

*Defendant:* European Central Bank (represented by: E. Yoo, M. Puidokas and A. Karpf, acting as Agents)

**Re:**

Application based on Articles 278 and 279 TFEU seeking suspension of the operation of an act of the European Central Bank contained in an email of 10 September 2018 by which the ECB required that any communication to it by the applicant be made either through the person appointed by the Malta Financial Services Authority or with the approval of that person.

**Operative part of the order**

1. *The application for interim measures is dismissed.*
2. *The costs are reserved.*

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**Action brought on 14 December 2018 — Aquind/ACER**

**(Case T-735/18)**

(2019/C 103/60)

*Language of the case: English*

**Parties**

*Applicant:* Aquind Ltd (Wallsend, United Kingdom) (represented by: S. Goldberg, E. White and C. Davis, Solicitors)

*Defendant:* Agency for the Cooperation of Energy Regulators

**Form of order sought**

The applicant claims that the Court should:

- annul the defendant's board of appeal Decision A-001-2018 of 17 October 2018 and the defendant's decision 05/2018 of 19 June 2018 which it upholds;
- rule on the main legal issues pleaded in the application, relating to: (i) the fact that the defendant and the defendant's board of appeal erroneously considered that the applicant was required to first apply for and obtain a decision on a cross-border cost allocation before a decision can be taken under Article 17 of Regulation (EC) No 714/2009 of the European Parliament and of the Council <sup>(1)</sup> (the fourth plea); and (ii) the failure of the defendant and the defendant's board of appeal to take into account the legal impossibility for the applicant to operate the proposed interconnector in France without an exemption (the sixth plea);
- rule on each of the pleas set out in the application individually to avoid further dispute on these contested grounds when the exemption request is reconsidered by the defendant; and
- order the defendant to pay costs.

**Pleas in law and main arguments**

In support of the action, the applicant relies on nine pleas in law.

1. First plea in law, alleging that an error of interpretation of Article 17(1) of Regulation No 714/2009 was committed by the allowing policy discretion of the defendant when assessing a request for exemption.

In the light of the objective criteria in Article 17(1) Regulation No 714/2009, the discretion of the defendant should be limited to examining whether those conditions are met or not.

2. Second plea in law, alleging that an error of interpretation of Regulation No 714/2009 was committed when considering that a request for exemption should be granted only as a measure of last resort.

It appears that there is no basis for considering that the grant of an exemption should be a measure of last resort.

3. Third plea in law, alleging that an error in the assessment of the burden and standard of proof required for an exemption to be granted pursuant to Article 17(1) of Regulation No 714/2009 was committed.

The defendant seems to impose a *probatio diabolica* to the applicant.

4. Fourth plea in law, alleging that an error in the interpretation of the relationship between Article 17(1) of Regulation No 714/2009 and Article 12 of Regulation (EU) No 347/2013 of the European Parliament and of the Council<sup>(2)</sup> and consequential reliance on the possibility of the applicant's interconnector being eligible for a cross-border cost allocation procedure and failure to take account of issues associated with such procedure was committed.

— It may not be correct that an exemption can only be granted after it has been demonstrated that a regulatory regime pursuant to Article 12 of Regulation No 347/2013 is not available. That regime should be voluntary and not applicable where an exemption is granted.

— The approach adopted by the defendant could have failed to take into account risks associated with pursuing a regulated regime.

5. Fifth plea in law, alleging that the fundamental principle of legal certainty of the EU law and the protection of legitimate expectations were violated by refusing to take into account established precedents in determining the correct interpretation of Regulation No 714/2009 and by adopting a radically different approach.

— The applicant should be able to rely on the regulatory practice and principles to the assessment of exemption requests that has been established in European Commission's decisions.

6. Sixth plea in law, alleging that an error in the application of Article 17(1)(b) of Regulation No 714/2009 was committed by failing to take into account restrictions under French law applicable to non-RTE promoters of electricity interconnectors in France.

— As the French legal restrictions have not been shown to be inconsistent with the EU law, therefore they should have been considered by the defendant in considering whether the investment would take place without an exemption.

— There is no limitation to the types of risk that may be taken into account in the assessment of the condition of Article 17(1)(b) of Regulation No 714/2009.

7. Seventh plea in law, alleging that an error in the application of Article 17(1)(b) of Regulation No 714/2009 was committed by failing to take into account the need for long term revenue certainty to secure financing for the applicant's interconnector.

Project risks may deter the commitment of the funding needed. The impact of risks on the applicant's ability to secure financing should therefore have been considered.

8. Eighth plea in law, alleging that an error in the application of Article 17(1)(b) of Regulation No 714/2009 was committed by failing to consider the overall impact of the individual risks applicable to the applicant's interconnector.

The overall risk/reward balance determines whether an investment will proceed. Therefore analysing each type of risk individually should not be sufficient.

9. Ninth plea in law, alleging that the defendant's board of appeal failed to apply sufficient scrutiny to the defendant's decision.

Given its scope of powers and the serious questions to be addressed, the defendant's board of appeal should have applied a higher level of scrutiny to the defendant's 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 L 211, 14.8.2009, p. 15).
- <sup>(2)</sup> 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 (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ L 115, 25.4.2013, p. 39).

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**Action brought on 18 December 2018 — ZZ v ECB**

**(Case T-741/18)**

(2019/C 103/61)

*Language of the case: English*

**Parties**

*Applicant:* ZZ (represented by: M. Demetriou, QC, D. Piccinin, Barrister, E. Poulton, L. Carlisle, and R. Molesworth, Solicitors)

*Defendant:* European Central Bank (ECB)

**Form of order sought**

The applicant claims that the Court should:

- annul the ECB's decision of 10 October 2018 regarding the proposed acquisition by the applicant of a qualifying holding in Bank A (ECB-SSM-2018-LV-2);
- order the defendant to pay the costs.

**Pleas in law and main arguments**

In support of the action, the applicant relies on two pleas in law.

1. First plea in law, alleging failure to show that the applicant lacked transparency in his dealings with the competent authorities.
  - The applicant contends that the evidence relied on by the ECB in the contested decision does not establish and provides no proper basis for the ECB's finding that the applicant was not transparent such that his integrity could be called into question.
2. Second plea in law, alleging an error of law in finding that the applicant's innocent dealings with a third party cast doubt on the applicant's integrity.
  - The applicant contends that the ECB erred in law in finding that the applicant's dealings with a third party cast doubt on his integrity in circumstances where the ECB accepts that the applicant had no knowledge of any wrongdoing on the part of that third party at the time and in circumstances where the applicant was an innocent victim of that wrongdoing.