

Announcement of appeal¹

Case	A-001-2018
Appellant:	Aquind Limited
Appeal received on	17 August 2018
Subject matter	Appeal by Aquind Limited of Decision of the Agency for the Cooperation of Energy Regulators No 05/2018 of 19 June 2018 on the Exemption request for the AQUIND Interconnector
Keywords	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
Language of the case	English

Remedy sought by the Appellant

The Appellant requests the Board of Appeal to:

- (1) Revise the findings of the Decision of the Agency for the Cooperation of Energy Regulators No 05/2018 of 19 June 2018 on the Exemption Request for the AQUIND Interconnector in respect of article 17 (1)(b) of Regulation (EC) 714/2009; and
- (2) grant the exemption as requested originally in Aquind's Exemption Request filed with Ofgem and the CRE, ie
 - o an exemption of Article 16(6) of Regulation (EC) 714/2009;
 - o a partial exemption from Article 32 of Directive 2003/54/EC;
 - o an exemption from Articles 37(6) and 37(10) of Directive 2003/54/EC;
 - o a partial exemption from the unbundling requirements set out in Article 9 of Directive 2003/54/EC together with the conditions as outlined in the Exemption Request.

¹ Announcement published in accordance with Article 9 of Decision BoA No1-2011 Laying down the rules of organisation and procedure of the Board of Appeal of the Agency for the Cooperation of the Energy Regulators.

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Pleas in law and main arguments

The Appellant's claims and arguments can be summarised as follows:

1. INCORRECT RELIANCE ON THE COST ALLOCATION PROCEDURE UNDER THE PCI REGULATION
 - 1.1 The Agency's decision does not consider the key risks in the manner consistently adopted by the Commission in exemption decisions, but the Agency instead adopts an unprecedented approach that lack of long term revenue certainty must be addressed through the PCI Regulation.
 - 1.2 This approach is disputed on a number of grounds, including that:
 - 1.2.1 there is no hierarchy between exemption procedures and applications under the PCI Regulation;
 - 1.2.2 the separate nature of the two regimes is demonstrated in exemptions granted by the Commission to PCIs, where such PCI status was not a consideration;
 - 1.2.3 it is not clear that the PCI Regulation can be used in the way suggested by the Agency as there are no precedents; and
 - 1.2.4 the existence of the PCI Regulation regime does not provide a guarantee that the required return could be achieved under the regulated regime.
2. INCORRECT ASSUMPTION THAT AN "EXCEPTIONAL" LEVEL OF RISK IS REQUIRED IN ORDER FOR AN EXEMPTION TO BE GRANTED
 - 2.1 It is submitted that major infrastructure projects such as the AQUIND Interconnector are by definition high risk and that this was considered by the Commission and the Council when the relevant test for an exemption under Article 17 was drawn up. There are suggestions in the decision however that the Agency considered that in order to qualify for an exemption, an "exceptional" level of risk should be present.
3. FAILURE TO CONSIDER THE ILLEGALITY OF OPERATION AND MAINTENANCE OF AQUIND INTERCONNECTOR IN FRANCE
 - 3.1 The Agency failed to take into account that it is illegal in France for non-RTE entities to operate and maintain an interconnector. Without an exemption not only would the investment not take place, but it would be illegal for AQUIND to implement the project in France.
 - 3.2 AQUINO faces other risks in France as a non-RTE developer as it will not benefit from several land and water derogations that are available to RTE.
 - 3.3 AQUINO's only option to mitigate the French legal risk is to obtain an exemption.
4. FAILING TO CONSIDER TO CONSIDER IMPACT OF RISKS ON THE ABILITY OF AQUIND TO SECURE DEBT FINANCE AND EQUITY INVESTMENT
 - 4.1 The Decision refers to a Commission Staff Working Document which sets out two main risks to determine the assessment where there are sunk costs (i) the risk of non-use of the investment and (ii) the risk of a change in costs and/or revenues in the future. By way of reducing revenue certainty, both of these categories impact on the on the ability of AQUIND to raise project finance and equity investment, which are necessary for AQUIND Interconnector to progress.

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4.2 However, the Agency has not considered all relevant risks and has not taken an approach consistent with that adopted by the Commission in previous exemption decisions pursuant to article 17 of Regulation (EC) 714/2009 and article 36 of Directive 2009/73/EC. For example, the ability of applicants to secure project financing is frequently taken into account by the Commission, including in the Eleclink decision.

4.3 Other risks not considered and inconsistencies in the Agency's approach include:

4.3.1 disregard for risks associated with the size of the project;

4.3.2 the Agency's conclusion that as two other interconnectors are progressing, the level of risk cannot be such that the investment would not take place without an exemption, without considering the lack of availability of a regulatory regime available to AQUIND;

4.3.3 revenue risks from expected changes to energy market policies in GB and France;
and

4.3.4 construction and operating risks.

5. FAILURE TO TAKE INTO ACCOUNT THE CUMULATIVE IMPACT OF RISKS ATTACHED TO THE AQUIND INTERCONNECTOR

5.1 The Agency incorrectly applied the risk criteria to individual and groups of factors instead of considering the cumulative impact on the overall viability of AQUIND Interconnector which is also inconsistent with the Commission's approach in previous exemption decisions.

OTHER ARGUMENTS

6.1 The Agency also:

6.1.1 failed to communicate all relevant details of Aquind's Exemption Request to the Board of Regulators;

6.1.2 failed to make a diligent and impartial examination as required by the EU principle of good administration;

6.1.3 overly-relied on contributions from Dr Weber and Dr Gerbault instead of undertaking a careful analysis of academic opinion;

6.1.4 failed to follow established precedent; and

6.1.5 incorrectly asserted that the Agency has discretion when assessing a request for exemption.



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Further information

The rules for the appeal procedure and other background information are available on the 'Appeals' section of the Agency's website:

https://www.acer.europa.eu/en/The_agency/Organisation/Board_of_Appeal/Pages/Procedural-Documents.aspx