Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

15 February 2023*

(Energy – Competence of the ACER – Withdrawal of the United Kingdom from the European Union – Error of law – Article 2(1) of Regulation (EU) 2019/943 – Article 92 of the Withdrawal Agreement – Ad hoc exemption regime under Article 308 of and Annex 28 to the Trade and Cooperation Agreement)

In Case T-492/21,

Aquind Ltd, established in London (United Kingdom),

Aquind Energy Sàrl, established in Luxembourg (Luxembourg),

Aquind SAS, established in Rouen (France),

represented by S. Goldberg, Solicitor, and E. White, lawyer,

applicants,

v

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

defendant,

supported by

European Parliament, represented by A. Tamás and O. Denkov, acting as Agents,

and by

Council of the European Union, represented by A. Lo Monaco, L. Vétillard and M.É. Sitbon, acting as Agents,

interveners,

THE GENERAL COURT (Second Chamber),

* Language of the case: English.

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

Registrar: I. Kurme, Administrator,

having regard to the written part of the procedure,

further to the hearing on 24 October 2022,

gives the following

Judgment

1 By their application based on Article 263 TFEU, the applicants Aquind Ltd, Aquind Energy Sàrl and Aquind SAS, seek the annulment of the decision of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 4 June 2021 concerning a request for an exemption relating to an electrical interconnector connecting the electricity transmission systems in the United Kingdom and France ('the contested decision').

Background to the dispute

2 Aquind Ltd is a private limited company incorporated in the United Kingdom. It is the project promoter for a proposed electricity interconnector connecting the British and French electricity transmission systems ('the Aquind interconnector').

3 On 17 May 2017, Aquind Ltd submitted a request for an exemption for the Aquind interconnector 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). That request for exemption was submitted to the French and British national regulatory authorities, namely, respectively, the Commission de régulation de l'énergie (CRE) and the Office of Gas and Electricity Markets (OFGEM).

4 As the national regulatory authorities could not reach agreement on the request for exemption, they referred the request, on 29 November and 19 December 2017 respectively, to ACER, pursuant to Article 17(5) of Regulation No 714/2009, for the decision to be taken by ACER itself.

5 By a decision of 19 June 2018, ACER rejected the request for an exemption for the Aquind interconnector ('ACER's decision').

6 On 17 August 2018, Aquind Ltd brought an appeal against that decision before the Board of Appeal of ACER ('the Board of Appeal').

7 By decision of 17 October 2018, the Board of Appeal upheld ACER's decision and thus refused the request for an exemption for the Aquind interconnector.

8 By application lodged at the Registry of the General Court on 14 December 2018, Aquind Ltd challenged that decision. By judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542), the Court annulled that decision.

9 On 5 February 2021, the Board of Appeal reopened the appeal proceedings brought by Aquind Ltd against ACER's decision.

10 On 19 May 2021, a hearing was held before the Board of Appeal.

11 On 4 June 2021, the Board of Appeal adopted the contested decision by which it declared the appeal inadmissible on the ground that, as a result of Brexit, it was no longer competent to make a decision in the procedure relating to the request for an exemption for the Aquind interconnector.

Forms of order sought

12 The applicants claim that the Court should:

– annul the contested decision;

– to order ACER to pay the costs.

13 ACER, supported in that respect by the European Parliament, contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

14 The Council of the European Union contends, in essence, that the action should be dismissed.

Law

15 In support of their action, the applicants put forward two pleas in law. The first plea in law alleges that the Board of Appeal erred in declaring that, following Brexit, it did not have competence and in therefore dismissing the action before it as inadmissible. The second plea in law alleges an infringement of Article 25(3) and Article 28(4) of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (OJ 2019 L 158, p. 22), and of several provisions of Decision No 1-2011 of the Board of Appeal, adopted on 1 December 2011, laying down its rules of organisation and procedure.

The first plea in law, alleging an error of law by the Board of Appeal in declaring itself to lack competence following Brexit

16 In the context of the first plea in law, the applicants submit that, notwithstanding Brexit, the Board of Appeal remained competent to review ACER's decision following the annulment, by the Court, of its decision of 17 October 2018. They submit that, under Article 266 TFEU, the Board of Appeal was required to adopt a new decision corresponding to that which it would have adopted if it had not made the errors identified by the Court, and state that the competence of the Board of Appeal is derived directly from Articles 19 and 20 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), namely, now, Articles 28 and 29 of Regulation 2019/942, and from the existence of a pending appeal.

17 The applicants submit also that, in order to take the necessary measures to comply with the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542), pursuant to Article 20(3) of Regulation No 713/2009 and Article 29 of Regulation 2019/942, the Board of Appeal should have remedied the errors made by amending ACER's decision on the basis of its powers and the applicable procedure at the time, in order to remove the illegality that that judgment identified. They submit that, in the same way as actions under Article 263 TFEU, the admissibility of the appeal before the Board of Appeal must be assessed in the light of the situation prevailing at the time the appeal was lodged, and submit that ACER's decision and the appeal against it before the Board of Appeal predate both the entry into force of Regulation 2019/942 and Brexit.

18 ACER supported by the Parliament, contends that that plea should be rejected.

19 It should be borne in mind that, under Article 266 TFEU, the institution, body, office or entity whose act has been annulled is required to take the necessary measures to comply with the judgment annulling that act. In that regard the Court of Justice has held that, in order to comply with such a judgment and to implement it fully, the institution, body, office or entity concerned is required to have regard not only to the operative part of that judgment but also to the grounds which led to the judgment and constitute the essential basis for it, in so far as they are necessary to determine the exact meaning of what is stated in the operative part (judgment of 26 April 1988, *Asteris and Others* v *Commission*, 97/86, 99/86, 193/86 and 215/86, EU:C:1988:199, paragraph 27).

20 However, prior to the adoption of such measures by the institution, body, office or entity whose act has been annulled, the question arises as to their competence, since they may only act within the limits of the powers conferred on them (see, to that effect, judgment of 14 June 2016, *Commission* v *McBride and Others*, C-361/14 P, EU:C:2016:434, paragraph 36 and the case-law cited).

21 Furthermore, the obligation to act which follows from Article 266 TFEU is not a source of competence for the institution, body, office or entity concerned, nor does it permit them to rely on a legal basis which has in the meantime been repealed (see, to that effect, judgments of 14 June 2016, *Commission* v *McBride and Others*, C-361/14 P, EU:C:2016:434, paragraph 38, and of 29 April 2020, *Tilly-Sabco* v *Council and Commission*, T-707/18, not published, EU:T:2020:160, paragraph 44).

22 The obligation to act, flowing from Article 266 TFEU, does not relieve the institution, body, office or entity concerned of the need to base the act containing measures to comply with a judgment annulling a decision on a legal basis that, first, gives it the power it to adopt that act, and, second, is in force on the date of adoption of that act (judgment of 19 June 2019, *C & J Clark International*, C-612/16, not published, EU:C:2019:508, paragraph 40).

23 Hence, the first step is to determine whether an institution, body, office or entity is competent to act and, if so, on the basis of which specific provision of EU law. Only then does one establish the precise substantive and procedural rules that govern that institution's action. However, if there is no valid legal base in force at the moment when an EU institution, body, office or entity seeks to

take a particular decision, it is not possible to rely on the principles governing the succession of legal rules to apply substantive provisions that had previously governed past acts (Opinion of Advocate General Sharpston in *Commission* v *McBride and Others*, C-361/14 P, EU:C:2016:25, point 86; see also, to that effect, judgment of 25 October 2007, *SP and Others* v *Commission*, T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, EU:T:2007:317, paragraph 117).

24 In the light of that case-law, it is necessary to ascertain whether, after the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542) was delivered, the Board of Appeal was entitled to base the decision containing the measures that compliance with that judgment required on a legal basis that, first, gave it the power to adopt that act and, secondly, was in force at the date on which that act was adopted.

25 That requires the determination, in this case, of which measures could have been taken in order to comply with the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542).

26 In that regard, it should be recalled that Aquind Ltd had submitted to the CRE and to OFGEM a request seeking an exemption for the Aquind interconnector under Article 17 of Regulation No 714/2009. As those two national regulatory authorities failed to reached an agreement, the request for an exemption had been referred to ACER in accordance with Article 17(5) of Regulation No 714/2009.

27 By ACER's decision of 19 June 2018, the request for an exemption for the Aquind interconnector was rejected. ACER found that Aquind Ltd had not satisfied one of the conditions necessary for obtaining an exemption, namely the condition under Article 17(1)(b) of Regulation No 714/2009, 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. By decision of 17 October 2018, the Board of Appeal upheld ACER's decision and thus refused the request for an exemption for the Aquind interconnector.

28 By the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542), the Court annulled the decision of the Board of Appeal of 17 October 2018 holding, first, that the Board of Appeal had carried out only a limited review of ACER's decision and, second, that it had established an additional condition which is not laid down in the legislation, for the grant of exemptions for new interconnectors, by requiring the prior introduction of a request for financial support for investments related to a project of common interest before submitting a request for an exemption.

29 Having regard to the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542), the measures required to comply with that judgment could consist of a fresh review, by the Board of Appeal, of ACER's decision without limiting that review to assessing whether there was a manifest error of assessment, whilst also taking care not to repeat the error found by the Court of requiring the prior introduction of a request for financial support when it assesses the condition concerning the degree of risk attached to the investment.

30 In that regard, and contrary to the applicants' submissions, those measures cannot consist of the adoption of the Board of Appeal's own motion of a decision granting them the exemption sought. It is not stated in the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542), that the Court considered that the condition concerning the degree of risk

attached to the investment, laid down in Article 17(1)(b) of Regulation No 714/2009, was satisfied and that the Board of Appeal was required to adopt a new decision opening up the possibility of an exemption.

31 Having identified the type of measures required in order to comply with the judgment annulling the decision, it is necessary to determine whether there was, as at the date on which the contested decision was adopted, namely 4 June 2021, a legal basis in force that gave the Board of Appeal the power to adopt a decision that contained that type of measure.

32 In that regard, it should be noted that the provisions relating to the legal basis and the procedure followed up to the adoption of the contested decision fall within the scope of procedural rules (see, to that effect, judgments of 29 March 2011, *ThyssenKrupp Nirosta* v *Commission*, C-352/09 P, EU:C:2011:191, paragraph 90; of 12 September 2007, *González y Díez* v *Commission*, T-25/04, EU:T:2007:257, paragraph 60; and of 31 March 2009, *ArcelorMittal Luxembourg and Others* v *Commission*, T-405/06, EU:T:2009:90, paragraph 67). It is settled case-law that procedural rules are generally taken to apply from the date on which they enter into force (see judgment of 26 March 2015, *Commission* v *Moravia Gas Storage* C-596/13 P, EU:C:2015:203, paragraph 33 and the case-law cited).

33 In the present case, when the Court annulled the decision of the Board of Appeal of 17 October 2018 and it was once again required to examine ACER's decision, the legal basis for its power to examine actions against ACER's decisions, including those relating to exemptions, was contained in Article 28 of Regulation 2019/942. Regulation 2019/942 replaced Regulation No 713/2009 and entered into force on 4 July 2019, namely prior to the adoption of the contested decision. Accordingly, the provisions of Article 28 of Regulation 2019/942 were, in principle, applicable in the case (see, to that effect, judgment of 7 September 2022, *BNetzA* v *ACER*, T-631/19, EU:T:2022:509, paragraphs 21 and 81). As regards ACER, the legal basis establishing its power to adopt a decision on a request for an exemption was contained in Article 10 of Regulation 2019/942 and Article 63(5) of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ 2019 L 158, p. 54).

34 However, those provisions giving ACER the power to examine a request for an exemption relating to an interconnector and those giving the Board of Appeal the power to assess ACER's decision on that request may only apply on the assumption that, as provided for in Article 2(1) of Regulation 2019/943 and, moreover, in Article 2(1) of Regulation No 714/2009, the transmission line crosses or spans a border between Member States and connects the national transmission systems of the Member States.

35 By contrast, Regulations 2019/942 and 2019/943 do not give ACER the power to consider a request for an exemption relating to an interconnector between a Member State and a third State, nor does it, a fortiori, confer on the Board of Appeal the competence to assess a decision by ACER upon such a request.

36 Following Brexit, the proposed Aquind interconnector related thereafter to an interconnector between a Member State and a third State. That had the consequence that neither ACER nor the Board of Appeal were entitled to base a decision containing measures to comply with the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542) on the legal basis that, originally, gave them the power to adopt that decision.

37 In the light of that finding, it is necessary to determine whether ACER and the Board of Appeal had the power to base a decision containing measures to comply with the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542), on a legal basis other than that contained in Regulations 2019/942 and 2019/943.

38 In that regard, the relationship between the European Union and the United Kingdom is governed by the provisions of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7; 'the Withdrawal Agreement') and by those of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ 2021 L 149, p. 10; 'the TCA').

39 First, as regards the Withdrawal Agreement, Article 92 thereof, entitled 'Ongoing administrative procedures', provides in paragraph 1 as follows:

'The institutions, bodies, offices and agencies of the Union shall continue to be competent for administrative procedures which were initiated before the end of the transition period concerning: (a) compliance with Union law by the United Kingdom, or by natural or legal persons residing or established in the United Kingdom; or (b) compliance with Union law relating to competition in the United Kingdom.'

40 Article 92(4) of the Withdrawal Agreement provides that the European Union is to provide the United Kingdom with a list of all individual ongoing administrative procedures that fall within the scope of paragraph 1 within three months after the end of the transition period.

41 First of all, a provision whose meaning is clear and unambiguous requires no interpretation (judgments of 25 November 2009, *Germany* v *Commission*, T-376/07, EU:T:2009:467, paragraph 22, and of 13 July 2018, *Société générale* v *ECB*, T-757/16, EU:T:2018:473, paragraph 33). A straightforward reading of Article 92(1) of the Withdrawal Agreement permits the conclusion that the scope of application thereof does not extend to administrative procedures which concern requests for exemption for interconnectors, pursuant to Article 63 of Regulation 2019/943. Article 92 of the Withdrawal Agreement grants competence to the institutions, bodies, offices and agencies of the European Union only in certain administrative procedures that raise issues against the institutions, bodies, offices and agencies of the United Kingdom or natural or legal persons residing or established in the United Kingdom regarding compliance with EU law. The institutions, bodies, offices and agencies of the European Union thus retain competence to investigate and, if necessary, sanction those institutions, bodies, offices and agencies of the United Kingdom and the natural or legal persons residing or established there if a procedure has been initiated before the end of the transition period.

42 Next, in that regard, the Commission confirmed to the Board of Appeal by an email of 10 May 2021, that the administrative procedure relating to this case was not included in the list of administrative procedures, drawn up in accordance with Article 92(4) of the Withdrawal Agreement. It should be noted that that provision unambiguously provides that the list provided to the United Kingdom within three months after the end of the transition period is to cover 'all' of the ongoing individual administrative procedures that fall within the scope of paragraph 1 and that it does not concern therefore a list that is 'purely informational', contrary to the applicants' submission.

43 Furthermore, and in the same vein, at the date of 27 January 2021, the CRE and OFGEM published a communication on their respective websites stating that it had been decided to close the procedure for the request for exemption for the Aquind interconnector on the ground that the exemption regime provided for in Article 63 of Regulation 2019/942 no longer applied to that project following the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union.

44 Finally, and contrary to the applicants' submissions, Article 92 of the Withdrawal Agreement does not reflect a general principle that ongoing procedures should not be interrupted by Brexit. As ACER has correctly pointed out, that provision constitutes, on the contrary, an exception to the general principle according to which EU law – and, therefore, the competence of EU bodies – no longer applied to the United Kingdom after its withdrawal from the European Union and from the legal order of the European Union.

45 Secondly, as regards the TCA, that agreement provides, in Article 309, as follows:

'Each Party shall ensure that exemptions granted to interconnections between the Union and the United Kingdom under Article 63 of Regulation [2019/943] in their respective jurisdictions, the terms of which extend beyond the transition period, continue to apply in accordance with the laws of their respective jurisdictions and the terms applicable.'

46 Article 309 of the TCA, the meaning of which is clear and unambiguous, requires no interpretation. It covers 'granted' exemptions only, namely those that are in existence, and does not concern therefore requests for an exemption that are still the subject of an assessment. Therefore, the Board of Appeal could not adopt measures to comply with the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542), by granting, pursuant to Article 309 of the TCA, an exemption for the Aquind interconnector.

47 The TCA laid down a specific exemption regime in Article 308 and Annex 28. That provision and the annex to which it refers provide that a party may decide not to apply Articles 306 and 307 of the TCA – which lay down provisions inter alia concerning charges for access and connection to systems and charges for the use of systems – for the construction of new infrastructure if the risk attached to the investment is such that the investment would not take place unless an exemption is granted.

48 However, neither Article 308 and Annex 28 nor, moreover, any other provision of the TCA confers any competence on ACER and, hence, the Board of Appeal, to rule on requests for an exemption for electricity interconnectors. As the Board of Appeal correctly stated, the implementation of an exemption regime requires arrangements to be made and steps to be taken by the Member States concerned and the United Kingdom.

49 Furthermore, the field of application of the regime for exemption from rules of the internal market of the European Union, on the one hand, and that of the exemption regime in Article 308 of and Annex 28 to the TCA, on the other hand, are different. The second regime covers exemptions from the TCA rules only, namely those in Article 306 of that agreement, relating to third-party access to transmission and distribution systems, and those contained in Article 307 of that agreement, relating to the management of the systems and the unbundling of transmission systems and transmission system operators.

50 Therefore, the applicants cannot successfully rely on Article 308 of and Annex 28 to the TCA to support their argument that the Board of Appeal was competent to take the necessary measures required to comply with the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542).

51 It follows that there is no provision equivalent to Article 20(3) of Regulation No 713/2009 or to Article 29 of Regulation 2019/942 which confers on ACER and on the Board of Appeal the competence to act in the case of an interconnector between a Member State and a third State and which confers on them the power to apply the substantive rules of Article 17(1)(b) of Regulation No 714/2009 and of Article 63 of Regulation 2019/943.

52 None of the applicants' arguments is capable of calling into question the merits of the Board of Appeal's reasoning.

53 First, it is necessary to reject the applicants' argument that '*restitutio in integrum*' requires that ACER resume the procedure before it at the point where the illegality arose and adopt a new decision without the illegality that the Court's judgment identified, and thus upholding the request for an exemption.

54 That argument does not suffice to call into question the fact that the Board of Appeal is no longer competent to examine ACER's decision. In addition, as has been noted in paragraph 30 above, the Court did not find that the condition concerning the degree of risk attached to an investment, laid down in Article 17(1)(b) of Regulation No 714/2009 was satisfied or that the Board of Appeal was thus required to adopt a new decision opening up the possibility of an exemption.

55 Secondly, the applicants submit that decisions relating to requests for exemption are declaratory and take effect on the date the request is made. They submit that that has the consequence that the exemption which is the object of their request submitted in 2017 should be regarded as an 'existing exemption' for the purposes of Article 309 of the TCA.

56 That argument cannot succeed. The Board of Appeal correctly held that a decision upholding a request for an exemption for an interconnector was an act that produces effects from the time of its adoption and that it was from the time of adoption only that the legal position of its beneficiary was amended. Such a decision cannot therefore create new rights with retroactive effects dating from the time of the request for an exemption.

57 Thirdly, the applicants are wrong in claiming that Article 29 of Regulation 2019/942 confers competence on the Board of Appeal to take the necessary measures required to comply with the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542).

58 The last sentence of Article 29 of Regulation 2019/942 provides that 'ACER shall take the necessary measures to comply with the judgments of the Court of Justice' and thus repeats the content of Article 266 TFEU. However, in accordance with the observations regarding the latter article set out in paragraphs 19 to 22 above, the obligation to act that results from Article 29 of Regulation 2019/942 also cannot constitute a source of competence for ACER, nor permit it to rely on a legal basis that, in the meantime, has ceased to apply to the situation in the case at hand. Hence, the review exercised by the Board of Appeal over ACER's decision in the context of adopting the necessary measures to comply with the judgment of 18 November 2020, *Aquind* v

ACER (T-735/18, under appeal, EU:T:2020:542) required that that Board of Appeal was competent at the time when it took the contested decision, which was not the situation in the present case.

59 Having regard to all the foregoing considerations, the Board of Appeal did not err in law in finding that, following Brexit, it was no longer competent to rule on ACER's decision by taking the necessary measures to comply with the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542).

60 It follows that the first plea in law must be rejected.

The second plea in law, alleging an infringement of Article 25(3) and Article 28(4) of Regulation 2019/942 and of several provisions of the Board of Appeal's rules of procedure

61 The applicants submit that the Board of Appeal infringed Article 25(3) and Article 28(4) of Regulation 2019/942, as well as provisions of its own rules of procedure. They denounce the fact that one of the members of the Board of Appeal was absent from the hearing on 19 May 2021, and criticise other members of that Board of Appeal for their silence during the hearing, refer to the lack of sufficient detail of the minutes of that hearing and note that, in the absence of publication on ACER's website of the minutes of the meeting for deliberations of the members of the Board of Appeal, it is impossible for them to know whether all the Board of Appeal members were present at that meeting and were involved in the decision-making process.

62 ACER, supported by the Parliament, contends that this plea should be rejected as being, in essence, ineffective, to the extent that, in the absence of the irregularities alleged by the applicants, the substance of the contested decision could not have been different.

63 According to settled case-law, an applicant cannot have a legitimate interest in the annulment, for a procedural breach, of a decision where the administration has no discretion and is required to act as it has done since, in such a case, the annulment of that decision can give rise only to the adoption of a new decision which is identical in substance to the annulled decision (judgment of 6 July 1983, *Geist* v *Commission*, 117/81, EU:C:1983:191, paragraph 7; see also, to that effect, judgments of 4 February 2016, *Italian International Film* v *EACEA*, T-676/13, EU:T:2016:62, paragraph 54, and of 7 July 2021, *HM* v *Commission*, T-587/16 RENV, not published, EU:T:2021:415, paragraph 30).

64 A fortiori, an applicant cannot establish an interest in a claim for annulment of a decision refusing to act on a given matter on the basis of a given plea where the administration concerned does not, in any event, have any competence to act on that matter, with the result that the annulment of such decision on the basis of that plea could only result in a new decision refusing to act on that matter (order of 14 July 2020, *Shindler and Others* v *Commission*, T-627/19, EU:T:2020:335, paragraph 49).

65 It is clear from an examination of the first plea in law that, in any event, the Board of Appeal was no longer competent, following Brexit, to take the necessary measures to comply with the judgment of 18 November 2020, *Aquind* v *ACER* (T-735/18, under appeal, EU:T:2020:542).

66 Consequently, as ACER correctly observes, the second plea in law must be rejected as ineffective, without it being necessary to examine its merits, and accordingly the action must be dismissed in its entirety.

Costs

67 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 135 of those rules, the General Court may, if equity so requires, decide that an unsuccessful party is to pay only a proportion of the costs of the other party in addition to bearing its own, or even that it is not to be ordered to pay any costs.

68 In the present case, even though the applicants have been unsuccessful in their claims, it remains the case that the Board of Appeal's lack of competence is the consequence of Brexit. That event, which was outside the applicants' control, occurred during the procedure before ACER's bodies, after the annulment, by the Court, of the original Board of Appeal decision. Having regard to those particular circumstances, the Court considers that it will make an equitable assessment of the case in holding that the applicants and ACER are to bear their own costs.

69 In accordance with Article 138(1) of the Rules of Procedure, institutions which have intervened in the proceedings are to bear their own costs. The Parliament and the Council shall therefore bear their own costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Aquind Ltd, Aquind SAS, Aquind Energy Sàrl and the European Union Agency for the Cooperation of Energy Regulators (ACER) to bear their own costs;**

3. **Orders the European Parliament and the Council of the European Union to bear their own costs.**

Tomljenović Škvařilová-Pelzl Nõmm

Delivered in open court in Luxembourg on 15 February 2023.

E. Coulon M. van der Woude
Registrar President