



# Reports of Cases

## Case C-46/21 P

**European Union Agency for the Cooperation of Energy Regulators**

**v**

**Aquind Ltd**

**Judgment of the Court (Fifth Chamber), 9 March 2023**

(Appeal – Energy – Regulation (EC) No 714/2009 – Article 17 – Request for exemption relating to an electrical 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)

*EU agencies – Agency for the Cooperation of Energy Regulators (ACER) – Appeals procedure – Appeal before the Board of Appeal of ACER – Appeal brought against ACER’s decision refusing a request for exemption relating to new electrical interconnectors – Scope of the review – Assessment of complex technical and economic facts – Review of legality not limited to the assessment of manifest errors of assessment*

*(European Parliament and Council Regulations No 713/2009, Arts 18(1) and 19, and No 714/2009, Art. 17(1))*

(see paragraphs 55-72)

### Résumé

Aquind Ltd is the project promoter for a proposed electricity interconnector connecting the electricity transmission systems in the United Kingdom and France. For the purposes of that project, Aquind Ltd submitted to the French and United Kingdom regulatory authorities a request for exemption relating to new electrical interconnectors under Article 17 of Regulation No 714/2009 on conditions for access to the network for cross-border exchanges in electricity.<sup>1</sup>

Since the national regulatory authorities failed to reach an agreement, the European Union Agency for the Cooperation of Energy Regulators (ACER) refused the request for exemption<sup>2</sup> on the ground that Aquind Ltd did not satisfy the condition that the level of risk attached to the investment for the new interconnector must be such that that investment would not take place unless an exemption is granted (‘the ACER decision’).

<sup>1</sup> 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).

<sup>2</sup> ACER Decision No 05/2018 of 19 June 2018.

On appeal by Aquind Ltd, the ACER decision was upheld by the Board of Appeal of ACER<sup>3</sup> ('the Board of Appeal'). Thus, Aquind Ltd brought an action before the General Court for annulment of the decision of the Board of Appeal, which action was upheld by judgment of 18 November 2020, *Aquind v ACER*.<sup>4</sup> In that judgment, the General Court found, inter alia, that the Board of Appeal had erred in law by limiting its review of the ACER decision to that of a manifest error of assessment.

On appeal lodged by ACER, the Court of Justice upholds the judgment of the General Court, while clarifying the intensity of the review which the Board of Appeal is required to carry out of ACER's decisions on requests for exemptions.

### *Findings of the Court*

As a preliminary point, the Court recalls that, when interpreting a provision of EU law, it is necessary to consider in particular its wording and the objectives pursued by the rules of which it is part.

In the first place, as regards the wording of the regulation establishing ACER, the Court notes that it is not expressly apparent from its provisions relating to the composition, organisation and powers of the Board of Appeal<sup>5</sup> that the latter's review of ACER's decisions involving assessments of complex economic and technical matters is necessarily limited to a review of a manifest error of assessment.

In the second place, as regards the objectives pursued by the establishment of the Board of Appeal, it should be noted 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. Although those different review bodies display certain differences in their structure, their functioning and their powers, they nevertheless share certain common characteristics.

First, such review bodies, which are administrative revision bodies that are internal to the agencies, have a certain independence, perform quasi-judicial functions through adversarial procedures, and are composed of lawyers and technical experts, which enables them to dispose of appeals against decisions that often have a strong technical component. Secondly, 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. Third, they are a quick, accessible, specialised and inexpensive mechanism for protecting the rights of the addressees and persons concerned by those decisions.

As regards the Board of Appeal, the Court notes that, according to the procedure applicable before that Board, any natural or legal person, including national regulatory authorities, may appeal against an ACER decision addressed to that person or which is of direct or individual concern to that person, without that appeal being subject to other conditions of eligibility. As

<sup>3</sup> Decision of the Board of Appeal of ACER No A-001-2018 of 17 October 2018.

<sup>4</sup> Judgment of 18 November 2020, *Aquind v ACER* (T-735/18, EU:T:2020:542).

<sup>5</sup> Articles 18 and 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).

regards its composition, the Board of Appeal includes members who must have prior experience in the energy sector, and thus it has the necessary expertise to allow it to conduct a full review of the complex technical and economic assessments contained in ACER's decisions.

In that regard, the existence of differences between the Board of Appeal and other Boards of Appeal, such as that of the European Chemicals Agency (ECHA), in terms of objectives, procedure, time limits and staff rules, cannot affect the intensity of the review which that board is required to conduct.

In that context, the Court endorses the General Court's conclusion that the case-law relating to the limited nature of the review conducted by the EU judiciary of complex technical, scientific and economic assessments cannot be transposed to the appeal bodies of the EU agencies. Indeed, a limited review by the Board of Appeal of technical and economic assessments would lead the EU judiciary to conduct a limited review of a decision which would itself be the result of a limited review. However, a system of 'limited review of a limited review' fails to offer the guarantees of effective judicial protection which must be afforded to undertakings that have been refused a request for exemption.

In the light of all those considerations, the Court of Justice concludes 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 confine itself to determining whether ACER had committed a manifest error of assessment.