Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

18 November 2020*

(Energy – Article 17 of Regulation (EC) No 714/2009 – Decision of ACER refusing a request for exemption relating to new electrical interconnectors – Appeal before the Board of Appeal of ACER – Intensity of the review)

In Case T-735/18,

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

applicant,

v

European Union Agency for the Cooperation of Energy Regulators (ACER), represented by P. Martinet, E. Tremmel, C. Gence-Creux and A. Hofstadter, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of (i) Decision A-001-2018 of the Board of Appeal of ACER of 17 October 2018 which upheld 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, and (ii) the decision of ACER thus upheld,

THE GENERAL COURT (Second Chamber),

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

Registrar: B. Lefebvre, Administrator,

having regard to the written part of the procedure and further to the hearing on 30 June 2020,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 The applicant, Aquind Ltd, is a private limited company incorporated in the United Kingdom. It is the project promoter for a proposed electricity interconnector connecting the electricity transmission systems in the United Kingdom and France ('the Aquind interconnector').

2 On 17 May 2017, the applicant 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 national regulatory authorities in France and the United Kingdom, namely the Commission de régulation de l'énergie (CRE) and the Office of Gas and Electricity Markets Authority (Ofgem) respectively.

3 Having failed to reach an agreement on the request for exemption, the national regulatory authorities in France and the United Kingdom forwarded that request, on 29 November and 19 December 2017 respectively, to the European Union Agency for the Cooperation of Energy Regulators (ACER), under Article 17(5) of Regulation No 714/2009, in order to have ACER take the decision itself.

4 On 12 March, 22 March and 16 May 2018, ACER held hearings at which the applicant made submissions.

5 On 26 April 2018, the Aquind interconnector obtained the status of project of common interest.

6 By Decision No 05/2018 of 19 June 2018 ('the decision of the Agency'), ACER refused the request for an exemption for the Aquind interconnector. It took the view that although the applicant satisfied the conditions for obtaining an exemption listed in Article 17(1)(a) and (c) to (f) of Regulation No 714/2009, the condition laid down in Article 17(1)(b) thereof, 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, was not satisfied. In particular, it noted that in April 2018, the Aquind interconnector had obtained the status of project of common interest and that, as such, the applicant was entitled to request the application of 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 (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ 2013 L 115, p. 39), which provides for the possibility of cross-border cost allocation. Nonetheless, the applicant had not made such a request. ACER thus found that it could not be ruled out that financial support under the regulated scheme might be available for the Aquind interconnector and concluded that it was not in a position to identify, with the required certainty, the existence of risk based on the lack of financial support from the regulated scheme with regard to that interconnector. It also found that the revenue risk, the exceptional market risk, the risk linked to direct competition with other interconnectors and congestion revenue uncertainty, the risk of curtailment of the UK network, the risk associated with construction of the Aquind interconnector, and political and macroeconomic risks, particularly those stemming from Brexit, were insufficient or had not been demonstrated.

7 On 17 August 2018, the applicant brought an appeal against that decision before the Board of Appeal of ACER.

8 On 26 September 2018, the Board of Appeal of ACER held a hearing during which, inter alia, five experts invited by the applicant gave evidence.

9 By Decision A-001-2018 of 17 October 2018 ('the decision of the Board of Appeal'), the Board of Appeal of ACER upheld the decision of the Agency and thus refused the request for an exemption for the Aquind interconnector. First, it pointed out that the Agency enjoyed discretion when verifying whether the conditions for obtaining an exemption laid down in Article 17(1) of Regulation No 714/2009 were satisfied and that the evaluation of those conditions involved a complex assessment. Second, with reference to the case-law providing for limited judicial review where the assessments made by the administration are economically or technically complex, the Board of Appeal stated that review on appeal was limited in the case of assessments with those characteristics and that it had to confine itself to determining whether the Agency had committed a manifest error of assessment in its examination of the conditions laid down in Article 17(1) of Regulation No 714/2009. Third, the Board of Appeal rejected the complaint that the Agency had, when assessing the risk attached to the investment, taken account of the possibility of recourse to the cross-border cost allocation procedure set out in Article 12 of Regulation No 347/2013 and found that the applicant had not discharged its burden of proof, as it had not demonstrated that the regulated scheme provided by Regulation No 347/2013 would not have been sufficient to make the investment and that, consequently, no investment would have been made without the exemption laid down in Article 17 of Regulation No 714/2009.

10 Fourth, the Board of Appeal examined the applicant's complaint that the Agency had committed a manifest error of assessment by requiring an 'exceptional level of risk' and took the view, after considering section 6.6 of the decision of the Agency, that there was no evidence to support the conclusion that the Agency had departed from the risk criterion laid down in Article 17(1)(b) of Regulation No 714/2009. The Board of Appeal added in that regard that the Agency had neither stated that an exceptional level of risk was required for an exemption to be granted nor adopted a line of reasoning following that approach.

11 Fifth, the Board of Appeal rejected the complaint alleging that legal restrictions in France prevented the applicant from qualifying for the regulated scheme and noted that the risks referred to in Article 17(1)(b) of Regulation No 714/2009 should essentially be market risks or financial risks and did not cover potential 'risks' stemming from French law.

12 Sixth, the Board of Appeal stated, first of all, that it was for the applicant to adduce evidence that no investor (that is, no investor of any kind) would have been attracted by the investment in the Aquind interconnector in the absence of an exemption; applying a different legal test would be tantamount to allowing exemption applicants to circumvent the requirement of Article 17(1)(b) of Regulation No 714/2009 by artificially limiting the range of potential investors. It went on to find, providing examples, that the climate was conducive to investments in interconnectors on the France-UK border. Furthermore, in the light of the risks associated with the size of the Aquind interconnector, the Board of Appeal considered that the Agency had correctly applied the 'no investment in the absence of an exemption' test, since it had not questioned the choice of size made by the promoter of the Aquind interconnector, but had instead taken account of the fact that that interconnector formed part of a cluster of potentially competing 'projects of common interest' on the France-UK border and had assessed the combined size of all those projects within that cluster. Last, it found that the Agency had been right to take the view that the applicant had not sufficiently demonstrated that the alleged development and construction risks, either alone or in combination with other risks, meant that no investment would have been made in the absence of an exemption.

13 Seventh, the Board of Appeal examined the complaint alleging that the cumulative effect of the risks had not been taken into account and made clear that the Agency had analysed each type of risk identified by the applicant in its request for exemption and had provided a reasoned evaluation of each of those risks, that the applicant had not mentioned a cumulative effect of the risks anywhere in its request for exemption, and that it had not substantiated that argument in its appeal.

Procedure and forms of order sought

14 By application lodged at the Registry of the General Court on 14 December 2018, the applicant brought the present action, which contains a request for priority treatment under Article 67(2) of the Rules of Procedure of the General Court. The defence, reply and rejoinder were lodged on 1 April, 20 May and 4 July 2019.

15 By decision of 17 October 2019, the President of the General Court, pursuant to Article 27(3) of the Rules of Procedure, reassigned the case to a new Judge-Rapporteur attached to the Second Chamber.

16 By decision of 14 February 2020, adopted on the basis of Article 69(a) of the Rules of Procedure, the President of the Second Chamber of the General Court, after receiving the observations of the parties, decided to stay the proceedings pending the judgment in Case C-454/18, *Baltic Cable*. That stay ended with the delivery, on 11 March 2020, of the judgment in *Baltic Cable* (C-454/18, EU:C:2020:189).

17 On 18 March 2020, the parties were invited, against that background, to submit any observations they might have on the conclusions to be drawn from the judgment of 11 March 2020, *Baltic Cable* (C-454/18, EU:C:2020:189), for the present action. The parties complied with that measure of organisation of procedure within the prescribed period.

18 On a proposal from the Judge-Rapporteur, the General Court (Second Chamber) decided on 20 April 2020 to open the oral part of the procedure without granting the applicant's request for priority treatment.

19 In the context of a measure of organisation of procedure of 23 April 2020 adopted on the basis of Article 89 of the Rules of Procedure, two written questions were put to the parties, to be answered orally at the hearing.

20 By letters of 3 and 15 June 2020, ACER stated that due to the health crisis linked to the COVID-19 pandemic, its agents were unable to travel to Luxembourg for the hearing and asked to be represented at that hearing via video conference. The applicant stated that it had no objection to ACER being represented via video conference.

21 The applicant claims that the Court should:

– annul the decision of the Board of Appeal and the decision of the Agency;

– rule on the main pleas in law raised in the application, namely the fourth plea alleging that the Agency and the Board of Appeal wrongly considered that the applicant was required first of all to apply for and obtain a decision on cross-border cost allocation, under Article 12 of Regulation No 347/2013, before a decision could be taken under Article 17 of Regulation No 714/2009, and the sixth plea alleging that the Agency and the Board of Appeal failed to take account of the fact that, without an exemption, it was legally impossible for the applicant to operate the proposed Aquind interconnector in France;

– rule on each of the pleas set out in the application individually to avoid further dispute on those contested grounds when the request for exemption is reconsidered by the Agency;

– order ACER to pay the costs.

22 ACER contends that the Court should:

– dismiss the action as inadmissible in so far as it concerns the decision of the Agency;

– dismiss the action;

– order the applicant to pay the costs.

Law

Admissibility

Admissibility of the action against the decision of the Agency

23 ACER argues that the action must be declared inadmissible in so far as it is directed against the decision of the Agency. It raises an objection of inadmissibility in that respect, stating that the Court would only be able to hear an action brought against the decision of the Board of Appeal.

24 The applicant maintains that if its claims in this case are upheld, ACER will be required to take all necessary measures to comply with the judgment under Article 266 TFEU. It argues that ACER would not be taking all necessary measures to comply with the judgment if it were to consider that the decision of the Agency remained valid, which is why it is of the view, in essence, that the action against that decision must be declared admissible.

25 For the purpose of examining the admissibility of the action brought against the decision of the Agency, first of all, it should be borne in mind that 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) states that 'where the Agency 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 the Agency, but independent from its administrative and regulatory structure …', adding that 'the decisions of the Board of Appeal may be subject to appeal before the Court of Justice of the European Communities'.

26 Next, it should be emphasised that Article 19(1) of Regulation No 713/2009 provides that '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 …'. Article 9, to which that provision refers, applies to decisions 'on exemptions, as provided for in Article 17(5) of Regulation … No 714/2009'. The decision of the Agency is precisely a decision on an exemption taken pursuant to Article 17(5) of Regulation No 714/2009.

27 It must also be observed that under Article 19(5) of Regulation No 713/2009, the Board of Appeal may exercise any power which lies within the competence of the Agency, or it may remit the case to the competent body of the Agency, which will be bound by the decision of the Board of Appeal.

28 Lastly, it should be noted that Article 20(1) of Regulation No 713/2009 provides that 'an action may be brought before the [General Court] … contesting a decision taken by the Board of Appeal or, in cases where no right lies before the Board of Appeal, by the Agency'. Article 20(3) of that regulation states that 'the Agency shall be required to take the necessary measures to comply with the judgment of the [General Court] or the Court of Justice'.

29 The purpose of those provisions is, on the one hand, to enable the Board of Appeal to grant, where appropriate, a request that has been refused by the Agency and, on the other, if the refusal is upheld by that board, to enable it to set out clearly the factual and legal grounds leading to that refusal, so that the EU judicature is in a position to exercise its power to review the legality of the refusal decision.

30 In the present case, the decision of the Agency could be appealed before the Board of Appeal under Article 19 of Regulation No 713/2009. The Board of Appeal was therefore required to take a decision and, in that context, to exercise, if necessary, the powers of the Agency.

31 Consequently, only the decision of the Board of Appeal can be challenged before the Court. In paragraph 2 of the operative part of its decision, the Board of Appeal clearly stated that 'this decision' – namely the decision of the Board of Appeal – could be challenged pursuant to Article 263 TFEU within two months of its publication on ACER's website or of its notification to the applicant.

32 In that context, and contrary to the applicant's assertions, the existence of functional continuity between ACER's examining units and the Board of Appeal – allowing the latter to exercise the powers of those examining units – does not mean that the Court can annul the initial decision. The claim for annulment of the decision of the Agency must be construed as actually seeking to have the Court take the decision that the Board of Appeal should have taken when the appeal was brought before it. It must be borne in mind that although the Court may, in the exercise of its power to amend decisions, amend the decisions of boards of appeal (see, to that effect, judgments of 8 July 2004, *MFE Marienfelde* v *OHIM - Vétoquinol (HIPOVITON)*, T-334/01, EU:T:2004:223, paragraph 19; of 12 September 2007, *Koipe* v *OHIM – Aceites del Sur (La Española)*, T-363/04, EU:T:2007:264, paragraphs 29 and 30; and of 11 February 2009, *Bayern Innovativ* v *OHIM – Life Sciences Partners Perstock (LifeScience)*, T-413/07, not published, paragraphs 15 and 16), the fact remains that it can do so only where such power is expressly conferred on it by the legislature. However, it must be stated that it is not apparent either from the provisions of Regulation No 713/2009 or from those of Regulation No 714/2009 that the legislature intended to give the Court such a power to alter decisions.

33 It follows that the applicant is not entitled to seek annulment of the decision of the Agency (see, by analogy, judgment of 11 December 2014, *Heli-Flight* v *EASA*, T-102/13, EU:T:2014:1064, paragraph 30).

34 Consequently, the action must be declared inadmissible in so far as it is directed against the decision of the Agency.

Admissibility of the second and third heads of claim

35 By its second and third heads of claim, the applicant asks the Court, in essence, to rule on the main pleas in law raised in the application.

36 It should be borne in mind at the outset that the Courts of the European Union may, at any time, of their own motion, examine whether there exists any absolute bar to proceeding, including, according to the case-law, the conditions governing the admissibility of an action. Review by the Court is therefore not limited to grounds of inadmissibility raised by the parties (judgment of 11 July 2019, *Gollnisch* v *Parliament*, T-95/18, not published, EU:T:2019:507, paragraph 35).

37 It should also be emphasised that in response to the measure of organisation of procedure of 23 April 2020 referred to in paragraph 19 above, the parties submitted their observations, at the hearing, on the question of the admissibility of the second and third heads of claim set out in the application in the light of the judgments of 11 July 1996, *Bernardi* v *Parliament* (T-146/95, EU:T:1996:105, paragraph 23), and of 17 February 2017, *Mayer* v *EFSA* (T-493/14, EU:T:2017:100, paragraph 37).

38 In the context of an action for annulment, claims which only seek declarations in respect of matters of fact or matters of law cannot, of themselves, be considered valid (see, to that effect, judgments of 11 July 1996, *Bernardi* v *Parliament*, T-146/95, EU:T:1996:105, paragraph 23, and of 17 February 2017, *Mayer* v *EFSA*, T-493/14, EU:T:2017:100, paragraph 37).

39 The analysis of the matters set out in those two heads of claim cannot be conducted independently of the examination of the legality of the contested measure in the context of the head of claim seeking annulment of the decision of the Board of Appeal. They cannot therefore constitute heads of claim as such.

40 Accordingly, those two heads of claim must be rejected as inadmissible.

Substance

41 In support of its action, the applicant relies on nine pleas in law. The first plea alleges error as regards the discretion enjoyed by ACER when granting an exemption under Article 17(1) of Regulation No 714/2009. The second plea claims misinterpretation of that provision in so far as it was found that a request for exemption should be granted only as a last resort. The third plea alleges incorrect assessment of the burden and standard of proof required for an exemption to be granted. In the fourth plea, the applicant: challenges the Board of Appeal's interpretation of the relationship between Article 17(1) of Regulation No 714/2009 and Article 12 of Regulation No 347/2013; raises doubts, in consequence, as to whether its proposed interconnector qualifies for a cross-border cost allocation procedure; and submits that the risks associated with that procedure were not taken into account. The fifth plea alleges infringement of the principles of legal certainty and the protection of legitimate expectations. The sixth plea claims that the legal obstacle established by French law was not taken into account as a risk. The seventh plea is based on ACER's refusal to take into account the need for long-term revenue certainty. The eighth plea alleges misapplication of Article 17(1)(b) of Regulation No 714/2009 due to the failure to take account of the overall impact of the specific risks to the interconnector. In the ninth plea, the applicant complains that the Board of Appeal carried out only a limited review of complex technical and economic assessments.

42 The Court considers it appropriate to examine the ninth plea first, given the particular nature of that plea, which relates to the very exercise by the Board of Appeal of its power to review the Agency's decisions.

Ninth plea in law, alleging insufficient scrutiny of the decision of the Agency

43 In the ninth plea, the applicant complains, in essence, that the Board of Appeal limited its review, when examining the applicant's appeal, to manifest errors of assessment. It submits that such limited review constitutes an infringement of Article 19(5) of Regulation No 713/2009.

44 For its part, ACER contends that Article 19(5) of Regulation No 713/2009 in no way obliges the Board of Appeal to carry out the same review as that performed by the Agency and that it is therefore free not to examine the case in the same level of detail as the Agency. It considers that the Board of Appeal has discretion to determine whether the conditions laid down in Article 17(1)(b) of Regulation No 714/2009 are satisfied. In that regard, it argues that according to the case-law, assessments involving complex economic and technical matters are subject, on appeal, to a review which is limited to manifest errors. It emphasises that Article 19 of Regulation No 713/2009 does not prevent the Board of Appeal from accepting the technical and economic assessments made by the Agency. Having regard to the complex economic and technical matters involved, the principle of procedural economy and the short deadline laid down in Article 19(2) of Regulation No 713/2009, the Board of Appeal is not in a position to carry out an examination as thorough as that of the Agency and may confine itself to deciding whether the Agency committed a manifest error of assessment. It notes that the applicant failed to demonstrate that a more thorough examination might have led to a different result and argues that the expert testimony on which the applicant relies was duly taken into account and assessed. It also contends that, contrary to the applicant's assertions, there was no need to put

questions to the CRE, since the decision of the Board of Appeal was not dependent on the CRE's answer to the questions concerning the possibility of qualifying for the regulated scheme in France under Article 12 of Regulation No 347/2013 and the compatibility of the restrictions with EU law.

45 The main question raised in this plea is whether the Board of Appeal's review of the decision of the Agency is in accordance with the provisions of Regulation No 713/2009 setting out the powers of the Board of Appeal.

46 As a preliminary point, first, it should be borne in mind that as regards the intensity of the review carried out by the EU authorities, the Court has consistently held that where those authorities have a broad discretion, in particular as to the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures which they adopt, review by the EU judicature must be limited to verifying whether the exercise of such powers has been vitiated by 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 judgment of 14 November 2013, *ICdA and Others* v *Commission*, T-456/11, EU:T:2013:594, paragraph 45). The same applies to complex economic assessments, since the EU judicature also carries out a limited review in those situations (judgments of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 66, and of 9 March 2017, *Ellinikos Chrysos* v *Commission*, C-100/16 P, EU:C:2017:194, paragraphs 18 and 19).

47 Second, it is necessary to ascertain the intensity of the Board of Appeal's review of the decision of the Agency. Relying explicitly on the judgments of 15 February 2005, *Commission* v *Tetra Laval* (C-12/03 P, EU:C:2005:87, paragraph 39), of 21 June 2012, *BNP Paribas and BNL* v *Commission* (C-452/10 P, EU:C:2012:366, paragraph 103), and of 17 September 2007, *Microsoft* v *Commission* (T-201/04, EU:T:2007:289, paragraph 95), which provide for limited judicial review where the administration's assessments are economically or technically complex, the Board of Appeal stated, in paragraphs 51 and 52 of its decision, that review on appeal was limited in the case of assessments with those characteristics and that it therefore had to confine itself to determining whether the Agency had committed a manifest error of assessment of the conditions laid down in Article 17(1) of Regulation No 714/2009.

48 Thus, the Board of Appeal unequivocally asserted, with reference to case-law, that the intensity of its review of complex economic and technical assessments was the same as the intensity of the EU judicature's limited judicial review of the same assessments.

49 It is in the light of those two preliminary observations that it is necessary to examine ACER's contention that the Board of Appeal's review of complex technical and economic assessments can be equated to the limited judicial review carried out by the EU judicature.

50 The limitation by the Board of Appeal of the intensity of its review of the decision of the Agency relating to a request for exemption under Article 17(1) of Regulation No 714/2009 is incorrect in law in several respects.

51 In the first place, it must be emphasised that the establishment of the Board of Appeal of ACER is part of a general tendency, prioritised by the EU legislature, to provide for a mechanism for appealing to an 'appellate body' within the agencies of the European Union where those agencies have been given significant decision-making powers over complex technical or scientific matters; powers which directly affect the legal situation of the parties concerned. The system of appellate bodies is, in that regard, an appropriate means of protecting the rights of those parties in circumstances where, as mentioned in paragraph 46 above, the Court has consistently held that review by the EU judicature must be limited to examining whether the exercise of a broad discretion in the assessment of complex scientific, technical and economic facts has been vitiated by a manifest error of appraisal or a misuse of powers.

52 In that connection, and in the second place, the provisions on the organisation and powers of the Board of Appeal of ACER support the finding that that appellate body was not established to confine itself to a limited review of complex technical and economic assessments.

53 First, Article 18(1) of Regulation No 713/2009 has provided 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 Union institutions 'with relevant experience in the energy sector'. The EU legislature thus intended to provide the Board of Appeal of ACER with the necessary expertise to allow it itself to carry out assessments of complex technical and economic facts relating to energy. It should be noted 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.

54 Second, the powers of the Board of Appeal, as set out in Article 19(5) of Regulation No 713/2009, also militate in favour of a review which differs from the review carried out by the EU judicature of complex assessments. First of all, Article 19(5) states that the Board of Appeal may exercise any power which lies within the competence of the Agency or remit the case to the competent body of the Agency for further action, that body being bound by the decision of the Board of Appeal. That provision governs the Board of Appeal's powers after it has held that an appeal before it was well founded. It confers a power of discretion on the Board of Appeal, in the exercise of which it must assess whether the evidence it disposes of following the examination of the appeal allows it to adopt its own decision (see, by analogy, judgment of 20 September 2019, *BASF Grenzach* v *ECHA*, T-125/17, EU:T:2019:638, paragraphs 66 and 118).

55 Thus, it must be pointed out that, in essence, the Board of Appeal has, under Article 19 of Regulation No 713/2009, not only all the powers available to ACER itself, but also powers conferred on it as the Agency's appellate body. If the Board of Appeal chooses to remit the case to the Agency, it is capable of shaping the decisions taken by the Agency in so far as the latter is bound by the statement of reasons of the Board of Appeal.

56 Furthermore, under Article 19(1) of Regulation No 713/2009, any natural or legal person, including national regulatory authorities, may appeal against a decision referred to in Articles 7, 8 or 9 of that regulation which is addressed or is of direct and individual concern to that person. It does not follow from that provision that an infringement of EU legislation by the Agency is a prerequisite for the admissibility of an appeal before it. Thus, and unlike the EU judicature, the Board of Appeal has jurisdiction, by way of a review of expediency, to annul or replace the decisions of the Agency solely on the basis of technical and economic considerations.

57 Third, Article 20 of Regulation No 713/2009 also demonstrates that the legislature intended to confer on the Board of Appeal a more extensive power of review than the power of limited review. Under that provision, 'an action may be brought before the [General Court] or the Court of Justice, in accordance with Article [263 TFEU], contesting a decision taken by the Board of Appeal or, in cases where no right lies before the Board of Appeal, by the Agency'.

58 It follows from that provision, and from the reasoning set out in paragraphs 25 to 34 above, that, as regards requests for exemption, only decisions of the Board of Appeal taken under Article 19(1) of Regulation No 713/2009 and Article 17(5) of Regulation No 714/2009 may be the subject of an action before the General Court. The fact that the applicant is barred from challenging the decision of the Agency before the EU judicature supports the finding that the Board of Appeal cannot carry out a limited review of the decision of the Agency that is equivalent to the judicial review conducted by the EU judicature. Indeed, if the Board of Appeal's review were to be only limited in nature as regards complex technical and economic assessments, this 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. It is clear

that 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 under Article 17(1) of Regulation No 714/2009.

59 In the third place, Article 19(6) of Regulation No 713/2009 provided, in essence, that it was for the Board of Appeal to adopt the rules of organisation and procedure applicable before it. It should be noted that Decision No 1-2011 of the Board of Appeal of ACER, adopted on 1 December 2011, laying down the rules of organisation and procedure of the Board of Appeal, provided, in Article 8(1)(e) thereof, that the notice of appeal must contain the 'pleas in law' and the arguments of fact and law relied on. That provision cannot justify the review conducted by the Board of Appeal being confined to a limited review. The fact that the EU legislature has expressly stated in Article 19(5) of Regulation No 713/2009 that the Board of Appeal is to enjoy the same powers as those available to ACER itself clearly confirms that it intended to confer on the Board of Appeal the task of reviewing the decisions of the Agency with an intensity which cannot be confined to that of a limited review.

60 In that regard, it must be pointed out that Article 20 of Decision No 1-2011, headed 'Competence', used to provide that the Board of Appeal could exercise any power lying within the competence of the Agency. In adopting that provision, the Board of Appeal reflected, in its rules of organisation and procedure, the power of review conferred on it by Article 19(5) of Regulation No 713/2009, which cannot be reduced to a power to review manifest errors of assessment. It is useful to note in that connection that, on 5 October 2019, the Board of Appeal circumscribed its power by amending Article 20 of that decision (now Article 21). Since that date, the Board of Appeal can only uphold a decision of the Agency or remit the case to the competent body of the Agency. There is therefore no longer any question of '[exercising] any power which lies within the competence of the Agency'. Without prejudice to the possible incompatibility of that provision – by which the Board of Appeal on any view circumscribed its power – with Regulation No 713/2009, it must be stated that it was not yet applicable when the decision of the Board of Appeal was adopted.

61 In the fourth place, the Court considers that the case-law according to which complex technical, scientific and economic assessments are subject to limited review by the EU judicature does not apply to the review carried out by the appellate bodies of the agencies of the European Union. In particular, it has 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 (judgment of 20 September 2019, *BASF Grenzach* v *ECHA*, T-125/17, EU:T:2019:638, paragraphs 87 to 89). 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, by analogy, judgment of 20 September 2019, *BASF Grenzach* v *ECHA*, T-125/17, EU:T:2019:638, paragraph 124). In so doing, the Court confirmed, in essence, that it would be contrary to the very nature of appellate bodies within agencies for those bodies to conduct the limited review reserved to the Courts of the European Union.

62 In that connection, it should be observed that in response to the measure of organisation of procedure of 23 April 2020, by which the parties were invited to submit observations on paragraphs 87 to 89 and 124 of the judgment of 20 September 2019, *BASF Grenzach* v *ECHA* (T-125/17, EU:T:2019:638), ACER argued at the hearing that that case-law could not be applied to the Board of Appeal, which is completely different from the Board of Appeal of ECHA.

63 First, ACER relies on the fact that the members of the Board of Appeal of ECHA are legally and technically qualified and employed full-time and that they can draw on the support of 11 full-time members of staff for the provision of legal assistance and secretariat services. It contends that this is not the case as regards the Board of Appeal of ACER, as (i) that board is composed of only six

members with experience in the energy field, which, according to ACER, does not ensure that the Board of Appeal is equipped with the full range of relevant expertise to be able to assess all the complex facts concerned; (ii) those members are not employed full-time and receive only nominal remuneration; and (iii) the Board of Appeal is assisted by only two lawyers.

64 Those arguments cannot succeed. The composition and powers of the Board of Appeal of ECHA are, contrary to ACER's assertions, comparable to those of the Board of Appeal of ACER.

65 The members of the Boards of Appeal of both ECHA and ACER are selected on the basis of a list of candidates proposed by the European Commission who have the required experience and expertise in the respective sectors. Concerning the Board of Appeal of ECHA, Article 89(3) of 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, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1) provides that 'the Chairman, the other members and the alternates … shall be appointed on the basis of their relevant experience and expertise in the field of chemical safety, natural sciences or regulatory and judicial procedures from a list of qualified candidates adopted by the Commission'. As regards the Board of Appeal of ACER, paragraph 53 above makes clear that, under the first sentence of Article 18(1) of Regulation No 713/2009, 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'. It must be inferred from those provisions that the legislature intended to equip the Boards of Appeal of both ECHA and ACER with the necessary expertise to enable them themselves to carry out assessments of complex scientific, technical and economic facts.

66 Moreover, the fact that the members of the Board of Appeal of ECHA, unlike the members of the Board of Appeal of ACER, are employed full-time has no bearing on the intensity of their review. The Board of Appeal of ECHA requires a more permanent administrative structure because of the number of cases to be dealt with, which is significantly higher than the number submitted to the Board of Appeal of ACER. More generally, it should be pointed out that the onus is on ACER to take all the internal organisational measures necessary to mobilise the resources available to it in order to achieve its objectives, as defined in Regulation No 713/2009. However, the attainment of those objectives does not automatically necessitate the establishment of a permanent Board of Appeal.

67 Furthermore, under Article 93(3) of Regulation No 1907/2006, the Board of Appeal of ECHA 'may exercise any power which lies within the competence of the Agency or remit the case to the competent body of the Agency for further action'. Similarly, and as is apparent from paragraph 27 above, the Board of Appeal of ACER may 'exercise any power which lies within the competence of the Agency, or it may remit the case to the competent body of the Agency', the latter being bound by the decision of the Board of Appeal. Thus, it follows from those provisions that the powers conferred on those appellate bodies are similar and that their review of scientific, technical and economic assessments is not limited to the existence of manifest errors of assessment.

68 Second, ACER submits that unlike ECHA and the other three agencies of the European Union, it is not covered by the mechanism provided for in Article 58a of the Statute of the Court of Justice of the European Union whereby the Court determines whether an appeal should be allowed to proceed, with the result that the review carried out by the Board of Appeal of ACER of the decisions of the Agency differs from that carried out by the Board of Appeal of ECHA. That argument must, however, be rejected as Article 58a of the Statute of the Court of Justice of the European Union is unrelated to the intensity of the review which boards of appeal within EU agencies are required to conduct.

69 Therefore, the review carried out by the Board of Appeal of ACER of complex technical and economic assessments contained in a decision of the Agency relating to a request for exemption under Article 17(1) of Regulation No 714/2009 must not be confined to a limited review of manifest errors of assessment. On the contrary, relying on the scientific expertise of its members, that board must examine whether the arguments put forward by the appellant are capable of demonstrating that the considerations on which that decision of ACER is based are vitiated by error.

70 By confining itself to conducting a limited review, the truth is that the Board of Appeal carried out a review of insufficient intensity in the light of the powers conferred on it by the legislature and, therefore, made only limited and incomplete use of its discretion. It follows that the only measure adopted in full exercise of the administration's discretion is the decision of the Agency. However, for the reasons set out in paragraphs 25 to 34, 57 and 58 above, the decision of the Board of Appeal is the only one amenable to review by the EU judicature. The Court cannot therefore examine potential manifest errors of assessment allegedly committed by the Agency in relation to complex technical and economic assessments, since such assessments necessarily concern the initial decision alone (see, to that effect, judgment of 11 December 2014, *Heli-Flight* v *EASA*, T-102/13, EU:T:2014:1064, paragraph 32).

71 In the light of the foregoing, it must be held that the Board of Appeal erred in law in finding, in paragraph 52 of its decision, that, as regards technical or complex assessments, it could carry out a limited review and thus confine itself to ascertaining whether the Agency had committed a manifest error of assessment of the conditions laid down in Article 17(1) of Regulation No 714/2009.

72 That finding cannot be called into question by any of ACER's arguments.

73 In the first place, ACER relies on the fact that, unlike the Board of Appeal of ECHA, which is not subject to any obligation concerning the maximum length of proceedings, the Board of Appeal of ACER is required to examine appeals within the two-month period laid down in Article 19(2) of Regulation No 713/2009 and is therefore unable to conduct a thorough examination.

74 Having regard to the considerations set out in paragraphs 51 to 69 above, the limited two-month timeframe available to the Board of Appeal of ACER for examining appeals is not enough to indicate that the legislature intended to limit its review to a review of manifest errors of assessment.

75 In that connection, it should be borne in mind that the examination of appeals is not unlimited and a distinction must be drawn between the 'scope of the review' and the 'intensity of the review' conducted by the Board of Appeal.

76 As regards the 'scope of the review' carried out by the Board of Appeal, Article 19 of Regulation No 713/2009 provides, in essence, that that scope is limited to examining whether the arguments put forward by the appellant are capable of demonstrating the existence of an error affecting the contested decision.

77 It must be noted that the procedure before the Board of Appeal has an adversarial nature. The parties are invited to submit comments on the communications from the other parties and may submit oral observations.

78 In addition, the appeal must state the grounds on which it is based. The subject matter of the proceedings before the Board of Appeal is therefore determined by the pleas put forward by the appellant. In the examination of the merits of such an appeal, the board thus confines itself to examining whether the pleas put forward by the appellant are capable of demonstrating that the decision being challenged before it is vitiated by error.

79 The adversarial nature of the proceedings before the Board of Appeal is not called into question by Article 19(5) of Regulation No 713/2009, under which the Board of Appeal may exercise any power which lies within the competence of the Agency or remit the case to the competent body of the Agency for further action. That provision governs solely the Board of Appeal's powers after it has held that an appeal before it was well founded. It confers on the Board of Appeal a power of discretion in the exercise of which it must assess whether the evidence it disposes of following the examination of the appeal allows it to adopt its own decision. By contrast, that provision does not govern the scope of the review carried out by that board in relation to the merits of an appeal before it (see, by analogy, judgment of 20 September 2019, *BASF Grenzach* v *ECHA*, T-125/17, EU:T:2019:638, paragraphs 66 and 118).

80 Consequently, an appeal before the Board of Appeal against a decision of the Agency relating to a request for exemption under Article 17(1) of Regulation No 714/2009 may only seek to examine whether the evidence submitted by the appellant is capable of showing that that decision is vitiated by error. Unlike the Boards of Appeal of EUIPO, the Board of Appeal of ACER does not therefore conduct a '*de novo*' examination.

81 Accordingly, as regards the 'intensity of the review' to be carried out, the review of errors of assessment must be conducted only in relation to the questions raised by the appellant and therefore does not encompass matters falling outside the ambit of the appeal or, by definition, complex economic and technical matters which were not raised in the appeal and which are not covered by the evidence submitted by the appellant.

82 Moreover, it should be borne in mind that in view of the scientific merits of its members, the Board of Appeal has the necessary expertise to carry out a thorough review within a period of time which judicial authorities would be unable to match.

83 In the second place, in response to the measure of organisation of procedure of 23 April 2020 considered in paragraphs 19 and 62 above, ACER stated at the hearing that it had referred to manifest errors of assessment only inasmuch as the applicant itself had done so in its appeal. That argument cannot succeed. As is apparent from paragraph 47 above, the Board of Appeal stated at the outset, in paragraphs 51 and 52 of its decision, that the review it conducted of technically or economically complex matters was limited to a review of manifest errors of assessment, and it expressly confirmed, in paragraph 47 of its decision, that the evaluation of the conditions for obtaining an exemption provided for in Article 17(1) of Regulation No 714/2009 involved a complex assessment.

84 In the third place, ACER argues, again unsuccessfully, that in any event the Board of Appeal examined all the pleas, statements and evidence put forward by the applicant.

85 In the context of the alleged examination of all the pleas, statements and evidence put forward by the applicant regarding the evaluation of the condition laid down in Article 17(1)(c) of Regulation No 714/2009 – an examination which, as the Board of Appeal itself confirmed, involved complex assessments – the Board of Appeal, as is apparent from paragraph 83 above, carried out only a limited review, confined to a review of manifest errors of assessment.

86 Specifically, the Court finds that in its analysis of the issues relating to risk within the meaning of Article 17(1)(b) of Regulation No 714/2009 – issues raised by the applicant in particular in paragraphs 129 to 156 and 158 to 172 of its appeal before the Board of Appeal and also referred to at the hearing of the experts before that board – the Board of Appeal, in paragraphs 70 to 74 and 94 to 98 of its decision, carried out only a limited review of the decision of the Agency in relation to those issues involving complex technical and economic assessments.

87 In the fourth place, ACER wrongly states that the applicant failed to demonstrate that a more thorough examination might have led to a different result.

88 It is true that, according to settled case-law, the existence of an irregularity relating in particular to non-compliance with a time limit or the principle of the rights of the defence may justify the annulment of a measure in so far as the procedure may lead to a different result in the absence of that irregularity (see, to that effect, judgments of 14 February 2017, *Kerstens* v *Commission*, T-270/16 P, not published, EU:T:2017:74, paragraph 74; of 12 July 2017, *Estonia* v *Commission*, T-157/15, not published, EU:T:2017:483, paragraph 151; and of 26 September 2018, *Portugal* v *Commission*, T-463/16, not published, EU:T:2018:606, paragraph 133). However, where the authority concerned has carried out a review of insufficient intensity in the light of the powers conferred on it by the legislature and, therefore, has made limited and incomplete use of its discretion, neither the applicant nor the Court is in a position to ascertain whether or not the procedure might have led to a different result in the absence of that irregularity.

89 Indeed, it is, by definition, impossible for the applicant to show that the Board of Appeal's assessment of complex technical and economic matters would have been different in the absence of the irregularity, since its discretion was in fact exercised only in a limited and incomplete manner in relation to those matters.

90 Having regard to all of the foregoing, the ninth plea must be upheld.

91 That said, for reasons related to the sound administration of justice, the Court considers it appropriate to examine the fourth plea, alleging misinterpretation of the relationship between Article 17(1) of Regulation No 714/2009 and Article 12 of Regulation No 347/2013 and, consequently, whether the proposed interconnector qualifies for a cross-border cost allocation procedure, and also alleging that the risks associated with that procedure were not taken into account.

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 and, consequently, whether the proposed interconnector qualifies for a cross-border cost allocation procedure, and also alleging that the risks associated with that procedure were not taken into account

92 In its fourth plea, the applicant submits that the Board of Appeal erred in finding that the relevant risk for the evaluation under Article 17(1)(b) of Regulation No 714/2009 could be properly assessed only if a request for a cross-border cost allocation procedure made in accordance with Regulation No 347/2013 had been refused. It asserts that, so far as concerns the Board of Appeal, the only way to demonstrate that the regulatory scheme provided by the latter regulation would not have allowed the project to proceed would have been to go through an unsuccessful cross-border cost allocation procedure. According to the applicant, that approach actually introduces an additional condition for the grant of an exemption. In that context, it also submits that the application of the regulated scheme under Article 12 of Regulation No 347/2013 does not eliminate all the risks incurred by the Aquind interconnector and that there is, on the contrary, great uncertainty as to the final form of the cross-border cost allocation request and a significant risk of delay.

93 ACER disputes that plea, stating, first of all, that the regulated scheme remains the rule and the exemptions are the exception, and that Regulations No 714/2009 and No 347/2013 must be read together having regard to the rationale for the third 'energy' package. Next, it argues that the decision of the Agency and the decision of the Board of Appeal do not state that a project of common interest must always go through an unsuccessful cross-border cost allocation procedure under Article 12 of Regulation No 347/2013 before an exemption can be granted. It also emphasises that in the particular circumstances of this case, the applicant did not show that the regulatory scheme provided by the cross-border cost allocation procedure in Regulation No 347/2013 would not have been sufficient to make the investment and that potential financial support under Article 12 of Regulation No 347/2013 is a factor to be taken into account when evaluating the risk. Last, it contends that the considerations

relating to the reasons why the Aquind interconnector could not have been operated within the framework of Article 12 of Regulation No 347/2013 are not relevant and are not substantiated by any evidence.

94 As a preliminary point, it should be noted that Regulation No 347/2013 concerns the identification of projects of common interest in the energy field, namely projects necessary to implement priority corridors and areas relating to energy infrastructure, and facilitates the timely implementation of such projects. In that respect, it lays down rules and guidance for the cross-border allocation of costs and risk-related incentives for projects of common interest. Thus, in accordance with the second subparagraph of Article 12(3) of Regulation No 347/2013, as soon as a project of common interest falling within the categories listed in point 1(a), (b) and (d) and point 2 of Annex II to that regulation has reached sufficient maturity, the project promoters are to submit an investment request to all the national regulatory authorities concerned, which must include a cross-border cost allocation request. Under Article 12(4) of that regulation, decisions on the allocation of investment costs are to be taken by the national regulatory authorities, after consulting the project promoters concerned, and the investment costs are to be borne by each system operator for the project.

95 In the present case, the Agency took the view in recital 134 of its decision that, in order to determine whether the proposed Aquind interconnector was exposed to a level of risk justifying the exemption, it was necessary to ascertain whether a regulated scheme (with financial support) was available for that interconnector. It found that, if that were the case, the level of risk of the project was not such as to satisfy the condition laid down in Article 17(1)(b) of Regulation No 714/2009. If, on the other hand, it could be demonstrated that the regulated scheme was not available for the construction of the Aquind interconnector, that would imply the presence of a significant level of financial risk for the promoter.

96 To that effect, the Board of Appeal endorsed, in particular in paragraphs 59, 67 and 91 of its decision, the Agency's reasoning in recitals 134 to 138, 143 and 144 of its decision, according to which the status of the Aquind interconnector as a project of common interest, the potential financial support linked to that status – provided for in Article 12 of Regulation No 347/2013 – and the fact that the applicant had not applied for that financial support were decisive assessment criteria in refusing to grant the request for exemption. The Board of Appeal considered, in essence, that because of the Aquind interconnector's status as a project of common interest, the applicant should have, on its own initiative, gone through an unsuccessful cross-border cost allocation procedure under Article 12 of Regulation No 347/2013 before it could be granted an exemption.

97 In so doing, the Board of Appeal essentially required the applicant to take actual administrative steps beforehand with a view to securing funding that might be granted to the project of common interest pursuant to Article 12 of Regulation No 347/2013, and considered that this was the prerequisite for examining the request for exemption under Article 17 of Regulation No 714/2009. It was therefore of the view, in essence, that it had to be impossible for the applicant to enjoy the benefits of the regulated scheme provided for in Article 12 of Regulation No 347/2013 and that the regulated scheme could not thus cover any risk attached to the investment.

98 It is in that context that it is necessary to examine whether the Board of Appeal erred in law in finding that, in the light of the Aquind interconnector's status as a project of common interest, the applicant should have submitted a request for financial support under Article 12 of Regulation No 347/2013.

99 In that regard, as is apparent from paragraph 94 above, the financial support mechanism provided for in Article 12 of Regulation No 347/2013 is part of the regulated scheme. It should also be emphasised that Article 17(1) of Regulation No 714/2009 lays down a mechanism for derogating from the regulated scheme and, a fortiori, from the financial support mechanism provided for in Regulation No 347/2013, and that one of the conditions to be satisfied in that regard relates to the level of risk attached to the investment.

100 It follows that the existence of possible financial support under Article 12 of Regulation No 347/2013 may validly constitute a relevant criterion for assessing whether there is a risk attached to the investment which would justify an exemption from the regulated scheme in accordance with Article 17(1) of Regulation No 714/2009.

101 However, although the possibility of funding under Article 12 of Regulation No 347/2013 may be a relevant criterion for determining the level of risk attached to the investment referred to in Article 17(1) of Regulation No 714/2009, that criterion cannot constitute a separate condition which must be satisfied in order to obtain an exemption. To that effect, the absence of a prior request for financial support under Article 12 of Regulation No 347/2013 for a proposed interconnector with the status of project of common interest cannot, in itself, constitute a ground for concluding that the risk attached to the investment was not demonstrated.

102 By requiring the applicant to have made an unsuccessful request for cross-border cost allocation under Article 12 of Regulation No 347/2013 before an exemption could be contemplated, the Board of Appeal in fact made the submission by the applicant of a request for financial support under Article 12 of Regulation No 347/2013 a separate condition for proving the risk attached to the investment. In so doing, it considered, in essence, that only a refusal of such a request for financial support and, therefore, the unavailability of the regulated scheme linked to the applicant's project of common interest supported the conclusion that there was a level of risk attached to the investment such that it justified the exemption being granted to the applicant.

103 Such an approach is not justified in the light of either Regulation No 714/2009 or Regulation No 347/2013.

104 First, under Article 17(1) of Regulation No 714/2009, an exemption is to be granted when the conditions laid down in that provision are satisfied. Although cross-border cost allocation under Article 12 of Regulation No 347/2013 may be taken into account when examining the risk attached to the investment set out in Article 17(1)(b) of Regulation No 714/2009, that provision does not contain an express statement to that effect. It follows that the introduction of a condition which is not among those listed in Article 17 of Regulation No 714/2009 is contrary to the wording of that provision and contradicts the legislature's intention to limit the grant of the exemption to the conditions laid down by that article.

105 Second, there is no legislative provision which permits the inference that the legislature accorded priority to one scheme over the other. Indeed, it is apparent from the wording of Article 12 of Regulation No 347/2013 and Article 17 of Regulation No 714/2009 that promoters have freedom to choose between the scheme for projects of common interest and a request for exemption. Where projects have the status of projects of common interest, it is open to their promoters, on the one hand, to request the cross-border cost allocation procedure provided for in Article 12 of Regulation No 347/2013, or, on the other, to request an exemption in accordance with Article 17 of Regulation No 714/2009. However, as the Board of Appeal itself pointed out, those requests are voluntary and the two procedures may or may not be successful. In that context, the view cannot be taken that the request for cross-border cost allocation provided for in Article 12 of Regulation No 347/2013 must be made first.

106 Third, it should be noted that the two schemes may be applied in the alternative. It is apparent from Article 12(9)(b) and Article 13(l)(b) of Regulation No 347/2013 that the incentives provided by those two provisions do not apply to projects of common interest which have received an exemption under Article 17 of Regulation No 714/2009. Thus, a person who has received an exemption no longer qualifies for cross-border cost allocation. Accepting the interpretation proposed by ACER would be tantamount to depriving the promoters of interconnector projects with the status of projects of

common interest of their freedom to choose the procedure applicable to their project. Those promoters have the freedom to choose between the applicable procedures and that freedom of choice cannot be undermined.

107 Fourth, the key criterion which must guide the examination of the request for exemption is that of the 'level of risk attached to the investment' provided for in Article 17(1)(b) of Regulation No 714/2009. It should be made clear that the risk in question which could justify the grant of the exemption may exist even where the promoter qualifies for financial support under Article 12 of Regulation No 347/2013. In other words, in no way does the possibility of securing financial support under that provision automatically exclude the financial risk attached to the investment.

108 The approach taken by the Board of Appeal and the Agency was primarily based on hypothetical reasoning, namely on the 'possibility' that a request under Article 12 of Regulation No 347/2013 would result in financial support for the applicant, and on the fact that it 'could not be ruled out' that a favourable decision under that provision would provide sufficient certainty for potential investors. They did not therefore conduct an assessment of that criterion in the light of the risk attached to the investment referred to in Article 17(1) of Regulation No 714/2009 and, accordingly, they implicitly presumed that the request would lead to the grant of a financial advantage enabling that risk to be neutralised.

109 Against that background, the Board of Appeal could not criticise the applicant for failing to prove that the financial support provided by the regulated scheme in Article 12 of Regulation No 347/2013 would not have been sufficient to mitigate the risk attached to the investment and to make that investment, since the Board of Appeal itself did not assess that criterion in the light of the risk attached to the investment referred to in Article 17(1) of Regulation No 714/2009 or, a fortiori, the significance of any advantage that that financial support might give the applicant. Such an advantage could not simply be founded on a presumption or presented as an established fact.

110 Fifth, as is argued by the applicant, recourse to the cross-border cost allocation procedure is no guarantee that all the risks to which interconnectors are exposed will be eliminated. Uncertainty remains as regards the final form – in terms of outcome and scope – of the applicant's cross-border cost allocation request and as regards the significant risk of delay. There is no certainty that the cross-border allocation request will be successful and, in accordance with Article 12(4) of Regulation No 347/2013, the national regulatory authorities are to take coordinated decisions within six months of the date on which the last investment request was received.

111 In that context, the applicant correctly observes that, on 31 October 2019, the Commission adopted Delegated Regulation (EU) 2020/389 amending Regulation No 347/2013 as regards the Union list of projects of common interest (OJ 2020 L 74, p. 1), which replaced the list of projects of common interest of the European Union and which omitted the Aquind interconnector from that list. That amendment to the list – which, a priori, can occur every two years – illustrates the fact that there may reasonably be doubts as to whether that financial support is capable of providing a medium- or long-term guarantee of funding.

112 It follows from the foregoing that, by raising the point that there was no request for financial support under Article 12 of Regulation No 347/2013 and by failing to conduct an assessment of that financial support mechanism in the light of the risk attached to the investment, the Board of Appeal wrongly established an additional condition which is not laid down in Article 17(1) of Regulation No 714/2009.

113 For all those reasons, it must be held that the Board of Appeal erred in law and that the fourth plea is well founded.

114 Having regard to all the foregoing considerations, the decision of the Board of Appeal must be annulled and the action must be dismissed as to the remainder.

Costs

115 Under Article 134(2) of the Rules of Procedure, where there is more than one unsuccessful party the Court is to decide how the costs are to be shared.

116 The Court finds that it is an equitable assessment of the case to decide that ACER is to bear its own costs and to pay all of the costs incurred by the applicant.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls Decision A-001-2018 of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 17 October 2018;**

2. **Dismisses the action as to the remainder;**

3. **Orders ACER to bear its own costs and to pay those incurred by Aquind Ltd.**

Tomljenović Škvařilová-Pelzl Nõmm

Delivered in open court in Luxembourg on 18 November 2020.

E. Coulon
Registrar

M. van der Woude
President

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