AQUIND INTERNAL MINUTES

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HEARING 26 SEPTEMBER 2018

Proceedings	Agency for the Cooperation of Energy Regulators ("**ACER**") Board of Appeal
Case	A-001-2018
Appellant	Aquind Limited
Subject matter	Appeal by Aquind Limited of Decision of the ACER No 05/2018 of 9 June 2018 on the Exemption request for the AQUIND
Keywords	Interconnector, Appeal, Decision 05/2018, Exemption, Article 17 of Regulation (EC) 714/2009, Article 12 of Regulation (EU) 374/2013, Project of Common Interest, risk level assessment
Contested decision	ACER Decision No 05/2018 of 19 June 2018
Location	CEER Headquarters, Brussels, Cours Saint-Michel, 30a, 5th floor Brussels
Time of start	10 am
Present:	
Board of Appeal	Mr Andris Piebalgs, Chairman, Mr Mariusz Swora (rapporteur) Ms Yvonne Frederiksson Ms Nadia Horstmann Mr Walter Boltz (by teleconference)
Registrar of the Board of Appeal	Mr Andras Szalay
Appelant representatives	Ms Silke Goldberg (Herbert Smith Freehills) Mr Eric White (Herbert Smith Freehills) Mr Jannis Bille (Herbert Smith Freehills) Mr Chris Davies (Herbert Smith Freehills) Mr Matthew Grant (Baringa) Mr Kirill Glukhovskoy (AQUIND Limited, Director) Mr Vladimir Temerko (AQUIND Limited)
Defendant representatives	Mr Albert Pototschnig (ACER, Director) Mr Christophe Gence-Creux

Mr Akos Hofstadter (ACER)

Mr Ernst Tremmel (ACER)

1. OPENING OF HEARING

Welcoming of all parties and announcements made by Chairman:

- The hearing is public. Publication of the date of the hearing was made on 19 September.
- The hearing is recorded by audio and all attendees have consented to this recording.
- Before making a statement or raising a question during the hearing speakers should state name and position for the minutes.
- Speakers ought to consider the time allocated to statements or questions.

Before introducing the first witness, parties are asked whether they have any observations or comments. None were made.

The chairman requests the Appellant to clarify the facts and circumstances for calling the selected witnesses before the Board before each witness statement is made.

2. WITNESS STATEMENTS

2.1 Witness Statement 1: Mark Copley

The Registrar calls the first witness: Mark Copley ("**MC**"). MC joins the hearing.

The Appellant clarifies that MC has been called in order to testify to matters of circumstances that have led Aquind Limited ("**Aquind**") to request the exemption for the AQUIND Interconnector.

Chairman indicates that the Board of Appeal received a letter from Ofgem (Mr Michael Wagner, deputy director of whole sale markets) the day before the hearing (25 September 2018), confirming that MC is permitted to speak on behalf of Ofgem.

MC introduces himself and states his professional background. He was deputy director of wholesale for 4 and a half years and represented Ofgem at the Board of Regulators of ACER. MC makes the following statements:

- Ofgem is the National Regulatory Authority ("**NRA**") of Great Britain. It is a strong proponent of further interconnection development and it is keen to develop the internal electricity and gas market. For the last 5-7 years, Ofgem has allowed for the development of more pipeline interconnection than ever previously. Interconnection is important due to the benefits it provides for competition, security of supply and decarbonisation on both sides of the interconnector and the EU. MC therefore agrees with the Appellant on the legal interpretation of Articles 12 and 17.
- The scale of investment needed in the EU means that 'we' cannot only rely on incumbent Transmission System Operators ("**TSOs**") to deliver the necessary investment. Alternative pools of capital must be brought forward. The offshore regime has relied on competition in order to gain foreign pools of investment (£700m benefits).
- Ofgem has been working with Aquind since 2016. The discussions between the parties grew more formal over time. At the start, the discussions considered the alternative routes that the project could take in order to move forward. Over time, it became clear that the legal impediment in French law meant the exempted route was the most likely available route for Aquind.
- In September 2017, Ofgem and CRE received the completed exemption request from Aquind. Both NRAs decided they could not agree on the request until the conditions of Brexit would become clearer. Therefore, Aquind was referred to ACER. However, before referral, Ofgem had assessed Aquind's submission against the six criteria for the exemption and concluded that all grounds were met.
- Particularly in relation to the condition b) in article 17(1), the conclusion was that pipeline risks create large economic risks. Furthermore, Ofgem considered legal and regulatory risks as highly significant due to the impediment brought forward by French law.

- Ofgem was not concerned about excessive profits and was surprised to see so much attention was brought to the subject of excess profits seeing as Aquind proposed certain conditions to address these concerns. The capacity of the interconnectors is forecast to increase from 2 GW to 8.8 GW in the near future. Aquind put limitations on itself based on previous decisions made by ACER regarding other interconnectors. Considering the economic risk of the project, there is as much chance for the project to make money as there is for it not to make money. Aquind is a project where consumers do not need to take on that risk.
- Regarding previous decisions made by ACER, it should be noted that the ElecLink project, while arguably more innovative, is not more risky than the project suggested by Aquind. In fact, in MC's view, it is considerably less risky due to the advantages of installing the interconnector in a tunnel, rather than the sea. Nevertheless the exemption was granted to ElecLink based on conditions similar to those Aquind proposed. There is no difference between the projects.
- The Aquind project is beneficial for Great Britain, France and the EU from a socio-economic perspective. The exemption conditions are met and have the additional benefit of not exposing consumers to undue risk.
- At the Board of Regulators meeting, the Aquind case was presented using an article written by two Members of Parliament and a flow chart, concerning the benefits of private finance and the need for alternative sources of capital. By not granting the exemption, ACER sends a negative signal to private investors and increases costs for consumers. ACERs interpretation of the conditions of the exemption leads to any Project of Common Interest ("**PCI**") being required to be regulated across the EU. This is not a comfortable position for any regulators and will probably be met with regulatory opposition.
- Where do we stand? ACER's PCI monitoring report suggests that half of the project deliveries of PCIs are delayed by half a year or more. Ofgem is concerned that, the exemption Decision makes the problem of delays worse as the impediment in French law would continue to exist.
- Ofgem's position is that interconnector projects which are beneficial and do not carry risks for consumers should be able to take place. Now, such a project is being delayed. All exemption conditions are met. The signal ACER is sending with its Decision - preventing private finance from developing - is poor. The analysis made by ACER of condition b) is incorrect.
- MC is happy to provide further information and welcomes questions.

2.2 **Questions and Answers - Mark Copley**

2.2.1 **Questions from ACER including the responses**

Alberto Pototschnig ("AP"): Does Ofgem believe that the current regulatory framework (both at a national and EU level) is not sufficient to attract alternative sources of finance to the energy infrastructure? Particularly regarding Articles 12 and 13 of Regulation (EU) No 347/2013.

Answer by MC: The regulatory framework needs to achieve attraction from alternative sources of finance in order to gain the investment to move forward. There are a variety of regimes that match risk profiles. ACERs current position stops exempted projects from moving forward. There are benefits from the projects without government subsidies. The scale of investment is so great, that we need to be flexible and evolve: we should not only follow one route.

Christophe Gence-Creux ("**CGC**"): When did Ofgem conclude that all the conditions for the exemption were met? According to the minutes of the meeting between Ofgem and Aquind, no assessment of the conditions was made.

Answer by MC: Ofgem did not formally consult on the assessment of the conditions. The assessment was made in an internal analysis, which has not been consulted on. This is best practice at Ofgem.

CGC: The witness has a clear view of the fulfilment of the conditions. Could he please specify which particular risks could not be addressed by the risk mitigation rules?

Answer by MC: The risk that cannot be addressed, is the risk posed by a project developer in France, who is not RTE. This developer cannot develop a project in France. That risk cannot be mitigated using any of the tools in the regulation.

CGC: The witness stated that ACER forces all PCIs to go through the regulated route in its decision made to Aquind. Where in the Decision does it do so?

Answer by MC: I do not have the Decision at hand and so I cannot point it out here now, but even though the Decision may not explicitly say PCIs must go through the regulated route its effect is clearly to kill third party investment in the future.

2.2.2 **Questions from the Board of Appeal including the responses**

Walter Boltz ("**WB**"): What kind of risks can you see in this particular project?

Answer by MC: The economic risk can be found in the backdrop of Brexit, as that carries uncertainty. Also, the number of projects being built is a risk for Aquind's future project revenue. The legal and regulatory risks are the most significant. In accordance to precedent, ElecLink has a similar risk profile to the Aquind case profile. The conditions mirror those of Aquind, but in actual fact there is more risk on Aquind's side. Furthermore, there is an ambiguity over how much capacity is needed.

Mariusz Swora ("**MS**"): Have you considered the benefits from referring to Article 12 of the PCI Regulation and if so, to what extent?

Answer by MC: Not in great detail as RTE was clear. They are not interested in partnering and so this route is not available.

There are no further questions. MC is thanked for his participation and exits the hearing.

2.3 **Witness Statement 2: Philip Lowe**

The Registrar calls the next witness: Philip Lowe ("**PL**"). PL joins the hearing.

The Appellant clarifies that PL has been called in order to share his inside knowledge of the objectives and correlation between the Third Energy Package ("**TEP**") and the PCI Regulation, as these were adopted whilst PL was Director General of the European Commission.

PL makes the following statements:

- PL emphasised that he is not representing Aquind and has great respect for ACER, but indicates he has a concern regarding its recent decision on the Aquind Interconnector case. The concern is for the manner in which the EU Regulations were applied, as the application affects the integration of the single market in the EU.
- PL states he is here to express his views of the intention and spirits of the legislation. The PCI Regulation was designed in respect of the provisions of Article 12, to open up all options for promoters of projects (whether these promoters were in the Regulated Asset Base ("**RAB**") or not) aiming to facilitate action without calling into question national positions. The word "may" in this article is very important. The article purposefully does not use the word "must". There has to be a distinction between what the exemption under Article 17 and the regime under Article 12 are about. Article 12 does not concern exemptions from the Regulatory Asset Base, but requirements of Third Party Access ("**TPA**").

- The Decision of ACER seems to give the impression that there is an obligatory passage, that inclusion of a RAB is possible. This is a sterile view, as French law precludes any participation of the TSO involved (at least until the law is changed). So, the conclusion of ACER puts promoters into a dead end.
- The principle behind the requested exemption, is whether the risk involved is at a level that means the project could not go ahead without the exemption. There are project risks, investor risks and regulatory risks. There is no reason to refrain from granting an exemption on the basis of the possibility of regulatory changes. In this case, there is a regulation in place, which needs to be interpreted.
- There is a right way forward in examining the case without the project resulting in "undue appropriation of revenue of private parties". ACER can impose conditions on the exemption which limit the extent to which this would happen and avoid a too generous exemption.
- Does economic viability mean that a project is less or more risky? Economists would agree: a project can be economically viable, but still have a volatile risk profile. Volatility can come from market conditions or the reality that there will be more players in interconnection projects on the market in the next few years. There is clearly some degree of volatility, how much depends on whether capacity will be used effectively.
- Another concern is on how to interpret the law as written. There are precedents of previous exemption decisions. ElecLink seems to provide for a precedent with conditions. This precedent offers a more pragmatic way forward, than the option proposed.
- What is the precedent set by a decision which obliges operators to move into a RAB as the first choice? As a promoter of a potential PCI project, that might be a serious disincentive to ensure the project is a PCI. In terms of mobilising public and private money to ensure an integrated and interconnected EU energy market, it seems to be ill advised to concentrate investment effort on RAB and therefore put all burden of risks involved onto consumers who pay for the electricity concerned. We ought to keep doors and windows open for financial models which enable promoters to make success of interconnection, rather than narrowing down to business models of TSOs. The EU would regret this development. PL was involved in the negotiation of the PCI Regulation; at no time during these negotiations was there discussion of narrowing down the options of PCI financing available. The provision is meant to be facilitating.
- During his witness statement, PL referred to a paper he wrote on the topic of the hearing. He explained that the paper provides further detail on what he has stated in his witness statement and that the paper has been or will be submitted to the Board of Appeal.

2.3.1 **Questions and Answers – Philip Lowe**

2.3.2 **Questions from ACER including the responses**

AP: Does the witness agree that exemptions are an exception to the general rule of TPA?

Answer by PL: The exemptions are from the TPA, not from the RAB. The Staff Working Paper of the Commission previously referred to, clearly states that exemptions are possible where, due to the level of risk, the project would not go forth without exemptions. The question is therefore: Are the risks sufficient for some form of exemption? If so, under which conditions? The obligatory passage is not through the RAB window.

AP: Considering the fact that only six PCIs opted to request specific additional incentives, the basic regulatory framework seems sufficient to attract. Does the witness consider that Regulation (EU) No 347/2013 is sufficient to attract not only TSOs but also private investment? Particularly considering Articles 12 and 13.

Answer by PL: I do agree that incentives given by the PCI Regulation are significant for the financial community (both public and private), as they give the cachet to projects which helps them to obtain funding from investment banks. But, this issue needs to be tackled on a case by case basis. It should not be assumed that there is sufficient incentive, simply because Articles 12 and 13 offer some opportunities. There are a lot of considerations in relation to the risk of a project for the

investor. In this case, the balance of the judgement should recognise that this project promoted by private funding, will face a level of risk which is sufficient to justify some form of exemption with perhaps conditions placed upon it to avoid undue expropriation.

In PL's view and exemption of some sort should be granted.

Ernst Tremmel ("**ET**"): The witness mentioned that he had submitted a paper to the Board of Appeal. What kind of paper was it and in which capacity did he submit it?

Answer by PL: The paper has not been submitted to the Board of Appeal. The Registrar clarified that the written procedure has closed and so no more papers can be submitted by the parties. A suggestion was made to include the paper in the minutes, however due to the fact that the parties are not provided with an opportunity to respond to the content of the paper, the paper will not be part of the proceedings. PL indicated that his witness statement provides a summary of the paper.

ET: The exemption of Article 17 is only for TPA, but it also mentions other regulatory requirements. Would you consider these requirements also as TPA requirements?

Answer by PL: I tried to emphasise that a combination of all elements constitutes the basic provision of the TEP. I don't see that one could interpret the provisions as a definition of the RAB. The TPA requirement is generically linked to what needs to be exempted.

2.3.3 **Questions from the Board of Appeal including the responses**

WB: What kind of risks can you see in particular for the Aquind project?

Answer by PL: Risks include: construction risk; risks concerning the time taken to implement; commercial risk (the development of the wholesale market of electricity on both sides of the channel); risk of interplay between this interconnector and other projects involved; project risk; etc. None of these projects are exempt from risk, this one is not unusual in having a low level of risk. Even though regulators need to be cautious in giving a full exemption, there is a good case for arguing for an exemption.

WB: Are these risks considerably larger or not, compared to gas projects?

Answer by PL: The test is not related to comparable projects.

MS: The witness referred to legal obstacles in the French Regulatory regime. Which obstacles may private investors face under this regime?

Answer by PL: I am not an expert on French law. As far as I am aware, the basic provisions in place say that any project which is not sponsored by TSO RTE must obtain an exemption in order for it to go ahead. Those provisions seem to exclude the possibility of a private promotor gaining regulatory approval on the French side for a project. According to EU law, the regulator and TSO may or may not wish to allow anyone to go ahead with another interconnector project. It is a question of policy from the French authorities.

There are no further questions. PL is thanked for his participation and exits the hearing.

2.4 **Witness Statement 3: Klaus-Dieter Borchardt**

The Registrar calls the next witness: Klaus-Dieter Borchardt ("**KDB**"). KDB joins the hearing.

The Appellant clarifies that KDB has been called in relation to the interpretation of Articles 12 and 17 and the impact of their relationship for future PCI projects.

KDB makes the following statements:

- The Commission was not formally involved in the exemption procedure. Under Article 17 the Commission may request amendments regarding the decision. After the Board of Appeal makes its decision on this case, the Commission can therefore either impose amendments, or in the case of a refusal, not act at all. KDB cannot say whether the conditions are met by Aquind, as he did not assess the details. The Commission might be asked to issue a formal decision, if the Board of Appeal decides that the exemption is to be issued. Therefore, KDB can only concentrate on the differences between the legal assessment of the Aquind Decision made by ACER and the Commission.
- KDB underlines that the decision made by ACER is well drafted in most parts and well argued. However, there is a point of substance that needs to be clarified relating to the risk criteria (which forms an essential part of the exemption). The Aquind Decision has argued that ACER has to undertake whether the project could have been developed as a regulated project. There is an assumption in the Decision that, because Aquind is PCI, this means that the risk profile is not sufficient for exemption. This relationship (that the PCI status has such an influence on the risk profile that this prevents a project to go ahead under the exemption procedure) is of concern. We do not have the same reading of the provisions: the PCI status and exemption procedures are in parallel. All elements have to go into assessment of the exemption: PCI status is part of this, but not in the way decided by the ACER Decision.
- The problem is that this clear link between the risk profile and the PCI status is not given. The Commission takes the exemption requirements seriously in its own practice: there are a couple of projects where exemptions have been given (eg, Greece-Bulgaria Interconnector) and one where this was not the case (eg, the Czech case in which the Commission refused the exemption because the project could go ahead as regulated). The Czech case was the only refusal; others have all been granted.
- The PCI status is only a part of the risk assessment. The idea that the risk profile is not sufficiently demonstrated to allow participation in the exemption procedure if the applicant has not tried the procedure under Article 12 is too strict, the Commission believes that ACER went too far in this respect.
- KDB is willing to answer any further questions regarding the interpretation of Articles 12 and 17.

2.5 **Questions and Answers – Klaus-Dieter Borchardt**

2.5.1 **Questions from ACER including the responses**

AP: Does the witness read any general rule in the Decision, regarding automatism between the PCI Status and requirements granting exemptions?

Answer by KDB: There is no explicit sentence stating so, but the argumentation found within the Decision means that the promoter is forced into the procedure of Article 12. In the Commission's view, ACER has gone a bit too far by pushing Aquind into Article 12, before allowing it to claim an exemption.

Pototschnik: Do you believe that Regulation (EU) No 347/2013 provides incentives which should be sufficient to take into account the risk, given Article 13 which provides for project specific incentives? Very few projects have applied for these incentives. Is the current regulatory framework under the Regulation (Articles 12 and 13 in particular) not considered to be adequate for attracting capital?

Answer by KDB: I agree that the exemption procedure is not the rule. There are enough rules and incentives in order to put the projects ahead. But, the Commission (in more than a dozen cases) has used the exemption procedure, which shows that there are cases in which infrastructure projects do not go ahead under general rules because they might have a large security of supply objective which is not covered. In order to give extra incentives, we have the exemption that is needed for the PCI to end energy isolation and to contribute to security of supply (and more public objectives). The exemption should not be left to very exceptional cases. The conditions are very strict, but in its Decision, ACER has gone too far.

CGC: Since you confirmed that the exempted regime is an exception of the general rule and there is no link between Articles 12 and 17, how can you prove the regulated route is not available for Aquind?

Answer by KDB: I did not state that there is no link at all. The PCI status and its consequences is a part that needs to go into the assessment by the NRA or ACER, but a project should not be forced into Article 12 before Article 17. The emphasis put onto the PCI status and the conclusion derived from that has gone too far.

2.5.2 **Questions from the Board of Appeal including the responses**

WB: What kind of risks can you see in the Aquind project? Can you compare those risks to other energy or gas projects? Are the risks considerably bigger in Aquind than those of others?

Answer by KDB: I will not answer this question. There is still a possibility that the Commission has to analyse and assess this depending on the outcome of procedure and I will not prejudge.

There are no further questions. KDB is thanked for his participation and exits the hearing.

2.6 **Witness Statement 4: Pierre Bernard**

The Registrar calls the next witness: Pierre Bernard ("**PB**"). PB joins the hearing.

The Appellant clarifies that PB has been called in order to inform the members of the Board of the far reaching negative influence ACERs Decision will have for the electricity market

PB makes the following statements:

- Adding transmission capacity is of great importance. If the decision of ACER is upheld then a significant part of the necessary capacity is not added to the grid. There are three main issues with the Decision, which concern: The essence of regulation and Third Party Promoters; legal issues in relation to risk and; freedom to contract and choose investors.
- Regarding the essence of regulation and Third Party Promoters ("**TPPs**"), PB stated the following: TSOs were historically used to build the required infrastructure, however the burden of building a grid can no longer only fall on the TSOs. In 2003, the EU opened the market. Soon after, the exemption was introduced and the PCI was created. Developing infrastructure projects is complex (there are issues for both TPPs and TSOs). Without the exemption, the full application of EU regulations opening the market is prevented. Article 12 allows TPP PCIs to recover their costs via tariffs, which provides comfort to investors. Despite this Regulation certain regulators (eg, France, Belgium and Spain) do not fully align with EU Regulations. Unless there is an exemption, TPPs cannot benefit from Article 12. They cannot implement cross-border cost allocation, which means it is unlikely they will pursue the development of the project. This creates less competition and leads to concern for the realisation of EU objectives. The development of infrastructure was meant to be simplified by EU law, but French law restricts the development to TSOs unless the developer has been granted an exemption. Without the exemption, the TPP – in this case Aquind - cannot go on with project.
- Regarding the legal issue in relation to risk, PB said the following: ACER incorrectly dismissed French law as a risk. ACER assumed national law always complies with EU law, however this is not the case. ACER suggests that Aquind should rely on Article 12 to obtain a CBCA decision. This implies that national law allows Aquind to do so, but French law (and probably the legal systems of other countries too) reserves operation to the grid to TSOs except in the case of an exemption. Aquind cannot implement the CBCA decision. While ACER cannot decide whether French law is compliant, it cannot ignore the underlying issue either. If there is a doubt on compliance, Aquind faces legal risk. Nowhere are legal risks to be excluded – they are important risks. If French law does not allow Aquind to operate the project, then a CBCA will not help. Aquind cannot implement it in France, meaning it will have to challenge it in front of French courts which will take years.

Legal risks are therefore significant risks and should justify the grant of an exemption (even if the grant is only temporary, until the French law issue has been resolved).

- In relation to freedom to contract and choose investors, PB stated that the regulator may not restrict the promoter's freedom to contract. The Article 12 route limits the type of investors Aquind can work with, which goes against the spirit of the Regulation (which wants to open markets). TPPs that are PCIs and follow the exempted route, can offer products (eg, long term renewables contracts) that TSOs do not offer. ACERs decision does not recognise these features. The choice of investor is not for the regulator, but for project developers. How Aquind's case is decided, will impact existing and future TPP and PCI projects.
- How the Aquind case is decided will impact other PCI projects (TSOs and TPPS). While there is a general aim to complete projects reaching this aim is not easy. PB feels some sympathy for the decision; however, ACER's way forward would only bring some kind of investors and some king of products.

2.7 Questions and Answers – Pierre Bernard

2.7.1 Questions from ACER including the responses

AP: The witness referred to the legal situation in France. Would he assess the current legal situation as conflicting with TEN-E Regulation?

Answer by PB: French law does not comply. There was an infringement procedure in 2014/2015, but that was against the TEP. The verdict of that procedure was that interpretation of French law shows that it is compliant with the TEP. But the Regulation goes one step further than the TEP: Article 12 clearly states that exemptions are still possible, but it also foresees for the regulated regime. The problem is that TPPs (which are not TSOs) might have a CBCA decision, but they cannot continue because they will not be granted the right for transmission under the regulated regime. The regulator should recognise that this is an issue.

AP: How do you explain that only six PCIs have requested additional incentives under Article 13 of the Regulation?

Answer by PB: It is surprising that only six PCIs have applied, but a report (possibly from 2017, DG Energy, TRI Economics) has asked various PCIs why they didn’t apply for Article 13. The answer was that it led to too much paperwork and takes too much time. 50% of the projects are already delayed and the process is already complex. PB therefore urges the EU to make the process easier in terms of paperwork.

AP: As a follow-up to the first question: Would you go to the point of saying the national regulator should disregard national law in favour of EU law?

Answer by PB: The French regulator will face a serious issue: Either the CBCA is granted and French law is side stepped, or the case is directed to the court for a decision. The investors of the project will try to make the project go ahead. Granting an exemption would make sense, even if under the condition that Aquind tries to see if French law can indeed be implemented. At least then Aquind could, in the meantime, benefit of the exemption and allow the project to move ahead. Furthermore, there would be no burden for the investor.

CGC: The ACER Decision is in line with the TEP. Is this Package in violation of the freedom to contract?

Answer by PB: According to the TEP, TPPs under exemption (Article 17) are allowed. The promoter has the choice to propose a certain project with certain investors, returns and products. In 2013, PCI Regulation went a step further than the TEP: The exemption is still okay, but PCIs can also benefit from a regulated regime (they therefore have another option). This is made clear by the use in Article 12(2) of the word "if", showing that the promoter has the choice.

ET: The witness requested the Board of Appeal to overrule ACERs Decision. Is this request based on the whole decision (incl. all details of the Aquind case)?

Answer by PB: The conclusion of my statement is that the exemption should be granted, due to national regulations. ACER did not consider the legal risks properly (in regards to the details) and so the Decision increased legal risks.

2.7.2 Questions from the Board of Appeal including the responses

WB: Are the risks considerably bigger or not compared to other electricity or gas projects?

Answer by PB: The risk is comparable to other projects trying to obtain the regulated regime and cannot get it. The way the project has been pushed towards the application of CBCA makes it impossible to be applied. Are commercial- or technical risks the same? Probably yes, as 80% of the contracts will be long-term contracts, lasting longer than one year. Therefore 80% turnover relies on negotiation with long-term providers. This risk is not in regulated projects (which do not allow such contracts), meaning the risk is accepted and paid by investors.

MS: Are your observations related to general observations or specific legislation of French law?

Answer by PB: My statement concerned specific provisions in the energy code and the exemption granted by RTE. When reading those two, it is clear that the only transmission projects in France by non-TSO are exempted projects. If the project is regulated and you need a licence for operation, you cannot get it under French law.

There are no further questions. PB is thanked for his participation and exits the hearing.

2.8 Witness Statement 5: Daniel Dobbeni

The Registrar calls the next witness: Daniel Dobbeni ("**DD**"). DD joins the hearing.

The Appellant clarifies that DD has been called in order give evidence of the technical and financial risks of the Aquind project.

DD makes the following statements:

- The ACER Decision did not consider key elements of risk, including: certain risks for offshore interconnectors; the concept of appetite for investing in offshore border capacities; contribution of exempted interconnectors in terms of long-term projects in demand and; the risk profile of TSOs and Third Party Investors are complimentary and needed in the future.
- Considering the risk of offshore interconnectors, DD stated that given the timeline, the uncertainty and risk arising from Brexit is similar to unforeseen events that can jeopardise any business case. This should not be underestimated. The assumption that price differences will remain between the UK and Europe is incorrect: an evaluation of price difference over 20-40 years is a highly risky exercise in itself. This risk is not better borne by consumers than by private investors.
- This risk is related to the potential of governments to set up import taxes in order to create a level playing field between bidding zones. There are other reasons why the UK Government might introduce an import tax, for example, if it wanted to be less dependent on EU.
- Furthermore, another risk is the rate of return discussions. DD was involved with NEMO, a project in which the technical issues took two years to agree upon. Despite careful analysis, the risk of curtailment in this project is still unknown. Many aspects cannot be accurately predicted, as they depend on the evolution of macro-economic policies and policies at a national and EU level.
- Clearly, these elements present in the Aquind project are highly risky. If they would not be qualified in his manner, then which elements would qualify as highly risky? Each offshore connection which involves laying cables on ocean floors is highly risky. Weather conditions; damages during loading on vessel; bombs that need detonating; joint segments; unforeseen situations in the grid are all examples of risks creating cost overruns. These may potentially be transferred to the consumer. Aquind uses a Voltage Source Converter ("VSC"), which is still evolving. Atlantic Cable Connection contemplated

on using VSCs, but it still needs to be fine-tuned. The design operation of VSCs is not straight forward, which creates more risk. Clearly the Aquind project is highly risky.

- In relation to the concept of appetite for investing in offshore border capacities, DD stated that private investors bear full financial risk: costs are paid by users. If investors cannot deliver certainty in terms of revenue, then it is impossible to finance the project. TPPs need to be allowed to play a role, as easy projects for TSOs will come to end. At some moment in time, Third Party Developers could be the only interested party in funding new projects. ACERs Decision however, closes the door for these developers.
- TSOs have very few incentives to reduce costs, while Third Party Investors wish to improve their business plans. Promoters of the project propose to share the profit, without requiring a proportionate sharing of the risk.

  Regarding the contribution of exempted interconnectors in terms of long-term projects in demand, DD stated that the move towards renewable energy requires the need for long-term projects. There is great potential for wind (and ocean in the future). Developing this potential is up to corporations which set ambitious renewable plans. In the current legislative context, long-term contracts can only be offered by exception and not by TSOs.
- In Belgium, power plants are shutting down and there is talk of an extreme electricity scarcity. The regulators should take this into account. If NEMO could be available today, it could alleviate the problem. The risk profiles of TSOs and Third Party Investors are complimentary and needed in the future.

2.9 Questions and Answers – Daniel Dobbeni

2.9.1 Questions from ACER including the responses

AP: Unexpected events have changed the course of time (eg, the shut down of nuclear power; the renewable regulations; etc.). Are you drawing the conclusion that the future of infrastructure in energy is a future of exempted projects?

Answer by DD: No, I said that according to this Decision, only the regulated projects are the way forward. I disagree with this, both regulated and exempted projects are needed.

AP: How do you assess the fact that nobody seems to be interested in additional risk mitigating measures in the current regulated regime (there were only six applications under Article 13)?

Answer by DD: I cannot answer this question, because I have no recent experience in terms of rate of return. I'm saying that it is normal that someone investing in a project, while taking on the financial- and operational risk, asks for a higher rate of a return. So, even for a regulated company the return is higher – it's reasonable. It is therefore normal that a project should be approved with a higher rate of return, I asked for this on NEMO.

2.9.1 Questions from the Board of Appeal including the responses

WB: What are the risks in this particular project? Are these risks bigger than in other EU projects?

Answer by DD: I have already answered these questions. Yes, they are bigger. I had several sleepless nights due to the level of risks in the Baltic Sea and for the NEMO project. I cannot accept that this project is easier to implement.

There are no further questions. DD is thanked for his participation and exits the hearing. The hearing proceeds to the statement of the Appellant.

3. STATEMENT BY SILKE GOLDBERG ("SG") ON BEHALF OF THE APPELLANT: AQUIND

SG provided a PowerPoint Presentation as a visual aid for her statement. After a brief introduction and structural overview, the Appellant provided the context of the case. A summary of the project timeline was displayed and attention was drawn to the following dates:

- November 2014: Aquind met with RTE. RTE was not interested in the project;

- March 2016: Aquind met with CRE. CRE advised Aquind to apply for the exemption as that was the only route available; and
- 2017: Aquind applied for an was granted the PCI status, which indicated that the project was necessary for completion of the EU Energy market.

She continued by stating the clear position of CRE and RTE. After meeting CRE, Aquind met with RTE to confirm RTE's position. Based on these meetings and CRE's advice, Aquind applied for the partial exemption. She provided a list of the key conditions of the exemption application. The Appellant emphasised that Aquind is clearly not unduly appropriating profits, based on the conditions put forward – in particular the condition concerning the profit sharing mechanism with consumers. She also pointed out that in accordance with the clear and proportionate framework, granting the exemption would be consistent, proportionate and in line with the approach taken with previous exemption decisions.

SG continued by presenting the core arguments of Aquind's appeal. She reminded the Board of Appeal of the fact that more arguments were submitted to its members in the written procedure, but the timeframe limited her to the five main arguments. The arguments were as followed:

- It is incorrect that risk is only properly assessed if the application to Article 12 is made. The application of the risk criteria is not only relevant in those circumstances and Aquind notes this with satisfaction as they made a different argument in the Decision;
- The level of risk only needs to be such that the project would not be able to take place without the exception. In ACER's defence, the Agency provided a common ground by stating that an exceptional level of risk is not required;
- Legal risks are part of the overall analysis that any sponsor makes. It is wrong to dismiss national legal risks;
- Aquind had described the financial risks it would face in detail;
- Any reasonable investor looks at a project holistically, meaning ACER should consider the cumulative impact of the risks

SG also mentioned that ACER failed to follow precedent, as Eleclink and Aquind were treated differently. Even though each exemption case should be tested on its own facts – there should be no difference in application of legal and regulatory principles. Aquind was therefore treated unfairly different.

SG stated the basis for the appeal, which is as followed:

- The relationship between Articles 12 and 17. The Decision implies that, because Aquind is a PCI it needs to first go through Article 12. This is a legal error and suggests an incorrect hierarchy of laws. If it were so that PCIs first need to apply for Article 12, then why would any project promotor apply for the status of PCI? It would simply lead to delays. Art. 12 also makes clear that the CBCA procedure is a voluntary one upon the request of a project promoter. The relationship between the articles as put forward by ACER has never been referred to in any other statements or publications. The regimes are entirely separate: the timelines work according to their own mechanisms, they are not coordinated. PCIs are therefore put at a disadvantage by trying to link the regulations.
- The French illegality situation. ACER is not required to test national law against EU law. It is to assume that the national laws are in line with EU law. Aquind must therefore assume that the legal framework it followed is valid and legal and may not ignore the French legal framework. Aquind is astonished that French law is deemed irrelevant when assessing the risks. Aquind should not have to challenge French law, it simply has to assume it is legal. It cannot be up to project promoters to challenge national laws.
- Financial risks. ACER did not consider the financial risks in detail in its Decision. A CBCA decision would lead to stranded assets as a CBCA would not lead to an authorisation to operate a transmission line in France. These risks form a weight on Aquinds sponsors and shareholders, which is best addressed by the exemption. They will not make an investment without the exemption.

The conclusion made by the Appellant is that the Board of Appeal has a strong basis to overturn the Decision. The Decision is not in the interest of the energy market. SG demonstrated this in a slide displaying the benefits of Aquind and providing this list of benefits:

- Aquind offers a new type of (long-term) contract which supports the aim of the EU internal market in a way it would not be able to under the regulated regime;
- It contributes to supply security by increasing trade;
- It helps competition in the energy sector and;
- It supports sustainability and overall system services

Throughout the SG's presentation, she referred to statements made by the witnesses and offered a renegotiation of the conditions for the exemption. She ended her statement by encouraging the Board of Appeal to make a decision.

4. STATEMENT BY AP ON BEHALF OF THE DEFENDANT: ACER

AP also focussed on a few relevant arguments in his statement. He stated that there is broad agreement that the exemption regime is an exception to the general TPA and regulated infrastructure regime. The defendant referred to the second witness statement made by Philip Lowe who clarified that TPA involves the whole regulatory framework. He stated that it is consistent with the practice of almost all NRAs, that they support this interpretation of regulatory framework.

AP continued with the argument that the exemption can only be granted if the projects are not suitable for the regulated regime. The rational for this approach is that projects are based on two sides: costs and revenues. The regulatory regime combines the two and ensures that consumers benefit from infrastructure. As far as possible, projects should be developed under the regulated regime. Only if this is not possible, then the exemption can be considered an alternative.

AP also clarified that there is no automatism between Articles 17 and 12. ACER can envisage situations whereby a PCI may face risks that are not suitable for the regulated regime (eg, in the case of competing PCIs: the second project will have too high risks). But, there is an inevitable link between the articles. Before the PCI Regulation, the TEP did not establish a special provision for higher risk investments. Only once a project is a PCI, does it have opportunities, in accordance with Article 13 which compliments Article 12.

AP emphasised that there are no general rules in the Decision. The Decision simply looks at the Aquind case. ACER assessed what the outlook is for the additional capacity required, looking at all possible studies. Its assessment is that the risk is such, that it does not see the need for the exemption. The regulated regime can easily take care of the project, with all the instruments that it makes available (including for risk mitigating measures). Private investors should gain fair private return. The expected rate of return under an exemption is much higher than would be granted under the regulated regime. It is ACER's view that benefits for consumers would be reduced in an unnecessary way.

Introducing conditions is not the general rule. The intention of the regulation is for the main route of PCIs to be in the regulated regime. The benchmark for assessing criteria under Article 17(1)b is not a high risk, but a higher risk than the regulated regime can support.

Regarding French law, the defendant stated that the NRA is at odds with the PCI Regulation. ACER does not expect project promoters to challenge national law. The defendant pointed out that the meeting with CRE was before Aquind was a PCI and at the time, it was indeed true that national law prevailed due to lack of EU provisions. Now, with PCI status, there is a clear clash between the rights of Article 12 and French law. According to case law, an authority can disregard national law when it is in conflict with EU law. It would be odd if ACER interpreted the application of EU provisions through national law. ACER therefore expects CRE to recognise supremacy of EU law and act accordingly.

According to AP, there was no risk which cannot be handled through the regulated regime. The only risk which would qualify is one which the national regulator considers too risky; however there is no proof that this is the case for Aquind. There is no evidence that this project has a level of risk which can justify an exemption. In order to get the evidence, Aquind must go through the regulated process.

Regarding Brexit, the defendant states that clearly, there are uncertainties. However, this uncertainty will only pertain for the next few weeks. ACER cannot consider this short-lasting risk for a project which will continue for many years. Furthermore, Brexit will not change the fundament of the market. Brexit in itself will not affect longer term impacts on project. A few months of uncertainty should not determine the future regime and how benefits of projects like this are shared between promoters and the public.

AP concludes by stating that the regulated regime does not discriminate and can accommodate high risks. ACER does not find conclusive evidence that conditions of Article 17 are met and that the Aquind project cannot be run as regulated project.

5. CLOSING REMARKS

The Board of Appeal was provided with the opportunity to ask any further questions. There were no further questions.

The Appellant made a final remark. She wished to clarify that Aquind does not consider that French law is in conflict with EU law and referred to a case by the European Court of Justice (C-105/12).

The attendees were thanked for their attendance and the hearing was closed.