requests for exemption under Article 17(1) of Regulation No 714/2009, only decisions of the Board of Appeal adopted under Article 19(1) of Regulation No 713/2009 and Article 17(5) of Regulation No 714/2009 may be challenged before the General Court. If the Board of Appeal

could conduct only a limited review of complex technical and economic assessments contained in ACER's decision, that would mean that the General Court would conduct a limited review of a decision which would itself be the result of a limited review.

- 25 Such a system does not offer the guarantees of effective judicial protection which undertakings that have been refused such an exemption should be able to enjoy.
- 26 In the third place, the General Court held, in paragraphs 59 and 60 of the judgment under appeal, that the rules of organisation and procedure adopted by ACER, pursuant to Article 19(6) of Regulation No 713/2009, gave the Board of Appeal the task of reviewing ACER's decision with an intensity which cannot be confined to that of a limited review.
- 27 Thus, in paragraph 60 of the judgment under appeal, the General Court stated that Decision No 1-2011 of the Board of Appeal of 1 December 2011 laying down the rules of organisation and procedure of the Board of Appeal, had been amended on 5 October 2019, by which the Board of Appeal restricted its power. In the version in force at the time when the decision at issue was adopted, it was expressly stated in Article 20 of that decision, entitled 'Competence', that the Board of Appeal could exercise any power which lay within the competence of ACER. The General Court held that, in adopting that provision, the Board of Appeal had therefore reflected, in its own internal rules of organisation and procedure, the power of review conferred on it by Article 19(5) of Regulation No 713/2009, and that the amendment of that provision, by which the Board of Appeal restricted its power, was not yet applicable at the time when the decision at issue was adopted.
- 28 In the fourth place, the General Court held, in essence, in paragraphs 61 to 68 of the judgment under appeal, that the principle of limited review by the EU judicature in relation to complex technical, scientific and economic assessments is not intended to apply to the review conducted by the appellate bodies of the EU agencies. Thus, it has already been held that, with regard to the Board of Appeal of ECHA, the review conducted by that board of appeal of scientific assessments in an ECHA decision was not limited to verifying the existence of manifest errors, but that, on the contrary, on account of the legal and scientific competences of its members, that board had to examine whether the arguments put forward by the applicant were capable of demonstrating that the considerations on which that ECHA decision had been based were vitiated by errors.
- 29 The General Court held, in paragraphs 62 to 68 of the judgment under appeal, that that case-law was fully applicable to the Board of Appeal. The composition and powers of the Board of Appeal of ECHA are comparable to those of the Board of Appeal of ACER.
- 30 On the basis of all those grounds, the General Court decided, in paragraphs 69 to 71 of the judgment under appeal, that the review conducted by the Board of Appeal of complex technical and economic assessments contained in one of ACER's decisions relating to a request for exemption under Article 17(1) of Regulation No 714/2009 could not be confined to the limited review of a manifest error of assessment. The Board of Appeal therefore erred in law in finding, in paragraph 52 of the decision at issue, that, as regards assessments of a technical or complex nature, it could conduct a limited review and thus confine itself to determining whether ACER had committed a manifest error of assessment of the conditions laid down in that provision.

- 31 After examining and rejecting, in paragraphs 72 to 89 of the judgment under appeal, the various arguments put forward by ACER in support of the opposing view, the General Court, in paragraph 90 of that judgment, upheld the ninth plea raised by Aquind in support of its action for annulment.
- 32 Lastly, in paragraphs 92 to 113 of the judgment under appeal, the General Court examined and declared to be well founded the fourth plea in that action, alleging misinterpretation of the relationship between Article 17(1) of Regulation No 714/2009 and Article 12 of Regulation No 347/2013 and, consequently, that the proposed interconnector may qualify for a cross-border cost allocation procedure, and also alleging that the risks associated with that procedure were not taken into account.
- 33 In paragraph 91 of that judgment, however, the General Court stated that that examination was based solely on reasons relating to the sound administration of justice.

Procedure before the Court of Justice and forms of order sought by the parties to the appeal

- 34 By its appeal, ACER claims that the Court should:
- set aside the judgment under appeal in whole or in part;
 - if the Court considers that the state of the proceedings so permits, dismiss the action at first instance as being unfounded;
 - in the alternative, refer the case back to the General Court for determination in accordance with the judgment of the Court of Justice, and
 - order Aquind to pay the costs incurred in the appeal and in the proceedings before the General Court.
- 35 Aquind contends that the Court should:
- dismiss the appeal;
 - if the Court of Justice should find that one of ACER’s arguments is well founded, dismiss the appeal on the other grounds advanced by Aquind, including, if necessary, those contained in the pleas in law dismissed by the General Court;
 - if the Court of Justice does not uphold the judgment under appeal, annul the decision at issue itself on the other grounds relied on by Aquind before the General Court;
 - order ACER to pay the costs.
- 36 By its cross-appeal, Aquind claims that, in the event that the Court upholds the main appeal, the Court should:
- annul the declaration as to the inadmissibility of the third and fourth pleas in law relied on by Aquind before the General Court;

- annul the dismissal of the first, fifth, and sixth to eighth pleas relied on by Aquind before the General Court;
- take into account the arguments put forward in the grounds of appeal relied on by Aquind in the present appeal in support of its contention that the Court should uphold the judgment under appeal;
- consequently, set aside the decision at issue on the grounds relied on in Aquind’s application before the General Court.

37 In its response, ACER contends that the Court should:

- dismiss the cross-appeal in its entirety, and
- order Aquind to bear its own costs and to pay those incurred by ACER in the cross-appeal.

The main appeal

- 38 The appellant raises two grounds in support of its appeal. By its first ground of appeal, it submits that the General Court erred in law with regard to the intensity of the review which must be undertaken by the Board of Appeal in relation to ACER’s complex technical and economic assessments in the context of its examination of a request for exemption under Article 17(1) of Regulation No 714/2009.
- 39 By its second ground of appeal, ACER submits that the General Court erred in law with regard to the interpretation of Article 17(1)(b) of Regulation No 714/2009 concerning the relationship between the exempted regime and the regulated regime.

The first ground of appeal

Arguments of the parties

- 40 By its first ground of appeal, ACER submits that the General Court erred in law in holding that, contrary to what the Board of Appeal had found in paragraphs 51 and 52 of the decision at issue, the review conducted by that board of complex technical and economic assessments relating to a request for exemption under Article 17(1) of Regulation No 714/2009 could not be limited to examining whether ACER had committed a manifest error of assessment, given that that agency must be granted a certain discretion when deciding on an exemption. According to ACER, in so doing, the General Court failed to have regard to the objective pursued by the EU legislature in establishing the Board of Appeal and the context in which it conducts its review.
- 41 In the alternative, ACER submits that, in any event, in the present case, the Board of Appeal did not fail to review ACER’s complex technical and economic assessments in the context of its examination which led to the adoption of Decision No 05/2018.

- 42 ACER argues that not all the independent appellate bodies of the various agencies of the European Union are called upon to review complex technical and economic assessments with the same intensity as that carried out by the agency to which they belong. Thus, as regards the Board of Appeal, it is free not to examine the case with the same level of detail as ACER does.
- 43 More specifically, as regards assessments involving complex economic and technical issues, the Board of Appeal conducts a review which, although considerable, is limited to manifest errors committed by ACER. In that context, the Board of Appeal examines not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it by ACER.
- 44 Given that Regulation No 713/2009 does not contain an explicit description of the level of intensity of the review which the Board of Appeal is required to conduct, it is necessary, in order to determine that level, to take into account the objective pursued by the appeal proceedings and the context in which the review takes place.
- 45 In ACER's submission, as regards the objective pursued by the creation of the Board of Appeal, the General Court was wrong to hold, in paragraph 53 of the judgment under appeal, that it is apparent from Article 18(1) of Regulation No 713/2009 that the EU legislature intended to provide that board with the necessary expertise to enable it to carry out assessments of complex technical and economic facts relating to energy, as the Board of Appeal of ECHA did in its field of competence. On the contrary, it is apparent from recital 19 of Regulation No 713/2009 that that objective was that interested parties should have a very rapid and simplified right of appeal before the Board of Appeal. That objective is borne out by the fact that the Board of Appeal is required to give a decision within two months of the matter being referred to it.
- 46 As regards the context of the review, ACER submits that the General Court erred in law, in paragraphs 52 to 82 of the judgment under appeal, in holding that the provisions relating to the organisation and the powers of the Board of Appeal supported the conclusion that the intensity of its review of complex technical and economic assessments could not be limited to a manifest error of assessment. The organisation of the Board of Appeal, in particular the selection of its members, who, contrary to what the General Court held in paragraphs 53, 65 and 69 of the judgment under appeal, and unlike the members of the Board of Appeal of ECHA, do not necessarily have to have the expertise necessary to carry out complex technical assessments themselves, the extremely short duration of the appeal proceedings of two months, the limited resources available to those members and the objective of simplifying the appeal procedure are all evidence that should lead to the opposite conclusion. The members of the Board of Appeal cannot be expected to carry out technical and economic assessments by themselves, without any support, within the extremely short period of two months available to them.
- 47 As regards the powers of the Board of Appeal, ACER submits that, in paragraphs 54, 55, 59 and 60 of the judgment under appeal, the General Court was wrong to rely on Article 19(5) of Regulation No 713/2009, according to which the Board of Appeal 'may ... exercise any power which lies within [ACER's] competence ... or remit the case to the competent body of [ACER for further action, that body being] bound by the decision of the Board of Appeal', when it held that that board must conduct a full review of all errors which were alleged to have vitiated the complex

technical and economic assessments contained in ACER's decision. As is apparent from the case-law of the General Court, such a provision cannot be interpreted as determining the intensity of the review to be conducted by the Board of Appeal.

- 48 The General Court also erred in law in paragraph 56 of the judgment under appeal in finding that it followed from Article 19(1) of Regulation No 713/2009 that, unlike the EU judicature, the Board of Appeal has jurisdiction, by way of a review of expediency, to annul or replace ACER's decisions, solely on the basis of technical and economic considerations. That provision, far from justifying the exercise of a full review by the Board of Appeal, according to the appellant, provided only for the possibility of annulling decisions adopted by ACER and replacing them with its own, or remitting the case to ACER, but is silent as to the intensity of the review which must be conducted by the Board of Appeal.
- 49 The General Court also erred in law in paragraph 56 of the judgment under appeal, when it referred to Article 19(1) of Regulation No 713/2009, which defined the persons who could bring an appeal before the Board of Appeal, even though that article does not concern the intensity of that review either. Similarly, contrary to what the General Court held in paragraphs 57, 58 and 70 of the judgment under appeal, it cannot be inferred from Article 20 of Regulation No 713/2009 that the Board of Appeal must conduct a full review of complex technical and economic assessments. The General Court could always conduct a full judicial review of the decisions of the Board of Appeal, even if those decisions were the result of a limited review carried out by that board.
- 50 In short, the General Court unlawfully disregarded the objective pursued and the context of the appeal procedure before the Board of Appeal, as set out in Regulation No 713/2009, and therefore infringed the principles of the separation of powers as regards the choices made by the EU legislature in its capacity as legislature and budgetary authority. Furthermore, the comparison made by the General Court with the Board of Appeal of ECHA is also wrong in law.
- 51 In the alternative, ACER submits that, in any event, even if the Board of Appeal had to conduct a full review of ACER's decisions in so far as they contain complex technical and economic assessments, the General Court erred in finding, in paragraphs 83 to 90 of the judgment under appeal, that the Board of Appeal did not conduct such a full review in the present case.
- 52 Aquind submits that the first ground of appeal must be rejected and that the General Court was right to hold that the Board of Appeal was required to conduct a full review of Decision No 05/2018, not limited to manifest error of assessment.

Findings of the Court

- 53 By its first ground of appeal, ACER submits, in essence, that the General Court erred in law as regards the intensity of the review to be conducted by the Board of Appeal of ACER's decisions, in accordance with the provisions of Regulation No 713/2009 relating to the definition of the powers of that Board of Appeal.
- 54 According to settled case-law, when interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 8 September 2022, *Ministerstvo životního prostředí (Hyacinth macaws)*, C-659/20, EU:C:2022:642, paragraph 37 and the case-law cited).

- 55 First, it is not expressly apparent from the wording of the provisions of Articles 18 and 19 of Regulation No 713/2009, relating to the composition, organisation and powers of the Board of Appeal, that its review of ACER's decisions involving assessments of complex economic and technical issues is necessarily limited to the review of a manifest error of assessment.
- 56 Second, as regards the objectives pursued by the establishment of the Board of Appeal, it should be noted, as the Advocate General observed in point 44 of his Opinion, that that creation forms part of an overall approach, adopted by the EU legislature, to provide the EU agencies with review bodies where they have been given decision-making powers on complex technical or scientific issues capable of directly affecting the legal situation of the parties concerned.
- 57 Thus, as the General Court also correctly noted in paragraph 51 of the judgment under appeal, those review bodies are an appropriate means of protecting the rights of the parties concerned in a context in which, according to settled case-law, where the authorities of the European Union have a broad discretion, in particular in relation to highly complex scientific and technical facts, to determine the nature and scope of the measures which they adopt, review by the courts of the European Union must be limited to verifying whether there has been a manifest error of appraisal or a misuse of powers, or whether those authorities have manifestly exceeded the limits of their discretion (order of 4 September 2014, *Rütgers Germany and Others v ECHA*, C-290/13 P, not published, EU:C:2014:2174, paragraph 25 and the case-law cited).
- 58 Third, as the Advocate General observed, in essence, in point 41 of his Opinion, although those different review bodies display certain differences in their structure, their functioning and their powers, they nevertheless share certain common characteristics.
- 59 First of all, it should be noted that these are administrative revision bodies, which are internal to the agencies. They have a certain independence, perform quasi-judicial functions through adversarial procedures, and are composed of lawyers and technical experts, which means they are better able to dispose of appeals against decisions which often have a strong technical component. Next, the right of appeal to these bodies is enjoyed by the addressees of decisions adopted by the agencies, in addition to the natural and legal persons to whom those decisions are of direct and individual concern. Furthermore, they review decisions, having effects on third parties, on which the secondary legislation creating those bodies gives them competence to adjudicate. Finally, they are a quick, accessible, specialised and inexpensive mechanism for protecting the rights of the addressees and persons concerned by those decisions.
- 60 Fourth, it should be noted that the procedure applicable before the Board of Appeal is not governed by rules other than those laid down in Article 19 of Regulation No 713/2009, which provides, in paragraph 1, that any natural or legal person, including national regulatory authorities, may appeal against a decision referred to in Articles 7 to 9 of that regulation which is addressed to that person or which is of direct or individual concern to that person. As the General Court rightly pointed out in paragraph 56 of the judgment under appeal, it is not apparent from Article 19 that the appeal before the Board is subject to other conditions of eligibility.
- 61 That assessment is supported by the wording of Article 19(2) of Regulation No 713/2009, which provides that an appeal must state the grounds on which it is based, without drawing a distinction, in the grounds which must therefore be relied on in support of the action, between pleas in law and pleas of fact.

- 62 Fifth, it should be pointed out that, under Article 18(1) of Regulation No 713/2009, the Board of Appeal is to comprise six members and six alternates selected from among current or former senior staff of the national regulatory authorities, competition authorities or other national or EU institutions with relevant experience in the energy sector.
- 63 The composition of the Board of Appeal thus meets the requirements necessary to enable it to conduct a full review of decisions adopted by ACER. If its members must have prior experience in the energy sector, this is because they have or should have the technical knowledge necessary to enable them to conduct a detailed examination of appeals.
- 64 Consequently, as the General Court rightly pointed out in paragraph 53 of the judgment under appeal, the EU legislature intended to provide the Board of Appeal with the necessary expertise to allow it to carry out assessments of complex technical and economic facts relating to energy. That was also the objective pursued by the EU legislature when other EU agencies were established, such as EASA or ECHA, whose Boards of Appeal are composed of experts holding qualifications which reflect the specific nature of the areas concerned.
- 65 The General Court was therefore right to hold, in paragraph 52 of the judgment under appeal, that it was apparent from the provisions relating to the organisation and powers of the Board of Appeal that that body had not been created in order to confine itself to a limited review of complex technical and economic assessments.
- 66 Sixth, the General Court was also correct in pointing out, in paragraph 61 of the judgment under appeal, that the case-law relating to the limited nature of the review conducted by the EU judicature of complex technical, scientific and economic assessments cannot be applied to the appellate bodies of the EU agencies.
- 67 As the General Court stated in paragraph 58 of the judgment under appeal, if the Board of Appeal's review were to be only limited in nature as regards complex technical and economic assessments in ACER's decisions, that would mean that the General Court would be carrying out a limited review of a decision which was itself the result of a limited review. The General Court was therefore right to conclude that such a system would fail to offer the guarantees of effective judicial protection which must be afforded to undertakings that have been refused a request for exemption under Article 17(1) of Regulation No 714/2009.
- 68 Seventh, it is to no avail that, in order to challenge the considerations set out in paragraphs 61 to 68 of the judgment under appeal, ACER submits, in support of its first ground of appeal, that there are differences between the Board of Appeal and the Board of Appeal of ECHA in terms of objectives, procedure, time limits and staff rules.
- 69 In that respect, the General Court stated, in paragraph 61 of the judgment under appeal, that it had already been held, with regard to the Board of Appeal of ECHA, that the review carried out by that board of appeal of scientific assessments in an ECHA decision was not limited to verifying the existence of manifest errors, but that, on the contrary, on account of the legal and scientific competences of its members, that board had to examine whether the arguments put forward by the applicant were capable of demonstrating that the considerations on which that ECHA decision had been based were vitiated by error and that the intensity of the review carried out by the Board of Appeal is thus greater than that of the review carried out by the EU judicature (see, to that effect, judgment of 20 September 2019, *BASF Grenzach v ECHA*, T-125/17, EU:T:2019:638, paragraphs 87 to 89 and 124).

- 70 As the General Court correctly held, in essence, in paragraphs 64 to 67 of the judgment under appeal, first, the composition and powers of the Board of Appeal of ECHA are, contrary to what ACER maintains, comparable to those of the Board of Appeal, since those bodies are both composed of members who have the necessary expertise to enable them to carry out assessments of complex scientific, technical and economic facts. Second, the fact that the members of the Board of Appeal of ECHA, unlike those of the Board of Appeal, are employed full time cannot affect the intensity of the review which they are required to conduct.
- 71 As regards ACER's argument based on the brevity of the time limit for the Board of Appeal to give a decision, set at two months by Article 19(2) of Regulation No 713/2009, it cannot be inferred from this that the intention of the EU legislature was to limit the review by the Board of Appeal, when that shortened time limit, incidentally extended to four months by Article 28(2) of Regulation 2019/942, reflects rather the concern of that legislature to ensure a swift procedure.
- 72 In the light of all those considerations, it appears that the General Court was right to find that the Board of Appeal had erred in law in holding that, as regards assessments of a technical or complex nature, it could conduct a limited review and confine itself to determining whether ACER had committed a manifest error of assessment.
- 73 In the alternative, ACER submits that, even if it is accepted that the Board of Appeal should undertake a full review of ACER's decisions entailing complex technical and economic assessments, the General Court erred in law in stating that the Board of Appeal had not carried out such a review in this case.
- 74 That argument cannot succeed, since it is expressly stated in paragraph 52 of the decision at issue that the Board of Appeal intended to limit its review of Decision No 05/2018 to a manifest error of assessment.
- 75 In the light of the foregoing considerations, ACER's first ground of appeal must be dismissed.

The second ground of appeal

- 76 By its second ground of appeal, ACER submits that the General Court erred in law as regards the interpretation of Article 17(1)(b) of Regulation No 714/2009 concerning the relationship between the exempted regime and the regulated regime.
- 77 As is apparent from paragraph 91 of the judgment under appeal, it was for the sake of completeness that the General Court examined that issue, which was the subject of Aquind's fourth plea in support of its action for annulment, after upholding the ninth plea in that action, on the grounds set out in paragraphs 43 to 90 of the judgment under appeal, which were unsuccessfully criticised by ACER in its first ground of appeal.
- 78 In accordance with the case-law of the Court of Justice, where one of the grounds adopted by the General Court is sufficient to sustain the operative part of its judgment, any defects that might vitiate other grounds given in the judgment concerned have, in any event, no bearing on that operative part and, accordingly, a plea relying on such defects is ineffective and must be dismissed (judgment of 5 September 2019, *European Union v Guardian Europe* and *Guardian Europe v European Union*, C-447/17 P and C-479/17 P, EU:C:2019:672, paragraph 143 and the case-law cited).

- 79 The second ground of appeal must therefore be rejected as ineffective.
- 80 It follows from all the foregoing reasons that the main appeal must be dismissed in its entirety.

The cross-appeal

- 81 Since the main appeal is dismissed, there is no need to adjudicate on the cross-appeal.

Costs

- 82 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 83 In the present case, since the Court has dismissed the main appeal and Aquind has applied for ACER to be ordered to pay the costs, ACER must be ordered to bear its own costs relating to the main appeal and to pay those incurred by Aquind.
- 84 Article 142 of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, provides that where a case does not proceed to judgment the costs are to be in the discretion of the Court.
- 85 It is appropriate to order ACER and Aquind to bear their own costs relating to the cross-appeal.

On those grounds, the Court (Fifth Chamber) hereby:

- 1. Dismisses the main appeal;**
- 2. Declares that there is no need to adjudicate on the cross-appeal;**
- 3. Orders the European Union Agency for the Cooperation of Energy Regulators (ACER) to bear its own costs relating to the main appeal and to pay those incurred by Aquind Ltd;**
- 4. Orders the European Union Agency for the Cooperation of Energy Regulators (ACER) and Aquind Ltd to bear their own costs relating to the cross-appeal.**

Regan

Gratsias

Ilešič

Jarukaitis

Csehi

Delivered in open court in Luxembourg on 9 March 2023.

A. Calot Escobar
Registrar

E. Regan
President of the Chamber