JUDGMENT OF THE GENERAL COURT (Second Chamber)

8 February 2023 (*)

(Energy – Trans-European energy infrastructure – Regulation (EU) No 347/2013 – Delegated regulation amending the list of projects of common interest – Second paragraph of Article 172 TFEU – Refusal of a Member State to give its approval to a proposed electricity interconnector with a view to granting the status of a project of common interest – Non-inclusion by the Commission of the project in the amended list – Obligation to state reasons – Principle of good administration – Equal treatment – Legal certainty – Legitimate expectations – Proportionality – Article 10 of the Energy Charter Treaty)

In Case T-295/20,

Aquind Ltd, established in Wallsend (United Kingdom),

Aquind SAS, established in Rouen (France),

Aquind Energy Sàrl, established in Luxembourg (Luxembourg),

represented by S. Goldberg, C. Davis and J. Bille, Solicitors, and by E. White, lawyer,

applicants,

v

European Commission, represented by O. Beynet and B. De Meester, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented by J. Möller and S. Costanzo, acting as Agents,

by

Kingdom of Spain, represented by M. Ruiz Sánchez, acting as Agent,

and by

French Republic, represented by A.-L. Desjonquères, A. Daniel, W. Zemamta and R. Bénard, acting as Agents,

interveners,

THE GENERAL COURT (Second Chamber),

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

Registrar: I. Kurme, Administrator,

having regard to the written part of the procedure,

further to the hearing on 6 September 2022,

gives the following

Judgment

1 By their action based on Article 263 TFEU, the applicants, Aquind Ltd, Aquind SAS and Aquind Energy Sàrl, seek annulment of Commission Delegated Regulation (EU) 2020/389 of 31 October 2019 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ 2020 L 74, p. 1; 'the contested regulation').

Background to the dispute

2 The applicants are the promoters of a proposed electricity interconnector linking the electricity transmission networks of the United Kingdom and France ('the proposed Aquind interconnector').

3 The proposed Aquind interconnector was placed on the list of 'projects of common interest' ('PCIs') of the European Union by Commission Delegated Regulation (EU) 2018/540 of 23 November 2017 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (OJ 2018 L 90, p. 38), and was thus considered to be a fundamental project in the infrastructure necessary for the completion of the internal energy market. The status of a Union PCI enables a promoter of projects, first, to benefit from a procedure for the grant of rationalised, coordinated and accelerated authorisations, secondly, to submit a request for investment and cross-border allocation of costs to the competent national regulatory authorities, in such a way that the efficiently incurred

investment costs are recoverable from network users and, thirdly, to seek financing under the Connecting Europe Facility.

4 The list established by Delegated Regulation 2018/540 was replaced by the one established by the contested regulation. In the new list in annex to the contested regulation, the proposed Aquind interconnector appears in the table of projects which are no longer considered to be Union PCIs.

Forms of order sought

5 The applicants claim, in essence, that the Court should:

– annul the contested regulation in so far as it removes the proposed Aquind interconnector from the Union list of PCIs;

– in the alternative, annul the contested regulation in its entirety; and

– order the European Commission to pay the costs;

6 The Commission and the Kingdom of Spain contend that the Court should:

– dismiss the application;

– order the applicants to pay the costs.

7 The French Republic contends that the Court should dismiss the action.

8 The Federal Republic of Germany contends that the Court should dismiss the action at least in so far as it concerns Article 10(1) of the Energy Charter Treaty, signed in Lisbon on 17 December 1994 (OJ 1994 L 380, p. 24), and clarify the issue of the inapplicability of Article 26 of that charter in intra-EU relations.

Law

9 In support of their action, the applicants rely on seven pleas in law, alleging, first, infringement of the obligation to state reasons, second, infringement of the procedural and substantive requirements laid down in Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ 2013 L 115, p. 39), in particular Article 5(8), third, infringement of Article 10(1) of the Energy Charter Treaty, fourth, infringement of the right to good administration laid down in

Article 41 of the Charter of Fundamental Rights of the European Union ('the Charter'), fifth, infringement of the principle of equal treatment, sixth, infringement of the principle of proportionality and, seventh, infringement of the principles of legal certainty and the protection of legitimate expectations.

10 The Court considers it appropriate to examine together the fourth and fifth pleas, alleging, respectively, infringement of the right to good administration and infringement of the principle of equal treatment, and not to examine until last the third plea, alleging infringement of Article 10(1) of the Energy Charter Treaty.

The first plea in law, alleging infringement of the obligation to state reasons

11 By the first plea, the applicants allege infringement of the obligation to state reasons. The removal of the proposed Aquind interconnector is not explained either in the contested regulation or in the accompanying statement of reasons, or even in the Commission staff working document accompanying the contested regulation.

12 The Commission, supported by the Kingdom of Spain and the French Republic, disputes that plea.

13 First of all, according to the case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the act at issue and the context in which it was adopted. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of concern, for the purposes of the fourth paragraph of Article 263 TFEU, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, inasmuch as the question whether the statement of reasons for a measure meets the requirements 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 (judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 150; see, also, judgment of 15 November 2012, *Council* v *Bamba*, C-417/11 P, EU:C:2012:718, paragraph 53 and the case-law cited; judgment of 10 June 2020, *Spliethoff's Bevrachtingskantoor* v *Commission*, T-564/15 RENV, not published, EU:T:2020:252, paragraph 108). In particular, the reasons given for a measure adversely affecting a person are sufficient if it was adopted in circumstances known to that person, which enable that person to understand the scope of the measure concerning him or her (judgment of 18 October 2018, *Terna* v *Commission*, T-387/16, EU:T:2018:699, paragraph 53).

14 Next, the interest which the applicants may have in receiving explanations must be taken into account when assessing the extent of the obligation to state reasons for the decisions in question (see, to that effect, judgment of 28 November 2019, *Portigon* v *SRB*, T-365/16, EU:T:2019:824, paragraph 164). The obligation to state reasons is the corollary of the principle of respect for the rights of the defence. Thus, the purpose of the obligation to state the reasons for an act adversely affecting a person is, first, to provide the person concerned with sufficient information to make it possible to determine whether the act is well founded or whether it is vitiated by an error which may permit its validity to be contested before the Courts of the European Union and, secondly, to enable those Courts to review the legality of that act (judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 462).

15 Lastly, a statement of reasons may be implicit, on condition that it enables the persons concerned to know why the measures in question were taken and provides the Court with sufficient material for it to exercise its power of review (judgment of 13 July 2011, *General Technic-Otis and Others* v *Commission*, T-141/07, T-142/07, T-145/07 and T-146/07, EU:T:2011:363, paragraph 302).

16 It is in the light of those factors that the first plea in law must be examined.

17 In the first place, it is necessary to determine both the reasons why the Commission did not include the proposed Aquind interconnector as a Union PCI in the contested regulation and where those reasons are set out.

18 First, the recitals of the contested regulation contain a brief summary of the content of Regulation No 347/2013, they refer to the Commission's power to adopt delegated acts in order to draw up the Union list of PCIs, they reiterate the obligation to draw up a new list every two years and they state that the projects proposed for inclusion in the Union list of PCIs were evaluated by the regional groups and that those groups confirmed that the projects in question satisfied the criteria set out in Article 4 of Regulation No 347/2013.

19 The contested regulation makes a general reference to the FEU Treaty and to Regulation No 347/2013 in its two citations.

20 Recital 5 of the contested regulation specifies that 'the draft regional lists [had been] agreed by the regional groups at technical-level meetings' and that, 'following the opinions of the [European Union] Agency for the Cooperation of Energy Regulators ('ACER') … on the consistent application of the assessment criteria and of the cost/benefit analysis across regions, the regional groups' decision-making bodies adopted the regional lists on

4 October 2019'. It also stated that 'pursuant to Article 3(3)(a) of Regulation … No 347/2013, prior to the adoption of the regional lists, all proposed projects [had been] approved by the Member States to whose territory the projects relate'.

21 Part A of Annex VII to Regulation No 347/2013 (as amended by the contested regulation), entitled 'Principles applied in establishing the Union list [of PCIs]', contains paragraph 3, entitled 'Projects that are no longer considered PCIs …'. In paragraph 3, the Commission stated the following:

'(a) Several projects included in the Union lists established by Regulation (EU) No 1391/2013 and Regulation (EU) 2016/89 [were] no longer considered [Union] PCIs for one or more of the following reasons:

– the project has already been commissioned or is to be commissioned in the near future and so it would not benefit from the provisions of Regulation (EU) No 347/2013;

– according to new data the project does not satisfy the general criteria;

– a promoter has not re-submitted the project in the selection process for this Union list [of PCIs]; or

– the project was ranked lower than other candidate PCIs in the selection process.

…'

22 The applicants are correct in stating that, among those four reasons, the second – which states 'according to new data the project does not satisfy the general criteria' – is the only one which could possibly have justified not including the proposed Aquind interconnector in the Union list of PCIs.

23 However, the concept of 'general criteria' in the second reason in question is rather vague. It is not clear whether that concept is limited to the one in Article 4(1) of Regulation No 347/2013 – and, therefore, to the conditions set out in that provision, which must be satisfied by PCI projects – or whether the expression 'general criteria' covers, in addition to the conditions laid down in that provision, all the conditions which a project must satisfy in order to be included in the Union list of PCIs.

24 Secondly, it should be noted that, in its written pleadings, the Commission stated that the reason why it had not included the proposed Aquind interconnector as a Union PCI in the contested regulation concerned the French Republic's refusal to give its approval to the inclusion of that project in the Union list of PCIs. It stated that the French Republic had justified its

refusal by the existence of a risk of overcapacity on account of the existence of several projects in the same region and by the fact that the proposed Aquind interconnector was considered to be the most uncertain. However, the Commission accepts that the contested regulation does not contain any reference to the French Republic's refusal or, a fortiori, to the reasons why the latter refused to give its agreement.

25 In the second place, it is therefore necessary to examine whether, despite that lack of an explicit reference to the reason for the French Republic's refusal in the contested regulation, the applicants were in a position to know the reasons why their proposed Aquind interconnector had not been included in the Union list of PCIs. That involves determining whether, for the purposes of the case-law cited in paragraph 13 above, the project was not included in circumstances known to the applicants which would enable them to understand the scope of the measure taken concerning them, and whether the view may be taken that there was implied reasoning in the contested regulation.

26 First, the applicants cannot disregard the regulatory framework within which the contested regulation was adopted. That regulatory framework is characterised in the second paragraph of Article 172 TFEU, which provides that guidelines and PCIs which relate to the territory of a Member State are to require that State's approval. The regulatory framework is also characterised in point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013, which lays down the requirement that the Member States concerned are to approve each individual proposal for a PCI where a group draws up its regional list, and in the first subparagraph of Article 3(4) of Regulation No 347/2013, which provides, in essence, that the Commission is to be empowered to adopt delegated acts establishing the Union list of PCIs, subject to the approval of the Member State whose territory is concerned by the PCI.

27 Secondly, as regards the factual context in which the contested regulation was adopted, it should be recalled that that regulation was published in the *Official Journal of the European Union* on 11 March 2020. A number of factors lead to the conclusion that, before that publication, the applicants had become aware of the reservations expressed by the French Republic about the proposed Aquind interconnector and, ultimately, of the latter's refusal to give its approval to that project.

28 First of all, in an email of 11 July 2019 sent to the applicants, the Commission informed them that the French Republic had expressed reservations about the proposed Aquind interconnector at the technical-level meeting of the regional group on 5 July 2019 and that it suggested that they should contact the relevant ministry for further details.

29 Next, at the meeting of 5 December 2019 of the European Parliament's Committee on Industry, Research and Energy, the Commissioner for Energy replied to a question put by two Members of the European Parliament from the United Kingdom concerning the reasons for the removal of the proposed Aquind interconnector from the Union list of PCIs. The Commissioner for Energy stated, first, that the French Republic considered that the four projects linking the United Kingdom and France would lead to overcapacity, secondly, that that Member State was of the opinion that the proposed Aquind interconnector was considered to be the most uncertain and, thirdly, that that Member State had accordingly requested that the project at issue should not be included in the new list of PCIs. The Commissioner for Energy stated that the Member States were entitled to approve projects which concerned their territory and that the Commission was required to respect that right.

30 In their reply to a written question from the Court, the applicants admit that they were aware of the reply from the Commissioner for Energy on the same day of the meeting, that is to say, 5 December 2019.

31 Lastly, in response to another written question from the Court, the applicants stated that, in response to their letter of 24 October 2019, the Deputy Director-General of the Commission's Directorate-General (DG) for Energy informed them, by letter of 20 February 2020, that the Commission was not empowered to include any projects in the Union list of PCIs after the decisions of the regional groups had been taken, and stated that the French Republic had raised an objection to the proposed Aquind interconnector.

32 It follows from all of the foregoing that the applicants became aware of the reason why the Commission did not include the proposed Aquind interconnector in the Union list of PCIs in the contested regulation, in so far as that reason related to the fact that the French Republic had not approved that project. In addition, they were able to note that, according to that Member State, there was a risk of overcapacity due to the existence of a number of projects and that the proposed Aquind interconnector was the most uncertain.

33 In the third place, it is necessary to examine the applicants' argument that the statement of reasons relating to the French Republic's refusal to approve the inclusion of the proposed Aquind interconnector in the Union list of PCIs, and the explanations given by that Member State regarding the risk of overcapacity and the fact that the project in question was the most uncertain, are insufficient. The applicants submit, in essence, that the Commission was not entitled to confine itself to providing such a statement of reasons, but should have required the Member State concerned to provide further justification for its refusal.

34 In order to determine whether the statement of reasons referred to in paragraph 32 above was sufficient, it is necessary to know at the outset what level of reasoning is required when the decision is made on whether or not to include a proposed interconnector in the Union list of PCIs.

35 Examination of that question involves considering the division and scope of the respective powers of the Member States and the Commission in the process for adopting the Union lists of PCIs. The applicants submit that the second paragraph of Article 172 TFEU does not confer on Member States an entirely discretionary right of veto over the inclusion of a PCI in the Union list and that, under Regulation No 347/2013, the Commission has a discretion in adopting the Union list of PCIs. For its part, the Commission submits that it could not include the proposed Aquind interconnector in the Union list of PCIs, because it considers that it cannot overrule the Member State's refusal to give its approval.

36 In that regard, it is worth recalling the settled case-law according to which, when a provision of EU law is being interpreted, account must be taken, not only of the terms of that provision and the objectives which it pursues, but also of its context and of all the provisions of EU law (see judgment of 8 July 2019, *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 49 and the case-law cited; order of 24 October 2019, *Liaño Reig* v *SRB*, T-557/17, not published, EU:T:2019:771, paragraph 59).

37 As regards the wording of the second paragraph of Article 172 TFEU, it should be noted that a literal reading of that provision clearly supports the Commission's position. Indeed, the wording of that provision is in no way capable of being interpreted in a number of ways, and it thus presents no difficulty in interpretation.

38 In view of the clear wording of the second paragraph of Article 172 TFEU, it must be held that that provision confers a discretion, that is to say, a broad margin of appreciation, on the Member State concerned to give or to refuse to give its approval to the inclusion of a project in the Union list of PCIs.

39 That is confirmed by the teleological and contextual interpretations of the second paragraph of Article 172 TFEU. The fact that the legislature chose to introduce a form of right of veto in favour of the Member State concerned is explained by the fact that trans-European network policy includes territorial aspects and thus, in some way, touches upon town and country planning, which is an area that traditionally falls within the sovereignty of the Member States (Opinion of Advocate General Bot in *United Kingdom* v *Parliament and Council*, C-121/14, EU:C:2015:526, points 157 and 158).

40 Moreover, that is also the meaning of the provisions of Regulation No 347/2013 referred to in paragraph 26 above. Consequently, and contrary to the applicants' submission, the Commission was not entitled to overrule that refusal to approve the project.

41 In view of the Member State's discretion, it is necessary to determine to what extent its refusal to approve a project must state the reasons on which it is based. In that regard, point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013 and Annex III.2(10) to that regulation state that, where a group draws up its regional list, the Member State concerned which decides not to give its approval to a project must present its substantiated reasons for doing so to that regional group. Those provisions state that the high-level decision-making body of the regional group concerned may examine those reasons for refusal 'at the request of a Member State' of that regional group. The legislature thus expressed its intention that, as a continuation of the second paragraph of Article 172 TFEU, the question of the refusal to approve a project preventing it from being granted the status of a Union PCI should fall within the competence of the Member States concerned.

42 In the present case, the minutes of the meeting of the technical decision-making bodies and of the meeting of the high-level decision-making body indicate that the French Republic had given reasons for its refusal to approve the inclusion of the proposed Aquind interconnector in the fourth list of PCIs and that no Member State of the regional group concerned had requested an examination of those reasons.

43 The Commission therefore satisfied the obligation to state reasons by referring to the French Republic's refusal to give its approval to the inclusion of the proposed Aquind interconnector in the Union list of PCIs. Similarly, it cannot be criticised for not having asked the French Republic for explanations of the detailed reasons for that refusal. In that regard, point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013 and Annex III.2(10) to that regulation did not allow it to interfere in any way with the reasons put forward by the French Republic. It should be added that the applicants have not pleaded the illegality of those provisions and that they cannot therefore allege that the Commission infringed its obligation to state reasons when it complied with those provisions (see, to that effect and by analogy, judgment of 26 September 2014, *Raffinerie Heide* v *Commission*, T-631/13, not published, EU:T:2014:830, paragraphs 41 to 44, and Opinion of Advocate General Mengozzi in *DK Recycling und Roheisen* v *Commission*, *Arctic Paper Mochenwangen* v *Commission*, *Raffinerie Heide* v *Commission* and *Romonta* v *Commission*, C-540/14 P, C-551/14 P, C-564/14 P and C-565/14 P, EU:C:2016:147, points 90 and 91).

44 In that context, Article 3(1) of Regulation No 347/2013, which provides that 'decision-making powers in the Groups shall be restricted to Member States and the Commission, who shall, for those purposes, be referred to as the decision-making body of the [regional] Groups [concerned]', and Article 3(4) and Article 16 of Regulation No 347/2013, by which the Commission is empowered to adopt the contested regulation, cannot be interpreted as meaning that the Commission is responsible for any unlawful act committed by a Member State when it refuses to give its approval to a project and that it should thus respond to a potential infringement of the obligation to state reasons committed by that Member State. Such an approach would be contrary to the rules governing the division of powers between the Member States and the Commission, as provided for in Article 172 TFEU and reiterated in Regulation No 347/2013.

45 Accordingly, it must be concluded that the Commission has provided a statement of reasons to the requisite legal standard for the contested regulation, and therefore the first plea in law must be rejected.

The second plea in law, alleging infringement of the procedural and substantive requirements laid down in Regulation No 347/2013, in particular Article 5(8)

46 By the second plea, the applicants claim that procedural and substantive rules have been infringed. Essentially, that plea comprises five complaints.

47 The Commission, supported on this point by the Kingdom of Spain and the French Republic, disputes those complaints and the plea in its entirety.

48 By the first complaint, the applicants submit that, as the body responsible for adopting the contested regulation, the Commission should have ensured that the Union list of PCIs is drawn up in accordance with all the relevant legal requirements. In the applicants' submission, the Commission infringed Article 3(3) of Regulation No 347/2013 on the ground that, for several reasons, the process set out in Annex III.2 to that regulation was not followed.

49 First, the applicants rely on the fact that ACER stated that, due to a number of lacunae in the information that had been provided to it, it had not been able to express an opinion on the consistent application of the criteria and the cost-benefit analysis across regions. However, the applicants do not indicate how the considerations set out in ACER's opinion have an actual impact on the lawfulness of the contested regulation in relation to the proposed Aquind interconnector.

50 The Commission was not able to include the proposed Aquind interconnector in the new Union list of PCIs on the ground that the French

Republic had not given its approval, that Member State having considered that there was a risk of overcapacity and that the proposed Aquind interconnector was regarded as the most uncertain. The issue of the consistent application of the criteria and the cost-benefit analysis across regions therefore had no effect on the decision not to include that project in the Union list of PCIs.

51 Secondly, the applicants' argument that the high-level decision-making body of the regional group concerned and the Commission infringed the requirements of Annex III.2(13) to Regulation No 347/2013 on the ground that they did not take into consideration ACER's opinion on the consistent application of the assessment criteria and of the cost-benefit analysis across regions is neither clear nor substantiated.

52 First of all, in general terms, the contested regulation states, in recital 5, that the high-level decision-making body of the regional group concerned did in fact take account of ACER's opinion when it adopted its final regional list. Next, the ACER opinion includes a section A.4.1.3 specifically devoted to the proposed Aquind interconnector, which highlights the differences between the regulatory authorities of the French Republic and the United Kingdom, and the reasons why the French regulatory authority, namely the Commission de régulation de l'énergie (Energy Regulatory Authority; CRE), opposed the inclusion of that project in the final regional list. Lastly, and in any event, it must be borne in mind that the French Republic refused to approve that project for reasons connected with the risk of overcapacity and because the proposed Aquind interconnector was considered to be the most uncertain, that the high-level decision-making body of the regional group concerned and the Commission were bound by that refusal and that, in those circumstances, they cannot be criticised for not taking ACER's opinion into account.

53 Thirdly, the applicants allege that the Commission failed to ensure cross-regional consistency in accordance with Article 3(5)(b) of Regulation No 347/2013, submitting, in essence, that a significant number of projects which had not progressed or had been regularly reprogrammed had been included in the Union list of PCIs and that, therefore, the contention that the proposed Aquind interconnector was the most uncertain did not amount to an obstacle to its eligibility as a Union PCI.

54 That argument cannot succeed. The applicants merely repeat the content of ACER's opinion on that point, but they do not demonstrate that that could call into question the lawfulness of the contested regulation as regards the proposed Aquind interconnector.

55 It should be noted that the Commission was required to take into consideration the French Republic's refusal to give its approval to the

inclusion of the proposed Aquind interconnector in the Union list of PCIs, and that it could not call into question the reasons why that project was the most uncertain. In that regard, it should be recalled that point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013 provides that 'when a Group draws up its regional list: … each individual proposal for a project of common interest shall require the approval of the Member States, to whose territory the project relates' and that 'if a Member State decides not to give its approval, it shall present its substantiated reasons for doing so to the [regional] Group concerned'. Annex III.2(10) to that regulation states that, if a Member State of that regional group so requests, the high-level decision-making body of that group must examine those reasons. The Commission was therefore not empowered to request that the reasons relied on by the French Republic be examined, and it therefore did not make any error in that regard. In the present case, no Member State has come forward to ask the French Republic to explain the reasons for its refusal.

56 Even if, as the applicants submit, the French Republic's conclusion that the proposed Aquind interconnector was the most uncertain is the result of an assessment error, the Commission did not have the power to correct it, any more than the General Court itself has jurisdiction to examine that issue. In that regard, it must be pointed out that, at the hearing, and without being challenged on that point by the applicants, the French Republic stated that its refusal to give its approval to the inclusion of the proposed Aquind interconnector in the Union list of PCIs was challenged before the tribunal administratif de Paris (Administrative Court, Paris, France).

57 By the second complaint, the applicants allege that the regional group infringed Article 3(2) of Regulation No 347/2013 in that it did not adopt rules of procedure.

58 Article 3(2) of Regulation No 347/2013 provides that each regional group is to adopt its own rules of procedure taking into account the provisions of Annex III. It is apparent from the documents adduced before the Court by the applicants themselves that the rules of procedure had been adopted in the form of a mandate from several regional gas and electricity groups, including the 'Northern Seas Offshore Grid' – that is to say, the priority corridors and areas, and the geographical coverage of which the proposed Aquind interconnector forms part. The applicants themselves state that they were able to acquaint themselves with those rules of procedure via the Union PCI portal and were able to download them.

59 The fact that the rules of procedure contained the words 'Draft' is irrelevant in that regard. On the applicants' own admission expressed in their written pleadings, they were perfectly aware of the fact that, despite that reference, it was the final version of the rules of procedure, which was, moreover,

evidenced by the fact that the name of the electronic file included the word 'Final'. In those circumstances, they cannot merely assert in a vague and unsubstantiated manner that the regional group of the 'Northern Seas Offshore Grid' did not adopt rules of procedure, and that therefore the process lacked transparency and did not offer them minimum guarantees.

60 The basis of the third complaint is that the delays in the implementation of the proposed Aquind interconnector cannot constitute a reason for not including that project in the Union list of PCIs. The applicants maintain that the regional group had already examined that issue, did not find any problem linked to those delays and, moreover, did not invite them to justify their position on that point.

61 That complaint is not relevant. The delays in implementing the proposed Aquind interconnector were not relied on by the French Republic, within the high-level decision-making body of the regional group of the 'Northern Seas Offshore Grid', as reasons for refusing to give its approval to the proposed Aquind interconnector.

62 Admittedly, it is apparent from ACER's opinion of 25 September 2019 that the CRE mentioned the delay in implementing the proposed Aquind interconnector and that it is one of the reasons why the CRE opposed the inclusion of that project in the Union list of PCIs. However, as the Commission rightly states, the position of a national regulatory authority cannot be interpreted as being the position of a Member State within the high-level decision-making body of the regional group concerned. Moreover, it is not apparent from any document that the French Republic adopted the reasons relied on by that national regulatory authority.

63 For that reason, the applicants' argument that no comments were made at the meeting of the regional network group of the 'Northern Seas Offshore Grid' on 28 May 2019 on the delay encountered by the proposed Aquind interconnector in its implementation, and on which the applicants were not called upon to justify themselves, is also irrelevant.

64 As regards the fourth complaint, alleging inconsistencies and inaccuracies in the Artelys study relating to the cost-benefit analysis, like the third complaint, it too is irrelevant.

65 The reason why the Commission did not include the proposed Aquind interconnector in the contested regulation relates to the French Republic's opposition to that project, which is based on reasons unrelated to the Artelys study. In that regard, it is apparent from paragraph A.4.1.3 of ACER's opinion of 25 September 2019 that it is the CRE, and not the French

Republic, which relied, inter alia, on that study to justify its opposition to the proposed Aquind interconnector.

66 In the fifth complaint, the applicants submit that the Aquind project could be removed from the Union list of PCIs only in the case provided for in Article 5(8) of Regulation No 347/2013. They submit that Article 3(3)(a) of Regulation No 347/2013 requires a Member State which refuses an individual proposal for a PCI to present the 'reasons' for that refusal, so that its decision cannot be purely arbitrary. They state that the French Republic did not give reasons for its refusal to approve the proposed Aquind interconnector and that the Commission thus seems to have considered that it was possible to remove the project for a reason other than the one provided for in Article 5(8) of Regulation No 347/2013, namely that the project was no longer supported by the Member State in whose territory it was to be operated.

67 First, Article 5(8) of Regulation No 347/2013 refers only to cases in which a project that has already been included in the Union list of PCIs is removed from that list, that is to say, where the project has been included in that list on the basis of incorrect information which was a decisive factor in that listing or where the project does not comply with EU law. Therefore, that provision does not deal with the inclusion of projects on the new list every two years.

68 In that regard, it should be noted that the proposed Aquind interconnector was not 'removed' from the Union list of PCIs; rather, it was not included in the new list at the end of the procedure for drawing up that list. Article 5(8) of Regulation No 347/2013 is therefore irrelevant in the present case.

69 That conclusion is confirmed by recital 24 of Regulation No 347/2013. That recital states unequivocally that a 'new' Union list of PCIs is to be drawn up every two years, that existing PCIs to be included in the new Union list of PCIs are subject to the same selection procedure as the projects proposed for the purpose of drawing up Union lists of PCIs, and that those which no longer meet the relevant criteria and requirements laid down by that regulation should not be included in the new Union list of PCIs. Projects that have already been included in the previous Union list of PCIs therefore do not have any advantage over the new projects. Regulation No 347/2013 is limited to pragmatic consideration, in recital 24, stating that, in order to minimise the resulting administrative burden for earlier projects as much as possible, use should be made, to the extent possible, of information submitted previously, and account should be taken of the annual reports of the promoters of those earlier projects.

70 Secondly, the applicants rely, unsuccessfully, on point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013 in order to argue that the exercise of a Member State's right of veto to the inclusion of a project in

the Union list of PCIs is limited only to the first inclusion of that project in that list.

71 Point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013 provides that 'when a Group draws up its regional list: … each individual proposal for a [PCI] shall require the approval of the Member States, to whose territory the project relates' and that 'if a Member State decides not to give its approval, it shall present its substantiated reasons for doing so to the [regional] Group concerned'. Annex III.2(10) to that regulation states that, if a Member State of the group so requests, the high-level decision-making body of the regional group concerned must examine those reasons.

72 Those provisions of Regulation No 347/2013 make no distinction as to whether a project is for the first time the subject of an application for inclusion or has already been included in the previous list. They therefore apply each time a new list is drawn up and thus refer to any project to which a Member State is opposed.

73 The fact that a Member State must present the reasons for refusing to approve a project and that the high-level decision-making body of the regional group concerned is called upon to examine those reasons at the request of another Member State of that group still does not mean that the Member State's right of veto may be exercised only on the basis of a criterion laid down in Regulation No 347/2013. First, the Member State has a discretion under the second paragraph of Article 172 TFEU to refuse to give its approval to including a project in the Union list of PCIs. Secondly, and in that respect, it does not follow from point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013, or from any other provisions of that regulation, that the 'reasons' on the basis of which the Member State may refuse to give its approval are limited to cases in which non-compliance with Regulation No 347/2013, in particular, or with EU law, in general, is found.

74 Furthermore, contrary to what is claimed by the applicants, there was no infringement of point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013, since the Commission correctly found, in the present case, that the French Republic had presented the reasons for refusing to approve the inclusion of the proposed Aquind interconnector in the Union list of PCIs. The respective minutes of the meeting of the technical decision-making bodies and of the meeting of the high-level decision-making body of the regional group concerned mention that the French Republic considered that the four proposed interconnectors between France and the United Kingdom would lead to overcapacity and that the proposed Aquind interconnector was the most uncertain of those projects.

75 It follows from all the foregoing that the second plea in law must be rejected.

The fourth and fifth pleas in law, alleging, respectively, infringement of the right to good administration and infringement of the principle of equal treatment

76 The fourth and fifth pleas allege, respectively, infringement of the right to good administration and infringement of the principle of equal treatment. The applicants submit that the Commission is responsible for amending the Union list of PCIs and therefore has the right and the duty to ensure compliance with the principles of good administration and equal treatment, and with other general principles of EU law. They emphasise that they did not have the opportunity to be heard during meetings of the technical decision-making body or of the high-level decision-making body. They also submit that, as a member of all the 'decision-making bodies', the Commission must adopt the Union list of PCIs under a delegation of legislative power and that it is therefore in a position to amend the regional lists proposed by the bodies.

77 The Commission, supported by the Kingdom of Spain and the French Republic, disputes the fourth and fifth pleas.

78 First, it should be recalled that the right to good administration is one of the guarantees conferred by the European Union's legal order in administrative procedures and is enshrined in Article 41 of the Charter (see, to that effect, judgment of 14 November 2017, *Alfamicro* v *Commission*, T-831/14, not published, EU:T:2017:804, paragraph 165 and the case-law cited). Article 41(1) of the Charter provides that 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union'. Article 41(2) of the Charter states that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him or her adversely is taken.

79 Furthermore, the Commission is required to observe the principle of equal treatment or non-discrimination, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 15 April 2010, *Gualtieri* v *Commission*, C-485/08 P, EU:C:2010:188, paragraph 70). Compliance with the principle of equal treatment must, however, be reconciled with that of the principle of legality (judgment of 17 January 2013, *Gollnisch* v *Parliament*, T-346/11 and T-347/11, EU:T:2013:23, paragraph 109).

80 In the second place, the examination of the fourth and fifth pleas involves determining what roles are allocated by Regulation No 347/2013 to each of the participants in the procedure for the inclusion of proposed projects in the Union list of PCIs and the conduct of that procedure.

81 First, as provided for in Article 3(3) of Regulation No 347/2013, it is for the regional group concerned to draw up the regional list of proposed PCIs. In that regard, it should be recalled that the group in question consists of representatives of the Member States, the national regulatory authorities and the transmission system operators, and representatives of the Commission, ACER and the European Network of Transmission System Operators for Electricity (see Annex III.1(1) to Regulation No 347/2013).

82 Promoters of a project potentially eligible for selection as a PCI wanting to obtain the status of projects of common interest must submit an application for selection as a PCI to the group (see Annex III.2(1) to Regulation No 347/2013). For proposed projects such as the one proposed for the project for an electricity interconnector, the national regulatory authorities and, if necessary, ACER are to ensure the consistent application of the criteria and of the methodology for the cost-benefit analysis, evaluate the importance of their cross-border dimension and present their assessment to the group (see Annex III.2(7) to Regulation No 347/2013).

83 It must be borne in mind that the legislation provides, in essence, that, when drawing up its regional list of proposed Union PCIs, the regional group concerned must take account of the fact that each individual proposal for a PCI requires the approval of the Member States whose territory is affected by the project. A Member State which refuses to give its approval will have to present the reasons for this refusal to the group concerned (see point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013). In that context, it is provided that, if a Member State of the group so requests, the high-level decision-making body of that group will have to examine the reasons put forward by the Member State to justify its refusal to approve a project of common interest concerning its territory (see Annex III.2(10) to Regulation No 347/2013).

84 The draft of the regional lists of proposed projects drawn up by the group is to be communicated to ACER. ACER then assesses the draft of those lists and adopts an opinion on that draft – which will deal with, inter alia, the consistent application of the criteria and the cost-benefit analysis across regions (see point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013 and Annex III.2(12) to that regulation).

85 Following ACER's opinion, the high-level decision-making body of the regional group concerned 'adopts' the final regional list of proposed Union

PCIs, on the basis of the group's proposal and taking into account ACER's opinion and the evaluation of the competent national regulatory authorities. That body presents the final regional list to the Commission.

86 Under a delegation of power, the Commission is empowered to adopt delegated acts which establish the Union list of PCIs. However, recital 23 of Regulation No 347/2013 states that the delegation to the Commission of the power to adopt and review that list in accordance with Article 290 TFEU is carried out 'while respecting the right of the Member States to approve [Union PCIs] related to their territory'. To that effect, the first subparagraph of Article 3(4) of that regulation states that the power to adopt an act which establishes the list of Union PCIs is exercised 'subject to the second paragraph of Article 172 of the TFEU'. The second paragraph of Article 172 TFEU provides that Union PCIs which relate to the territory of a Member State are to require the approval of that Member State.

87 Secondly, the conclusions below may be drawn from the description of the various stages of the procedure laid down in Regulation No 347/2013.

88 First of all, neither the technical decision-making body of the regional group concerned (which draws up the regional list of proposed Union PCIs), nor the high-level decision-making body of that regional group (which adopts the regional list of proposed Union PCIs), nor the Commission (which adopts the delegated act definitively establishing the Union list of PCIs) may include, in those lists, an individual proposal for a project which has not received the approval of the Member State in whose territory the project is to be implemented.

89 Next, and as is apparent from the foregoing, the Commission does not have a discretion in definitively drawing up the Union list of PCIs, contrary to what is claimed, in essence, by the applicants.

90 The Commission's delegated powers – conferred by Article 3(4) and Article 16 of Regulation No 347/2013, read together – to adopt definitively the Union list of PCIs must be exercised within the limits of the provisions of the FEU Treaty and of Regulation No 347/2013. As has already been pointed out in paragraph 86 above, the Commission's power to adopt delegated acts is exercised 'subject to the second paragraph of Article 172 of the TFEU'. The Commission thus has no power to add to the list in question a project which has been refused approval by a Member State on whose territory the project was to be implemented.

91 Similarly, it is apparent both from the second subparagraph of Article 3(4) and from Article 3(5) of Regulation No 347/2013 that the task of ensuring that the Union list of PCIs is drawn up every two years and that of adopting

that list, which falls to the Commission, are carried out 'on the basis of the regional lists' of proposed Union PCIs.

92 In the context of that task, the Commission's powers are precisely defined as '[ensuring] that only those projects that fulfil the criteria referred to in Article 4 [of Regulation No 347/2013] are included [in the Union list of PICs]' (Article 3(5)(a) of Regulation No 347/2013), '[ensuring] cross-regional consistency, taking into account the opinion of [ACER]' (Article 3(5)(b) of Regulation No 347/2013) and '[aiming] for a manageable total number of projects … on the Union list [of PCIs]' (Article 3(5)(d) of Regulation No 347/2013).

93 Those three powers which were conferred on the Commission can logically be exercised only in respect of projects which appear on the regional lists of proposed Union PCIs. The Commission can assess compliance with the criteria applicable to PCIs, set out in Article 4 of Regulation No 347/2013, only as regards the projects included in those lists. The examination of compliance with those criteria cannot relate to a project which, because of the refusal at an earlier stage of the Member State on whose territory that project was to be implemented, is not even examined in the light of those criteria by the decision-making bodies of the regional group concerned. Therefore, by definition, the Commission cannot examine compliance with those criteria in relation to a project for which that examination has never been carried out.

94 A similar conclusion may be drawn in relation to the Commission's competence to ensure cross-regional consistency, taking into account ACER's opinion. Such competence can logically be exercised by the Commission only with regard to the projects included in the lists drawn up by the regional groups' decision-making bodies. Therefore, it cannot relate to a project which was not included in those lists because approval was refused by a Member State on whose territory the project was to be implemented.

95 As regards the power to check whether the total number of projects is manageable, Annex III.2(14) to Regulation No 347/2013 states that the Commission may consider not including certain projects in the Union list of PCIs if it considers that the total number of proposed PCIs exceeds a manageable number. However, no provision of Regulation No 347/2013 confers on it a power to add projects which were not selected by the regional groups' decision-making bodies or, consequently, those which were not approved by the Member State on whose territory the project was to be implemented.

96 Lastly, as regards the reasons relied on by the Member State in support of its refusal to give its approval, the EU legislature reserved only to Member States belonging to the regional group concerned the possibility of requesting

that those reasons be examined, thus excluding all the other parties comprising the regional group, namely the national regulatory authorities, the transmission system operators and the representatives of the Commission, ACER and the European Network of Transmission System Operators for Electricity. The legislature thus intended that, as a continuation of the second paragraph of Article 172 TFEU, the question of the refusal to approve a project should remain within the remit of the Member States.

97 Thirdly, from a factual point of view, it must be stated that the French Republic refused to include the proposed Aquind interconnector in the Union list of PCIs and presented the reasons for that refusal to the group concerned (see paragraph 74 above).

98 It is also apparent from the documents provided in the case that no other Member State in the regional group asked for the reasons put forward by the French Republic to be examined. In that regard, the applicants wrongly rely on an email of 20 November 2019, sent by the competent United Kingdom body to the Commission, in order to assert, in essence, that that former Member State objected to the removal of the proposed Aquind interconnector and thus obliged the group to examine the reasons. That email contains a request that certain amendments be made to the minutes of the meeting of the high-level decision-making body of 4 October 2019, but does not contain any request, even implicit, to the regional group concerned to examine the reasons put forward by the French Republic for refusing to include the proposed Aquind interconnector in the Union list of PCIs. That email contains only a statement of position from the United Kingdom in which it indicates its views on the four proposed interconnectors between that State and France.

99 It follows from the foregoing that the Commission could exercise its powers only with regard to the list of projects adopted by the high-level decision-making body of the regional group concerned, that it could not request an examination of the reasons why the French Republic had refused to approve the proposed Aquind interconnector and that it could not add that project to the Union list of PCIs.

100 In that context, the applicants' argument alleging infringement of their right to be heard must be rejected. It is apparent from the above findings that the Commission was required, without having any discretion, not to include the proposed Aquind interconnector in the Union list of PCIs and that it complied with the rules laid down in Regulation No 347/2013.

101 It is important to point out in that regard that the applicants have not at any time claimed that the relevant provisions of Regulation No 347/2013 are unlawful, in particular point (a) of the second subparagraph of Article 3(3) of, and Annex III.2(10) to, that regulation. They cannot therefore claim any

infringement of their right to be heard (see, to that effect and by analogy, judgment of 26 September 2014, *Raffinerie Heide* v *Commission*, T-631/13, not published, EU:T:2014:830, paragraphs 41 to 44, and Opinion of Advocate General Mengozzi in *DK Recycling und Roheisen* v *Commission*, *Arctic Paper Mochenwangen* v *Commission*, *Raffinerie Heide* v *Commission* and *Romonta* v *Commission*, C-540/14 P, C-551/14 P, C-564/14 P and C-565/14 P, EU:C:2016:147, points 90 and 91).

102 Moreover, in order for an infringement of the right to be heard to result in the annulment of the contested regulation, it was for the applicants to establish that, had it not been for that irregularity, they could have relied on evidence capable of calling into question the Commission's position and could therefore have had an influence, in whatever way, on the assessments made by the Commission when the proposed Aquind interconnector was not included in any Union list of PCIs (see, to that effect, judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 23 and the case-law cited). However, there was nothing that could have influenced the Commission's position in any way in view of the French Republic's refusal to give its approval to the inclusion of the proposed Aquind interconnector in the Union list of PCIs.

103 In those circumstances, the Commission cannot be said to have infringed the right to good administration.

104 Nor can it be said that the Commission infringed the principle of equal treatment. For the purposes of the case-law cited in paragraph 79 above, it could not treat the proposed Aquind interconnector unequally in comparison with the competing projects, since that project was not included in the list of proposed PCIs drawn up by the regional group concerned, on the basis of which the Commission exercised its delegated powers; thus the proposed Aquind interconnector was not in a comparable situation to that of the competing projects on that list.

105 More specifically, first, the applicants submit, unsuccessfully, that the Commission infringed the principle of equal treatment on the ground that the proposed interconnectors between France and the United Kingdom (including the proposed Aquind interconnector) met the same needs of the same customers and that the results of the Artelys study – on the basis of which the Commission allegedly refused to approve that project – did not concern the proposed Aquind interconnector in particular, but the three other competing projects.

106 It must be borne in mind that the Commission could only take note of the French Republic's refusal to give its approval to the inclusion of the proposed Aquind interconnector in the Union list of PCIs. In addition, it is apparent

from the examination of the first plea alleging infringement of the obligation to state reasons that the results of the Artelys study do not constitute a reason why the proposed Aquind interconnector was not included in the list of proposals drawn up by the decision-making group concerned, nor do they constitute the reason why the Commission did not include that project in the Union list of PCIs.

107 Secondly, the applicants unsuccessfully base their fifth plea, alleging infringement of the principle of equal treatment, on the fact that the proposed Aquind interconnector received a better score than two competing projects in the ranking of proposed PCIs carried out in accordance with the evaluation method and that, in spite of that, it was not included in the Union list of PCIs.

108 Apart from the fact that the proposed Aquind interconnector did not appear on the regional list adopted by the decision-making group and the fact that the Commission could not therefore take it into account, the ranking relied on by the applicants is in any event wholly irrelevant. Regulation No 347/2013 states unequivocally in Article 4(4) and in Annex III.2(14) that the ranking of projects is intended only for internal use by the group, that neither the regional list nor the Union list of PCIs contains any ranking and that it cannot be used for any other subsequent purpose, except when the Commission exercises the power referred to in paragraph 95 above to verify whether the total number of projects is manageable.

109 In that context, it is necessary to examine the applicants' argument based on the judgment of 11 March 2020, *Baltic Cable* (C-454/18, EU:C:2020:189). They state that the Court of Justice held in that judgment that the powers conferred on national regulatory authorities had to be interpreted and applied in a manner which respects the general principles of EU law even where the regulation does not give the authority concerned the express power to take the necessary measures to avoid any discrimination. They submit, in essence, that, in the same way, the powers conferred on the Commission to adopt the Union lists of PCIs must be interpreted and applied in a manner which respects the general principles of EU law, in the present case the principle of equal treatment, even though Regulation No 347/2013 does not give it the express power to take the necessary measures in that regard.

110 However, that argument cannot succeed. First, the applicants start from the incorrect premiss that the situation of the national regulatory authorities concerned by the judgment of 11 March 2020, *Baltic Cable* (C-454/18, EU:C:2020:189), is the same as the Commission's in the present case. There is a fundamental difference between the two situations at issue relating to the fact that, under Article 16(6) of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing

Regulation (EC) No 1228/2003 (OJ 2009 L 211, p. 15), the national regulatory authority was vested with the power to take a decision on the use of the revenues of the transmission system operator concerned. In the present case, the Commission did not have the power to include the proposed Aquind interconnector in the Union list of PCIs, since the French Republic exercised its right not to approve that project in accordance with the second paragraph of Article 172 TFEU and point (a) of the second subparagraph of Article 3(3) of Regulation No 347/2013.

111 Secondly, it must be pointed out that, if the Commission had, on the basis of the principle of equal treatment, taken the initiative of including the proposed Aquind interconnector in the Union list of PCIs, its action would have infringed EU legislation and, in particular, the FEU Treaty itself.

112 In the light of all the foregoing, the fourth and fifth pleas in law, alleging, respectively, infringement of the right to good administration and infringement of the principle of equal treatment, must be rejected.

The sixth plea in law, alleging infringement of the principle of proportionality

113 By the sixth plea, alleging infringement of the principle of proportionality, first of all, the applicants submit that the appropriateness and necessity of removing the proposed Aquind interconnector from the Union list of PCIs should have been evaluated more strictly and by taking due account of the nature of that project and the consequences of that removal. Next, they submit that, in the absence of information on the reasons for the removal of the project from the list, it is not possible to evaluate the proportionality of the contested regulation. In addition, they criticise the Commission's understanding of the procedural guarantees and its respect for the fundamental principles for not going far enough in its interpretation of Regulation No 347/2013 in order to achieve the objectives of that regulation. Lastly, they submit that the purpose of Regulation No 347/2013 is to facilitate the implementation of proposed PCIs and that the Commission's interpretation of that regulation is incompatible with the principle of proportionality, in that a period of two years is insufficient to allow a project to benefit from the investment and cross-border cost allocation procedure provided for in Article 12 of that regulation.

114 The Commission, supported by the Kingdom of Spain and the French Republic, disputes that plea.

115 According to settled case-law, the principle of proportionality is among the general principles of EU law. By virtue of that principle, acts of the institutions of the European Union must not exceed the limits of what is

appropriate and necessary in order to attain the objectives legitimately pursued by the measure in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgments of 13 November 1990, *Fedesa and Others*, C-331/88, EU:C:1990:391, paragraph 13; of 5 May 1998, *United Kingdom* v *Commission*, C-180/96, EU:C:1998:192, paragraph 96; and of 23 September 2020, *BASF* v *Commission*, T-472/19, not published, EU:T:2020:432, paragraph 108).

116 Furthermore, the assessment of the proportionality of a measure must be reconciled with compliance with the discretion that may have been conferred on the EU institutions at the time it was adopted (judgments of 12 December 2006, *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 145, and of 16 May 2017, *Landeskreditbank Baden-Württemberg* v *ECB*, T-122/15, EU:T:2017:337, paragraph 68).

117 It is in the light of that case-law that the Court will examine the sixth plea in law.

118 First of all, account must be taken of the fact that the Commission had no discretion as regards the non-inclusion of the project at issue following the refusal by the French Republic to give its approval to the inclusion of the proposed Aquind interconnector in the Union list of PCIs, and that it could therefore only take note of that refusal.

119 Next, it should be borne in mind that, according to recital 43 of Regulation No 347/2013, 'since the objective of this Regulation, namely the development and interoperability of trans-European energy networks and connection to such networks, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 [TEU]. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective'.

120 Regulation No 347/2013 does not provide that the project promoters are to receive explanations from the regional groups, or that they may make representations prior to the adoption of the regional lists by those groups, and subsequently prior to the adoption of the delegated acts by which the Commission definitively establishes the Union list of PCIs. The applicants have not put forward any plea of illegality in respect of the provisions of that regulation relating to the procedure for adopting the Union list of PCIs. Accordingly, the applicants cannot rely on those arguments to claim that it was not possible for them to assess whether the removal of the proposed

Aquind interconnector from the Union list of PCIs was proportionate. Nor, in that context, can they criticise the Commission, in essence, for not giving them a prior explanation or for not ensuring respect for the principle of proportionality during the procedure for drawing up the list. First, the Commission complied with the provisions of Regulation No 347/2013 when it adopted the contested regulation. Secondly, the possibility of calling into question the reasons put forward by a Member State for refusing to approve a project is reserved solely to representatives of the other Member States of the regional group concerned and the Commission could not therefore interfere in that respect.

121 In addition, the applicants are wrong to criticise the Commission for not evaluating the appropriateness and necessity of removing the proposed Aquind interconnector from the Union list of PCIs more strictly and by taking into account the nature of that project. The examination of the previous pleas, in particular the analysis carried out in paragraphs 87 to 96 above, highlighted the fact that it was impossible for the Commission to overrule the refusal issued by the French Republic and the fact that it was impossible for the Commission to include the proposed Aquind interconnector in the Union list of PCIs, which did not appear on the regional list adopted by the regional group concerned. In the light of the case-law referred to in paragraph 116 above, account must be taken of the fact that the Commission did not have any discretion as regards the inclusion of the proposed Aquind interconnector in the Union list of PCIs. In those circumstances, it cannot be said that the Commission infringed the principle of proportionality by not including that project in the Union list of PCIs.

122 Lastly, the applicants assert, in essence, that the Commission's interpretation in the contested regulation of Regulation No 347/2013 is contrary to the objective pursued by that regulation – namely that of facilitating the implementation of the projects – in that it is clear that a period of two years is insufficient to enable a project to benefit from the investment and cross-border cost allocation procedure provided for in Article 12 of that regulation. That argument cannot succeed. As the Commission rightly points out, the development of infrastructure projects is not dependent on whether or not they are Union PCIs.

123 It follows from all of the foregoing that the sixth plea must be rejected.

The seventh plea in law, alleging infringement of the principles of legal certainty and the protection of legitimate expectations

124 By the seventh plea, alleging infringement of the principles of legal certainty and the protection of legitimate expectations, the applicants submit, first of all, that Article 172 TFEU and Regulation No 347/2013 cannot be interpreted

as meaning that the status of a Union PCI is entirely precarious. They submit that no one could have considered that the discriminatory removal of the status of a Union PCI from the proposed Aquind interconnector was 'likely'. Next, they submit that the arbitrary removal, after two years, of the proposed Aquind interconnector from the Union list of PCIs infringed their legitimate expectations. According to the applicants, the objective of encouraging investment in priority projects provided for by Regulation No 347/2013, the initial inclusion of the proposed Aquind interconnector as a Union PCI, and the considerable efforts and significant investments which they made provided them with a certain degree of stability in the status of that project. In addition, they state that ACER's refusal in 2018 to grant an exemption under Article 17 of Regulation No 714/2009 was motivated by the fact that the proposed Aquind interconnector appeared on the Union list of PCIs and therefore enjoyed the benefits provided for in Article 12 of Regulation No 347/2013. In their view, by that decision, the European Union gave them an assurance that the proposed Aquind interconnector would not be removed from that list arbitrarily. Lastly, they submit that the French Republic was wrong to state that there could be no legitimate expectation on their part, allegedly because the four proposed interconnectors between France and the United Kingdom were in competition. They claim that the removal of the proposed Aquind interconnector from the Union list of PCIs directly reduced the competitive pressure on the remaining projects and gave them an advantage, resulting in the opposite of it being 'left to the market to determine which PCI is to be implemented'.

125 The Commission, supported by the Kingdom of Spain and the French Republic, disputes that plea.

126 As a preliminary point, it must be recalled that, according to settled case-law, the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires, on the one hand, that rules of law must be clear and precise and, on the other, that their application must be foreseeable by those subject to them (judgments of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 80, and of 10 September 2009, *Plantanol*, C-201/08, EU:C:2009:539, paragraph 46).

127 It is also settled case-law that the principle of the protection of legitimate expectations is one of the fundamental principles of the European Union. The right to rely on that principle extends to any person with regard to whom an institution of the European Union has given rise to justified hopes. In whatever form it is given, information which is precise, unconditional and consistent, and comes from authorised and reliable sources constitutes assurances capable of giving rise to such hopes. However, a person may not plead an infringement of that principle unless he or she has been given precise assurances by the administration. Similarly, if a prudent and alert economic

operator can foresee the adoption of an EU measure likely to affect his or her interests, he or she cannot plead the principle of the protection of legitimate expectations if the measure is adopted (judgments of 14 March 2013, *Agrargenossenschaft Neuzelle*, C-545/11, EU:C:2013:169, paragraphs 23 to 26, and of 26 September 2014, *B&S Europe* v *Commission*, T-222/13, not published, EU:T:2014:837, paragraph 47).

128 It is also clear from the case-law that the principle of the protection of legitimate expectations may be relied on by any economic operator on whose part national authorities have created reasonable expectations. However, economic operators cannot justifiably claim a legitimate expectation that an existing situation which may be altered by the national authorities in the exercise of their discretionary power will be maintained (see, to that effect, judgments of 10 September 2009, *Plantanol*, C-201/08, EU:C:2009:539, paragraph 53, and of 11 July 2019, *Agrenergy and Fusignano Due*, C-180/18, C-286/18 and C-287/18, EU:C:2019:605, paragraph 31).

129 It is in the light of that case-law that the Court must determine whether, in the context of the adoption of the list of proposals drawn up by the regional group concerned and the adoption of the Union list of PCIs, it may be said that the Commission infringed the principles of legal certainty and the protection of the applicants' legitimate expectations that the status of a Union PCI of the proposed Aquind interconnector would be maintained.

130 First, it must be pointed out that the Commission had no discretion as regards the non-inclusion of the project at issue following the refusal by the French Republic to give its approval to the inclusion of the proposed Aquind interconnector in the Union list of PCIs, and that it could therefore only take note of that refusal.

131 Secondly, as has been pointed out, in particular, in paragraphs 69 to 71 above, it is clear from the applicable legislation that a new list of Union PCIs is drawn up every two years, that all projects – including those on the existing Union list of PCIs – are subject to the same selection procedure, that projects which have already been included in the previous Union list of PCIs do not therefore have any benefit over the new projects and that the Union PCIs which relate to the territory of a Member State require the approval of that Member State.

132 The unambiguous content of Regulation No 347/2013 precludes the conclusion that the objective of that regulation – which is, in essence, to encourage investment in priority projects – and the inclusion of the proposed Aquind interconnector in the Union list of PCIs constituted an assurance for the applicants that that project would automatically be included in the new Union list of PCIs.

133 Thirdly, the applicants submit that the decision of the Board of Appeal of ACER of 17 October 2018 rejecting their request for an exemption under Article 17 of Regulation No 714/2009 for the proposed Aquind interconnector constituted an assurance on the part of the European Union that the proposed Aquind interconnector would not be removed from the Union list arbitrarily or for as long as it satisfied the listing conditions.

134 In that regard, it is appropriate to recall that, according to Article 17(1)(b) of Regulation No 714/2009, the exemption from the regulated scheme may be granted if 'the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted'. The applicants state that ACER's refusal to grant them the exemption was based on the fact that the proposed Aquind interconnector was included in the Union list of PCIs and that it therefore enjoyed the benefits provided for in Article 12 of Regulation No 347/2013.

135 While it is true that, in rejecting the request for an exemption under Article 17(1)(b) of Regulation No 714/2009, ACER referred to the Union PCI status of the proposed Aquind interconnector (and to the cross-border cost allocation which the project in question might possibly benefit from as a result of that status), that reference did not in any way constitute an assurance capable of giving rise to an expectation on the part of the applicants that the proposed Aquind interconnector would automatically be included in the new Union list of PCIs. Rather, ACER's approach had to be understood in the sense that, if the project in question was no longer included in the Union list of PCIs, that would open up the possibility of making another request for an exemption under that article.

136 In that sense, as the Commission points out, the applicants have no right to a 'freeze' of their legal situation as a result of the initial inclusion of their project in the Union list of PCIs, in circumstances where the legal framework foresaw the potential of such changes. Nor were they unaware that the decision relating to an exemption under Article 17(1)(b) of Regulation No 714/2009 and the decision to adopt the Union list of PCIs were taken by different bodies that are independent from each other.

137 Fourthly, the applicants cannot in any way claim that the signing of the Energy Charter Treaty gave rise to precise, unconditional and consistent assurances for them that the proposed Aquind interconnector initially included in the Union list of PCIs was going to be automatically included in the new Union list. Apart from the fact that that argument is not substantiated in any way, the signing of such a treaty cannot on its own provide the promoters of a specific proposed interconnector with an assurance concerning the Union PCI status of their project. That is all the more so since the existence of that treaty did not make it possible to disregard the requirement

for an initial approval by the French Republic, pursuant to the second paragraph of Article 172 TFEU, in order for their proposed Aquind interconnector to be included in the new regional list of the regional group. The applicants knew that such approval was lacking in the present case.

138 Fifthly, it is common ground that, when the new regional list of proposed projects and the new Union list of PCIs were being adopted, the proposed Aquind interconnector was in competition with other proposed interconnectors between the United Kingdom and France. In that context, the applicants were fully informed that one or more of those projects could suffice to meet the objectives of Regulation No 347/2013 and that both the United Kingdom and the French Republic had a broad discretion under the second paragraph of Article 172 TFEU and Article 3(3) of Regulation No 347/2013 whether or not to give their approval to one or other of those projects.

139 In that regard, the applicants cannot rely on the scoring obtained for the proposed Aquind interconnector (better than the one attributed to the other projects) in order to assert that their legitimate expectations were frustrated. As has already been pointed out in paragraph 108 above, neither the regional list nor the Union list of PCIs contained a ranking, and the ranking of the proposed PCIs carried out in accordance with the evaluation method could be used by the Commission only when it exercised the power to check whether the total number of projects was manageable.

140 In the light of the foregoing, the seventh plea must be rejected.

The third plea in law, alleging infringement of Article 10(1) of the Energy Charter Treaty

141 By the third plea, the applicants allege infringement of Article 10(1) of the Energy Charter Treaty. First, they submit that that provision has direct effect on the ground that the nature and structure of the Energy Charter Treaty, viewed as a whole, make it capable of conferring enforceable rights, and that the Charter itself is sufficiently clear and precise and does not have to be the subject of further implementing measures. Secondly, they argue that that provision governs the treatment which each contracting party must accord to investors of the other contracting parties, that the European Union and each of its Member States are all contracting parties to the Energy Charter Treaty and that the investors of a Member State are investors from a contracting party other than the European Union, with the result that they are entitled to rely on that provision against the European Union. Thirdly, they submit that the protection provided for by the Energy Charter Treaty is, in any event, relevant for the interpretation of Regulation No 347/2013 and the application of the

general principles of EU law from which all investors from the Member States must benefit.

142 The Commission, supported by the Federal Republic of Germany, the Kingdom of Spain and the French Republic, disputes that plea.

143 As a preliminary point, it should be recalled that the Energy Charter Treaty is a multilateral agreement to which both the majority of the Member States and the European Union itself are parties.

144 Article 10 of the Energy Charter Treaty – entitled 'Promotion, protection and treatment of investments' – provides, in paragraph 1, as follows:

'Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for investors of other Contracting Parties to make investments in its area. Such conditions shall include a commitment to accord at all times to investments of investors of other Contracting Parties fair and equitable treatment. Such investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal …'.

145 First of all, it should be noted, in essence, that Article 10(1) of the Energy Charter Treaty lists general principles of law which exist in EU law, namely the principles of good administration, equal treatment, legal certainty, the protection of legitimate expectations and proportionality. It follows from the examination of the fourth to seventh pleas in law that, by not including the proposed Aquind interconnector in the contested regulation as a Union PCI, the Commission cannot be said to have infringed those principles. Accordingly, it cannot be said to have infringed Article 10(1) of the Energy Charter Treaty either.

146 Next, the applicants claim, unsuccessfully, that the obligation to ensure transparent and equitable conditions was not complied with because of the infringement of the obligation to state reasons and of the procedural and substantive requirements relied on in the first and second pleas, those pleas having been rejected. It follows that, since it is based on the grounds set out in those pleas, the argument alleging infringement of Article 10(1) of the Energy Charter Treaty must be rejected.

147 Lastly, it should be recalled that the founding treaties, which constitute the basic constitutional charter of the European Union (see, to that effect, judgment of 23 April 1986, *Les Verts* v *Parliament*, 294/83, EU:C:1986:166, paragraph 23), have, unlike ordinary international treaties, established a new

legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, paragraph 157 and the case-law cited).

148 According to settled case-law, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the European Union and its law, relating in particular to the constitutional structure of the European Union and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally and binding its Member States to each other (see, to that effect, Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454, paragraphs 165 to 167 and 201; see also judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 33 and the case-law cited).

149 With regard in particular to the rules binding the European Union and its Member States reciprocally, the second paragraph of Article 172 TFEU confers a discretion on the Member State concerned to give or to refuse to give its approval to the inclusion of a project in the Union list of PCIs, as is apparent from the examination of the previous pleas (see, in particular, paragraphs 38 to 40, 45, 56, 110 and 111).

150 Accordingly, the FEU Treaty has clearly established limits on the competence of the European Union in the field of Union PCIs, since the Commission is prevented from including, in the list of those PCIs, a project which has not received the approval of the Member State on whose territory the project is to be implemented.

151 In that regard, the applicants are unsuccessfully attempting to call into question the division of powers between the Member States and the European Union in the field of Union PCIs. In essence, they criticise the Commission for not overruling the French Republic's refusal to give its approval to the inclusion of the proposed Aquind interconnector in the Union list of PCIs and, consequently, for infringing Article 10 of the Energy Charter Treaty.

152 In view of the autonomy of EU law and the existence of a structured network of principles, rules and mutually interdependent legal relations

binding the European Union and its Member States reciprocally, on the one hand, and the existence of a discretionary power of the Member State concerned recognised by EU law, on the other, it must be held that Article 10(1) of the Energy Charter Treaty cannot have a scope such that it obliges the Commission not to take account of the division of powers provided for in the second paragraph of Article 172 TFEU and thus to contravene that provision.

153 The Commission therefore complied with the second paragraph of Article 172 TFEU. Thus it cannot be alleged that it infringed Article 10(1) of the Energy Charter Treaty.

154 Consequently, the third plea must be rejected.

155 In the light of all the foregoing, the action must be dismissed in its entirety.

Costs

156 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

157 Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those of the Commission, in accordance with the latter's pleadings.

158 The Federal Republic of Germany, the Kingdom of Spain and the French Republic must each bear their own costs, pursuant to Article 138(1) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Aquind Ltd, Aquind SAS and Aquind Energy Sàrl to pay the costs;**

3. **Orders the Federal Republic of Germany, the Kingdom of Spain and the French Republic each to bear their own costs.**

Tomljenović Škvařilová-Pelzl Nõmm

Delivered in open court in Luxembourg on 8 February 2023.

E. Coulon S. Papasavvas

Registrar President

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* Language of the case: English.