



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

16 March 2022 *

(Energy – Regulation (EU) 2017/459 – Network code adopted by the Commission including an ‘incremental capacity process’ – ACER decision approving the implementation of an incremental capacity project – Plea of illegality – Lack of competence of the Commission – Article 6(11), Article 7(3) and Article 8(6) of Regulation (EC) No 715/2009)

In Joined Cases T-684/19 and T-704/19,

Magyar Energetikai és Közmű-szabályozási Hivatal (MEKH), established in Budapest (Hungary), represented by G. Stanka, J. Burai-Kovács, G. Szikla and Á. Kulcsár, lawyers,

applicant in Case T-684/19,

FGSZ Földgázszállító Zrt., established in Siófok (Hungary), represented by M. Horányi, N. Niejahr and S. Zakka, lawyers,

applicant in Case T-704/19,

v

European Union Agency for the Cooperation of Energy Regulators (ACER), represented, in Case T-684/19, by P. Martinet, D. Lelovitis and N. Keyaerts, acting as Agents, and by E. Ameye, M. de Sousa Ferro and Cs. Nagy, lawyers, and, in Case T-704/19, by P. Martinet, D. Lelovitis and N. Keyaerts, acting as Agents, and by E. Ameye and M. de Sousa Ferro, lawyers,

defendant,

supported by

Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control), represented by S. Polster, lawyer,

and by

European Commission, represented by O. Beynet and A. Sipos, acting as Agents,

interveners,

* Languages of the cases: English and Hungarian.

APPLICATION under Article 263 TFEU seeking annulment of Decision No 05/19 of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 9 April 2019 and of Decision No A-004-2019 of the Board of Appeal of ACER of 6 August 2019,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of V. Tomljenović, President, V. Kreuschitz, F. Schalin, P. Škvařilová-Pelzl and I. Nömm (Rapporteur), Judges,

Registrar: A. Juhász-Tóth, Administrator,

having regard to the written part of the procedure and further to the hearing on 27 October 2021,
gives the following

Judgment

I. Background to the disputes

- 1 In 2015, the applicant in Case T-704/19, FGSZ Földgázszállító Zrt. ('FGSZ'), namely the Hungarian gas transmission system operator, and its Bulgarian, Romanian and Austrian counterparts, engaged in a regional cooperation project to increase energy independence by bringing Black Sea gas to markets. Under the title 'ROHUAT/BRUA', that project provided for an increase in incremental capacity at two interconnection points, one between Romania and Hungary and the other between Hungary and Austria.
- 2 On 26 May 2017, the project was split into two separate projects, one of which relating to the interconnection point from Hungary to Austria ('the HUAT project'). On that basis, FGSZ and the Austrian gas transmission system operator, Gas Connect Austria GmbH ('GCA'), carried out an assessment of market demand for the HUAT project, in accordance with Article 26 of Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (OJ 2017 L 72, p. 1).
- 3 On 27 July 2017, FGSZ and GCA published a joint assessment report in which they concluded that there was non-binding interest from network users in incremental capacity allowing the initiation of an incremental capacity project within the meaning of Article 3(9) of Regulation 2017/459. However, the report revealed an asymmetrical result, as the demand submitted to GCA on the Austrian side was almost twice as high as the demand submitted to FGSZ on the Hungarian side.
- 4 Between 19 October and 19 November 2017, FGSZ and GCA conducted a joint public consultation on the draft project proposal, pursuant to Article 27(3) of Regulation 2017/459.
- 5 On 6 April 2018, FGSZ formally submitted to the applicant in Case T-684/19, Magyar Energetikai és Közmű-szabályozási Hivatal (MEKH), namely the Hungarian Energy and Public Utility Regulatory Authority, the proposal for the HUAT incremental capacity project, pursuant to Article 28(1) of Regulation 2017/459, stating that it was not in favour of the implementation of that project and that, therefore, it was not proposing that incremental capacity auctions be initiated under Article 29 of that regulation.

- 6 On 9 April 2018, GCA submitted the proposal for the HUAT project to the regulatory authority for the Austrian electricity and natural gas sectors, Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control), intervener in support of the European Union Agency for the Cooperation of Energy Regulators (ACER).
- 7 On 27 April 2018, E-Control adopted a decision approving the HUAT project proposal.
- 8 On 5 October 2018, MEKH adopted a decision rejecting the HUAT project proposal.
- 9 On 10 October 2018, ACER informed MEKH and E-Control that it had found that no coordinated decision had been taken within six months of receipt of the HUAT project proposal by the latter national regulatory authority and that, therefore, pursuant to Article 8(1) 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), it was empowered to decide on that proposal.
- 10 On 9 April 2019, ACER adopted Decision No 05/2019 approving the HUAT project proposal ('the initial decision').
- 11 On 6 and 7 June 2019, two appeals were lodged against the initial decision before the Board of Appeal of ACER, in accordance with Article 19 of Regulation No 713/2009, by MEKH and FGSZ respectively.
- 12 By decision of 6 August 2019, the Board of Appeal of ACER dismissed the appeals brought against the initial decision ('the decision of the Board of Appeal').

II. Procedure and forms of order sought

- 13 By applications lodged at the Court Registry on 7 and 15 October 2019 respectively, MEKH and FGSZ brought the present actions.
- 14 On 21 and 22 January 2020, the European Commission applied for leave to intervene in support of the form of order sought by ACER in Cases T-684/19 and T-704/19.
- 15 On 23 January 2020, E-Control applied for leave to intervene in support of the form of order sought by ACER in Cases T-684/19 and T-704/19.
- 16 By decisions of 2 March and 5 June 2020, the President of the Second Chamber of the General Court granted the Commission leave to intervene.
- 17 By orders of 28 April and 4 June 2020, the President of the Second Chamber of the General Court granted E-Control leave to intervene.
- 18 On 22 December 2020, pursuant to Article 27(3) of the Rules of Procedure of the General Court, the case was assigned to a new Judge-Rapporteur sitting in the Second Chamber.
- 19 By order of 27 July 2021, the President of the Second Chamber of the General Court decided to join Cases T-684/19 and T-704/19 for the purposes of the oral part of the procedure and the decision closing the proceedings. In that order, she dismissed the application for confidentiality,

made by ACER in respect of FGSZ, concerning the annex to the defence in Case T-684/19, corresponding to the decision of the Board of Appeal, as FGSZ was necessarily aware of that decision, being its addressee.

- 20 On a proposal from the Second Chamber of the General Court, the latter decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.
- 21 On a proposal from the Judge-Rapporteur, the General Court (Second Chamber, Extended Composition) decided to open the oral part of the procedure and, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties.
- 22 As a member of the Second Chamber (Extended Composition) was unable to sit in the case, the President of the General Court designated another Judge to complete the Chamber.
- 23 MEKH claims that the Court should:
 - annul the initial decision upheld by the Board of Appeal of ACER;
 - order ACER to pay the costs.
- 24 FGSZ claims that the Court should:
 - annul the initial decision and the decision of the Board of Appeal;
 - in the alternative, annul Article 1(1) and (2) and Article 2(4) of the initial decision as upheld by the decision of the Board of Appeal;
 - in the further alternative, annul the decision of the Board of Appeal;
 - order ACER to pay the costs.
- 25 ACER contends that the Court should:
 - in Case T-684/19:
 - declare inadmissible the first and second parts of the first plea in law and the second part of the second plea in law;
 - jointly or in the alternative, find that all the pleas in law are unfounded and, accordingly, dismiss the action in its entirety;
 - order MEKH to pay the costs;
 - in Case T-704/19:

- find that all the pleas in law are unfounded and, accordingly, dismiss the action in its entirety;
- order FGSZ to pay the costs.

26 The Commission and E-Control claim that the Court should:

- dismiss the actions;
- order the applicants to pay the costs.

27 At the hearing on 6 November 2020, the parties presented oral argument and replied to the Court's oral questions. In addition, FGSZ withdrew its action in so far as it concerned the initial decision, a matter of which formal note was taken in the minutes of the hearing.

III. Law

28 As a preliminary point, it must be noted that, unlike FGSZ, which, at the hearing, withdrew its action against the initial decision, MEKH disputes in its action both the initial decision and the decision of the Board of Appeal. It is therefore necessary to examine the admissibility of the latter action in so far as it challenges the initial decision.

A. Admissibility of the action in Case T-684/19 in so far as it concerns the initial decision

29 According to settled case-law, the conditions governing the admissibility of an action laid down in Article 263 TFEU concern an absolute bar to proceeding and it is thus for the Court to consider them of its own motion (see, to that effect, judgment of 16 May 2019, *Pebagua v Commission*, C-204/18 P, not published, EU:C:2019:425, paragraph 28 and the case-law cited).

30 In the context of the measures of organisation of procedure referred to in paragraph 21 above, the parties expressed their views on the admissibility of the actions in so far as those actions concerned the initial decision, in the light, first, of recital 34, Article 28(1) and Article 29 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 (recast) (OJ 2019 L 158, p. 22), which replaced Regulation No 713/2009, and second, the fifth paragraph of Article 263 TFEU.

31 In the first place, it must be noted that, as regards actions brought by non-privileged applicants, the fifth paragraph of Article 263 TFEU states that 'acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them'.

32 In the context of the present disputes, the specific conditions and arrangements concerning actions, as referred to in the fifth paragraph of Article 263 TFEU, arise from Regulation 2019/942.

33 It is settled case-law that procedural rules are generally taken to apply from the date on which they enter into force, as opposed to substantive rules, which are usually interpreted as applying to situations existing before their entry into force only in so far as it follows clearly from their terms,

their objectives or their general scheme that such an effect must be given to them (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).

34 It follows that, in the present case, the procedural rules applicable in order to determine the admissibility of the action in Case T-684/19 in so far as that action concerns the initial decision are those laid down in Regulation 2019/942. It is important to note that, between the adoption of the initial decision (9 April 2019) and the adoption of the decision of the Board of Appeal (6 August 2019), Regulation No 713/2009 was replaced by Regulation 2019/942, which entered into force on 4 July 2019.

35 In the second place, it follows from recital 34 and from Articles 28 and 29 of Regulation 2019/942 that natural and legal persons disagreeing with a decision of ACER that is addressed to them or is of individual and direct concern to them must refer the matter to the Board of Appeal where that possibility is open to them. Where such a possibility exists, they will have standing to challenge before the Court only the decision of that Board of Appeal.

36 First, according to recital 34 of Regulation 2019/942:

‘Where ACER has decision-making powers, interested parties should, for reasons of procedural economy, be granted a right of appeal to a Board of Appeal, which should be part of ACER, but independent from its administrative and regulatory structure. In order to guarantee its functioning and full independence, the Board of Appeal should have a separate budget line in the budget of ACER. In the interest of continuity, the appointment or renewal of the members of the Board of Appeal should allow for the partial replacement of the members of the Board of Appeal. The decisions of the Board of Appeal are subject to appeal before the Court of Justice of the European Union (the Court of Justice).’

37 Second, Article 29 of Regulation 2019/942, entitled ‘Actions before the Court of Justice’, states that ‘actions for the annulment of a decision issued by ACER pursuant to this Regulation and actions for failure to act within the applicable time limits may be brought before the Court of Justice only after the exhaustion of the appeal procedure referred to in Article 28 ...’.

38 In that regard, third, Article 28 of Regulation 2019/942, entitled ‘Decisions subject to appeal’, provides, in paragraph 1 thereof, that ‘any natural or legal person, including the regulatory authorities, may appeal against a decision referred to in point (d) of Article 2 which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person’. According to paragraph 2 of that article, ‘the Board of Appeal shall decide upon the appeal within four months of the lodging of the appeal’.

39 Consequently, in so far as an appeal could be brought before the Board of Appeal against the initial decision, it follows from a combined reading of recital 34 and of Articles 28 and 29 of Regulation 2019/942 that only the decision of the Board of Appeal was capable of being challenged before the General Court.

40 In the third place, on the supposition that Regulation No 713/2009 were applicable *ratione temporis*, the same conclusion would have to be reached, since Article 20 of that regulation provided that ‘an action may be brought before the [General Court] ..., in accordance with Article [263 TFEU], contesting a decision taken by the Board of Appeal or, in cases where no right [would

lie] before the Board of Appeal, by the Agency’ (see, to that effect, judgment of 24 October 2019, *Austrian Power Grid and Vorarlberger Übertragungsnetz v ACER*, T-333/17, not published, EU:T:2019:760, paragraphs 31 and 32).

- 41 In the light of all the foregoing, MEKH is not entitled to seek annulment of the initial decision.
- 42 It follows that the action in Case T-684/19 must be declared inadmissible in so far as it concerns the initial decision.

B. The merits of the actions

- 43 In support of their respective actions, MEKH and FGSZ put forward, in essence, 14 pleas in law. The Court considers that it is sufficient to examine the first plea in law in Case T-684/19, by which MEKH claims that Chapter V of Regulation 2017/459 is unlawful.
- 44 MEKH pleads that Chapter V of Regulation 2017/459 is unlawful on the ground that that chapter exceeds the powers conferred on the Commission by Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ 2009 L 211, p. 36), and that it should, therefore, be declared inapplicable to the present disputes pursuant to Article 277 TFEU.
- 45 ACER, supported by the Commission, contends that the plea of illegality is inadmissible and, in any event, unfounded.

1. Admissibility of the plea of illegality

- 46 First, ACER claims that the plea of illegality is inadmissible since, pursuant to Article 29 of Regulation 2019/942, only pleas raised before the Board of Appeal of ACER may be relied on before the Court.
- 47 It is true that MEKH did not claim that Chapter V of Regulation 2017/459 is unlawful before the Board of Appeal of ACER.
- 48 Furthermore, ACER is correct in stating, in essence, that the obligation to exhaust the procedure before the Board of Appeal of ACER before bringing an action before the Court of Justice of the European Union, laid down in Article 29 of Regulation 2019/942, means, in principle, that pleas in law that have not been submitted before that Board of Appeal may not be put forward for the first time before the General Court in an action for annulment. Since that action for annulment relates exclusively to the decision of that Board of Appeal, it must be examined in the light of the factual and legal context of the disputes as they were brought before that Board of Appeal.
- 49 However, such an approach cannot be followed with regard to a plea of illegality raised for the first time before the Court, since the submission of such arguments before the Board of Appeal of ACER could not, in any event, have succeeded.

- 50 It follows from the legislative and judicial system established by the FEU Treaty that the EU Courts alone are entitled, under the terms of Article 277 TFEU, to rule that an act of general application is unlawful and to draw the consequences of the inapplicability which results from that with regard to the act of individual scope contested before them, the EU institution, body, office or agency providing for the internal remedies not being afforded such competence by the Treaties (see, to that effect, judgment of 27 October 2016, *ECB v Cerafogli*, T-787/14 P, EU:T:2016:633, paragraph 49).
- 51 Therefore, since the Board of Appeal of ACER was not entitled to assess the validity of Chapter V of Regulation 2017/459, but had, on the contrary, to apply that chapter as long as the EU Courts had not established its unlawfulness, MEKH cannot be criticised for not having claimed that that chapter is unlawful before that Board of Appeal.
- 52 Second, ACER states, in the rejoinder, that the ‘deadline set by Article 263 TFEU to challenge the validity of [Regulation 2017/459] had expired at the time of the Application’.
- 53 In that regard, it is apparent from the wording of Article 277 TFEU itself that the possibility of pleading the illegality of an act of general application in a dispute concerning that act exists ‘notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, [TFEU]’.
- 54 Moreover, in so far as, by that argument, ACER relies on the case-law according to which the plea of illegality provided for by Article 277 TFEU cannot be relied on by a natural or legal person who has failed to bring an action against the act complained of within the time limits laid down to that end, it must be pointed out that that case-law does not apply unless such an action would have been admissible beyond doubt (see, to that effect, judgment of 22 April 2004, *Schintgen v Commission*, T-343/02, EU:T:2004:111, paragraph 26; see also, to that effect and by analogy, judgments of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756, paragraphs 41 and 42, and of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, EU:C:2018:582, paragraph 14 and the case-law cited).
- 55 In the present case, the view cannot be taken that the admissibility of an action for annulment brought by MEKH against Regulation 2017/459 would have been evident. On the contrary, since it concerns an act of general application entailing implementing measures, within the meaning of the fourth paragraph of Article 263 TFEU, and MEKH cannot be likened to a privileged applicant for the purposes of the second paragraph of that article, the admissibility of such an action would, at the very least, have been doubtful.
- 56 Third, ACER claims, in essence, that the plea of illegality must be declared inadmissible, in so far as Regulation 2017/459 does not constitute the legal basis of the decision of the Board of Appeal, that decision having been adopted under the powers delegated to ACER by Regulation No 713/2009.
- 57 Such a line of argument cannot succeed either.
- 58 While it follows from the case-law that a plea of illegality under Article 277 TFEU may be made only against an act of general application which is applicable, directly or indirectly, to the issue with which the action is concerned, the Court of Justice has accepted that that condition was met as regards not only the provisions of an act of general application that constitute the basis of the contested individual decisions, but also those which have a direct legal connection with such

decisions (see, to that effect, judgment of 8 September 2020, *Commission and Council v Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraphs 67 to 70 and the case-law cited).

- 59 By its first plea in law, MEKH is claiming that Chapter V of Regulation 2017/459 is unlawful on the ground that that chapter exceeds the powers conferred on the Commission by Regulation No 715/2009. In so far as Regulation 2017/459 is the source of rules that the Board of Appeal of ACER applied in its decision, there is necessarily a direct legal connection within the meaning of the case-law cited in paragraph 58 above.
- 60 In the light of the foregoing, it must be concluded that the plea of illegality is admissible.

2. Merits of the plea of illegality

- 61 MEKH claims that Chapter V of Regulation 2017/459 is unlawful on the ground that Regulation No 715/2009 does not allow the Commission to adopt a network code providing for a process for the creation of incremental capacity going so far as to require the operator to make the investments necessary for the creation of that incremental capacity.
- 62 In essence, the present plea in law consists of two parts. First, MEKH submits that Chapter V of Regulation 2017/459 is incompatible with the legal basis of Regulation No 715/2009, namely Article 114 TFEU. Second, it claims that that chapter does not come within the powers conferred on the Commission by the latter regulation to adopt network codes.
- 63 ACER, supported by the Commission, contends that the two parts of the present plea are unfounded. As a preliminary point, it claims that the plea of illegality is ineffective for three reasons.
- 64 The first reason relied on by ACER concerns the erroneous nature of the premiss on which the plea of illegality is based, since Chapter V of Regulation 2017/459 does not require transmission system operators to take investment decisions in order to create incremental capacity on the network.
- 65 That line of argument cannot succeed.
- 66 Chapter V of Regulation 2017/459 establishes a procedure comprising, in essence, seven steps, resulting, as the case may be, in an obligation on the part of transmission system operators to make the investments necessary for the creation of incremental capacity on the network.
- 67 First, under Article 26 of Regulation 2017/459, the transmission system operators concerned must assess market demand for incremental capacity projects on each side of an interconnection point.
- 68 Second, if the indication that market demand might exist for an incremental capacity project follows from the preceding step, Article 27 of Regulation 2017/459 provides that a phase to design a project to that effect is to be initiated by the transmission system operators concerned.
- 69 Third, pursuant to Article 28(1) of Regulation 2017/459, the transmission system operators concerned must present the incremental capacity project for approval by their respective national regulatory authorities.

- 70 Fourth, according to Article 28(2) of Regulation 2017/459, the competent national regulatory authorities must approve or reach an agreement on the project.
- 71 Fifth, once the incremental capacity project has been approved by the national regulatory authorities, Article 29 of Regulation 2017/459 states that that incremental capacity is to be auctioned with a view to obtaining binding commitments from network users for contracting capacity for different offer levels.
- 72 Sixth, it follows from Articles 22 to 25 of Regulation 2017/459 that either the national regulatory authority or the transmission system operator is to conduct an economic test on the basis of the binding commitments received.
- 73 Seventh, and lastly, if the economic test has a positive outcome on both sides of an interconnection point for at least one offer level that includes incremental capacity, Article 22(3) of Regulation 2017/459 provides that the ‘project shall be initiated’. In the absence of a positive outcome, ‘the specific incremental capacity process shall be terminated’.
- 74 It follows that, if the various conditions laid down in Chapter V of Regulation 2017/459 are met, in particular the existence of binding commitments on the part of network users to contract incremental capacity on the basis of which the economic viability of an increase in capacity is demonstrated via the economic test, the ‘project shall be initiated’ in accordance with Article 22(3) of that regulation, which means that the transmission system operator is required to create incremental capacity by making the necessary investments.
- 75 That conclusion was, moreover, followed by ACER’s bodies themselves. It is apparent from the very wording of the initial decision (Article 2(4) of the operative part) that ACER imposed an obligation on FGSZ and GCA to implement the HUAT project by 1 October 2024 in case of a positive outcome of the economic test for that project. In addition, the Board of Appeal of ACER itself acknowledged in paragraph 99 of its decision that the combined reading of Article 22(3) and of Articles 28 and 29 of Regulation 2017/459 could lead to such an obligation.
- 76 The second reason relied on by ACER alleges that the plea of illegality is ineffective, in so far as the decision of the Board of Appeal was adopted not on the basis of Chapter V of Regulation 2017/459, but on the basis of Article 8(1) of Regulation No 713/2009.
- 77 It must be borne in mind that, by the decision of the Board of Appeal, ACER substituted itself for the national regulatory authorities to carry out the fourth step of the incremental capacity process, established by Chapter V of Regulation 2017/459 and described in paragraphs 66 to 73 above.
- 78 Accordingly, and for reasons similar to those set out in paragraph 59 above, the decision of the Board of Appeal, even if it is taken on the basis of Article 8(1) of Regulation No 713/2009, applies the rules set out in Chapter V of Regulation 2017/459, on which its lawfulness is therefore conditional, with the result that the plea of illegality is not ineffective as claimed by ACER.
- 79 Lastly, as a third reason, ACER states that MEKH is challenging solely the validity of Chapter V of Regulation 2017/459, even though other provisions of that regulation refer to the creation of incremental capacity on the network.

- 80 In that regard, it is sufficient to point out that the fact that other provisions of Regulation 2017/459 refer to the creation of incremental capacity and are not expressly referred to in the present plea of illegality is irrelevant, since the only important issue is whether Chapter V of that regulation, which was applied in the decision of the Board of Appeal, is unlawful, which would mean that it would be declared inapplicable to the present disputes pursuant to Article 277 TFEU.
- 81 Since those preliminary complaints raised by ACER have been rejected, the merits of the two parts of the present plea in law must be examined.

(a) Merits of the first part, alleging that Regulation 2017/459 is incompatible with the legal basis of Regulation No 715/2009

- 82 In essence, MEKH submits that the Commission could not provide, in Chapter V of Regulation 2017/459, for the possibility of addressing individual decisions to transmission system operators, requiring them to make investments, without disregarding the legal basis of Regulation No 715/2009, namely Article 114 TFEU, which provides for the adoption of harmonisation measures, which, according to MEKH, are not capable of encompassing the introduction of a legal regime involving the adoption of individual decisions addressed to private operators.
- 83 Pursuant to the second sentence of Article 114(1) TFEU, ‘the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market’.
- 84 Article 1 of Regulation No 715/2009 states that the purpose of that regulation consists, inter alia, in ‘setting non-discriminatory rules for access conditions to natural gas transmission systems taking into account the special characteristics of national and regional markets with a view to ensuring the proper functioning of the internal market in gas’, ‘facilitating the emergence of a well-functioning and transparent wholesale market with a high level of security of supply in gas’ and ‘providing mechanisms to harmonise the network access rules for cross-border exchanges in gas’.
- 85 First, it must be borne in mind that, by the expression ‘measures for the approximation’, the authors of the Treaty intended to confer on the EU legislature, depending on the general context and the specific circumstances of the matter to be harmonised, discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features (judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, paragraph 102).
- 86 Second, it follows from the case-law of the Court of Justice that (i) in certain fields, the approximation of general laws alone may not be sufficient to ensure the unity of the market, and (ii) nothing in the wording of Article 114 TFEU implies that the addressees of the measures adopted by the EU legislature on the basis of that provision can only be Member States (judgment of 22 January 2014, *United Kingdom v Parliament and Council*, C-270/12, EU:C:2014:18, paragraphs 106 and 107).

- 87 Third and consequently, the view must be taken that Article 114 TFEU does not preclude the Commission, under Regulation No 715/2009, from drawing up rules which entail, as the case may be, the obligation on the part of one or more transmission system operators to make the investments necessary to obtain incremental capacity on the network, provided that that obligation does not appear to be manifestly inappropriate for attaining its harmonising objectives.
- 88 Fourth, having regard to the importance that sufficient capacity on the networks can have so as to ensure the proper functioning of the internal market in gas and the security of supply, the view must be taken that the process of increasing capacity set out in Chapter V of Regulation 2017/459 and described in paragraphs 66 to 73 above can, without difficulty, be linked to the objectives of Regulation No 715/2009 as set out in Article 1 thereof.
- 89 The first part must therefore be rejected.

(b) Merits of the second part, alleging that Chapter V of Regulation 2017/459 exceeds the powers conferred on the Commission by Regulation No 715/2009

- 90 MEKH claims, in essence, that Chapter V of Regulation 2017/459 exceeds the limits of the power conferred on the Commission by Article 8(6) of Regulation No 715/2009 to adopt network codes.
- 91 ACER, supported by the Commission, contends that the provisions of Regulation 2017/459 concerning incremental capacity are consistent with Regulation No 715/2009. It states that the adoption of rules relating to incremental capacity is, by definition, a supranational matter, that those rules are essential to the attainment of the objectives of the latter regulation and that they come within the scope of the powers conferred on the Commission to amend non-essential elements of that regulation when adopting network codes relating to, inter alia, capacity allocation, security of supply and network connection.
- 92 The Commission also refers to the importance, for the proper functioning of the internal market in natural gas and the protection of competition on that market, of regulating large gas pipeline networks, since these constitute natural monopolies capable of giving rise to abusive conduct, such as the restriction of strategic investment in the development and extension of the network. It adds that the need to ensure an adequate level of interconnection between national energy systems in the interest of establishing the internal energy market arises from Articles 170, 172 and 194 TFEU.
- 93 In addition, the Commission states, in essence, that, despite the structural separation between, on the one hand, gas production and trade and, on the other, its transmission, there may be economic incentives not to make the necessary infrastructure investments and to maintain the network utilisation rate and apply congestion charges. According to the Commission, that is why both Regulation No 715/2009 and Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94) impose, on transmission system operators, obligations connected with the establishment of cross-border transmission capacity and, on the national regulatory authorities, the task of ensuring compliance with those obligations.
- 94 The Commission also claims that it follows from the wording of Article 16(2) and (5) of Regulation No 715/2009 that the concept of cross-border allocation necessarily involves the possibility of increasing existing capacity in order to create a well-functioning internal energy market and protect competition on that market. In addition, the Commission states, in essence,

that the obligation on the part of transmission system operators to take an investment decision when certain conditions are met is necessary in order to achieve the objective of coordinated allocation of cross-border capacity set out in Article 42(2)(a) of Directive 2009/73.

- 95 In the first place, the Court points out that Regulation 2017/459 has as its legal bases Article 6(11) and Article 7(3) of Regulation No 715/2009 and establishes ‘a network code on capacity allocation mechanisms in gas transmission systems’ while repealing Commission Regulation (EU) No 984/2013 of 14 October 2013 establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems and supplementing Regulation No 715/2009 (OJ 2013 L 273, p. 5), which was the source of the previous network code. Chapter V of Regulation 2017/459 concerns the ‘incremental capacity process’. As set out in paragraphs 67 to 74 above, that process can lead to the obligation on the part of the gas transmission system operator to create incremental capacity on that network if certain conditions are met.
- 96 In the second place, the power conferred on the Commission to adopt network codes arises from Article 6(11), Article 7(3) and Article 8(6) of Regulation No 715/2009. It follows from a combined reading of those provisions that the Commission is entitled to develop network codes, in certain areas which are exhaustively listed, instead of the European Network of Transmission System Operators for Gas (‘ENTSOG’), which constitutes, pursuant to Article 4 of that regulation, the structure for cooperation at EU level of all gas transmission system operators.
- 97 As regards, first, Article 6 of Regulation No 715/2009, it lays down the procedure for the establishment of network codes. Although that procedure provides for the development of network codes by the ENTSOG together with ACER and the Commission, the first subparagraph of paragraph 11 thereof provides that ‘the Commission may adopt, on its own initiative where the [ENTSOG] has failed to develop a network code ..., one or more network codes in the areas listed in Article 8(6)’. Thus, the scope of the power conferred on the Commission to adopt network codes is limited solely to areas in which the ENTSOG could have developed those codes, namely the areas referred to in Article 8(6) of that regulation.
- 98 Second, the second subparagraph of Article 6(11) of Regulation No 715/2009 states that the measures adopted in the network code are ‘designed to amend non-essential elements of this Regulation by supplementing it’ and ‘shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 28(2)’. The latter provision refers to Article 5a(1) to (4) of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23), known as the ‘comitology decision’, as amended by Council Decision 2006/512/EC of 17 July 2006 (OJ 2006 L 200, p. 11). An equivalent reference is found in Article 7(3) of Regulation No 715/2009, which concerns amendments made by the Commission to existing network codes.
- 99 In the third place and consequently, the present part requires an examination, in a first step, of whether Chapter V of Regulation 2017/459 can be linked to the areas envisaged by Article 8(6) of Regulation No 715/2009, to which the first subparagraph of Article 6(11) of that latter regulation refers. If that is not the case, it will be necessary, in a second step, to examine whether that chapter can be likened to an amendment of a non-essential element of Regulation No 715/2009, which would be authorised by the second subparagraph of Article 6(11) and Article 7(3) of that regulation.

(1) The scope of the power conferred on the Commission by the first subparagraph of Article 6(11) of Regulation No 715/2009

100 For the reasons set out in paragraph 97 above, the scope of the power delegated by Article 6(11) of Regulation No 715/2009 is limited to the areas listed in Article 8(6) of that regulation, which must therefore be interpreted.

101 Pursuant to settled case-law, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives of the rules of which it is part (see judgment of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 41 and the case-law cited).

(i) The literal interpretation of Article 8(6) of Regulation No 715/2009

102 The areas listed in Article 8(6) of Regulation No 715/2009, in respect of which provision is made for the adoption of a network code, include, in point (g) thereof, ‘capacity-allocation and congestion-management rules’, to which MEKH refers in its pleadings. ACER refers, in addition, to the areas set out in points (a) to (c), concerning, respectively, ‘network security and reliability rules’, ‘network connection rules’ and ‘third-party access rules’.

103 It is clear, however, that the only area in respect of which provision is made for the establishment of a network code, the wording of which is capable of covering the matter of incremental capacity, is that referred to in Article 8(6)(g) of Regulation No 715/2009, relating to ‘capacity-allocation and congestion-management rules’. The other areas covered by that paragraph and, in particular, those relating to ‘network security and reliability rules’, ‘network connection rules’ and ‘third-party access rules’, to which ACER refers, are not worded in a manner capable of encompassing the matter of creation of incremental capacity on that network.

104 Article 2 of Regulation No 715/2009 provides definitions of the terms and expressions used in that regulation, inter alia in Article 8(6)(g) of that regulation. The concept of capacity is defined in a general manner in point 3 of Article 2. Then, its various components are listed: in point 4, ‘unused capacity’; in point 16, ‘firm capacity’; in point 18, ‘technical capacity’, and in point 19, ‘contracted capacity’. The concept of congestion management is defined in point 5. Points 21 and 23 address also the concept of congestion under the definition of ‘contractual’ and ‘physical’ congestion respectively.

105 It follows from those definitions that the concept of capacity indisputably refers to current capacity on the network and that congestion management is conceived on the basis of existing capacity on that network. By contrast, it is not expressly apparent from any of those definitions that that concept could be understood as encompassing also the creation of incremental capacity on that network or that ‘congestion management’ could be interpreted as envisaging tackling potential congestion by creating incremental capacity.

106 Thus, first, the concept of capacity is defined as ‘the maximum flow ... to which the network user is entitled in accordance with the provisions of the transport contract’. In so far as it refers only to capacity to which a network user is ‘entitled’, such a definition implies rather that only current capacity on the network, and not future capacity, is envisaged.

107 Second, it must be noted that although Regulation No 715/2009 addresses the concept of capacity in a large number of its possible variants, it does not refer to ‘future capacity’. It is only in Article 3(1) of Regulation 2017/459 that the latter is defined by the Commission as referring to ‘a possible future increase via market-based procedures in technical capacity or possible new capacity created where none currently exists that may be offered based on investment in physical infrastructure or long-term capacity optimisation and subsequently allocated subject to the positive outcome of an economic test, in [various] cases’.

108 Third, neither the definition of the expression ‘congestion management’ nor those of the expressions ‘contractual congestion’ and ‘physical congestion’ envisage the creation of incremental capacity on the network as a solution to network congestion or saturation problems.

(ii) The contextual interpretation of Article 8(6) of Regulation No 715/2009

109 As regards the contextual interpretation of Article 8(6) of Regulation No 715/2009, it is necessary to examine whether it follows from the general scheme of that regulation, or, as the case may be, from other provisions of EU law, that the scope of the competence conferred on the ENTSOG by Article 8(6) of that regulation when establishing network codes and, consequently, on the Commission pursuant to the first subparagraph of Article 6(11) of that regulation, extends to rules concerning the creation of incremental capacity on the network.

110 That is not the case since an examination of Regulation No 715/2009 as a whole reveals that there is a clear distinction between, on the one hand, the areas listed in Article 8(6) of that regulation, for which the ENTSOG is competent to develop relevant rules in the context of network codes, and, on the other hand, the framework for the investments necessary for the creation of incremental capacity on the network, in respect of which the ENTSOG plays only a role of support and coordination.

111 That is apparent, in the first place, from the nature of the powers delegated to the ENTSOG as regards network development, such as they follow from a combined reading of Article 8(3)(b) and Article 8(10) of Regulation No 715/2009.

112 First, while Article 8(3)(b) of Regulation No 715/2009 provides that the ENTSOG is to adopt the EU-wide network development plan, it is stated therein that that plan is ‘non-binding’. In addition, pursuant to Article 8(10) of that regulation, that plan builds on ‘national investment plans’.

113 Second, while the EU-wide network development plan, adopted by the ENTSOG pursuant to Article 8(10) of Regulation No 715/2009, ‘[identifies]’, according to point (c) of that provision, ‘investment gaps, notably with respect to cross-border capacities’, that provision does not confer any power on the ENTSOG for the purpose of filling the identified gaps. The ENTSOG has only the option, under the third subparagraph of Article 8(10) of that regulation, to annex to that plan ‘a review of barriers to the increase of cross-border capacity of the network arising from different approval procedures or practices’.

114 It follows that the EU-wide network development comes primarily within the competence of the Member States and that the role of the ENTSOG relates solely to coordinating the exercise by those Member States of their competence. It would therefore be contrary to the internal logic of Regulation No 715/2009 to interpret it as conferring, under Article 8(6) thereof, regulatory competence on the ENTSOG as regards the drawing up of rules governing the creation of incremental capacity on the network.

- 115 In the second place, it is apparent from both Article 16 of Regulation No 715/2009 and a comparison of that regulation with Directive 2009/73 that the arrangements for increasing capacity on the network are not envisaged, in that regulation, as constituting an area capable of being the subject of subsequent regulatory treatment on the basis of that regulation.
- 116 First, Article 16 of Regulation No 715/2009 concerns ‘capacity allocation’ and ‘congestion management’ and therefore covers the same areas as the network code which the ENTSOG is empowered to develop under Article 8(1) and 8(6)(g) of that regulation.
- 117 In the first place, Article 16(1) to (4) of Regulation No 715/2009 sets out precise obligations for transmission system operators in relation to capacity allocation and the management of contractual and physical congestion on the network. Nevertheless, those obligations relate exclusively to allocation of current capacity and congestion management on the sole basis of existing capacity, that is to say, without taking into account any incremental capacity that might result from future investments. Neither incremental capacity nor corresponding new investments are envisaged in those paragraphs. The matter of new investments on the network is, by contrast, expressly addressed in paragraph 5 of that article.
- 118 In the second place, Article 16(5) of Regulation No 715/2009 is much less restrictive than the first four paragraphs of that article. It merely states that ‘transmission system operators shall regularly assess market demand for new investment’, and that, ‘when planning new investments, transmission system operators shall assess market demand and take into account security of supply’. No obligation on the part of transmission system operators to make additional investments on account of the network situation or the security of supply is envisaged.
- 119 Second, it must be noted that the only provisions capable of entailing an obligation on the part of transmission system operators to make new investments on the network in order to create incremental capacity are set out in Directive 2009/73, which was adopted at the same time as Regulation No 715/2009, in the context of the ‘third energy package’.
- 120 Thus, Article 13(2) of Directive 2009/73 requires transmission system operators to build ‘sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity and taking into account security of gas supply’. In addition, Article 22 of that directive, entitled ‘Network development and powers to make investment decisions’, provides in paragraph 1 thereof that ‘transmission system operators shall submit to the regulatory authority a ten-year network development plan based on existing and forecast supply and demand after having consulted all the relevant stakeholders’. Under paragraph 3 of that article, that plan must be based on ‘reasonable assumptions about the evolution of the production, supply, consumption and exchanges with other countries’.
- 121 In addition, it follows from Article 41(1)(b) and (g) of Directive 2009/73 that it is for the regulatory authority to ensure that the transmission system operator complies with its obligations under EU law, including as regards cross-border issues, and that that monitoring task extends to the investment plans of transmission system operators.
- 122 That monitoring task is apparent, in particular, from Article 22(4) to (7) of Directive 2009/73, which requires the national regulatory authority, respectively, to consult the actual or potential system users on the 10-year network development plan submitted by the transmission system operator, to examine whether that plan is complete and whether it is consistent with the

EU-wide network development plan referred to in Article 8(3)(b) of Regulation No 715/2009, to monitor and evaluate the implementation of the 10-year network development plan and, where appropriate, to take measures where the transmission system operator does not execute an investment.

- 123 It follows from the foregoing that it is under Directive 2009/73 that a transmission system operator is subject to the obligation to make the investments necessary for the proper functioning of the network and, as the case may be, for the creation of incremental capacity, and that it is for the Member State to ensure compliance with those obligations via its national regulatory authority.
- 124 Furthermore, the view must be taken that no provision of Directive 2009/73 envisages the adoption, at EU level, of a regulatory framework for arrangements for implementing the obligations of transmission system operators with regard to investment or for arrangements for the monitoring of those obligations by the national regulatory authorities.
- 125 In that regard, it must be noted that, although Article 42(2)(a) of Directive 2009/73, to which the Commission refers, focuses on the importance of cooperation between national regulatory authorities, inter alia, ‘to enable an adequate level of interconnection capacity, including through new interconnections’, that provision merely lays down an obligation of cooperation between regulatory authorities ‘at a regional level’. That provision cannot therefore be regarded as envisaging the adoption of rules on the part of the Commission concerning the creation of incremental capacity at interconnection points.
- 126 It must therefore be inferred from the analysis of Regulation No 715/2009 and Directive 2009/73 that the legislature, when it adopted the ‘third energy package’, intended for the implementation of relevant EU rules relating to network development and the creation of incremental capacity to come within the competence of the Member States alone, without conferring competence to that effect on the ENTSOG and the Commission.

(iii) The teleological interpretation of Article 8(6) of Regulation No 715/2009

- 127 As regards the teleological interpretation of Article 8(6) of Regulation No 715/2009, ACER and the Commission put forward various arguments in order to support the validity of the adoption of rules at EU level in the field of investments allowing the creation of incremental capacity. Thus, they refer to the need, for the proper functioning of the internal market in natural gas, to regulate large gas pipeline networks in order for them to have recourse to sufficient investments and not be subject to conduct restricting competition on the part of transmission system operators, which are in a situation of natural monopoly.
- 128 In that regard, while it was, admittedly, open to the EU legislature to provide, in Regulation No 715/2009, for the creation of incremental capacity on the network, in order, inter alia, to achieve the objective of the EU energy policy to ‘ensure security of energy supply in the Union’, provided for in Article 194(1)(b) TFEU, the view must, however, be taken that none of the grounds for that regulation makes it possible to identify an aim of empowering the ENTSOG and, consequently, the Commission, to develop a network code extending to the matter of investments necessary for the creation of such incremental capacity.

- 129 On the contrary, as stated in paragraph 126 above, it is apparent from Regulation No 715/2009 and Directive 2009/73 that, when the ‘third energy package’ was adopted, the legislature’s intention was to delegate the implementation of relevant EU rules in that field to the Member States alone.
- 130 That conclusion is borne out by a consideration of the preparatory documents relating to Regulation No 715/2009. It is apparent from Council Common Position (EC) No 12/2009 of 9 January 2009 with a view to the adoption of a Regulation of the European Parliament and of the Council on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (OJ 2009 C 75E, p. 38) that the Council preferred the wording of Article 8(3)(b) and Article 16 of Regulation No 715/2009 referred to, respectively, in paragraphs 112 and 118 above, over that envisaged by the Commission and the European Parliament, thus disregarding the envisaged references to investments on the network and the creation of incremental capacity.
- 131 First, as regards Article 8(3)(b) of Regulation No 715/2009, MEKH correctly stated, in response to the measures of organisation of procedure, that the Council, as regards the role conferred on the ENTSOG in relation to planning, disregarded the Commission’s proposal by favouring the expression ‘network development plan’ instead of the expression ‘investment plan’, and introduced an emphasis on the ‘non-binding’ nature of that plan.
- 132 Second, as regards Article 16 of Regulation No 715/2009, the Council did not follow an amendment by the European Parliament, to which the Commission had agreed, which would have led to the recognition of an obligation on the part of transmission system operators to create incremental capacity, following a procedure somewhat resembling that envisaged under Chapter V of Regulation 2017/459 and described in paragraphs 66 to 73 above.
- 133 That amendment was intended to add to Article 16 of Regulation No 715/2009 a paragraph providing, first, for an obligation on the part of transmission system operators, ‘in the event of long-term physical congestion ..., [to] relieve congestion by adding new capacities according to market demand’, and second, for an obligation on the part of those operators to undertake open-season procedures ‘in order to assess market demand’.
- 134 In the light of the foregoing, it must be concluded that it follows from the literal, contextual and teleological interpretations of Article 8(6) of Regulation No 715/2009 that that article does not confer any power on the ENTSOG allowing it to include in a network code rules capable of imposing on a gas transmission system operator the obligation to create incremental capacity on that network.
- 135 It follows that the Commission was not empowered, solely on the basis of the first subparagraph of Article 6(11) of Regulation No 715/2009, to adopt provisions governing the incremental capacity process, set out in Chapter V of Regulation 2017/459.

(2) The scope of the power conferred on the Commission by the second subparagraph of Article 6(11) and Article 7(3) of Regulation No 715/2009

- 136 For the reasons set out in paragraph 99 above, it is necessary to ascertain whether such an empowerment could, as the case may be, follow from the second subparagraph of Article 6(11) and Article 7(3) of Regulation No 715/2009, which authorise the Commission to amend non-essential elements of that regulation when a network code is adopted or amended.

- 137 Pursuant to settled case-law, the essential elements of basic legislation are those which, in order to be adopted, require political choices falling within the responsibilities of the EU legislature (see judgment of 11 May 2017, *Dyson v Commission*, C-44/16 P, EU:C:2017:357, paragraph 61 and the case-law cited).
- 138 Identifying the elements of a matter which must be categorised as essential must be based on objective factors amenable to judicial review, and requires account to be taken of the characteristics and particular features of the field concerned (see judgment of 11 May 2017, *Dyson v Commission*, C-44/16 P, EU:C:2017:357, paragraph 62 and the case-law cited).
- 139 In the present case, it must be borne in mind that Chapter V of Regulation 2017/459 can be likened to an amendment of Regulation No 715/2009 which has the effect of extending, to the creation of incremental capacity, the power conferred by Article 8(6)(g) of Regulation No 715/2009 in the area of ‘capacity-allocation and congestion-management rules’ on the ENTSOG and, consequently, the Commission, even though that power concerns only existing capacity on the network.
- 140 For the reasons set out in paragraphs 114 to 126 above, it is apparent from the scheme of Regulation No 715/2009 and from a joint reading of that regulation and Directive 2009/73, adopted at the same time, that the legislature made a political choice consisting of attributing the implementation of relevant EU rules relating to the creation of incremental capacity to the Member States alone, without delegating competence to that effect to the ENTSOG and the Commission. Therefore, in accordance with the case-law cited in paragraph 137 above, the view must be taken that the amendment made by Chapter V of Regulation 2017/459 concerns an essential element of Regulation No 715/2009, which is not covered by the second subparagraph of Article 6(11) and Article 7(3) of that latter regulation.
- 141 It follows from all of the foregoing that the Commission was not empowered by Regulation No 715/2009 to adopt the provisions governing the incremental capacity process set out in Chapter V of Regulation 2017/459.
- 142 The plea of illegality must therefore be upheld and Chapter V of Regulation 2017/459 declared inapplicable under Article 277 TFEU. It follows that the decision of the Board of Appeal, which applies that chapter, must be annulled with effect *erga omnes* (see, to that effect, judgment of 1 June 2006, *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission*, C-442/03 P and C-471/03 P, EU:C:2006:356, paragraph 43 and the case-law cited), without it being necessary to rule on the other pleas in law raised in the present disputes.
- 143 Consequently, in so far as they are directed against the decision of the Board of Appeal, the present actions must be upheld.

IV. Costs

- 144 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. In the present case, since ACER has been largely unsuccessful, it is appropriate to order it to bear its own costs and to pay all the costs incurred by the applicants, in accordance with the forms of order sought by the applicants.

- 145 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 Commission is therefore to bear its own costs.
- 146 In addition, pursuant to Article 138(3) of the Rules of Procedure, it is appropriate to order E-Control to bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

- 1. Declares the action brought by Magyar Energetikai és Közmű-szabályozási Hivatal (MEKH) inadmissible in so far as it concerns Decision No 05/2019 of the European Union Agency for the Cooperation of Energy Regulators (ACER) of 9 April 2019;**
- 2. Annuls Decision No A-004-2019 of the Board of Appeal of ACER of 6 August 2019;**
- 3. Orders ACER to bear its own costs and to pay those incurred by MEKH and FGSZ Földgázszállító Zrt.;**
- 4. Orders the European Commission and Energie-Control Austria für die Regulierung der Elektrizitäts- und Erdgaswirtschaft (E-Control) to bear their own costs.**

Tomljenović

Kreuschitz

Schalin

Škvařilová-Pelzl

Nömm

Delivered in open court in Luxembourg on 16 March 2022.

E. Coulon
Registrar

M. van der Woude
President

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