

**DECISION OF THE BOARD OF APPEAL
OF THE AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS**

17 October 2018

*(Application for granting exemption – ACER Decision No. 05/2018 – Assessment of risks –
Application of national law)*

Case number	A-001-2018
Language of the case	English
Appellant	AQUIND Limited ('AQUIND') Represented by: Herbert Smith Freehills LLP
Defendant	Agency for the Cooperation of Energy Regulators ('the Agency') Represented by: Alberto Pototschnig, Director
Intervener	Commission de Régulation de l'Énergie Represented by: Charles Verhaeghe, Head of Electricity Transmission Department Application (On behalf of Defendant)
Application for	The grant of an exemption for the AQUIND Interconnector as requested originally in the exemption request submitted to the Agency for the Cooperation of Energy Regulators in procedure led to ACER Decision No. 05/2018 of 19 June 2018 on the exemption request for the AQUIND Interconnector

THE BOARD OF APPEAL

composed of Andris Piebalgs (Chairman), Mariusz Swora (Rapporteur), Walter Boltz, Yvonne Fredriksson, Nadia Horstmann, Michael Thomadakis (Members).

Registrar: Andras Szalay

gives the following

Decision

1. Background

Legal background

1. Regulation (EC) 714/2009¹ lays down conditions for access to the network for cross-border exchanges in electricity and also, under certain conditions, allows exemptions for new direct interconnectors from specific regulatory requirements.
2. Under Article 17 of Regulation (EC) 714/2009, regulatory authorities may, upon request, grant exemptions from the regulatory provisions on the use of congestion revenues, on unbundling, on third party access and on terms and conditions for connection and access, including tariffs, provided certain conditions are met.
3. According to Article 17(4) and (5) of Regulation (EC) 714/2009, the relevant regulatory authorities receiving a request for exemption should reach an agreement or take a decision within six months after the receipt of such request by the last regulatory authority.
4. In the event the regulatory authorities are not able to reach an agreement within the indicated period of time, the Agency becomes responsible for adopting the decision concerning the request for exemption.

¹ 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 1228/2000.

Facts giving rise to the dispute

5. On 17 May 2017, AQUIND Limited submitted a request for exemptions to the Commission de Régulation de l'Énergie ('CRE', national regulatory authority of the French Republic) as well as to the Office of Gas and Electricity Markets ('OFGEM', national regulatory authority of the United Kingdom).
6. On 16 November 2017, CRE issued its Deliberation No 2017-253 establishing guidelines for new interconnector projects with the United Kingdom and deciding to transfer the exemption request submitted by AQUIND to the Agency. On 29 November 2017 and 19 December 2017, the Agency received communications by CRE and by OFGEM, respectively, referring the exemption request of AQUIND to the Agency for decision, pursuant to Article 17(5) of Regulation (EC) 714/2009.
7. On 19 June 2018, the Agency reached its Decision No 05/2018 on the exemption request for the AQUIND interconnector ('Contested Decision'). The Contested Decision stipulated that the exemptions from Article 16(6) of Regulation (EC) No 714/2009 and from Articles 9, 32, 37(6) and 37(10) of Directive 2009/72/EC requested by AQUIND Limited are not granted.
8. On 26 June 2018, the non-confidential version of the Decision was published on the Agency's website (www.acer.europa.eu).

Procedure

9. On 17 August 2018, the Appellant filed an appeal with the Registry of the Board of Appeal asking the grant of an exemption for the AQUIND Interconnector as requested originally in the Exemption Request. The Appellant requested the Board of Appeal to hold an oral hearing. The Appellant also claimed confidential treatment for certain documents or for parts of them.

10. The appeal was registered under A-001-2018. The announcement of appeal, along with the schedule of the potential days for oral hearing, was published on the website of the Agency on 20 August 2018.
11. The Defendant was notified of the appeal on 20 August 2018.
12. The Appellant amended its claim for confidential treatment for certain documents or for parts of them on 24 August 2018.
13. The Chairman of the Board of Appeal decided to grant all confidentiality claims in its decision launched on 27 August 2018.
14. The Chairman of the Board of Appeal notified the Parties of the composition of the Board on 29 August 2018.
15. On 29 August 2018, CRE submitted an application for intervention, and its annexes, on behalf of the Defendant. Within the deadline provided, on 5 September 2018 the Appellant sent its observations about the application requesting the Board of Appeal to dismiss it.
16. On 9 September 2018, the Appellant specified its request for oral hearing and named five witnesses to be heard by the Board of Appeal. The Board of Appeal, in accordance with the relevant legal provisions², granted the Appellant's request for oral hearing and on 10 September 2018 summoned through the Registrar the Parties as well as the witnesses to a hearing of 26 September 2018.
17. The Defendant submitted its defence on 10 September 2018 to the Registry.
18. On 12 September 2018, the Board of Appeal decided to leave the applicant to intervene on behalf of the Defendant. The Registrar provided accordingly the Intervener with access to the non-confidential documents of the case. The Intervener did not file a second submission with the Registry.

² Article 19(4) of Regulation (EC) 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators

19. On 17 September 2018, the Appellant filed a reply ('Joinder') to the Defendant's defence paper. The Appellant attached a study on merchant investments in interconnections as an annex to its joinder.
20. On 25 September 2018, the Defendant submitted its rejoinder to the Registry.
21. On 25 September 2018, the Chairman of the Board of Appeal notified the Parties that the written procedure is closed.
22. On 26 September 2018, the Board of Appeal held an oral hearing where the five expert-witnesses proposed by the Appellant, as well as the Parties, were heard.
23. The Registrar sent the minutes of the hearing to the Parties on 3 October 2018. The Appellant requested on 9 October 2018 amendments and rectifications in the minutes, which were partially granted and the amended and rectified minutes were sent to the Parties on 12 October 2018.

Main arguments of the Parties

24. The Appellant challenges the Agency's finding that AQUIND did not meet the condition of Article 17(1)(b) of Regulation (EC) 714/2009 by referring to violations of procedural rules and fundamental procedural guarantees, manifest errors of assessment and errors in law. The Appellant argues that the Agency: (i) incorrectly asserted that the relevant risk can only be properly assessed where an application under Regulation (EU) 347/2013³, was made and rejected; (ii) incorrectly held that an 'exceptional' level of risk is required for an exemption to be granted; (iii) neglected to take into account legal restrictions in France that render the investment impossible without an exemption; (iv) failed to take into account the impact of the level of risk on AQUIND's ability to secure the necessary investment and financing, and incorrectly assessed several types of risks; (v) failed to take into account the cumulative impact of the several types of risks; (vi) failed to communicate all relevant details to the Board of Regulators; (vii) infringed the principle of good administration; (viii) failed to properly assess and weigh certain

³ 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.

evidence; (ix) failed to follow established precedent; and (x) incorrectly asserted that the Agency has discretion when assessing a request for exemption.

25. The Defendant indicated that, in order to properly and impartially assess whether the risk requirement of Article 17(1)(b) of Regulation (EC) 714/2009 is fulfilled, it was necessary, in this case, for the project promoter to demonstrate that the project could not take place under a regulated regime, considering all features applicable thereunder (including risk mitigation measures and support and incentive schemes provided for in Regulation (EU) 347/2013). Therefore, the Defendant indicated that it had not been able to identify, with the required certainty, a level of risks for the AQUIND interconnector such that the investment in the project would not take place unless the requested exemption was granted. In other words, it concluded that it could only correctly have assessed the level of risk relevant for an exemption under Article 17(1)(b) of Regulation (EC) 714/2009 where an application under Article 12 of Regulation (EU) 347/2013 had been made and decided; and also that it (i) had not assumed that an exceptional risk is required for an exemption to be granted; (ii) had not failed to consider the alleged illegality of operation and maintenance of the AQUIND Interconnector in France; (iii) had not failed to consider the impact of risks on the ability of AQUIND to secure debt finance and equity investment; (iv) had not failed to take into account the cumulative impact of risks attached to the AQUIND Interconnector; (v) had communicated all relevant details to the Board of Regulators; (vi) had made a diligent and impartial examination in accordance with the principle of good administration; (vii) had not overly relied on some evidences; (viii) had not failed to follow established precedent; and (ix) enjoys discretion when assessing a request for exemption.

II. Admissibility

Admissibility of the appeal

Ratione temporis

26. Article 19(2) of Regulation (EC) 713/2009⁴ provides that “[t]he appeal, together with the statement of grounds, shall be filed in writing at the Agency within two months of

⁴ Regulation (EC) 713/2009 of the European Parliament and of Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

the day of notification of the decision to the person concerned, or, in the absence thereof, within two months of the day on which the Agency published its decision.”

27. The appeal was submitted on 17 August 2018, challenging ACER Decision No 05/2018, which was serviced to the Appellant on 19 June 2018.
28. The appeal was received by the Registry in writing, by e-mail, and it contained the statement of grounds.
29. Therefore, the appeal is admissible *ratione temporis*.

Ratione materiae

30. Article 19(1) of Regulation (EC) 713/2009 provides that decisions referred to in Article 7, 8 and 9 of this Regulation may be appealed before the Board of Appeal.
31. The Contested Decision was issued on the basis of Article 9(1) of Regulation (EC) 713/2009, which is explicitly mentioned in its introductory part.
32. Therefore, since the appeal fulfils the criterion of Article 19(1) of Regulation (EC) 713/2009, the appeal is admissible *ratione materiae*.

Ratione personae

33. Article 19(1) of Regulation (EC) 713/2009 provides that “*any natural or legal person, including national regulatory authorities, may appeal against certain a decision referred to in Articles 7, 8 or 9 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.*”
34. In accordance with Article 2 of the Contested Decision, the Appellant is the addressee of the Decision.
35. The appeal is therefore admissible *ratione personae*.

Admissibility of other submissions

36. As stated in paragraph 19 of this Decision, the Appellant submitted, enclosed to its reply to the Defence a study on merchant investments.
37. Article 16(1) of the Rules of Procedure of the Board of Appeal reads that no further evidence may be introduced after the first exchange of written pleadings unless the Board of Appeal decides that the delay in offering the evidence is duly justified.
38. The Appellant did not provide the Board of Appeal with such due justification concerning the delay in offering this evidence.
39. Therefore, the Board of Appeal found Annex 1 of the Appellant's Joinder (pages 14-19) inadmissible.

III. Merits

Remedy sought by the Appellant

40. The Appellant asked the Board of Appeal to grant an exemption for the AQUIND Interconnector, as requested originally in the exemption request (AQUIND's Appeal, para 198).
41. According to Article 19(5) of Regulation (EC) 713/2009, the Board of Appeal may, in accordance with this Article, exercise any power which lies within the competence of the Agency, or it may remit the case to the competent body of the Agency.
42. With regard to the remedy sought by the Appellant, requesting only the replacement of the Contested Decision and not to remit the case to the Agency, the Board of Appeal had to assess, first, whether or not the remedy sought would restrict the scope of the further examination of the case as well as the potential final decisions of the Board.
43. It has to be noted that the appeal procedure in front of the Board of Appeal, in accordance with Recital (19) of Regulation (EC) 713/2009, is created as to be based on "*reasons of procedural economy*". Article 19(5) of Regulation (EC) 713/2009 provides that the Board of Appeal may exercise any power which lies within the competence of the

Agency or may remit the case to the Agency. Therefore, the last sentence of Article 19(2) of Regulation (EC) 713/2009, according to which the Board of Appeal shall decide upon the appeal within two months, must be interpreted through the abovementioned principle as well as through the power vested in the Board of Appeal by the Regulation.

Pleas and arguments of the Parties

The Agency's discretion when assessing a request for exemption and the exceptional nature of exemptions

44. The Board of Appeal considers appropriate to briefly analyse, in the first place, the Appellant's claim, made particularly in its last plea, that the Agency has no discretion when assessing a request for exemption as, according to the Appellant, an interconnector is entitled to be exempted if the criteria of Article 17 of Regulation (EC) 714/2009 are met (paras 196-197 of the Appeal).
45. The Board of Appeal finds that the literal element, in this case, must be given due consideration. Article 17 of Regulation (EC) 714/2009 provides that new interconnectors 'may' be exempted, not that they 'will' be exempted when certain requisites are met.
46. As it has been confirmed by the General Court, an agency can have "*a broad discretion in a sphere which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments*" (Case T-96/10 *Rütgers Germany e.a. v. ECHA* EU:T:2013:109). The Board of Appeal finds that, when taking decisions in the specific case of exemptions, the Agency may, for example, take into consideration wider policy goals, such as security of supply, diversification or elimination of energy islands. It must be observed though, that in, the case under consideration, the Agency did not base its decision to refuse the exemption on political or social considerations, but on a finding that the conditions stipulated in Article 17(1)(b) of Regulation (EC) 714/2009 were not met.
47. Even if the wording of Article 17 of Regulation (EC) 714/2009 were not to grant discretion to the Agency, *quod non*, the assessment provided for in Article 17 of

Regulation (EC) 714/2009 constitutes, in any event, a complex assessment which confers discretionary power to the Agency (see, by analogy, the Board of Appeal decision of 17 March 2017, Case A-001-2017).

48. In this regard, and in addition to the discretionary powers of the Agency to grant an exemption, considering the boundaries set by Article 17 of Regulation (EC) 714/2009, the Board of Appeal finds that the system established for granting an exemption is an exception to the general rule and, as such, must be interpreted restrictively. Recital (23) expressly states that “[w]here direct current interconnectors are located in the territory of more than one Member State, the Agency should handle as a last resort the exemption request in order to take better account of its cross-border implications and to facilitate its administrative handling”.
49. This interpretation is confirmed by a reading of the *Travaux Préparatoires*, which state that the Council introduced “*the possibility of an exemption from third party access*”. A reference should also be made to Article 7 of the Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251(2) of the EC Treaty concerning the common position of the Council on the adoption of a European Parliament and Council Regulation on conditions for access to the network for cross-border exchanges in electricity⁵, which provides the “*possibility*” of exemptions for new interconnectors and states that “[t]he Commission feels that the strict limitative conditions, which the Council further elaborated, and the Commission scrutiny of any regulatory decision on an exemption should be sufficient guarantees to ensure that this possibility of exemption will only be used in cases in which it is absolutely necessary to safeguard an investment in the interest of the internal market and security of supply”.
50. In any event, the Contested Decision did not conclude to reject the exemption request on the grounds of the Agency’s discretion, as argued by the Appellant in its Appeal. In effect, the Agency did not reject the exemption notwithstanding the fact that AQUIND’s request complied with all the requisites established in Article 17(1) of Regulation (EC) 714/2009), but rejected the exemption for not meeting the conditions of Article 17(1)(b)

⁵ SEC/2003/0160 final - COD 2001/0078.

of Regulation (EC) 714/2009. Therefore, the last plea put forward by AQUIND is unfounded.

The Board of Appeal's limited review of ACER's complex, technical assessment

51. According to settled case-law of the Court of Justice of the European Union ('CJEU') (Case C-12/03 P *Commission v Tetra Laval* EU:C:2005:87, para. 39; Case T-201/04 *Microsoft v Commission* EU:T:2007:289, para. 89; Case T-301/04 *Clearstream v Commission* EU:T:2009:317, para. 95; Case T-398/07 *Spain v Commission* EU:T:2012:173, para. 62; Case C-452/10 *BNP Paribas v Commission* EU:C:2012:366, para. 103; Case T-29/10 *Netherlands et al v Commission*, para. 103; Case T-68/89 *Società Italiana Vetro v Commission* EU:T:1992:38, para. 160), when complex economic and technical issues are involved, the appraisal of the facts is subject to more limited review upon appeal.
52. The Board of Appeal considers, in line with its position in Case A-001-2017, that, in the limited timeframe it is given to decide on the appeal of the Contested Decision, considering the principle of procedural economy, and with regard to the complex economic and technical issues involved, it is not able to, and should not, carry out its own complete assessment on each of the requisites foreseen in Article 17(1) of Regulation (EC) 714/2009. Instead, it must limit itself to decide whether the Defendant made a manifest error of assessment. As explained above, the Board of Appeal considers that the Agency should be granted a certain margin of discretion when deciding about exemption.

Burden of proof

53. Although the burden of the proof is analysed in the following sections of this Decision, when relevant, the Board of Appeal underlines, from the outset, that, in the context of an appeal such as the one at hand, an appeal against or request for annulment of the Agency's Decision necessarily rests on an adversarial logic. The Appellant argues that the Agency failed to meet some of its legal obligations and misinterpreted the law in some regards or misapplied it to the facts. It also argues that it is entitled to an exemption. It is therefore expectable, under general principles of law, that the Appellant shows that the requisites for the benefit of the exemption are met. It is also a general principle of law, accepted as such by the CJEU for the EU legal order (see, e.g., Case C-247/11 P

Areva EU:C:2014:257, paras 79-80; and Case T-208/13 *Portugal Telecom* EU:T:2016:368, para 192), that the distribution of the burden of proof should not result in the imposition of a *probatio diabolica*, as is typically the case when someone is required to prove that something did not happen. While the Agency can and should show that, based on the arguments and evidence put forward by AQUIND, the legal standard for the granting of the exemption has not been met, it cannot be required to show that this standard could never be met in the present case. To do that, the Agency would have to consider, on its own initiative or *de proprio motu*, all possible lines of arguing and to collect evidence and conduct studies of its own, a task which is beyond the scope of its regulatory powers and, in any event, not demandable of an administrative body asked by an undertaking to grant it a benefit that the undertaking argues it is entitled to.

First plea – Incorrect reliance on the cost allocation procedure under Regulation (EU) No. 347/2013 and failure to follow established precedents

54. The Appellant argues, in essence, that the Agency made an error in law by relying on the possibility of an application for a cross-border cost allocation procedure under Article 12 of Regulation (EU) 347/2013, in view of the fact that the Appellant’s project had obtained PCI status, in order to find that requirement of Article 17(1)(b) of Regulation (EC) 714/2009 was not met. It argues that the Agency took an unprecedented position, which implied that there is a relation of hierarchy between Article 17(1) of Regulation (EC) 714/2009 and Article 12 of Regulation (EU) 347/2013 (AQUIND’s Appeal, paras 97-116).
55. As a preliminary point, the discussion on the correct interpretation of EU Law and the discussion on the failure to follow established precedents are two different discussions that have to be distinguished.
56. A correct interpretation of EU law requires a joint reading of both Regulation (EC) 714/2009 and Regulation (EU) 347/2013. The rationale of these regulations is that the regulated model is the rule within the Third Energy Package. This rationale is clear from Recital (38) of Regulation (EU) 347/2013: “*the existing internal energy market law requires that tariffs for access to gas and electricity networks provide appropriate*

incentives for investment. When applying the internal energy market law, national regulatory authorities should ensure a stable and predictable regulatory framework with incentives for projects of common interest, including long-term incentives that are commensurate with the level of specific risk of the project. This applies in particular to innovative transmission technologies for electricity allowing for large scale integration of renewable energy, of distributed energy resources or of demand response in interconnected networks, and to gas transmission infrastructure offering advanced capacity or additional flexibility to the market to allow for short-term trading or back-up supply in case of supply disruptions”.

57. The Third Energy Package considers financing solutions within the regulated model as the rule but provides, at the same time, for exemptions of the regulated model. It cannot be left up to undertakings to choose between the financing options within the regulated model and the financing available under the exemption model, the latter freeing them from regulatory obligations. The EU legal order gives preference to the regulated model and it is up to the regulators to assess whether no option within the regulated model is viable. This is the exception and must be interpreted restrictively. Recital (23) of Regulation (EC) 714/2009 expressly states *“the Agency should handle as a last resort the exemption request in order to take better account of its cross-border implications and to facilitate its administrative handling”*. Therefore, the legal requisite can only be met if the project would not be able to go forward without the exemption, alternatives having been excluded.

58. In line with the above, article 12 of Regulation (EU) 347/2013 is a valid legal norm and provides a basis for the inclusion of project promoters with different characteristics (incumbents, non-incumbents). And the Agency, as a regulatory watchdog of the electricity market in the EU, is entrusted with fostering the regulatory regime in line with the Third Energy Package.

59. There is no ‘hierarchy’ between Regulation (EC) 714/2009 and Regulation (EU) 347/2013, as the Appellant suggests (AQUIND’s Appeal, para 108), these Regulations are linked. Indeed, Regulation (EU) 347/2013 is entitled *“Regulation no 347/2013 of the European Parliament and 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". Regulation (EU) 347/2013 was meant to amend Regulation (EC) 714/2009, as stated in its Article 21 "*Amendments to Regulation (EC) No 714/2009*". Regulation (EU) 347/2013 clearly states, in its Article 12(9), that investments with cross-border impacts cannot be applied to PCI projects that are exempted under Regulation (EC) 714/2009. Similarly, Article 13 of Regulation (EU) 347/2013 provides incentives in accordance with Article 37(8) of Directive 2009/72/EC⁶ or Article 14 of Regulation (EC) 714/2009, except when the PCI project has received an exemption under Regulation (EC) 714/2009. Moreover, PCI investments with cross-border cost allocation are explicitly linked to Directive 2009/72/EC: its Article 12(5) states that NRAs need to take into account the actual costs incurred by the project promoter as a result of the investments when fixing or approving tariffs in accordance with Article 37(1)(a) of Directive 2009/72/EC, insofar as these costs correspond to those of an efficient and structurally comparable operator. The latter invalidates the Appellant's arguments on the difference in return or interest rates between AQUIND and TSO-developed projects (para 114 of the Appeal). Indeed, NRAs take account of structural differences when considering the actual costs of the investment for the purpose of tariff inclusion of PCI projects.

60. The combined application of two Regulations, whereby one partially amends the other, is legally valid. The Appellant's argument invoking an illegal 'hierarchy' is unfounded.

61. Furthermore, the Appellant's argument that the Contested Decision could not apply Regulation (EU) 347/2013 'retrospectively' is unfounded. Both Regulation (EC) 714/2009 and Regulation (EU) 347/2013 were directly applicable at the time of the Appellant's request for an exemption in May 2017 (paras 110 and 111 of the Appeal). In addition, given the case-by-case approach of exemptions provided by Article 17(4) of Regulation (EC) 714/2009, the legitimate expectations invoked by the Appellant are unfounded (para 112 of the Appeal).

62. Although the Board of Appeal is not dependent on, or subject to, the legal views of the European Commission when performing its functions in the present case, it observes

⁶ Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC

that the European Commission's expert who took part in the oral hearing of 26 September 2018 did not identify the Agency's interpretation as an error in law, notwithstanding the fact that the European Commission's Exemption Decisions do not expressly refer to Regulation (EU) 347/2013⁷.

63. Regarding the failure to follow established precedents, the Board of Appeal highlights that exemptions are granted on a case-by-case basis, as foreseen by Article 17(4) of Regulation (EC) 714/2009. General conclusions should not be inferred from the Contested Decision. The Contested Decision exclusively assesses the Appellant's project. In doing so, it takes account of the particularities and circumstances of the Appellant's case and, especially, of the fact that the Appellant belongs to a cluster of potentially competing PCIs on the France-UK border. The Board notes that the case-specific nature of Exemption Decisions is acknowledged by the Appellant in its Appeal ("*each exemption decision must therefore be made on the facts of the particular project*", AQUIND's Appeal, para 147).
64. The Appeal argues, however, that the Agency interpreted the applicable law differently from the manner in which it has been interpreted so far by the European Commission and by NRAs. First, this plea must be dismissed because the number of granted or rejected exemptions is irrelevant to the legal criteria applied and inconclusive on the application of those legal criteria to the case at hand. Second, as a matter of law, there is no legal obligation upon the Agency to interpret the law in accordance with the interpretation adopted in previous cases by the European Commission and NRAs. The interpretations of EU law adopted by a national administrative authority can obviously not be binding upon an agency of the EU. It is also not for the Commission to authoritatively interpret EU law. There is also no legally binding 'custom' which can be invoked in this context, nor has the Appellant argued for the presence of *opinio iuris*. Only previous interpretations of the law by the CJEU could be considered binding upon the Agency, not because of a 'rule of precedent', technically speaking, but because of

⁷ Except for Decision of 25/7/2018 on the Interconnector Greece-Bulgaria C(2018)5058, which states that "*(112) Even though the project is recognised as a PCI, this does not entail a guarantee that the return on investment expected by the shareholders could be fully achieved under the regulated regime*". A close reading of this Decision shows that the applicant therein substantiated with sufficient proof that the return on investment expected by the shareholders could not be fully achieved under the regulated regime, showing that, in the absence of an exemption, capacity could be allocated for up to 15 years, i.e. a 40% shorter contractual guarantee than with the contracts concluded based on the market test with a 25 years' duration.

the principle of sincere cooperation between the institutions of the EU. In adopting the Contested Decision, the Agency did not disobey the rule of law; it interpreted EU Law in accordance with the general principles of EU Law and clarifications of EU Law provided by the CJEU.

65. The Appeal expressly highlights two cases, without establishing the similarity between the cases. Nor does it identify the *ratio decidendi* which the Contested Decision allegedly failed to follow in denying the requested exemption with the proposed conditions. As it is clear from the letter and spirit of Article 17(4) of Regulation (EC) 714/2009, each case must be assessed on its own merits, and exemptions cannot be based on anything else but their justification in the specific case. In other words, even if there were a legally binding precedent in the sense suggested by the Appellant, the Appeal would still have to show that the proposed conditions would have been enough to justify their acceptance. The Appellant failed to do so. More importantly, such a demonstration could only be possible after AQUIND had demonstrated that it was entitled to an exemption at all, i.e., that the project would not be viable without it, a matter which has already been the subject of analysis in preceding points.
66. With respect to the Appellant's reliance upon the ElecLink Exemption Decision in its Joinder (chapter D), the Contested Decision sufficiently reasoned that ElecLink's particularities – i.e. complexities linked to building an interconnector via the Channel tunnel and railway infrastructure (safety, access rights, interaction of electro-magnetic fields or heat generation with other equipment, etc.) – undermines any comparison with the Appellant's project. Taking this into account, the Board of Appeal was also unpersuaded by the testimonies of witnesses called by Appellant, in this regard, finding them too general and not precise enough to prove the opposite. The European Commission's very Exemption Decision qualifies ElecLink as a "*first of a kind*" project (para 82). The Board observes that there are other projects under construction (IFA2) or under development (FAB and Gridlink) on the France-UK border that also enjoy PCI status but did not request an exemption under Article 17(1)(b) of Regulation (EC) 714/2009.
67. Finally, the Board underlines that the Appellant did not meet its burden of proof, as it did not demonstrate that the regulatory regime according to Regulation (EU) 347/2013

would not have been sufficient to make the investment and that, hence, no investment would have been made without an exemption under Article 17 of Regulation (EC) 714/2009.

68. In view of the above, the Board of Appeal finds that the Agency did not err in law when assessing the Appellant's request for an exemption, and that it correctly took account of Regulation (EU) 347/2013 when carrying out this assessment, without incurring in a failure to follow established precedents.

Second plea – Incorrect assessment of an exceptional level of risk

69. The Appellant argues that the Agency committed manifest errors of assessment (AQUIND's Appeal, para 90), applying a wrong test in its evaluation of the AQUIND Interconnector *"by assessing the project risks against an expected 'exceptional' risk profile rather than against the criteria required pursuant to Article 17(1)(b) of the Electricity Regulation"* (AQUIND's Appeal, para 120).

70. Upon an analysis of section 6.6 of the Contested Decision, the Board of Appeal does not find any factor or reasoning that supports the idea that the Agency moved away from applying Article 17(1)(b) of Regulation (EC) 714/2009 in the sense of assessing whether the level of risk was such that the investment would not take place without the exemption. In this regard, the Agency neither said that an exceptional level of risk is required for an exemption to be granted, nor did it adopt a line of reasoning following that approach. On the contrary, the Agency summarised the risks identified by AQUIND and conducted its assessment taking into account the test foreseen in Article 17(1)(b) of Regulation (EC) 714/2009.

71. The assessment of the Agency using the "no investment if no exemption"-test it is not called into question by the two specific statements included in the Contested Decision on which AQUIND supports its argument. The first statement is that the introductory section of the Contested Decision refers to Recital (23) of Regulation (EC) 714/2009 according to which "the exceptional risk profile" of "exempt major infrastructure projects" meeting the "no investment if no exemption-test" should benefit from derogation from full unbundling rules. The Board of Appeal finds that the Agency

merely reiterated the obvious meaning of that Recital (23). The second statement is that the Contested Decision refers to the policy and macroeconomic risks in the context of this type of projects (paras 158 and 159 of the Contested Decision), which, in the opinion of the Appellant, suggests that the Agency requires a unique risk not commonly seen in this type of infrastructures. The Board of Appeal considers that the main purpose of the Contested Decision in this respect is to assess whether the policy and macroeconomic risks pointed out by AQUIND impede the investment in the absence of an exemption and that the test applied in the Contested Decision is in line with what is established in Article 17(1)(b) of Regulation (EC) 714/2009.

72. AQUIND argues that exceptional risks are inherent to major transmission infrastructure projects. This argument must be dismissed because it would render the risk assessment under Article 17(1)(b) of Regulation (EC) 714/2009 redundant and would deprive the provision of its *effet utile*. It would lead to a situation where projects would have to be automatically exempted if they related to transmission infrastructure and were considered ‘major’.

73. The regime foreseen in Article 17 of Regulation (EC) 714/2009 is an exemption to the regulated regime and, as an exception, it must be interpreted restrictively. It is from that restrictive perspective that the risks associated with AQUIND’s Interconnector must be analysed by the Agency, taking into account AQUIND’s burden of proof. From this perspective, the Contested Decision adequately assessed whether a regulated regime was available for AQUIND’s Interconnector, as well as all risks related to the PCI status of the project, the risks related to the size of the infrastructure, the revenue risks, the development and construction risks, etc. The latter risks were adequately analysed in a situation in which a regulated regime might have been available and on the basis of the evidence provided by AQUIND.

74. In view of the above, the Board of Appeal finds that the Agency did not err in law when assessing the Appellant’s request for an exemption and that it correctly assessed the level of risk required by Article 17(1)(b) of Regulation (EC) 714/2009.

Third plea – Incorrect assessment of the legal restrictions in France

75. The Appellant argues that the Agency committed an error in law, or a manifest error of assessment, by failing to duly consider the illegality of operation and maintenance of the AQUIND interconnector in France. In the Appellant’s view, certain rules of French law mean that the AQUIND interconnector can only be authorised in France if an exemption is granted. It argues that this should have led the Agency to grant an exemption in this case.
76. The Contested Decision acknowledged this argument (para. 132) and dismissed it, stating that Regulation (EU) 347/2013 “[i]s directly and immediately applicable and that under Article 12(4) of that Regulation, if an investment request is submitted, the regulatory authorities, within six months of the submission, shall take coordinated decisions on the allocation of investment costs to be borne by each system operator for the project, as well as their inclusion in tariffs. Therefore, no risks related to a delay of regulatory decisions pursuant to Article 12(4) of Regulation (EU) No 347/2013 (or, if required, by Article 12(6) thereof) are evident based on the information available at this stage” (para 160).
77. First, the Appellant’s plea was, seemingly, at least originally, based on the assumption that French law contravenes the Third Energy Package. The Board of Appeal observes that the European Commission has sent a reasoned opinion to France in relation to an alleged monopoly restricting access in France, contravening the Third Energy Package.
78. The Board of Appeal is not competent to assess the compatibility of French law with EU law. Nonetheless, such an assessment is not necessary in the present context. In the event that certain provisions of French law were to infringe the Third Energy Package, the principles of the primacy and effectiveness of EU law would prohibit national – administrative and judicial – authorities from deciding on the validity of EU law, and would require them not to apply infringing national provisions, and to ensure compliance with EU law, even if the infringement had not yet been declared by the CJEU (see: Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114, para 3; Case 314/85 *Foto-Frost* EU:C:1987:452, paras 11-16; Case 106/77 *Simmenthal* EU:C:1978:49, paras 17-18). The Agency cannot, and should not, reach a decision on

risks faced by AQUIND on the assumption that French authorities would fail to comply with their obligations arising from the EU legal order, and apply national provisions which contravene EU law. Therefore, if the French national rules the Appellant refers to were incompatible with EU Law, this would, in no way, imply a different outcome of the Contested Decision, as such provisions could not be applied by the French authorities.

79. Second, subsequently, AQUIND argued that the provisions in question of French law are compatible with EU Law, because “*there is no provision in EU legislation requiring independent operators to be entitled to benefit from regulated tariffs for the operation of interconnectors that they create*” (AQUIND’s Joinder, para 26). AQUIND thus argues that the Agency was obliged to grant the exemption because of a lawful option of the French legislator. This raises an issue of interpretation of EU Law, which can be addressed herein without assessing the compatibility of French law with EU law.

80. The interpretation of EU Law proposed by the Appellant in its Joinder cannot be accepted. AQUIND seems to be suggesting that EU Law requires Member States to allow ‘independent’ (non-TSO) operators, but only requires this if they benefit from the exemption foreseen in Article 17 of Regulation (EC) 714/2009. Since this exemption is an exception, and can only be provided when its requisites are met, AQUIND’s position creates an impossible logical paradox which it is trying to benefit from. On the one hand, EU law would require Member States to allow the existence of ‘independent’ operators, but only if they were exempt under Article 17 of Regulation (EC) 714/2009. On the other hand, if Member States chose not to allow independent operators to be entitled to benefit from regulated tariffs, then, automatically, independent operators would have to be granted an exemption under Article 17, since they would not be able to have access to the market of that Member State otherwise.

81. The Agency has rightfully pointed out this problem, when it stressed that “*if one were to follow AQUIND Ltd’s interpretation, this would effectively mean that Member States and their authorities could establish risks by national law and override Union law by national law*” (Agency’s Defence, para 31). Indeed, as the Agency elaborated on in para 12 of its Rejoinder, accepting AQUIND’s position would mean that the *ratio legis* of Article 17 of Regulation (EC) 714/2009, which is meant to limit situations of exemption

to cases when certain requisites laid out therein are met, could easily be circumvented by the law of any given Member State, which refused to allow access to the regulated model for independent operators.

82. In light of the above, it cannot be held that EU law allows Member States to adopt national rules which deprive Article 17(1)(b) of Regulation (EC) 714/2009 of its *effet utile*, creating situations where the Agency would be obliged to grant exemptions, even if the investment were possible otherwise, simply because of an option of the national legislator (see AQUIND's Joinder, para 28).

83. Third, even if it were considered, *ad arguendum*, that the French legal provisions in question were lawful and would be applied in this case, the Appellant's argument rests on the assumption that the legal barriers it identifies should be considered 'risks' for the purposes of Article 17(1)(b) of Regulation (EC) 714/2009. However, the Appellant has not identified a 'risk', in the sense of a possibility/probability that an event will happen. It has identified a certainty, a legal obstacle which guarantees that an event will (not) happen (AQUIND's Appeal, para 125). The aim of Article 17 is not to remove 'legal barriers', but rather to mitigate relevant risks. Furthermore, if such national legal barriers were lawful, it would not be the Agency's role to act in such a way which would result, in practice, in the circumvention of those barriers.

84. The Board of Appeal remained cautious when assessing testimonies of witnesses, as the facts and circumstances regarding to which their hearing was requested were already presented in a detailed way by the Parties, and, in particular, by the Appellant. In general, the Board of Appeal does not rely on witness testimonies when it comes to the law and its interpretation. Indeed, it is the duty and privilege of the Board of Appeal to interpret and to apply the law, so it cannot be bound by any testimonies in this regard. Nonetheless, the Board of Appeal noted that most of the witnesses perceived the legal regulations in France as an objective barrier or legal monopoly. For example, according to Mr. Pierre Bernard: '*French law, and the public concession granted to RTE, restricts the development, the operation etc. of the grid to a TSO except for a case where an exemption is granted. Without an exemption, a company like AQUIND, a TPP cannot legally operate the grid.*'⁸ According to another witness, Mr. Mark Copley, and despite

⁸ Minutes of the oral hearing.

his verbal reference to risks, it has to be noticed that, in his testimony, he referred rather to legal barrier or legal monopoly, noticing that *‘if the investor is not the RTE, it cannot develop a project in France’*⁹. A similar perception of the legal regime in France may be found in the testimony of Sir Philip Lowe. Consequently, the Board of Appeal found that these witnesses confirmed that the perception of the legal regime in France is that it creates objective legal barriers in a form of legal monopoly, rather than risks.

85. Fourth, further in the same hypothetical scenario, the Appellant’s argument also rests on the assumption that this specific type of legal ‘risk’ (if it could be considered such) fits into the type of risks which can be considered under Article 17(1)(b) of Regulation (EC) 714/2009. In this regard, the Agency stated it believes the *“risk which the AQUIND Interconnector may face from the application of a requirement under the French law is not a risk which is related to the application of Article 16(6) of Regulation (EC) No 714/2009 or Articles 9, 32 and 37(6) and (10) of Directive 2009/72/EC. Therefore, such risk is not relevant for the purpose of Article 17(1)(b) of Regulation (EC) No 714/2009 and cannot justify the exemption from Union law provisions”* (Agency’s Defence, para 30).

86. The Board of Appeal agrees with the Agency’s assessment. Article 17(1)(b) must be interpreted in its context and taking into account its *ratio legis*. Article 17 of Regulation (EC) 714/2009 is meant to allow exempting projects from specific obligations included in the provisions of EU law named therein. These obligations relate to use of revenues resulting from allocation of interconnection, unbundling of transmission systems and transmission system operators, third party access, and imposition of certain regulatory obligations concerning methodologies and terms and conditions (regarding connection, access and balancing services). It follows that there must be a clear and direct link between the risks deemed relevant under Article 17(1)(b) and the remedies which are available under Article 17. Otherwise, the provision could be used to grant an exemption from obligations which are irrelevant to the risks which justified such an exemption. The risks in question must, therefore, primarily, be market or financial related risks, and do not, in any case, include ‘risks’ (barriers) such as the ones arising from the French legal provisions in question. The fact that French law would prevent AQUIND from having

⁹ Minutes of the oral hearing.

access to the market is not one of the potential problems faced by investors which the EU legislator had in mind when adopting this exemption mechanism, and using it to get around any such national restrictions would distort its intent and purpose.

87. The Appellant's argument that prior administrative practice, of NRAs and of the European Commission, has never suggested that there is any limitation to the type of risks that can be considered (AQUIND's Joinder, para 22) is not relevant. Such an argument has no impact on the correct interpretation of EU law, as discussed above. And, again, it rests on the assumption that such precedents (assuming they were as described), are binding upon the Agency when adopting the Contested Decision, which they are not.

88. In view of the above, the Board of Appeals finds that the Agency did not err in law or commit manifest errors of assessment in its assessment of legal restrictions in France.

Fourth plea – Incorrect assessment of the ability to secure equity investment and non-recourse project finance

89. The Appellant claims that it cannot attract debt and equity investment in the absence of an exemption (AQUIND Appeal, para 173). The Appeal invokes the relevance of the risk of securing funding (paras 129-130), argues that the Agency made a manifest error in its assessment of the risks attached to the AQUIND interconnector (paras 131-133), proceeds to expand on revenue certainty required to achieve project financing and equity investment (paras 133-137), argues that the Agency failed to duly take account of (i) the risks associated with the size of the AQUIND interconnector (paras 138-140), (ii) the policy and macroeconomic risks (paras 141-153), (iii) the development and construction risks (paras 154-156), (iv) the legal regime in France (paras 157-161), (v) the risks related to the regulated regime (paras 162-170) and (vi) project finance considerations (paras 171-172).

90. The Appeal states that the regulated regime is insufficient with regard to a specific group of investors, i.e. equity investors and non-recourse project finance (paras 129-133 and 137 of the Appeal). These investors are typically interested in financing an exempted project and willing to take higher risks for higher returns. Yet the burden of proof is on

the Appellant and, in order to demonstrate that the investment would not have been made in the absence of an exemption, the Appellant should have provided evidence that no investor (i.e. any type of investor) would have been attracted by the investment in the absence of an exemption. Applying a different legal test would mean allowing applicants for exemption to effectively circumvent the requirement of Article 17(b)(1) of Regulation (EC) 714/2009 by artificially limiting the universe of potential investors. Given that the Appellant failed to provide such evidence, the Decision correctly applies the test of Article 17(1)(b) of Regulation (EC) 714/2009. Indeed, there may be investors interested in financing a regulated project, which provides a lower return in exchange of the risk mitigating impact of the financial underpinning through tariffs. If so, the investment could still take place, absent an exemption.

91. Moreover, the Appellant's arguments on equity investment and project finance are in contrast with a climate where investments in comparable investments in interconnections on the France-Great Britain border seem to flourish. The Contested Decision describes a market of 8 interconnectors on the Britain-France border - 1 existing (IFA), 2 under construction (IFA2 and ElecLink), 3 under development (Aquind, Fab and Gridlink) and 2 under consideration (ANAI and Britib) - irrespective of many other Britain-continent interconnectors (e.g. Moyle, BritNed, Nemo, etc.). The Board of Appel stresses that, of these 8 interconnectors, only 2 (IFA and ElecLink) have a merchant status, whereas all other interconnectors are subject to a regulated regime. In such a climate prone to investments, it is reasonable to expect that the regulated regime under Regulation (EU) 347/2013 allows a rate of return and a risk/reward balance which attracts sufficient investors so that the AQUIND Interconnector can be realised without an exemption. Again, the Appellant bears the burden of proof to demonstrate that in such climate prone to investments, no investor or an insufficient number of investors would be attracted by the regulated regime and the financing options available for the AQUIND project under such regime in the absence of an exemption.

92. On the specific risks invoked by AQUIND, it is observed as a general remark that all these risks need to be assessed without the exemption when applying the "no investment in the absence of an exemption"-test. Hence, it is not sufficient for the Appellant to adduce a large number of high risks. The test of Article 17 of Regulation (EC) 714/2009 requires the Appellant to actively demonstrate that the regulated framework does not

address the claimed risk in such a way that the investment would not be made in the absence of an exemption.

93. Turning to each of these risks, with regard to the risks associated with the size of the AQUIND interconnector, the Contested Decision correctly applies the “no investment in the absence of an exemption”-test. The Decision does not question the choice of size of AQUIND’s developer. Rather, the Contested Decision takes account of the fact that the AQUIND interconnector is part of a cluster of potentially competing PCIs on the France-UK border and assesses the combined size of all PCI-projects under development in this cluster.

94. The Decision also applies the “no investment in the absence of an exemption”-test when analysing the policy and macroeconomic risks. The Agency did not carry out a comparison between the policy and macroeconomic risks of the AQUIND project and the other PCI-projects under development on the France-UK border, but correctly evaluated the aggregate of all three projects under development in order to assess whether the investment in AQUIND would occur in the absence of an exemption. In doing so, the Decision respects the developers’ material and structural choices given that these choices translate into risks whose costs would be socialized through network charges. The Appellant did not demonstrate that the regulated framework does not address the claimed risk in such a way that the investment would not be made in the absence of an exemption.

95. One of the policy and macroeconomic risks raised by the Appellant is the risk associated to Brexit, and this was tackled by the Agency (Contested Decision, paras 158-159). In this regard, the Board of Appeal stresses again that the burden of proof lies with the Appellant, who needs to substantiate to which extent the Brexit-risk has the effect that the investment would not be made in the absence of an exemption. However, the Appellant does not substantiate to which extent the regulatory, policy and macroeconomic risks triggered by Brexit will render an investment unviable without an exemption. Moreover, in the cases of other infrastructural investments, their promoters seem to perceive Brexit rather as a business opportunity than risk. The Board of Appeal disregards arguments related to political aspects of Brexit as presented by the Intervener in its Intervention Application (point 3), also in the context of attached study (Appendix

3), which is based on unclear and arbitrary differentiation between ‘hard’ and ‘soft’ Brexit and its consequences. It must also be underlined that at the date of issuing decision none of investors in interconnectors between France and United Kingdom withdrew from the investment for reasons related either with risk or uncertainty.

96. In any event, due to the problem with measurability, inherently accompanying such type of risk, the Board considers that the Agency, when deciding about exemptions should take political risks into account (if ever)¹⁰ only for particularly justified reasons and with careful attention as administrative agencies generally do not have instruments precise enough to operationalize or measure such risks. Even though there are isolated examples of Exemption Decisions which took political risks into account (e.g. Nabucco and TAP in the gas sector or ElecLink’s prolongation in the electricity sector), as previously mentioned by the Board, from a strictly legal point of view, the Agency is not bound by these decisions and all exemption decisions are case-specific as foreseen by Article 17(4) of Regulation (EC) 714/2009. It must also be underlined that exemptions provided for in Article 17 of Regulation (EC) 714/2009 do not generally offer remedies aimed at overcoming political risks such as Brexit. In the present case, the Appellant did not show a credible concept of risks related to Brexit, especially in the area of cross-border trade of electricity. The Board does not deny that in the case of ‘no deal’ Brexit negative consequences may occur, but it cannot substitute Appellant in their presentation, taking into account mainly two factors. First, the Appellant did not show precisely possible negative consequences of ‘no deal’ (‘hard’) Brexit for its project, which should be a part of risk analysis. Second, the fact that the status of Brexit is not decided at the time of issuing decision and the Appellant did not show any credible prediction related to the possibility of ‘no deal’ Brexit to happen.

97. The Contested Decision takes account of the development and construction risks (outage, adverse weather or sea conditions, repercussion on subcontractors, etc.) to the extent that these risks are sufficiently proven. The Board finds that the Agency reasonably considered that the Appellant failed to sufficiently substantiate that the

¹⁰ See for example J.W. Yackee, *Political Risk and International Investment Law*, Duke Journal of Comparative & International Law Vol. 24, 2014, p. 198.

claimed development and construction risks by themselves or combined with other risks implied that no investment would have been made in the absence of an exemption.

98. Finally, on the risks related to the regulated regime (AQUIND's Appeal, paras 162-170), the Board considers that the Agency correctly applied the test foreseen by Article 17(1)(b) of Regulation (EC) 714/2009, given that the very Appeal highlights the benefits of a regulated regime, claiming in various instances that regulated interconnectors face no revenue risks and lower regulatory risks¹¹. The Board also considers that the Agency correctly applied the "no investment in the absence of an exemption"-test when assessing the structural differences between operators within the project finance considerations stated in the Appeal.

99. For these reasons, the Board of Appeal concludes that the Agency did not fail to adequately consider the impact of risks on the ability of the Appellant to secure debt finance and equity investment.

Fifth plea – Failure to take account of the cumulative impact of risks

100. The Appellant considers that the Agency committed an error in law when applying the test of Article 17(1)(b) of Regulation (EC) 714/2009 to individual factors, rather than considering the cumulative impact of the risks.

¹¹ [Confidential]

101. The Board finds that this plea ignores the main argument put forward by the Contested Decision on the availability of a regulatory route. Furthermore, the Board finds that the Agency analysed each type of risk identified by AQUIND in its application for an exemption and provided a reasoned assessment of each of these risks. The Appellant, on the contrary, did not make any reference in its application to a cumulative effect of the risks, and, even in the Appeal this argument is not supported by any evidence or substantiation allowing the Appellant to meet its burden of proof that a cumulative effect of the risks is present in this case to such an extent as to render the investment impossible without the exemption.

102. In view of the above, the Board of Appeal finds that the Agency did not fail to adequately take into consideration the cumulative impact of risks attached to AQUIND Interconnector.

Sixth plea – Failure to communicate all relevant information to the Board of Regulators

103. The Appellant argues that the Board of Regulators was not provided with all necessary information on its exemption request in order to be able to provide fully informed guidance to the Agency's Director for the purposes of the Contested Decision. In order to be relevant in the context of a request for annulment of the Contested Decision, this argument must be interpreted as meaning that the absence of the provision of the information referred to by the Appellant to the Board of Regulators constitutes an infringement of an essential procedural requirement.

104. When adopting an Exemption Decision provided for in Article 17(5) of Regulation (EC) 714/2009 and Article 9(1) of Regulation (EC) 713/2009, the Agency is required to obtain the prior Opinion of the Board of Regulators on the planned decision in accordance with Article 15(1) of Regulation (EC) 713/2009. This provision follows a typical pattern in EU Law of provisions which require the prior consultation of an advisory body before a given draft document can be adopted. Such consultation is always based on the draft document itself. Such advisory body is not an instance upon appeal. The Appellant's argument boils down to arguing that the advisory body must be provided with all (or most of) the information in the file leading up to the draft act, so that it is in possession of all information which may be deemed relevant. This is neither

the practice in the EU legal order, nor is it a reasonable requirement, in this specific case, for the following reasons.

105. First, Article 17 of Regulation (EC) 714/2009 does not require that exemption requests be sent to the Board of Regulators but to the Agency.

106. Second, Articles 15(1) and 17(3) of Regulation (EC) 713/2009 situate the Board of Regulator's function in the same decision-making process as the Agency's staff towards the adoption of the Exemption Decision. In other terms, the Board of Regulators is an advisory body within the Agency, which, building further upon the results of the proceedings by the Agency's staff, provides its Opinion to the Agency's Director from the angle of its sector-specific expertise, to enable the latter to take an informed Decision considering all angles. In doing so, the Agency's staff and the Board of Regulators do not have overlapping functions.

107. Third, the Appellant does not argue that the Contested Decision itself is insufficiently reasoned. If the Appellant does not challenge that the Contested Decision is sufficiently reasoned, it cannot argue that the Contested Decision did not provide the Board of Regulators with enough information to serve as the basis for its Opinion. In any case, it should be pointed out that the reasoning of the Contested Decision need not *“go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of the second paragraph of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question”*. The Agency *“cannot be required to provide an account that follows exhaustively and one by one all the lines of reasoning articulated by the parties before it”* (Case T-63/16 E-Control EU:T:2017:456, para 68 and 69).

108. Fourth, the Board of Regulators is entitled to ask the Agency for any additional documentation and information it deems useful to provide its Opinion. If it deemed it necessary, the Board of Regulators could have asked for a copy of the Appellant's request.

109. Fifth, the Minutes of the Board of Regulators' meetings do not contain any complaint on lack of available information on the case at issue.

110. Finally, the Appellant's criticism fails to take into account the institutional and practical reality of the Board of Regulators. This body includes representatives of the regulatory authorities, including the British and French NRAs which were well aware of all the details of this exemption request and had the opportunity to argue and inform their fellow members at the Board of Regulators – as indeed they did, as is shown by the Meeting Minutes –, including to point out any potential information gaps which might justify requesting additional documentation. At the oral hearing held in this case, Mr. Mark Copley confirmed that OFGEM voiced its disapproval with the Contested Decision at the Board of Regulators and had the opportunity to justify its position. The Board of Appeal also notes that the members of the Board of Regulators are also advised and informed by the staff of their respective NRAs, who take part in the Agency working groups where the matters to be decided by the Agency are discussed beforehand.

111. In conclusion, the Agency complied with its duties under Regulation (EC) 713/2009 to inform the Board of Regulators and obtain its Opinion prior to the adoption of the Contested Decision.

Seventh plea – Violation of the principle of good administration

112. In line with its previous arguments, analysed as the Sixth Plea, the Appellant also claims that the Agency failed to make a diligent and impartial examination as required by the EU principle of good administration. In particular, in the Appellant's view, this would be, as explained above, because the Board of Regulators only received a draft Decision. Therefore, in the Appellant's view, the Board of Regulators failed to make an impartial examination, as required by the EU principle of good administration. It claims that this, in turn, generated a violation of its right to be heard (AQUIND's Appeal, paras 182-188). The Appellant also alleges that its exemption request is the core document to be considered by the Board of Regulators.

113. The Charter of Fundamental Rights of the European Union codifies some of the fundamental rights governing EU procedural law and, in particular, Article 41 of the Charter establishes the right to good administration.

114. According to the Charter, the right to good administration requires that decisions be taken pursuant to procedures, which guarantee fairness, impartiality and timeliness. In other words, good administration creates a duty of care to respect the right of every person to have his or her affairs handled impartially, fairly and within a reasonable time. It obliges the administration to carefully establish and review all the relevant factual and legal elements of a case taking into account not only the administration's interests but also all other relevant interests, prior to making decisions or taking other steps (see Opinion of AG van Gerven in Case C-16/90 Eugen Nölle EU:C:1991:402; and Case C-269/90 TU München EU:C:1991:438).

115. The Board finds that the Agency correctly followed ACER's procedural rules in the proceedings related to the Contested Decision. As set out in the Sixth Plea, the Agency's staff and the Board of Regulators do not have overlapping functions. The principle of good administration does not require the Board of Regulators to reassess the application for an exemption *ab initio* or to replicate the functions and efforts of the Director and the Agency's staff. In this regard, Article 7.2 of the Rules of Procedure of the Board of Regulators of the Agency Ref: A10-BoR-01-03 04 May 2010 states that "*The BoR may provide Guidance principally on important or strategic issues within the competence of the BoR, avoiding duplicating any issues within the scope of the Agency acts (as defined in Article 4 of the Regulation 713/2009) formally requiring a favourable opinion of the BoR*". Furthermore, in light of the Board's functions, the core document for its consideration is not the exemption request, but the Director's draft decision.

116. The Appellant invokes case C-269/90 TU München EU:C:1991:438, and quotes para 14 of that judgment according to which: "*... where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present*".

117. However, that case is not applicable to the present analysis. Among other aspects, in that case “[t]he Commission has admitted that it has always followed the opinions of the group of experts because it has no other sources of information concerning the apparatus being considered”. And, second, the European Court also considered that “[...] in those circumstances, the group of experts cannot properly carry out its task unless it is composed of persons possessing the necessary technical knowledge in the various fields in which the scientific instruments concerned are used or the members of that group are advised by experts having that knowledge”. In the present case, by contrast, the functions of the Director of the Agency and of the Board of Regulators are clear and both the Agency and the Board of Regulators are correctly composed in terms of knowledge and expertise to carry out their tasks.

118. In view of the above, the Board of Appeal finds that the Agency complied with the EU principle of good administration in the proceedings related to the Appellant’s application for an exemption and did not fail to make a diligent and impartial examination within the time limits imposed by the Regulation.

Eighth plea – Overly relying on the observations of two academics

119. Finally, the Appellant considers that the Agency overly relied on the observations of Dr. Alexander Weber and Dr. Clemens Gerbaulet, received by the Agency as part of the observations following the Agency’s notice to third parties of 7 February 2018.

120. According to the Appeal, the studies of these scholars are specific to the Baltic region and have little in common with the situation faced by the AQUIND Interconnector. In the Appellant’s view, the relevant academic literature supports merchant interconnector investment and, to this end, the Appeal mentions examples of some academic articles.

121. The receipt of observations by Dr. Weber and Dr. Gerbaulet is merely mentioned in para 8 of the Contested Decision, when listing each of the 16 observations received by the Agency after publishing a notice to third parties (“and one (observation) from academic experts”). In addition, para 32 of the Contested Decision briefly summarises these academics’ observations in an anonymous manner in its Section 5 “Observations

and other information received by the Agency”, which summarizes all the observations received by the Agency.

122. The Board finds that the Contested Decision merely mentioned these scholars because the Agency received observations from them during the public consultation. The description of the observations submitted by these scholars is similar to that included for each and all the observations received by the Agency. The Agency has argued in this respect that the Contested Decision summarised all the observations received for reasons of transparency. Moreover, the Board observes that the Appellant was entitled to submit to the Agency any and all other academic studies it believed relevant for the assessment of its exemption request.

123. The existence of different views from the academic field, which are not in line with the Appellant’s interest, cannot switch the burden of proof from AQUIND to the Agency, especially given that the Contested Decision is not primarily based on any of the observations that were received.

124. The Board of Appeal finds, in this regard, that the Agency’s primary arguments for refusing the requested exemption are not based on references to the observations submitted by Dr. Weber and Dr. Gerbaulet.

DECISION

On those grounds,

THE BOARD OF APPEAL

hereby dismisses the appeal as unfounded.

This decision may be challenged pursuant to Article 263 of the Treaty on the Functioning of the European Union and Article 20 of Regulation (EC) 713/2009 within two months of its publication on the Agency website or of its notification to the Appellant as the case may be.

Andris Piebalgs

Chairman of the Board of Appeal

Andras Szalay

Registrar of the Board of Appeal