

DECISION OF THE BOARD OF APPEAL
OF THE EUROPEAN UNION AGENCY FOR THE COOPERATION OF ENERGY
REGULATORS

of 4 June 2021

*(Application for annulment – ACER Decision No. 05/2018 – BoA Decision A-001-2018– General
Court Judgment T-735/18 - Relaunched procedure)*

Case number	A-001-2018_R
Language of the case	English
Appellant	AQUIND Limited (“ AQUIND ”) Represented by S. GOLDBERG, Herbert Smith Freehills, LLP
Defendant	European Union Agency for the Cooperation of Energy Regulators (“ ACER ” or “ the Agency ”) Represented by C. ZINGLERSEN
Intervener	Commission de Régulation de l’Énergie (“ CRE ” or “ the Intervener ”) Represented by: J. CARENCO on behalf of Defendant
Application for	<ul style="list-style-type: none">• the grant of an exemption for the AQUIND Interconnector as requested originally in the exemption request submitted on 17 May 2017 (the ‘Exemption Request’) and forwarded by the National Regulatory Authorities (‘NRAs’) in the United Kingdom and France to the Agency in the procedure that led to ACER Decision No. 05/2018 of 19 June 2018 on the exemption request for the AQUIND Interconnector (‘ACER Decision 05/2018’); or• the remittal of the matter to the competent body of ACER with instructions to correct and amend ACER Decision 05/2018; or• the remittal of the matter to the competent body of ACER with clear instructions as to the facts to be established or verified before an exemption can be granted.
Relaunched procedure upon	Judgment T-735/18 (Aquind v ACER) of 18 November 2020 – annulment of Board of Appeal Decision A-001-2018 of 17 October 2018 dismissing the appeal against ACER Decision 05/2018 (“ Decision A-001-2018 ”).

THE BOARD OF APPEAL

composed of

A. PIEBALGS (Chairman), M. SWORA (Rapporteur), W. BOLTZ, Y. FREDRIKSSON, N.
HORSTMANN, M. THOMADAKIS (Members).

Deputy Registrar: S. VAONA

gives the following

DECISION

I. Legal background

1. Regulation (EC) 714/2009¹ laid down conditions for access to the network for cross-border exchanges in electricity and also allowed, under certain conditions, exemptions for new direct interconnectors from specific regulatory requirements.
2. Under Article 17 of Regulation (EC) 714/2009, NRAs could, upon request, grant exemptions to new direct interconnectors, for a limited period of time, 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 were met.

3. Article 17(1) of Regulation (EC) 714/2009 stated:

“New direct current interconnectors may, upon request, be exempted, for a limited period of time, from the provisions of Article 16(6) of this Regulation and Articles 9, 32 and Article 37(6) and (10) of Directive 2009/72/EC under the following conditions:

- (a) the investment must enhance competition in electricity supply;*
- (b) the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted;*
- (c) the interconnector must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that interconnector will be built;*
- (d) charges are levied on users of that interconnector;*
- (e) since the partial market opening referred to in Article 19 of Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity ⁽¹⁰⁾, no part of the capital or operating costs of the interconnector has been recovered from any component of charges made for the use of transmission or distribution systems linked by the interconnector; and*
- (f) the exemption must not be to the detriment of competition or the effective functioning of the internal market in electricity, or the efficient functioning of the regulated system to which the interconnector is linked.”*

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 1228/200.

4. According to Article 17(4) and (5) of Regulation (EC) 714/2009, the relevant NRAs receiving a request for the exemption of a new interconnector had to reach an agreement and take a decision within six months after the receipt of such request by the last NRA.
5. In the event that the NRAs were not able to reach an agreement within the indicated period of time, the Agency became responsible for adopting the decision concerning the request for the exemption of a new interconnector under Regulation (EC) 713/2009².
6. Regulation (EC) 714/2009 and Regulation (EC) 713/2009 were part of the Third Energy Package³.
7. In 2019, these regulations were repealed by the Clean Energy for All Europeans Package⁴ (“**Clean Energy Package**”), which replaced Regulation (EC) 714/2009 with Regulation (EU) 2019/943 (“**the New Electricity Regulation**”)⁵ and Regulation (EC) 713/2009 with Regulation (EU) 2019/942 (“**the New ACER Regulation**”)⁶.
8. Under the New Electricity Regulation, NRAs can, upon request, grant exemptions to new direct interconnectors, for a limited period of time, 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.
9. Article 63(1) of the New Electricity Regulation states:

“New direct current interconnectors may, upon request, be exempted, for a limited period, from Article 19(2) and (3) of this Regulation and from Articles 6 and 43, Article 59(7) and Article 60(1) of Directive (EU) 2019/944 provided that the following conditions are met:

² 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

³ EU regulatory package aimed at improving the functioning of the internal energy market and resolving certain structural problems, covering the areas of unbundling, independent regulators, ACER, cross-border cooperation and open and fair retail markets. Composed of: (i) Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC; (ii) 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; (iii) 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; (iv) 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; (v) 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.

⁴ Set of eight legislative acts on the energy performance of buildings, renewable energy, energy efficiency, governance and electricity market design, published in June 2019, after a dialogue between the European Commission, Council and Parliament. It is the fourth package of its kind, building further on the energy policy framework set by the Third Energy Package. It paves the way for a gradual transition away from fossil fuels and towards a carbon-neutral economy. The Clean Energy Package contains the Energy Performance in Buildings Directive (EU) 2018/844; the Renewable Energy Directive (EU) 2018/2001; the recast Electricity Directive (EU) 2019/944; the Energy Efficiency Directive (EU) 2018/2002; the Governance of the Energy Union Regulation (EU) 2018/1999; the recast Electricity Regulation (EU) 2019/943; the Risk Preparedness Regulation (EU) 2019/941 and the recast ACER Regulation (EU) 2019/942.

⁵ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity.

⁶ 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.

- (a) *the investment enhances competition in electricity supply;*
- (b) *the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted;*
- (c) *the interconnector is owned by a natural or legal person which is separate, at least in terms of its legal form, from the system operators in whose systems that interconnector is to be built;*
- (d) *charges are levied on users of that interconnector;*
- (e) *since the partial market opening referred to in Article 19 of Directive 96/92/EC of the European Parliament and of the Council, no part of the capital or operating costs of the interconnector has been recovered from any component of charges made for the use of transmission or distribution systems linked by the interconnector; and*
- (f) *an exemption would not be to the detriment of competition or the effective functioning of the internal market for electricity, or the efficient functioning of the regulated system to which the interconnector is linked.”*

10. The New ACER Regulation, as per its Article 47, entered into force on the twentieth day as from its publication in the Official Journal of the EU (14 June 2019), i.e. on 4 July 2019. It did not establish any provisions on its transitory regime or specific transitory rules of application.
11. The modifications introduced by the New ACER Regulation with respect to repealed Regulation (EC) 713/2009 involved, among others, the appeal of the Agency’s decisions before the Board of Appeal, including, for the purpose of this Decision, the competences of the Board of Appeal, reducing the possible outcomes of its assessment.
12. Under Article 19(5) of Regulation (EC) 713/2009, the Board of Appeal had the power to (i) confirm ACER Decision 05/2019; or (ii) uphold the appeal filed by AQUIND, and (iii) adopt any decision within the competence of the Agency or (iv) remit the case back to the competent body of the Agency, who would be bound by the decision taken by the Board of Appeal. Article 19(5) of Regulation (EC) 713/2009 stated: *“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. The latter shall be bound by the decision of the Board of Appeal.”*
13. The same was provided by Article 20(1) of the Rules of Procedure of the Board of Appeal (**‘RoP’**), prior to their amendment on 5 October 2019: *“The Board of Appeal may exercise any power which lies within the competence of the Agency.”*

14. The New ACER Regulation lists the competences of the Board of Appeal in its Article 28(5). It reduces the competences attributed to the Board of Appeal. It establishes that *“The Board of Appeal may confirm the decision, or it may remit the case to the competent body of ACER. The latter shall be bound by the decision of the Board of Appeal.* Therefore, the competence to *“exercise any power which lies within the competence of the Agency”* has been repealed.
15. The RoP were amended in this sense on 5 October 2019 (**“the New RoP”**)⁷. Article 21(1) New RoP states: *“The Board of Appeal may confirm the impugned decision of the Agency or may remit the case to the competent body of the Agency.”*

II. Facts giving rise to the dispute

16. On 17 May 2017, AQUIND submitted an Exemption Request (**“the Exemption Request”**) under Article 17 of the Regulation (EC) 714/2009 to the NRAs in the UK (Ofgem⁸) and France (the Intervener, CRE).
17. Ofgem and CRE forwarded AQUIND’s Exemption Request to ACER on 29 November 2017 and 19 December 2017, respectively, under Article 17(5) of Regulation (EC) 714/2009, on the account of them having failed to reach an agreement on the matter.
18. On 26 April 2018, the AQUIND Interconnector was granted the status of “Project of Common Interest” (**“PCI”**) within the meaning of Regulation (EU) 347/2013⁹.
19. On 19 June 2018, ACER Decision 05/2018 on the Exemption Request for the AQUIND interconnector denied the request for an exemption for the AQUIND Interconnector, on the basis of the following grounds:
 - (i) the condition established under Article 17(1)(b) of Regulation (EC) 714/2009, consisting in the level of risk attached to the investment being such that said investment would not take place unless an exception is granted, was not satisfied;
 - (ii) even though the AQUIND Interconnector had obtained the status of a PCI on 26 April 2018, which circumstance entitled AQUIND to request the application of Article 12 of Regulation (EU) 347/2013, which provides for the possibility of cross-border cost allocation, AQUIND had not made such a request;

⁷ Decision BoA No1-2011 as amended on 5 October 2019 Laying down the rules of organisation and procedure of the Board of Appeal of the European Union Agency for the Cooperation of Energy Regulators.

⁸ Office of Gas and Electricity Markets.

⁹ 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.

- (iii) it could not be ruled out that financial support under the regulated scheme might be available for the AQUIND Interconnector, and the Agency was in no position to identify, with the required certainty, the existence of risk based on the lack of financial support from the regulated scheme with regard to the AQUIND Interconnector; and
- (iv) the revenue risk, the exceptional market risk, the risk linked to direct competition with other interconnectors and congestion revenue uncertainty, the risk of curtailment of the UK network, the risk associated with construction of the AQUIND Interconnector and political and macroeconomic risks, particularly those stemming from the legal framework of the withdrawal of the UK from the European Union (“**Brexit**”), were insufficient or had not been demonstrated.
20. On 17 August 2018, AQUIND appealed ACER Decision 05/2018 before the Board of Appeal.
21. On 17 October 2018, the Board of Appeal adopted Decision A-001-2018, upholding ACER Decision 05/2018 which had refused AQUIND’s Exemption Request.
22. On 14 December 2018, AQUIND lodged an appeal before the General Court of the European Union (‘**GCEU**’), including a request for priority treatment under Article 67(2) of the Rules of Procedure of the GCEU.
23. On 18 March 2020, the parties were invited to submit observations based on the conclusions drawn in the Judgment of 11 March 2020 in the *Baltic Cable* case (Case C-454/18). Both parties forwarded their observations within the timeframe prescribed by the Court.
24. On 29 May and 2 June 2020, respectively, AQUIND filed a new exemption request for the AQUIND Interconnector with Ofgem and the Intervener CRE (“**the New Exemption Request**”) on the basis of Article 63 of the New Electricity Regulation. The scope of the New Exemption Request was narrower than the Exemption Request filed in 2017. Indeed, the New Exemption Request (i) was only made for France and (ii) included a 25-year request of exemption from the obligation to allocate revenue resulting from allocation of cross-zonal capacity set out in Articles 19(2) and (3) the New Electricity Regulation.
25. On 18 November 2020, the GCEU adopted Judgment T-735/18, annulling Decision A-001-2018 (the ‘**GCEU Judgment in T-735/18**’), on the basis of the following arguments (the GCEU upheld the ninth plea and the fourth plea, in that order):
- Ninth Plea: The Board of Appeal failed to apply sufficient scrutiny to ACER Decision 05/2018.
 - Fourth Plea: Error in the interpretation of the relationship between Article 17(1) of Regulation (EC) 714/2009 and Article 12 of Regulation (EU) 347/2013 and according

reliance on the possibility of the AQUIND Interconnector being eligible for a cross-border cost allocation (“CBCA”) procedure and failure to take account of issues associated with such procedure.

26. On 18 December 2020, Ofgem and CRE launched a joint consultation on the New Exemption Request.
27. On 31 December 2020, the Brexit transition period ended as per Article 126 of the Trade and Cooperation Agreement between the UK and the European Union of December 31, 2020 (the ‘TCA’) and Article COMPROV.17 of the Withdrawal Agreement executed between the EU and the UK on 24 December 2020 (the ‘**Withdrawal Agreement**’).
28. On 27 January 2021, both Ofgem and CRE decided that the exemption foreseen in Article 63 of the New Electricity Regulation could no longer be granted to AQUIND following Brexit and the entry into force of the TCA on 31 December 2020.
29. On 27 January 2021, ACER lodged an appeal against GCEU Judgment in T-735/18 before the Court of Justice of the European Union (‘CJEU’), in Case C-46/21 P (the “**CJEU Appeal**”).
30. On 10 May 2021, the Board of Appeal was informed by the Agency that, on 28 April 2021, it had applied for interim measures in case C-46/21-P, seeking the suspension of the operation of the GCEU Judgment in T-735/18 (Case C-46/21 P-R).

III. Procedure

31. On 5 February 2021, the Board of Appeal relaunched the appeal case under reference number A-001-2018_R.
32. To this end, on 5 February 2021, the Board of Appeal sent out a letter to the Appellant - which was notified to ACER – inviting the Appellant on the basis of Article 20 RoP to indicate, by 19 February 2021 at the latest, whether it wished to maintain its appeal against ACER Decision 05/2018. In the affirmative, the Appellant was also invited to indicate whether any parts of its initial notice of appeal or its further submissions, either in their entirety or in part, had become redundant. Additionally, the Appellant was invited to indicate, on the basis of Article 20 of the RoP, which consequences had to be drawn from the GCEU Judgment in T-735/18, appealed by ACER before the CJEU (Case C-46/21-P), and whether Brexit had, in its opinion, any impact on its initial notice of appeal, in particular as regards ACER’s competence and the admissibility of the appeal.
33. On 18 February 2021, the Appellant notified its statements to the Board of Appeal, upholding its Appeal and providing complementary statements.

34. On 1 March 2021, the Board of Appeal asked the French NRA, CRE, intervener in the proceedings leading-up to Decision A-001-2018, to confirm whether it wished to maintain its intervention in the relaunched appeal case.
35. Following CRE's confirmation of 5 March 2021, the Board of Appeal invited CRE to indicate, on the same day and on the basis of Article 20 RoP, whether any parts of its intervention in the proceedings had become redundant either in their entirety or in part and to submit supplementary submissions indicating which consequences had to be drawn from the Judgement of the General Court in case T-735/18, appealed by ACER before the CJEU in Case C-46/21-P, and whether Brexit had, in its view, any impact on its initial intervention, in particular as regards ACER's competence and the admissibility of the appeal.
36. On 12 March 2021, CRE notified a supplementary intervention submission to the Board of Appeal.
37. On 17 March 2021, the Board of Appeal invited ACER to indicate, on the basis of Article 20 RoP, whether any parts of its Defence or further submissions in the proceedings had become redundant, either in their entirety or in part, and to submit supplementary submissions by 31 March 2021 indicating which consequences had to be drawn from the GCEU Judgement in case T-735/18, appealed by ACER before the CJEU in Case C-46/21-P, and whether Brexit had, in its view, any impact on its initial submissions. By the same means, the Board of Appeal notified the Appellant's statements and CRE's submission to the Defendant.
38. On 31 March 2021, ACER notified its statements to the Board of Appeal, maintaining its Defence and providing complementary statements.
39. On 16 April 2021, ACER's and CRE's statements were notified to AQUIND and AQUIND was invited, on the basis of Article 20 RoP, to present additional written submissions in relation to those statements and to indicate whether, following the discontinuation of the procedure related to the exemption request by the NRAs of the UK and France, any action had been undertaken by AQUIND before the national jurisdictions of the UK and France.
40. On 19 April 2021, a clarification to the invitation for additional written submissions was sent to AQUIND, clarifying that the second point of the request, concerning the discontinuation of the procedure related to the exemption request by the NRAs of the UK and France referred to the New Exemption Request for the AQUIND Interconnector as submitted on 29 May 2020 and 2 June 2020 to the NRAs of the UK and France.
41. On 27 April 2021, the Board of Appeal addressed a Request for Information pursuant to Article 20 RoP to the European Commission regarding the scope of Article 92 of the Withdrawal

Agreement, requesting whether it concerns exemptions for interconnectors in the sense of the New Electricity Regulation, in particular the AQUIND Interconnector.

42. By e-mail of 30 April 2021, the Appellant's deadline to submit additional written submissions was extended to 5 May 2021.
43. On 5 May 2021, the Appellant submitted its additional written statements, maintaining its request to the Board of Appeal to annul ACER Decision 05/2018 as rapidly as possible and, "either:
 - *to grant the exemption itself, subject to whatever conditions it considers necessary and appropriate, or*
 - *if it believes that it can only remit the matter to the competent body of ACER, to instruct that competent body to correct and amend the Agency Decision so as grant the exemption; or*
 - *if the Board of Appeal considers that other facts that it does not have available need to be established or verified, to remit the matter to the competent body of ACER with clear instructions as to the facts to be established or verified before an exemption can be granted."*
44. On 10 May 2021, the European Commission replied to the Request for Information of 27 April 2021 indicating that "*in line with Article 92(4) of the Agreement on the withdrawal of the United Kingdom from the European Union, the Union provided the United Kingdom on 29 March 2021 with a list of all individual ongoing administrative procedures that fall within the scope of paragraph 1 of the same Article. I can confirm that the procedure you refer to in your email is not on this list as it does not meet the criteria of Article 92(4)."*
45. On 10 May 2021, ACER notified the Board of Appeal of its request to suspend the judgement of the General Court in Case in case T-735/18 in Case C-46/21 P-R.
46. AQUIND, ACER and the Intervener were granted access to the file of the proceeding throughout the appeal procedure.
47. An Oral Hearing was held on 19 May 2021.

IV. Main arguments of the Parties

48. The Appellant claims that, following the annulment of ACER Decision 05/2018 by the GCEU Judgment in T-735/18, the Board of Appeal is obliged to take any measure necessary to comply with its operative part under Article 266 of the Treaty on the Functioning of the European Union ('TFEU') and Article 29 of the New ACER Regulation, which empower the Board of Appeal

to adopt a decision granting the requested Exemption itself. According to the Appellant, the Board of Appeal is competent under Regulation (EC) 713/2009 to replace ACER Decision 05/2018 by a new decision. In the alternative, the Board of Appeal should remit the relaunched appeal case to ACER. In the Appellant's opinion, Brexit does not have any impact on the Board of Appeal's competence to decide on the relaunched appeal case. In its view, the implications of Article 266 TFEU following the annulment of Decision A-001-2018 by the GCEU Judgment in T-735/18 are as follows: (i) there is a *restitutio in integrum*, placing AQUIND essentially back in a situation in which Decision A-001-2018 would not have taken place; (ii) in said restated situation, given that exemptions are declaratory acts (valid as from the moment of their request) and that the Board of Appeal has no other choice than to annul ACER Decision 05/2018 due to the Fourth Plea of the GCEU Judgment in T-735/18, AQUIND's Exemption benefits from the extension of existing exemptions under Article 309 (ex-Article ENER.11) of the TCA; and (iii) ACER and its Board of Appeal are still competent to grant the requested Exemption under Article 92 of the Withdrawal Agreement.

49. The Appellant maintains its initial Appeal and adds that no part of it has become redundant.
50. Turning to the Appellant's initial Appeal, the Appellant challenged the Agency's finding that AQUIND did not meet the condition stipulated in 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 argued that the Agency: (i) incorrectly asserted that the relevant risk could only be properly assessed where an application under Regulation (EU) 347/2013 was made and rejected; (ii) incorrectly held that an 'exceptional' level of risk was required for an exemption to be granted; (iii) neglected to take into account legal restrictions in France that rendered 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 evidence; (ix) failed to follow an established precedent; and (x) incorrectly asserted that the Agency had discretion when assessing a request for exemption.
51. The Defendant responds that (a) as a direct consequence of Brexit and the end of the transition period on 31 December 2020, the Agency and its Board of Appeal are no longer competent to grant an exemption from EU internal energy market rules to a new interconnector between a Member State and the UK; (b) in any event, the currently pending appeal proceedings before the CJEU in Case C-46/21 P require a stay of the relaunched proceedings before the Board of Appeal

pursuant to the principle of sincere mutual cooperation of Article 13(2) TEU and the prohibition against *lis pendens*; and (c) ACER maintains its initial defence and further submissions, but questions whether AQUIND can maintain its 2017 Exemption Request and related argumentation in light of its subsequent, more limited New Exemption Request.

52. Turning to the Defendant's initial Defence, ACER indicated that, in order to properly and impartially assess whether the risk requirement of Article 17(1)(b) of Regulation (EC) 714/2009 was fulfilled, it was necessary 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 ACER indicated that it had not been able to identify, with the required certainty, a level of risk 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 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. ACER also held that it (i) had not assumed that an exceptional risk was 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 an established precedent; and (ix) enjoyed discretion when assessing a request for exemption.
53. The Intervener holds that it maintains its initial intervention. It refers to its initial application for leave to intervene of 20 August 2018 on behalf of the Defendant, which contained in annex a 2017 Study on the Value of Interconnections between France and Great Britain by Artelys. Moreover, it considers that, due to the withdrawal of the UK from the EU, ACER and its Board of Appeal are not empowered any longer to decide on the Appellant's Appeal against ACER Decision 05/2018.

V. *Admissibility*

V.I *Applicable law to the procedural aspects of the relaunched appeal case*

54. The Appellant alleges that Regulation (EC) 713/2009 applies and that, under Regulation (EC) 713/2009, the Board of Appeal is competent to replace ACER Decision 05/2018 by a new decision granting an exemption to the Aquind Interconnector, in order to fulfill its obligation to

comply with the GCEU Judgment T-735/18, which annulled the BoA Decision¹⁰. The Appellant also claims that Article 28(5) of the New ACER Regulation “*does not indicate that confirming or remitting ACER’s decisions are its only powers*”. It adds: “*Indeed, they cannot be its only powers since Article 28(5) goes on to state that the competent body of the Agency shall be bound by the decision of the Board of Appeal. That must refer to more than simple remittal since otherwise the sentence would be redundant*”¹¹.

55. The Board of Appeal notes that it follows from the general principles of EU law that, when no transitional regime applies, new procedural rules apply to legal situations arising prior to their entry into force, as confirmed by settled case-law¹². Furthermore, the same case-law holds even more clearly that the provision which forms the legal basis of an act and empowers an EU institution to adopt the act (i.e. attributes the competence to adopt the act) must be in force on the date on which said act is adopted¹³, as will be further explained below. This means that the scope of action of the EU institutions and bodies is limited to the powers attributed (conferred) to it at a certain moment in time by the regulations in force at said time.
56. No specific transitional regime has been established for the applicability of the New ACER Regulation to legal situations arising prior to its entry into force. It entered into force on 4 July 2019.
57. Consequently, the New ACER Regulation applies to the procedure and competence to act of the present proceedings.
58. The New ACER Regulation lists the competences of the Board of Appeal in its Article 28(5). It establishes that “*The Board of Appeal may confirm the decision, or it may remit the case to the competent body of ACER. The latter shall be bound by the decision of the Board of Appeal.* Similarly, Article 21(1) the New RoP state: “*The Board of Appeal may confirm the impugned decision of the Agency or may remit the case to the competent body of the Agency.*”
59. The competences to “*exercise any power which lies within the competence of the Agency*” fall foul of the scope of Article 28(5) New ACER Regulation.

¹⁰ Page 2 of the Appellant’s written submission of 18 February 2021.

¹¹ Page 2 of the Appellant’s written submission of 5 May 2021.

¹² Case C-432/17, *Dermot Patrick O’Brien*, EU:C:2018:879, para. 26, C-596/13 P, *Commission v Moravia Gas Storage*, EU:C:2015:203, para. 33, Case C-610/10, *Spain v. Commission*, EU:C:2012:781, para. 45, C-334/08, *Commission v. Italy*, EU:C:2010:414, para. 60, Joined cases C-201/09 P and C-216/09 P, *ArcelorMittal Luxembourg v. Commission and Commission v. ArcelorMittal Luxembourg and others*, EU:C:2011:190, para. 75, Case C-352/09 P *ThyssenKrupp Nirosta v. Commission*, EU:C:2011:191, para. 88, Case C-17/10, *Toshiba Corporation and others*, EU:C:2012:72, para. 47, Joined Cases C-212/80 to C-217/80 *Salumi and Others*, EU:C:1981:270, Case T-447/16, *Pirelli Tyre SpA v. EUIPO*, EU:T:2018:709, para. 18, Case T-357/02, *Freistaat Sachsen v. Commission*, EU:T:2011:376, para. 94, para. 9, Joined Cases T-142/01 and T-283/01 *OPTUC v Commission* EU:T:2004:25, para. 60.

¹³ Case C-361/14 P *Commission v. Peter McBride and Others*, EU:C:2016:434, paras. 35-57, C-596/13 P, *Commission v Moravia Gas Storage*, EU:C:2015:203, para. 34, Case C-352/09 P *ThyssenKrupp Nirosta v. Commission*, EU:C:2011:191, para. 88 and Case C-269/97, *Commission v Council*, EU:C:2000:1832257, para. 45.

60. The Board of Appeal - a special appeals instance within ACER - has the competence to confirm or remit ACER's decisions upon appeal under the New ACER Regulation.
61. The Board of Appeal concludes, therefore, that, in case of admissibility, only a remittal to ACER would be possible under the New ACER Regulation.

V.II Ratione temporis

62. Article 28(2) of Regulation (EU) 2019/942 provides that "*the appeal shall include a statement of the grounds for appeal and shall be filed in writing at ACER within two months of the notification of the decision to the person concerned, or, in the absence thereof, within two months of the date on which ACER published its decision*".
63. The relaunched procedure was not initiated by the submission of a Notice of Appeal by the Appellant but is the result of the annulment of the Decision A-001-2018 by the GCEU Judgment in T-735/18. Accordingly, Article 28(2) of Regulation (EU) 2019/942 is not applicable to the present case and the Appeal is admissible *ratione temporis*.

V.III Ratione personae and ratione materiae

64. Article 28(1) of Regulation (EU) 2019/942 provides 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.*"
65. Article 2 of ACER Decision 05/2018 stipulates that it is addressed to AQUIND. ACER Decision 05/2018 is an individual decision of ACER, which was issued on the basis of Article 9(1) of Regulation (EC) 713/2009.
66. The question arises whether the relaunched case is admissible in the light of Brexit.
67. On the one hand, AQUIND claims that the relaunched appeal case is admissible notwithstanding Brexit¹⁴.
68. On the other hand, ACER and CRE claim that the relaunched appeal case is inadmissible as a consequence of Brexit and that the Board of Appeal is not competent to remit the relaunched appeal case to ACER¹⁵.
69. In order to correctly address the question of whether the Board of Appeal is currently competent to decide on the merits of the relaunched appeal case, as a consequence of Brexit, two

¹⁴ Pages 3 and 4 of the Appellant's written submission of 18 February 2021; pages 2 to 6 of the Appellant's written submission of 5 May 2021.

¹⁵ Pages 3 to 8 of ACER's written submission of 31 March 2021 and pages 2 and 3 of CRE's written submission of 12 March 2021.

circumstances must be taken into consideration: (i) the driving force behind the adoption of a potential new Board of Appeal Decision is the fulfillment of its obligation under Article 266 TFEU to adopt any measure necessary to comply with the operative part of the GCEU Judgment in T-735/18; and (ii) EU institutions and bodies may only act within the limits of the powers conferred on them, as laid out by Article 13(2) TEU.

70. Article 266 TFEU states: “*The institution, body, office or entity whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union. This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340*”.
71. Article 13(2) TEU states: “*Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation*”.
72. This implies that the Board of Appeal must find a balance between adopting any measure necessary and not exceeding the powers conferred to it.
73. Settled case-law establishes that the provision which forms the legal basis of an act and empowers an EU institution to adopt the act (i.e. grants the competence to that body to adopt the act) must be in force on the date on which said act is adopted¹⁶ and that, as set out above in Section V.I, the general rule is that procedural rules apply to legal situations arising prior to their entry into force¹⁷.
74. This means that the scope of action of the EU institutions and bodies is limited to the powers conferred to them at a certain point of time by the regulations in force at said time.
75. Based on this case-law, in case C-461/18, *Changmao Biochemical Engineering v Distillerie Bonollo and Others*, the CJEU found that the GCEU had made an error in law when it ordered the Council of the EU to adopt the “*measures necessary*” under Article 266 TFEU to comply

¹⁶ Case C-461/18, *Changmao Biochemical Engineering v Distillerie Bonollo and Others*, EU:C:2020:979, para. 103, Case C-612/16, *C & J Clark International*, EU:C:2019:508, para. 39, Case C-361/14 P *Commission v. Peter McBride and Others*, EU:C:2016:434, paras. 35-57, C-596/13 P, *Commission v Moravia Gas Storage*, EU:C:2015:203, para. 34, Case C-352/09 P *ThyssenKrupp Nirosta v. Commission*, EU:C:2011:191, para. 88 and Case C-269/97, *Commission v Council*, EU:C:2000:1832257, para. 45; T-626/17, *Slovenia v Commission*, ECLI:EU:T:2020:402, para 85.

¹⁷ Case C-461/18, *Changmao Biochemical Engineering v Distillerie Bonollo and Others*, EU:C:2020:979, para. 103, Case C-432/17, *Dermod Patrick O'Brien*, EU:C:2018:879, para. 26, C-596/13 P, *Commission v Moravia Gas Storage*, EU:C:2015:203, para. 33, Case C-610/10, *Spain v. Commission*, EU:C:2012:781, para. 45, C-334/08, *Commission v. Italy*, EU:C:2010:414, para. 60, Joined cases C-201/09 P and C-216/09 P, *ArcelorMittal Luxembourg v. Commission and Commission v. ArcelorMittal Luxembourg and others*, EU:C:2011:190, para. 75, Case C-352/09 P *ThyssenKrupp Nirosta v. Commission*, EU:C:2011:191, para. 88, Case C-17/10, *Toshiba Corporation and others*, EU:C:2012:72, para. 47, Joined Cases C-212/80 to C-217/80 *Salumi and Others*, EU:C:1981:270, Case T-447/16, *Pirelli Tyre SpA v. EUIPO*, EU:T:2018:709, para. 18, Case T-357/02, *Freistaat Sachsen v. Commission*, EU:T:2011:376, para. 94, para. 9, Joined Cases T-142/01 and T-283/01 *OPTUC v Commission* EU:T:2004:25, para. 60.

with the operative part of the judgment on the imposition of anti-dumping duties, based on a regulation that had been repealed in the process and replaced by another regulation that attributed the power to impose the mentioned anti-dumping measures to the Commission instead. This judgment found that the Council could not be obliged to adopt any measure under Article 266 TFEU to comply with the judgment of the GCEU, as (i) the regulation that attributed the power to impose anti-dumping duties to the Council had been repealed and the regulation in force at the moment only attributed competences to do so to the Commission, and (ii) Article 266 TFEU cannot be understood as a source of competence for said institution¹⁸.

76. The CJEU explained the correct reading of the case-law as follows:

“(101) Admittedly, under that provision, the EU institution whose act has been declared void by the Court of Justice or the General Court is required to take the necessary measures to comply with the judgment annulling that act (judgments of 14 June 2016, Commission v McBride and Others, C-361/14 P, EU:C:2016:434, paragraph 35, and of 19 June 2019, C & J Clark International, C-612/16, not published, EU:C:2019:508, paragraph 37).

(102) However, prior to the adoption of such measures by the institution whose act has been annulled, the question arises as to the competence of that institution, since the EU institutions may only act within the limits of the powers conferred on them (judgment of 14 June 2016, Commission v McBride and Others, C-361/14 P, EU:C:2016:434, paragraph 36). The principles of institutional balance and of the allocation of powers, as laid down in Article 13(2) TEU, require that each institution act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out therein (see, to that effect, judgment of 28 July 2016, Council v Commission, C-660/13, EU:C:2016:616, paragraphs 31 and 32 and the case-law cited).

(103) Therefore, while Article 266 TFEU does indeed establish an obligation for the institution concerned to act, it does not constitute a source of competence for that institution, nor does it enable that institution to rely on a legal basis which has in the meantime been repealed (see, to that effect, judgment of 19 June 2019, C & J Clark International, C-612/16, not published, EU:C:2019:508, paragraph 39 and the case-law cited). Furthermore, according to the case-law, the provision which forms the legal basis of an act and empowers an EU institution to adopt the act in question must be in force at the time when the act is adopted and, moreover, procedural rules are generally held to apply from the time of their entry into force (judgment of 29 March

¹⁸ Case C-461/18, *Changmao Biochemical Engineering v Distillerie Bonollo and Others*, EU:C:2020:979, para. 103, Case C-612/16, *C & J Clark International*, EU:C:2019:508, para. 40, Case C-361/14 P *Commission v. Peter McBride and Others*, EU:C:2016:434, para. 38.

2011, *ThyssenKrupp Nirosta v Commission*, C-352/09 P, EU:C:2011:191, paragraph 88 and the case-law cited).

(104) *In those circumstances, the second ground of the cross-appeal must be upheld, in so far as it relates to the General Court's error of law in point 2 of the operative part, whereby the Council is obliged to take the measures necessary to comply with the judgment under appeal. Consequently, point 2 of the operative part of the judgment under appeal must be set aside in so far as the General Court thereby required the Council to take the measures necessary to comply with that judgment, and the cross-appeal must be dismissed as to the remainder*".

77. In similar case C-612/16, *C & J Clark International*, the CJEU ruled that the obligation to act under Article 266 TFEU does not relieve the EU Institution of the need to base the act containing measures to comply with a judgment annulling or declaring a measure to be invalid on a legal basis that empowers it to adopt that act¹⁹.
78. Applying this case-law to the present case, it follows that the Board of Appeal, when fulfilling its obligation to adopt any measure necessary to comply with GCEU Judgment T-735/18 under Article 266 TFEU, is required to base its act to comply with the GCEU Judgment on the law in force at the time of its adoption.
79. In its written submission of 5 May 2021 and at the oral hearing, the Appellant adduced that Article 29 of the New ACER Regulation, requiring ACER and its Board of Appeal to take necessary measures to comply with EU Courts' judgments, provides comfort of a new source of competence. ACER disagreed with this statement at the oral hearing, alleging that this would render Article 29 of the New ACER Regulation more far-reaching than Article 266 of the TFEU.
80. Article 29 of the New ACER Regulation states: "*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. ACER shall take the necessary measures to comply with the judgments of the Court of Justice.*"
81. The Board of Appeal finds, in line with ACER, that Article 29 of the New ACER Regulation cannot be interpreted in a broader fashion than the identical provision of Article 266 of the TFEU, which is primary and superior law. If Article 266 of the TFEU is not a source of competence, *a fortiori*, Article 29 of the New ACER Regulation is not source of competence.

¹⁹ Case C-612/16, *C & J Clark International*, EU:C:2019:508, para. 40, and the case-law cited therein.

82. Pursuant to Brexit, as of 31 December 2020²⁰, an exemption request between an EU Member State and the UK no longer concerns two Member States and, accordingly, is no longer governed by EU law -including Regulation (EC) 714/2019 and Directive 2012/27/EU - and the “*acquis communautaire*”²¹. ACER’s competence derives from EU Law: ACER acted on the basis of Article 17(5) of Regulation (EC) 714/2009 and Article 9(1) of Regulation (EC) 713/2019 following CRE and Ofgem’s referral of the decision on the Exemption Request for the AQUIND Interconnector to ACER.
83. In addition, even if Regulation (EC) 714/2019 or the New Electricity Regulation were to apply, *quod non*, both regulations define an interconnector as “*a transmission line which crosses or spans a border between Member States and which connects the national transmission systems of the Member States*”. Given that the UK is not a Member State anymore, none of these regulations could *de facto* apply to a transmission line which crosses or spans a border between a Member State and the UK.
84. By contrast, an exemption request for an interconnector between a Member State and the UK is, as of 31 December 2020, governed by the provisions of the Withdrawal Agreement and TCA, which do not attribute any competences or powers to ACER (and, its Board of Appeal) in that regard.
85. The same view was expressed by Ofgem and CRE in their press release of 28 January 2021, in which they decided to discontinue the ongoing consultation and assessment process related to the New Exemption Request because “*following the UK’s departure from the EU, the NRAs consider that the exemption request process defined under the Electricity Regulation is only available to interconnector projects developed between Member States. As the UK is no longer a Member State and the transition period has ended, Aquind can no longer access that process and the NRAs no longer have the necessary legal powers to assess and decide upon the Exemption Request.*”²²
86. To conclude, EU Law applicable pre-Brexit does not apply anymore: Regulation (EC) 714/2009 and the New Electricity Regulation, which were the legal basis for ACER to act in ACER Decision 05/2018 and for the Board of Appeal to act upon appeal, are no longer applicable to the AQUIND Interconnector Exemption Request. The Board of Appeal - a special appeals instance within ACER – has no competences any longer following Brexit to decide upon the relaunched appeal case under the New ACER Regulation. Article 266 TFEU does not constitute a source of competence, and, accordingly, neither the Board of Appeal nor ACER are competent

²⁰ End of the transition period, as per Article 126 of the TCA and Article COMPROV.17 of the Withdrawal Agreement.

²¹ Accumulated legislation, legal acts and court decisions that constitute the body of EU law.

²² <https://www.ofgem.gov.uk/publications-and-updates/cre-and-ofgem-discontinue-public-consultation-aquinds-exemption-request>

to adopt a decision either granting or rejecting AQUIND's Exemption Request, as there is no legal basis empowering them to do so. Reasoning otherwise would imply that Article 266 TFEU constitutes a source of limitless powers. ACER and the Board of Appeal can only act within the powers conferred upon them and, following Brexit, such competence has ceased to exist.

87. The relaunched appeal case must therefore be declared inadmissible.
88. The Board of Appeal could conclude its ruling here. However, for fullness, AQUIND's arguments are addressed in detail.
89. In AQUIND's opinion, Brexit does not have any impact on the Board of Appeal's competence to decide on the relaunched appeal case. In its view, the implications of Article 266 TFEU following the annulment of Decision A-001-2018 by the GCEU Judgment in T-735/18 are as follows:
 - there is a *restitutio in integrum*, placing AQUIND essentially back in a situation in which Decision A-001-2018 would not have taken place;
 - in said restated situation, given that exemptions are declaratory acts (valid as from the moment of their request) and that the Board of Appeal has no other choice than to annul ACER Decision 05/2018 due to the Fourth Plea of the GCEU Judgment in T-735/18, AQUIND's Exemption benefits from the extension of existing exemptions under Article 309 of the TCA and
 - ACER and its Board of Appeal are still competent on the basis of Article 92 of the Withdrawal Agreement.
90. In its letter of 18 February 2021, AQUIND claims that the obligation to act that stems from Article 266 TFEU and the principle of "*restitutio in integrum*" requires the Board of Appeal to take all measures necessary to comply with the GCEU Judgment in T-735/18, including the duty to place AQUIND in the position it would be in, had Decision A-001-2018 not been adopted.
91. The Appellant's claim cannot be sustained.
92. The principle of *restitutio in integrum* entails a return to the *status quo ante* and ensures that each party is restored to its original position without loss or gain. It entails, accordingly, the removal of the effects of the illegalities found in the GCEU Judgment in T-735/18 annulling Decision A-001-2018²³. In this sense, in the event that an act had been executed or implemented prior to its annulment, it may still have the ability to produce legal consequences that, under the

²³ Joined cases T-480/93 and T-483/93, *Antillean Rice Mills and Others v Commission*, EU:T:1995:162, para. 60, Case T-171/99, *Corus UK Ltd. v Commission*, EU:T:2001:249, para. 50 and the case-law cited therein.

restitutio in integrum principle, must be eliminated or may require measures to avoid the adoption of a similar decision to that previously annulled²⁴. In the present case, however, Decision A-001-2018 confirmed ACER Decision 05/2018, which refused an exemption to AQUIND's Interconnector. Decision A-001-2018 did not produce any effects or changes to AQUIND's position. Therefore, there are no persistent effects of this Decision that must be removed to return to the *status quo ante*. The *status quo ante* to Decision A-001-2018 is an absence of a confirmation of ACER Decision 05/2018, i.e. a situation whereby AQUIND has been given a refusal decision by ACER or, at most, a situation whereby AQUIND has requested an exemption. The *status quo ante* is not a situation where there was a decision by NRAs or ACER granting an exemption to AQUIND's Interconnector. The exemption has never been granted.

93. Any *restitutio in integrum* would not place AQUIND back in a situation in which AQUIND benefits from a granted exemption, but in a situation in which it faces an exemption refusal or, at most, in which it had merely submitted an exemption request. ACER Decision 05/2018 refused the exemption on the basis of non-compliance with Article 17(b) of Regulation (EC) 714/2009. This exemption request, is not, following the annulment of Decision A-001-2018 by the GCEU Judgment in T-735/18, automatically converted into a granted exemption. In addition, the annulment of Decision A-001-2018 on the basis of AQUIND's Fourth Plea does not automatically entail compliance with Article 17(1)(b) of Regulation (EC) No. 714/2009 (“*the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted*”). Indeed, the statement of the GCEU, in this respect, ruling that the Board of Appeal wrongly established an additional condition “*by raising the point that there was no request for financial support under Article 12 of Regulation 347/2013 and by failing to conduct an assessment of that financial support mechanism in the light of the risk attached to the investment*” does not automatically entail compliance with Article 17(1)(b) of Regulation (EC) No. 714/2009.
94. The GCEU's statement relating to the Fourth Plea only concerns one of the aspects that ACER examined when carrying out its joint assessment of all risks, namely whether a regulated regime with financial underpinning was available to AQUIND in France or whether it had no access to financial underpinning. However, in its joint risk assessment, ACER also examined revenue risk, risk of a reduced or uncertain demand for capacity, GB network curtailment risk, construction and operational risks and policy and macroeconomic risks. The GCEU's finding of an erroneous assessment of the financial risks relating to the AQUIND Interconnector does not automatically

²⁴ Joined cases T-480/93 and T-483/93, *Antillean Rice Mills and Others v Commission*, EU:T:1995:162, para. 60, Case C-92/78 *Simmenthal v Commission*, EU:C:1979:53, paragraph 32; Case C-53/85, *AKZO Chemie v. Commission*, EU:C:1986:256, para. 21; and Case C-207/86, *Apesco v Commission*, EU:C:1988:200, para. 16.

imply that all the other elements of the joint risk assessment justify an exemption. The fact that the issue of Article 12 of Regulation (EC) 2013/47, dealt with by the Fourth Plea of the GCEU Judgment in T-735/18, only constitutes part of the risk assessment for the grant of an exemption was confirmed by the Appellant at the oral hearing, where it listed various risks and underlined the cumulative impact of such risks.

95. It is noteworthy, in this respect, that the fact that AQUIND filed a New Exemption Request on 29 May and 2 June 2020 with Ofgem and the Intervener, which has a narrower scope than the 2017 Exemption, undermines the need for the 2017 Exemption all in all. Indeed, exemptions are tied to a certain level of risks attached to the interconnector investment (such that the investment would not happen in the absence of an exemption). The request of a narrow exemption for the AQUIND Interconnector in 2020 demonstrates that the earlier, broader request of an exemption for the AQUIND Interconnector in 2017 was not justified, because the interconnector investment would also happen under a new exemption with a more limited scope.
96. *Ad arguendum*, irrespective of the clear lack of powers of the Board of Appeal set out above, rendering the relaunched appeal case patently inadmissible, any *restitutio in integrum* would not place AQUIND back in a situation in which AQUIND benefits from a granted exemption.
97. Furthermore, based on the erroneous assumption that exemption decisions are by their nature declaratory and declare the conditions for exemption to be satisfied as from the date of their request²⁵, AQUIND alleges that the exemption to be granted by the Board of Appeal must take effect from the date of the Exemption Request and that such Exemption Request falls within the scope of Article 309 of the TCA (existing exemptions for interconnectors). This is, in its view, because Article 309 of the TCA establishes that existing exemptions granted to interconnectors under Article 17 of Regulation (EC) 714/2009 or Article 63 of the New Electricity Regulation continue to apply.
98. The Defendant and the Intervener argue, with respect to this claim, that exemptions are not merely declaratory, as they do not constitute a retrospective clarification of the state of the law. Accordingly, since an exemption does not constitute an existing situation at the time of its request, an exemption cannot be antedated, nor can it be considered existing in the meaning of Article 309 of the TCA²⁶.
99. The Appellant's claim cannot be sustained.
100. Exemptions are requested and granted upon request.

²⁵ The Appellant argues this erroneous claim on the basis that Regulation (EC) 714/2009 and the New Electricity Regulation do not specify the date from which exemptions take effect.

²⁶ OJ, L 149/10 of 30.4.2021.

101. Article 17(1) of Regulation (EC) 714/2009 states: “*New direct current interconnectors may, upon request, be exempted, for a limited period of time, from the provisions of Article 16(6) of this Regulation and Articles 9, 32 and Article 37(6) and (10) of Directive 2009/72/EC under the following conditions (..)*”, followed by the applicable conditions. Similarly, Article 63(1) of New Electricity Regulation states: “*New direct current interconnectors may, upon request, be exempted, for a limited period, from Article 19(2) and (3) of this Regulation and from Articles 6 and 43, Article 59(7) and Article 60(1) of Directive (EU) 2019/944 provided that the following conditions are met: (..)*”, followed by the applicable conditions. It goes without saying that exemptions are not declaratory but *may* be granted upon request, if the granting authority decides that the applicable conditions are met.
102. In addition, exemptions are exceptions to the general rules applicable to the internal energy market, which makes the need for an express grant even more important. Their numerous legal constraints in terms of timing and contents render an express grant mandatory.
103. It is only as of the moment of the decision granting the exemption that the legal position of its addressee is amended and that new rights are created. Exemption decisions are constitutive acts that produce effects as from their adoption.
104. In this respect, the Board of Appeal notes that AQUIND’s erroneous reasoning would imply that it currently benefits from two exemptions, given that it filed two exemptions since 2017, one in 2017 and one in 2020. However, both exemptions have been refused.
105. AQUIND also claims that its Exemption Request - which it erroneously assimilates to a granted exemption - falls under Article 309 of the TCA.
106. Article 309 of the TCA, entitled “*Existing exemptions for interconnectors*”, states that “*Each party shall ensure that exemptions granted to interconnections between the Union and the United Kingdom under Article 63 of Regulation (EU) 2019/943 of the European Parliament and of the Council and under the law transposing Article 36 of the Directive 2009/73/EC of the European Parliament and of the Council in their respective jurisdictions, the terms of which extend beyond the transition period, continue to apply in accordance with the laws of the respective jurisdictions and the terms applicable.*”
107. Article 309 of the TCA seeks to extend the duration of the exemptions granted prior to Brexit for existing interconnectors beyond the transition period (i.e. it aims to cover a legal situation that has been completed or consolidated prior to the end of the transition period). An “existing” interconnector means that the interconnector must exist on the date of entry into force of the provisionally applicable TCA, i.e. 1 January 2021.

108. Article 309 of the TCA does not apply to AQUIND's Interconnector because (i) AQUIND's Interconnector has not yet been built (i.e. it is not an "existing" interconnector); (ii) Article 309 of the TCA requires that the exemption exists at the end of the transition period, not that a decision regarding an exemption (in this case denying it) exists at that date, and the exemption requested in AQUIND's Exemption Request has not yet been granted, it is a mere "request"; and (iii) the nature of an exemption decision as a constitutive act means that it is intended to create or amend a legal situation from the moment of its adoption onwards and cannot be understood to produce effects retroactively as from the date of its request. Thus, the legal situation to which AQUIND refers has not been consolidated before the end of the transition period but relates to a future or eventual legal situation, excluded from the scope of Article 309 of the TCA.
109. The Board of Appeal notes, in this regard, that the example of the ELECLINK Interconnector between France and the UK, quoted by the Appellant in its additional written submission of 5 May 2021, needs to be distinguished from the AQUIND Interconnector. ELECLINK is an existing interconnector, which was granted an exemption decision, as opposed to AQUIND, which has not been built and has been refused an exemption decision.
110. *Ad arguendum*, irrespective of the clear lack of powers of the Board of Appeal set out above, rendering the relaunched appeal case patently inadmissible, any potential new decision on AQUIND's Exemption Request would only produce effects as from the date of the adoption of the decision and not as from the date of AQUIND's Exemption Request, which does not constitute an existing exemption decision granted to an existing interconnector within the scope of Article 309 of the TCA.
111. In its letter of 18 February 2021, AQUIND claims that the Agency's competence derives from the transitional arrangements regulated in Article 92(1)(a) of the Withdrawal Agreement²⁷. The Board of Appeal observes that, in its written submission of 5 May 2021 and during the oral hearing, the relevance of this argument was downplayed²⁸.
112. The Agency and the Intervener disagree with the Appellant's claim and adduce that Article 92(1)(a) of the Withdrawal Agreement cannot be invoked as a source of competence for ACER or the Board of Appeal because proceedings relating to interconnector exemptions under Article 63 of the New Electricity Regulation are excluded from its scope.

²⁷ Page 3 of the Appellant's written submission of 18 February 2021.

²⁸ Page 5 of the Appellant's written submission of 5 May 2021: "Article 92 of the Withdrawal Agreement is an application of the general principle that bodies remain competent to adopt decisions, or to amend decisions that they have already taken, on matters pending before them even where the substantive conditions surrounding the matter have been altered by intervening events."

113. The Appellant’s claim cannot be sustained.
114. Article 92(1)(a) of the Withdrawal Agreement (part of Chapter 2, “Administrative Proceedings”) provides that *“the institutions, bodies, offices and agencies of the Union shall continue to be competent for administrative procedures which were initiated before the end of the transition period concerning: (a) compliance with Union law by the UK, or by natural or legal persons residing or established in the UK. (...)”*.
115. AQUIND misreads Article 92(1)(a) of the Withdrawal Agreement, broadening its scope beyond what was intended by the EU and the UK. A correct reading of this Article is that EU institutions, bodies, offices and agencies remain competent to investigate and, where applicable, sanction in certain administrative proceedings involving UK institutions, bodies, offices and agencies and/or natural or legal persons residing or established in the UK in relation to compliance with EU law, when these proceedings were initiated before the end of the transition period. This relates to competition, State aid, mergers, financial services regulation, and anti-fraud measures. Reference is made to the Note to Stakeholders by DG COMP of 2 December 2020²⁹. It does not apply to all other administrative proceedings, such as an exemption request for an interconnector. EU institutions, bodies or agencies –in this case, ACER and its Board of Appeal– do not remain competent for proceedings initiated before the end of the transition period with respect to interconnector exemptions.
116. This has been confirmed by the European Commission in its email response of 10 May 2021, pursuant to the Board of Appeal’s Request for Information: *“in line with Article 92(4) of the Agreement on the withdrawal of the United Kingdom from the European Union, the Union provided the United Kingdom on 29 March 2021 with a list of all individual ongoing administrative procedures that fall within the scope of paragraph 1 of the same Article. I can confirm that the procedure you refer to in your email is not on this list as it does not meet the criteria of Article 92(4).”*
117. *Ad arguendum*, irrespective of the clear lack of powers of the Board of Appeal set out above, rendering the relaunched appeal case patently inadmissible, proceedings relating to interconnector exemptions are excluded from the scope of Article 92(1)(a) of the Withdrawal Agreement.
118. Exemption requests that have not been decided upon by the end of the transition period are governed by the provisions of Article 308 (ex-Article ENER.10) and Annex 28 (ex-Annex.ENER-3) of the TCA, which do not confer any powers upon ACER.

²⁹ https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/eu-competition-law_en_0.pdf

119. Article 308 of the TCA³⁰, entitled “*Public policy objectives for third-party access and ownership unbundling*”, states: “*1. Where necessary to fulfill a legitimate public policy objective and based on objective criteria, a party may decide not to apply articles 306 [third-party access to transmission and distribution networks] and 307 [system operation and unbundling of transmission network operators] to the following: (a) infrastructure which meets the conditions set out in Annex 28. (..)*”.
120. Annex 28 of the TCA³¹, entitled “*Non-application of third-party access and ownership unbundling of infrastructure*”, states “*A Party may decide not to apply Article 306 [Third-party access to transmission and distribution networks] and Article 307 [System operation and unbundling of transmission network operators] to new infrastructure or to a significant expansion of existing infrastructure where: (a) the risk attached to the investment in the infrastructure is such that the investment would not take place unless an exemption is granted; (b) the investment enhances competition or security of supply; (c) the infrastructure is owned by a natural or legal person separate, at least in terms of its legal form, from the system operators in whose systems it was or is to be built; (d) before granting the exemption, the Party has decided on the rules and mechanisms for management and allocation of capacity.*”.
121. After the end of the transition period, EU law does not apply anymore to future interconnectors between the UK and a Member State. Hence, the Exemption Regime under the New Electricity Regulation does not apply. The TCA provides for an *ad hoc* regime specifying in which situations an exemption may be granted and under which rules. The TCA lays down the possibility of *ad hoc* exemptions under the TCA, as opposed to EU exemptions under the New Electricity Regulation. This possibility under the TCA requires additional steps by the Member States concerned and the UK to develop such arrangements and does not foresee any attribution of powers to ACER or, upon appeal, its Board of Appeal. Furthermore, this *ad hoc* exemption regime of Article 308 and Annex 28 of the TCA is not related to the New Electricity Regulation. Its scope is different: it does not provide for exemptions from EU internal market rules (New Electricity Regulation and Directive (EU) 2019/944); it provides for exemptions from TCA rules on third-party access to transmission and distribution networks (Article 306) and on the operation of networks and unbundling of TSOs (Article 307). This is in contradiction with the Exemption Request of AQUIND, which was a request for a partial exemption from Article 16(6) of Regulation (EC) 714/2009 (use of revenue requirements) and from Article 9 of Directive 2012/27/EU (unbundling requirements), Article 32 of Directive 2012/27/EU (third-party access; all other short-term AQUIND capacity would be subject to the prevailing capacity allocation

³⁰ OJ, L 149/10 of 30.4.2021.

³¹ OJ, L 149/10 of 30.4.2021.

rules; no exemption was requested for short-term capacity) and Articles 37(6) and 37(10) of Directive 2012/27/EU (allocation rules for multi-year contracts).

122. *Ad arguendum*, irrespective of the clear lack of powers of the Board of Appeal set out above, rendering the relaunched appeal case patently inadmissible, Articles 308 and Annex 28 of the TCA do not confer any powers to ACER or the Board of Appeal.
123. It follows from all the above that the Board of Appeal lacks competence to decide upon relaunched appeal Case A-001-2018-R, which must be dismissed as inadmissible.

DECISION

On those grounds,

THE BOARD OF APPEAL

Hereby dismisses the relaunched appeal case as inadmissible.

This decision may be challenged pursuant to Article 263 of the Treaty on the Functioning of the European Union and Article 29 of Regulation (EU) 2019/942 within two months of its publication on the Agency website or of its notification to the Appellant as the case may be.

For the Board of Appeal

The Chairperson

A. PIEBALGS

For the Registry

The Deputy Registrar

S. VAONA