**European Economic Regulation Law – M2 Droit européen / European Law**

**Pr. S. de La Rosa – 2023/2023**

**Chapter 3. - Network industries and sectoral eu policies**

* **Main topics**

Overview of the diversity of policies overlapping with network issues

* Transport policy
* Network policy
* Energy policy
* **Useful cases and links**

**Art. 194 TFUE -** 1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks.

2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.

**EU Energy Union:** [**https://eur-lex.europa.eu/summary/chapter/18.html**](https://eur-lex.europa.eu/summary/chapter/18.html)

**REPOWER EU action plan :** COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS REPowerEU Plan - COM/2022/230 final - <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A230%3AFIN&qid=1653033742483>

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Sustainable and Smart Mobility Strategy – putting European transport on track for the future :** [**https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0789**](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0789)

* **Before the session – readings**

**Doc. 1 - CJUE, 15 July 2021, *Germany c. Poland and Commission*, case C-848/19 P**

**Doc. 2 - CJUE, 20 december 2017, C-434/15, Asociación Profesional Élite Taxi c. Asociación Profesional Élite Taxi, Uber Spain**

**Doc. 3 - General Court (Trib. UE), 8 february 2023, T-295/20, Aquind LtD**

**Doc. 1 - CJUE, 15 July 2021, *Germany c. Poland and Commission*, case C-848/19 P**

(Appeal – Article 194(1) TFEU – Principle of energy solidarity – Directive 2009/73/EC – Internal market in natural gas – Article 36(1) – Decision of the European Commission on review of the exemption of the OPAL pipeline from the requirements on third-party access and tariff regulation following a request by the German regulatory authority – Action for annulment)

In Case C‑848/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 20 November 2019,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, N. Piçarra and A. Kumin, Presidents of Chambers, C. Toader (Rapporteur), D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: M. Aleksejev, Head of Unit,

having regard to the written procedure and further to the hearing on 13 January 2021,

after hearing the Opinion of the Advocate General at the sitting on 18 March 2021,

gives the following

**Judgment**

1        By its appeal, the Federal Republic of Germany seeks to have set aside the judgment of the General Court of the European Union of 10 September 2019, *Poland* v *Commission* (T‑883/16, EU:T:2019:567, ‘the judgment under appeal’), by which the General Court annulled Commission Decision C(2016) 6950 final of 28 October 2016 (‘the decision at issue’) on review of the exemption of the Baltic Sea Pipeline Connector (‘the OPAL pipeline’) from the requirements on third-party access and tariff regulation granted under Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC (OJ 2003 L 176, p. 57).

**Legal context**

***European Union law***

2        Directive 2003/55 was repealed and replaced by Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

3        Article 32 of Directive 2009/73, entitled ‘Third-party access’, which is identical to Article 18 of Directive 2003/55, provides:

‘1.      Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and [liquefied natural gas (LNG)] facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation are approved prior to their entry into force in accordance with Article 41 by a regulatory authority referred to in Article 39(1) and that those tariffs – and the methodologies, where only methodologies are approved – are published prior to their entry into force.

2.      Transmission system operators shall, if necessary for the purpose of carrying out their functions including in relation to cross-border transmission, have access to the network of other transmission system operators.

3.      The provisions of this Directive shall not prevent the conclusion of long-term contracts in so far as they comply with Community competition rules.’

4        Article 36 of Directive 2009/73, entitled ‘New infrastructure’, which replaced Article 22 of Directive 2003/55, reads as follows:

‘1.      Major new gas infrastructure, i.e. interconnectors, LNG and storage facilities, may, upon request, be exempted, for a defined period of time, from the provisions of Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10) under the following conditions:

(a)      the investment must enhance competition in gas supply and enhance security of supply;

(b)      the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;

(c)      the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;

(d)      charges must be levied on users of that infrastructure; and

(e)      the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.

…

3.      The [national regulatory authority] may, on a case-by-case basis, decide on the exemption referred to in paragraphs 1 and 2.

…

6.      An exemption may cover all or part of the capacity of the new infrastructure, or of the existing infrastructure with significantly increased capacity.

In deciding to grant an exemption, consideration shall be given, on a case-by-case basis, to the need to impose conditions regarding the duration of the exemption and non-discriminatory access to the infrastructure. When deciding on those conditions, account shall, in particular, be taken of the additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances.

…

8.      The regulatory authority shall transmit to the Commission, without delay, a copy of every request for exemption as of its receipt. The decision shall be notified, without delay, by the competent authority to the Commission, together with all the relevant information with respect to the decision. That information may be submitted to the Commission in aggregate form, enabling the Commission to reach a well-founded decision. In particular, the information shall contain:

(a)      the detailed reasons on the basis of which the regulatory authority, or Member State, granted or refused the exemption together with a reference to paragraph 1 including the relevant point or points of that paragraph on which such decision is based, including the financial information justifying the need for the exemption;

(b)      the analysis undertaken of the effect on competition and the effective functioning of the internal market in natural gas resulting from the grant of the exemption;

(c)      the reasons for the time period and the share of the total capacity of the gas infrastructure in question for which the exemption is granted;

(d)      in case the exemption relates to an interconnector, the result of the consultation with the regulatory authorities concerned; and

(e)      the contribution of the infrastructure to the diversification of gas supply.

9.      Within a period of two months from the day following the receipt of a notification, the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption. That two-month period may be extended by an additional period of two months where further information is sought by the Commission. That additional period shall begin on the day following the receipt of the complete information. The initial two-month period may also be extended with the consent of both the Commission and the regulatory authority.

…

The regulatory authority shall comply with the Commission decision to amend or withdraw the exemption decision within a period of one month and shall inform the Commission accordingly.

…’

***German law***

5        Paragraph 28a(1) of the Gesetz über die Elektrizitäts- und Gasversorgung (Energiewirtschaftsgesetz – EnWG) (Law on the supply of electricity and gas) of 7 July 2005 (BGBl. 2005 I, p. 1970), in the version applicable to the facts of the present case, allows the Bundesnetzagentur (Federal Network Agency, Germany), in particular, to exempt interconnectors between Germany and other States from the application of the provisions governing third-party access. The conditions for the application of Paragraph 28a are the same, in essence, as those of Article 36(1) of Directive 2009/73.

**Background to the dispute and the decision at issue**

6        For the purposes of these proceedings, the background to the dispute, as set out in paragraphs 5 to 18 of the judgment under appeal, may be summarised as follows.

7        On 13 March 2009, the Federal Network Agency notified the Commission of two decisions of 25 February 2009 which excluded, for a period of 22 years, the capacities for cross-border transmission of the planned OPAL pipeline, which is the terrestrial section, to the west, of the Nord Stream 1 gas pipeline, from the application of the rules on third-party access laid down in Article 18 of Directive 2003/55, reproduced in Article 32 of Directive 2009/73, and tariff regulation laid down in Article 25(2) to (4) of Directive 2003/55. The two decisions concerned the shares held by the two owners of the OPAL pipeline. The company operating the 80% share of the OPAL pipeline belonging to one of those two owners is OPAL Gastransport GmbH & Co. KG (‘OGT’).

8        By Decision C(2009) 4694 of 12 June 2009, the Commission asked the Federal Network Agency, pursuant to the third subparagraph of Article 22(4) of Directive 2003/55, now Article 36(9) of Directive 2009/73, to vary its decisions of 25 February 2009 by adding two conditions. The first of these concerned a prohibition against an undertaking that is dominant on one or several large markets in natural gas reserving, in a single year, more than 50% of the transport capacities of the OPAL pipeline at the Czech border. The second condition introduced an exception to that limit, which could be exceeded in the event of a release to the market, by the undertaking concerned, of an annual volume of 3 billion m³ of gas on the OPAL pipeline under an open, transparent and non-discriminatory procedure, in so far as, first, the undertaking managing the pipeline or the undertaking required to carry out the programme ensured the availability of corresponding transport capacities and the free choice of the exit point and, second, the form of the gas release and capacity release programmes was subject to the approval of the Federal Network Agency.

9        On 7 July 2009, the Federal Network Agency amended its decisions of 25 February 2009 by incorporating those conditions, and granted the exemption from the rules on third-party access and tariff regulation for a period of 22 years on the basis of Directive 2003/55.

10      In the technical configuration of the OPAL pipeline, which was put into service as from 13 July 2011, natural gas can be supplied at the pipeline entry point close to Greifswald (Germany) only by the Nord Stream 1 pipeline, used by the Gazprom group to transport gas from Russian gas fields. As Gazprom did not implement the gas release programme referred to in Decision C(2009) 4694, the non-reserved 50% of the capacity of the OPAL pipeline has never been used.

11      On 12 April 2013, OGT, OAO Gazprom and Gazprom Export OOO formally requested the Federal Network Agency to vary certain provisions of the exemption granted by its decisions of 25 February 2009.

12      Following that request, on 13 May 2016 the Federal Network Agency notified the Commission, on the basis of Article 36 of Directive 2009/73, of its intention to vary certain provisions of the exemption granted by its decisions of 25 February 2009 regarding the share of the OPAL pipeline operated by OGT. The variation proposed by the Federal Network Agency consisted, in essence, in replacing the restriction imposed by Decision C(2009) 4694 on the capacity that could be reserved by dominant undertakings with the obligation, for OGT, to offer, by auction, at least 50% of its operating capacity at the exit point of Brandov (Czech Republic).

13      On 28 October 2016, the Commission adopted, on the basis of Article 36(9) of Directive 2009/73, the decision at issue, which is addressed to the Federal Network Agency and was published on the Commission website on 3 January 2017.

14      In that decision, the Commission approved the amendments to the exemption regime proposed by the Federal Network Agency, subject to certain conditions, concerning, in particular (i) restriction of the initial offer of capacities to be auctioned to 3 200 000 kWh/h (approximately 2.48 billion m3/year) of fixed freely allocable capacities and to 12 664 532 kWh/h (approximately 9.83 billion m3/year) of fixed dynamically allocable capacities; (ii) an increase in the volume of fixed freely allocable capacities which had to be offered at auction in the subsequent year, if, at an annual auction, demand exceeded 90% of the capacities offered, and which had to be made in tranches of 1 600 000 kWh/h (approximately 1.24 billion m3/year) up to a maximum of 6 400 000 kWh/h (approximately 4.97 billion m3/year); and (iii) the fact that an undertaking or a group of undertakings with a dominant position in the Czech Republic or controlling more than 50% of the gas arriving at Greifswald could bid for fixed freely allocable capacities only at the base price, which was required to be set no higher than the average base price of regulated tariffs on transmission networks from the Gaspool area, comprising the north and east of Germany, to the Czech Republic for comparable products in the same year.

15      On 28 November 2016, the Federal Network Agency amended the exemption granted by its decision of 25 February 2009 concerning the share of the OPAL pipeline operated by OGT, in accordance with the decision at issue, by entering into a public-law contract with OGT which, under German law, is equivalent to an administrative decision.

**The procedure before the General Court and the judgment under appeal**

16      By application lodged at the General Court Registry on 16 December 2016, the Republic of Poland brought an action for annulment of the decision at issue.

17      In support of its action, the Republic of Poland relied on six pleas in law, alleging, first, infringement of Article 36(1)(a) of Directive 2009/73, read in conjunction with Article 194(1)(b) TFEU and the principle of solidarity; second, the lack of competence of the Commission and infringement of Article 36(1) of that directive; third, infringement of Article 36(1)(b) of that directive; fourth, infringement of Article 36(1)(a) and (e) of that directive; fifth, infringement of international conventions to which the European Union is a party; and, sixth, breach of the principle of legal certainty.

18      The General Court granted the Federal Republic of Germany leave to intervene in support of the form of order sought by the Commission, and granted the Republic of Latvia and the Republic of Lithuania leave to intervene in support of the form of order sought by the Republic of Poland.

19      By the judgment under appeal, the General Court annulled the decision at issue on the basis of the first plea in law, without ruling on the other pleas put forward, and ordered the Commission to bear its own costs and to pay those incurred by the Republic of Poland.

20      In the context of the examination of the first plea in law, after having rejected that plea, in paragraph 60 of the judgment under appeal, as being ineffective to the extent that it was based on Article 36(1)(a) of Directive 2009/73, the General Court held that the decision at issue had been adopted in breach of the principle of energy solidarity, as provided for in Article 194(1) TFEU. As regards the scope of that principle, the General Court stated, in paragraphs 72 and 73 of the judgment under appeal, that that principle entails a general obligation, for the European Union and the Member States, to take into account the interests of all stakeholders liable to be affected, and that the European Union and the Member States must therefore endeavour, in the exercise of their powers in the field of the energy policy of the European Union, to avoid adopting measures that might affect those interests, as regards security of supply, its economic and political viability and the diversification of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity.

21      In its assessment as to whether the decision at issue breached the principle of energy solidarity, the General Court found, in paragraphs 81 and 82 of the judgment under appeal, that that decision undermined it, in so far as, first, the Commission did not carry out an examination of the impact of the variation of the regime governing the operation of the OPAL pipeline on the security of supply in Poland and, second, it does not appear that the Commission examined what the medium-term consequences, inter alia for the energy policy of the Republic of Poland, might be of the transfer to the Nord Stream 1/OPAL transit route of part of the volumes of natural gas previously transported via the Yamal and Braterstwo pipelines, or that it balanced those effects against the increased security of supply that it had observed at EU level.

**Forms of order sought**

22      The Federal Republic of Germany claims that the Court should:

–        set aside the judgment under appeal;

–        refer the case back to the General Court; and

–        reserve the costs.

23      The Republic of Poland contends that the Court should:

–        dismiss the appeal in its entirety as unfounded and, as regards the third ground of appeal, as inadmissible; and

–        order the Federal Republic of Germany to pay the costs.

24      The Republic of Latvia and the Republic of Lithuania, interveners at first instance, contend that the Court should dismiss the appeal.

25      The Commission, which did not submit a response pursuant to Article 172 of the Rules of Procedure of the Court of Justice, requested the Court, during the oral part of the procedure before the Court, to uphold the first ground of appeal.

**The appeal**

26      The Federal Republic of Germany relies on five grounds of appeal.

***First ground of appeal: incorrect legal assessment of the principle of energy solidarity***

*Arguments of the parties*

27      By its first ground of appeal, the appellant submits that, contrary to the General Court’s finding in paragraph 70 of the judgment under appeal, the principle of energy solidarity as set out in Article 194(1) TFEU does not have binding effect, in the sense that it does not entail rights and obligations for the European Union and the Member States. According to the Federal Republic of Germany, it is an abstract, purely political notion, and not a legal criterion for the assessment of the validity of an act of an EU institution. It is only by the adoption of more specific rules in secondary legislation that such a principle could become a legal criterion to be implemented and applied by the executive. This follows from the fact that it is not the purpose of primary law to establish legal criteria that might be relied on before the courts, but to define in political terms the general framework within which the European Union is to develop and the European Union’s objectives, the latter being pursued and more closely defined by regulations and directives.

28      According to the appellant, the Commission did not err in examining the requirements of Article 36(1) of Directive 2009/73, that provision being the only criterion by which the legality of the decision at issue may be reviewed. That provision, which imbues the principle of energy solidarity with specific legal content, requires that only security of supply must be verified. By contrast, other abstract aspects of the principle of energy solidarity cannot be relied on before the courts.

29      In addition, the Federal Republic of Germany submits that there is no evidence to suggest an obligation on the Commission, as executive body of the European Union, arising from the principle of energy solidarity as such, beyond the specific form given to that principle in Article 36(1) of Directive 2009/73, that principle being binding, at most, on the EU legislature.

30      The Republic of Poland, supported by the Republic of Latvia and the Republic of Lithuania, contends that the first ground of appeal is unfounded.

31      In particular, the Republic of Poland counters that the principle of energy solidarity, to which Article 194(1) TFEU refers, constitutes the specific expression of the general principle of solidarity between the Member States. According to the Republic of Poland, in the hierarchy of sources of EU law, general principles rank equally with primary law. In that regard, it argues that acts of secondary legislation must be interpreted, and their legality assessed, in the light of that principle. Consequently, the claim by the Federal Republic of Germany that Article 36(1) of Directive 2009/73 constitutes the only criterion for reviewing the legality of the decision at issue is incorrect.

32      Thus, according to the Republic of Poland, the principle of solidarity is binding not only on the Member States but also on the EU institutions, including the Commission, which, as guardian of the Treaties, must ensure that the general interest of the European Union is served.

33      In addition, the Republic of Poland claims that the security of gas supply in the European Union, which is one of the objectives of EU energy policy, must be ensured in accordance with the principle of solidarity laid down in Article 194(1) TFEU, that principle being a criterion for the assessment of the legality of measures adopted by the EU institutions, and in the present case of the decision at issue. It follows that the arguments of the Federal Republic of Germany aimed at reducing that principle to a purely political notion are unfounded.

34      The Republic of Latvia submits that the Federal Republic of Germany wrongly seeks to reduce the scope and application of the principle of energy solidarity, when Article 194(1) TFEU, which is a provision of primary law, imposes obligations on the Member States and on the EU institutions. That principle prevents the Member States from taking certain measures which impede the functioning of the European Union. The Commission should ensure in that respect that the Member States respect the principle of energy solidarity when implementing Article 36(8) of Directive 2009/73.

35      The Republic of Lithuania also takes issue with the categorisation of the principle of energy solidarity in the appeal. In its view, that principle is derived from the principle of sincere cooperation, laid down in Article 4(3) TEU, and from the principle of solidarity, laid down in Article 3(3) TEU. As a general principle of EU law, the principle of energy solidarity could be relied on in the context of the judicial review of the legality of Commission decisions, under Article 263 TFEU.

36      At the hearing, the Commission was invited by the Court to comment on the first ground of appeal. The Commission stated that it concurred with the argument put forward by the Federal Republic of Germany, in so far as the principle of energy solidarity is not an autonomous legal criterion that may be invoked in order to assess the legality of an act. According to the Commission, that principle is binding on the EU legislature only when it adopts an act of secondary legislation. The Commission, as executive body, is bound only by the requirements laid down in Article 36(1)(a) of Directive 2009/73, and the principle of energy solidarity can only be a criterion in the light of which the provisions of secondary legislation are interpreted.

*Findings of the Court*

37      Article 194 TFEU provides in paragraph 1 that, in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, European Union policy on energy is to aim, in a spirit of solidarity between Member States, to ensure the functioning of the energy market, ensure security of energy supply in the European Union, promote energy efficiency and energy saving and the development of new and renewable forms of energy and promote the interconnection of energy networks (judgment of 4 May 2016, *Commission* v *Austria*, C‑346/14, EU:C:2016:322, paragraph 72 and the case-law cited).

38      Thus, the spirit of solidarity between Member States, mentioned in that provision, constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself one of the fundamental principles of EU law.

39      In addition to Article 194(1) TFEU, several other provisions of the Treaties refer to the principle of solidarity. As regards the EU Treaty, in the preamble thereto, the Member States declare that, by establishing the European Union, they intend ‘to deepen the solidarity between their peoples’. Solidarity is also mentioned in Article 2 TEU, as one of the characteristics of a society founded on the values common to the Member States, and in the third subparagraph of Article 3(3) TEU, according to which the European Union is to promote, inter alia, solidarity among Member States. In accordance with Article 21(1) TEU, solidarity is also one of the principles governing the European Union’s external action and, under Article 24(2) and (3) TEU, it is among the provisions relating to the common foreign and security policy as ‘mutual political solidarity’ among Member States.

40      In the case of the FEU Treaty, Article 67(2) expressly refers to solidarity between Member States in matters of asylum, immigration and external border controls, and the application of that principle in that area is confirmed in Article 80 TFEU. In Title VIII of Part Three of the FEU Treaty, specifically in Chapter 1 which covers economic policy, Article 122(1) TFEU also refers explicitly to the spirit of solidarity between Member States, which additionally features in Article 222 TFEU, according to which the European Union and its Member States are to act jointly in a spirit of solidarity where a Member State is the object of a terrorist attack or the victim of a disaster.

41      It follows that, as the General Court correctly noted in paragraph 69 of the judgment under appeal, the principle of solidarity underpins the entire legal system of the European Union (see, to that effect, judgments of 7 February 1973, *Commission* v *Italy*, 39/72, EU:C:1973:13, paragraph 25, and of 7 February 1979, *Commission* v *United Kingdom*, 128/78, EU:C:1979:32, paragraph 12) and it is closely linked to the principle of sincere cooperation, laid down in Article 4(3) TEU, pursuant to which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In that regard, the Court has held, inter alia, that that principle not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States (judgment of 8 October 2020, *Union des industries de la protection des plantes*, C‑514/19, EU:C:2020:803, paragraph 49 and the case-law cited).

42      As regards the allegedly abstract nature of the principle of solidarity, invoked by the Federal Republic of Germany in order to argue that it cannot be used in the context of judicial review of the legality of Commission acts, it must be pointed out that the Court, as the Advocate General noted in point 69 of his Opinion, expressly referred to the principle of solidarity mentioned in Article 80 TFEU in coming to the conclusion that, in essence, Member States had failed to fulfil certain of their obligations under EU law on border controls, asylum and immigration (judgments of 6 September 2017, *Slovakia and Hungary* v *Council*, C‑643/15 and C‑647/15, EU:C:2017:631, paragraph 291, and of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*, C‑715/17, C‑718/17 and C‑719/17, EU:C:2020:257, paragraphs 80 and 181).

43      That being so, there is nothing that would permit the inference that the principle of solidarity referred to in Article 194(1) TFEU cannot, as such, produce binding legal effects on the Member States and institutions of the European Union. On the contrary, as the Advocate General noted in points 76 and 77 of his Opinion, that principle, as is apparent from the wording and structure of that provision, forms the basis of all of the objectives of the European Union’s energy policy, serving as the thread that brings them together and gives them coherence.

44      It follows, in particular, that acts adopted by the EU institutions, including by the Commission under that policy, must be interpreted, and their legality assessed, in the light of the principle of energy solidarity.

45      In that regard, the Federal Republic of Germany’s argument that the principle of energy solidarity could at most be binding on the EU legislature, and not on the Commission as the executive body, cannot be upheld. That principle, like general principles of EU law, constitutes a criterion for assessing the legality of measures adopted by the EU institutions.

46      Therefore, contrary to the arguments advanced by the Federal Republic of Germany, according to which Article 36(1) of Directive 2009/73 gives specific form to the principle of energy solidarity in secondary legislation and is consequently the only article in the light of which the legality of the decision at issue should be reviewed, it must be held that that principle can be relied on in matters of EU energy policy in the context of the establishment and functioning of the internal market in natural gas.

47      As the Advocate General stated in points 76 and 104 of his Opinion, that principle cannot, moreover, be regarded as being synonymous with or limited to the requirement to ensure security of supply, referred to in Article 36(1) of Directive 2009/73, which is merely one of the manifestations of the principle of energy solidarity, since Article 194(1) TFEU sets out, in points (a) to (d), four different objectives which, in a spirit of solidarity between Member States, EU energy policy aims to achieve. Indeed, Article 36(1) of that directive cannot be read as limiting the scope of the principle of energy solidarity, referred to in Article 194(1) TFEU, which, as has been pointed out in paragraph 43 of the present judgment, governs the whole of EU energy policy.

48      Consequently, the absence in Article 36(1) of Directive 2009/73 of any reference to the principle of energy solidarity did not relieve the Commission of the need to examine the effect of that principle on the derogating measures adopted by the decision at issue.

49      It is apparent from the foregoing that the General Court was right to hold, in paragraph 70 of the judgment under appeal, that the principle of solidarity entails rights and obligations both for the European Union and for the Member States, the European Union being bound by an obligation of solidarity towards the Member States and the Member States being bound by an obligation of solidarity between themselves and with regard to the common interest of the European Union and the policies pursued by it.

50      That finding is not called in question by the arguments advanced by the Commission at the hearing, according to which it had not received information concerning the risk to security of supply in the Polish market for gas, which justified the fact that no account was taken of the principle of energy solidarity in the decision at issue.

51      Such a failure to communicate, unprompted, information concerning the risks for security of supply in the Polish market for gas cannot justify the lack of any examination by the Commission of the impact that the decision at issue could have on the gas market of the Member States liable to be affected.

52      Thus, the principle of energy solidarity, read in conjunction with the principle of sincere cooperation, requires that the Commission verify whether there is a danger for gas supply on the markets of the Member States, when adopting a decision on the basis of Article 36 of Directive 2009/73.

53      In addition, as the Advocate General noted in point 116 of his Opinion, the principle of energy solidarity requires that the EU institutions, including the Commission, conduct an analysis of the interests involved in the light of that principle, taking into account the interests both of the Member States and of the European Union as a whole.

54      In view of the foregoing, the first ground of appeal must be rejected as being unfounded.

***Second ground of appeal: non-applicability of the principle of energy solidarity***

*Arguments of the parties*

55      By its second ground of appeal, the Federal Republic of Germany submits that, in paragraph 72 of the judgment under appeal, the General Court erred in law by finding that the principle of solidarity entails a general obligation, for the European Union and the Member States, in the exercise of their respective competences, to take into account all the interests liable to be affected.

56      According to the appellant, the General Court disregarded the fact that the principle of energy solidarity is an emergency mechanism, which must be used only in exceptional cases and which implies, in such cases, an obligation of unconditional assistance, meaning ‘unconditional loyalty’. Taking that principle into account in anything other than exceptional cases would have the effect of impeding or preventing decision-making within the European Union, given that the various points of view and objectives could only rarely be reconciled. That is the case in this instance, since the interests of the Republic of Poland are different from those of the Federal Republic of Germany in the context of the decision at issue.

57      In the appellant’s submission, that principle therefore merely means a duty to assist in the event of a disaster or crisis. That interpretation is confirmed by Article 3(3) TEU read in conjunction with Article 222 TFEU.

58      Even though Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (OJ 2017 L 280, p. 1) was not applicable at the time when the decision at issue was adopted, Article 13 thereof shows that the duty to assist that flows from the principle of energy solidarity is to be invoked only as a last resort, in a full emergency.

59      According to the Federal Republic of Germany, since the decision at issue was not adopted in such an emergency, the Commission was not required to take the principle of energy solidarity into account in that decision. It concludes from this that the judgment under appeal must be set aside in so far as it is based solely on the alleged lack of any reference to that principle in the decision at issue.

60      The Republic of Poland, supported by the Republic of Latvia and the Republic of Lithuania, contends that the second ground of appeal is unfounded.

61      In particular, the Republic of Poland counters that Article 194(1) TFEU requires account to be taken of the principle of solidarity among Member States in the context of any action falling within the European Union policy on energy, and that that obligation is not limited to action in times of crisis. In its view, it is preferable to prevent crises from occurring rather than to remedy them.

62      In addition, the analogy drawn by the Federal Republic of Germany between Article 194 TFEU and Article 222 TFEU is not correct in so far as the special emergency mechanisms, such as those provided for in Articles 122 and 222 TFEU, are of a nature and have objectives that are distinct from those of the principle of energy solidarity provided for in Article 194 TFEU.

63      As to the argument of the Federal Republic of Germany that the mechanisms of Regulation 2017/1938 show that the duty to assist is to be applied only as a last resort, this also is incorrect. In fact, that regulation provides for preventive measures and for emergency mechanisms applicable in crisis situations. In the present case, the Republic of Poland submits that there are genuine risks to the security of energy supply in Poland and the States of the central and eastern areas of Europe if the decision at issue were to be applied, owing to the dominant position of Gazprom on the market for the supply of gas.

64      The Republic of Latvia argues that the principle of energy solidarity does not apply only in order to deal with exceptional cases when they arise, but that it also implies the adoption of preventive measures. That principle cannot be interpreted as requiring ‘unconditional loyalty’ but should be understood to mean that the decision-making process is to take into account the particular characteristics of neighbouring States and of the region and respects the common objectives of the European Union in the field of energy. Thus, the Commission was required to assess, in the decision at issue, whether the amendments proposed by the German regulatory authority could affect the energy interests of the Member States liable to be affected.

65      The Republic of Lithuania also challenges the argument of the Federal Republic of Germany, contending that it is based on too narrow an interpretation of the principle of energy solidarity, which is not consistent either with the text of Article 194 TFEU or with the rights and obligations that flow from that provision.

66      The Commission did not comment on the second ground of appeal.

*Findings of the Court*

67      It must be noted that the wording of Article 194 TFEU does not give any indication that, in the field of EU energy policy, the principle of energy solidarity should be limited to the situations referred to in Article 222 TFEU. On the contrary, the spirit of solidarity mentioned in Article 194(1) TFEU must, for the reasons set out in paragraphs 41 to 44 of the present judgment, inform any action relating to EU policy in that field.

68      That finding cannot be called in question by Article 222 TFEU, which introduces a solidarity clause under which the European Union and its Member States are to act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. As the Advocate General noted in essence in points 126 and 127 of his Opinion, Article 194(1) TFEU and Article 222 TFEU cover different situations and have different objectives.

69      Thus, the EU institutions and the Member States must take into account the principle of energy solidarity, referred to in Article 194 TFEU, in the context of the establishment and functioning of the internal market and, in particular, the internal market in natural gas, by ensuring security of energy supply in the European Union, which means not only dealing with emergencies when they arise, but also adopting measures to prevent crisis situations. To that end, it is necessary to assess whether there are risks for the energy interests of the Member States and the European Union, and in particular to security of energy supply, before going on to conduct the analysis to which reference is made in paragraph 53 of the present judgment.

70      Furthermore, as regards Regulation 2017/1938, on which the Federal Republic of Germany relied in support of its argument that the duty of assistance must be invoked only as a last resort, it should be noted that that regulation provides for two categories of measure: preventive measures, aimed at preventing possible crisis situations from occurring, and emergency measures, should a crisis situation arise.

71      Thus, the General Court correctly held, in paragraphs 71 to 73 of the judgment under appeal, that the principle of energy solidarity entails a general obligation, for the European Union and the Member States, in the exercise of their respective competences in respect of EU energy policy, to take into account the interests of all stakeholders liable to be affected, by avoiding the adoption of measures that might affect their interests, as regards security of supply, its economic and political viability and the diversification of sources of supply, and to do so in order to take account of their interdependence and de facto solidarity.

72      As regards the argument of the Federal Republic of Germany that if the principle of energy solidarity were applicable in non-crisis situations, the European Union and the Member States would be subject to a requirement of ‘unconditional loyalty’, which would impede any decision within the European Union, it must be pointed out that such an interpretation is based on a misreading of the judgment under appeal.

73      In paragraph 77 of the judgment under appeal, to which the appeal makes no reference, the General Court correctly stated that the application of the principle of energy solidarity does not mean that EU energy policy must never, under any circumstances, have negative impacts for the particular interests of a Member State in that field. However, as has been pointed out in paragraphs 53 and 69 of the present judgment, the EU institutions and the Member States are required to take into account, in the context of the implementation of that policy, the interests both of the European Union and of the various Member States that are liable to be affected and to balance those interests where there is a conflict.

74      Consequently, the second ground of appeal must be rejected as being unfounded.

***Third ground of appeal: incorrect assessment as regards the account taken by the Commission of the principle of energy solidarity***

*Arguments of the parties*

75      Should the Court accept the principle of energy solidarity as being a criterion applicable to the decision at issue, the Federal Republic of Germany submits, by its third ground of appeal, that the General Court disregarded (i) the fact that the Commission did take that principle into consideration when adopting that decision, and (ii) the fact that the Commission was not obliged to indicate in detail how it took that principle into account.

76      According to the Federal Republic of Germany, the General Court erred in law, in paragraph 81 of the judgment under appeal, by finding that the Commission had not examined the principle of energy solidarity in so far as it did not carry out an examination of the impact of the variation of the regime governing the operation of the OPAL pipeline on security of supply in the Polish gas market.

77      According to the appellant, that finding by the General Court is contradicted, first, by the process by which the decision at issue was adopted, including in particular the submission by the Republic of Poland of written comments before the adoption of that decision, as is apparent from paragraph 10 thereof; second, by the study carried out by a working group composed of representatives of the Ministry of Energy of the Russian Federation and the Commission, in relation to more efficient operation of the OPAL pipeline, as is apparent from paragraph 17 of the decision at issue; third, by the content of a Commission press release of 26 October 2016 concerning the consequences of that decision for the gas market in Europe, as is also apparent from paragraphs 80 to 88 of that decision; and, fourth, by the Commission’s verification of security of supply in the examination of exemption conditions under Article 36 of Directive 2009/73.

78      Furthermore, there is a transit contract between the Republic of Poland and Gazprom for the transport of natural gas via the Polish section of the Yamal pipeline to supply the western European markets, including the Polish markets, until 2020, and a contract between the largest Polish energy supplier and Gazprom for deliveries of natural gas until the end of 2022.

79      In addition, the Federal Republic of Germany claims that the Republic of Poland aims, according to the statements of that Polish energy supplier, to be independent of Russian gas by 2022/2023.

80      The Federal Republic of Germany also maintains that the decision at issue puts the Republic of Poland in a better position as compared with its position under Decision C(2009) 4694, against which the Republic of Poland could have brought an action. Moreover, the OPAL pipeline contributes to the completion of the internal market in natural gas, bringing benefits for cross-border trade and security of supply.

81      The Republic of Poland contends that the third ground of appeal is inadmissible in that it seeks to call in question findings of fact.

82      As to the substance, the Republic of Poland, supported by the Republic of Latvia and the Republic of Lithuania, contends that this ground of appeal is unfounded.

*Findings of the Court*

83      By its third ground of appeal, the appellant submits that, in the decision at issue and during the process of its adoption, the Commission examined the principle of energy solidarity in the context of the variation of the regime governing the operation of the OPAL pipeline, envisaged by the decision at issue, and the consequences of that decision for the Polish gas market.

84      At the hearing before the Court, the Commission did not contest the General Court’s assessment in respect of the decision at issue, while maintaining that, in its view, it was not required to assess the risks to the interests of the Member States liable to be affected or, therefore, to balance those interests, because it had verified, overall, whether the decision at issue represented a threat for alternative pipelines and found that that was not the case.

85      In that regard, it is apparent from the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that an appeal is to be limited to points of law only and the appraisal of the facts by the General Court does not, save where they are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.

86      However, it must be noted that, by virtue of part of the argument advanced under the third ground of appeal, the Federal Republic of Germany seeks to call in question findings of a factual nature.

87      Specifically, in so far as it invokes matters of fact surrounding the adoption of the decision at issue or that followed its adoption, with a view to challenging the General Court’s assessment regarding the lack, in that decision, of any examination by the Commission of the question whether the variation of the regime governing the operation of the OPAL pipeline, proposed by the German regulatory authority, could affect the energy interests of Member States liable to be affected, the appellant does no more than to call in question the factual analysis carried out by the General Court, which is not subject to review by the Court of Justice.

88      It follows that the third ground of appeal is, to that extent, inadmissible.

89      Furthermore, in so far as the appellant challenges by this ground of appeal the General Court’s interpretation of the decision at issue, relying to that effect on the paragraphs of that decision referred to in paragraph 77 of the present judgment, this ground of appeal must be rejected as being unfounded.

90      None of those paragraphs of the decision at issue is such as to call in question the General Court’s finding in paragraph 82 of the judgment under appeal that the Commission did not, in that decision, examine what the medium-term consequences, inter alia for the energy policy of the Republic of Poland, might be of the transfer to the Nord Stream 1/OPAL transit route of part of the volumes of natural gas previously transported via the Yamal and Braterstwo pipelines, or balance those effects against the increased security of supply at EU level.

91      The third ground of appeal must, therefore, be rejected as being in part inadmissible and in part unfounded.

***Fourth ground of appeal: no obligation for the Commission to mention the principle of energy solidarity***

*Arguments of the parties*

92      By its fourth ground of appeal, the Federal Republic of Germany submits, first, that the General Court erred in law by finding, in paragraph 79 of the judgment under appeal, that the decision at issue does not disclose that the Commission did, as a matter of fact, carry out an examination of the principle of energy solidarity and, second, that the Commission was not required to mention that principle in the decision at issue. In the view of the Federal Republic of Germany, that decision is correct so far as its content is concerned in that it did not jeopardise the security of gas supply in Poland, which was not at risk, and therefore the Commission had no reason to examine in detail the consequences of the decision at issue for the Polish gas market.

93      In that regard, the appellant refers to the case-law of the Court concerning the obligation to state the reasons for legal acts, in particular the judgment of 11 July 1989, *Belasco and Others* v *Commission* (246/86, EU:C:1989:301, paragraph 55), and to the principle of good administration, guaranteed by Article 41 of the Charter of Fundamental Rights of the European Union, from which it follows that it is not necessary to specify all the relevant facts and points of law. In the present case, to oblige the Commission to present all the consequences of the decision at issue for the Member States, in the light of the principle of energy solidarity, would be to exceed the requirements laid down by EU law.

94      The Republic of Poland contends that the fourth ground of appeal is ineffective and, in any event, unfounded.

95      The Republic of Lithuania, which analysed this ground of appeal in conjunction with the third ground of appeal, concurs with that analysis.

96      The Republic of Latvia and the Commission did not comment on the fourth ground of appeal.

*Findings of the Court*

97      It should be noted that the General Court found, in paragraphs 79 to 82 of the judgment under appeal, not only that the principle of solidarity was not mentioned in the decision at issue but also that the decision itself does not disclose that the Commission adequately examined the impact of the extension of the exemption in relation to the OPAL pipeline on the Polish gas market and on the markets of the Member States other than the Republic of Poland, which could be geographically affected.

98      Contrary to the appellant’s claims, it is for that reason that the General Court concluded that the decision at issue should be annulled, and not merely because of the lack of any reference to the principle of energy solidarity in that decision or because the statement of reasons was insufficient.

99      Consequently, in so far as the judgment under appeal is based on the finding that the decision at issue was adopted in breach of the principle of energy solidarity, the fourth ground of appeal must be rejected as being ineffective.

***Fifth ground of appeal: infringement of the second paragraph of Article 263 TFEU***

*Arguments of the parties*

100    By its fifth ground of appeal, the Federal Republic of Germany submits that, in paragraph 79 of the judgment under appeal, the General Court infringed the second paragraph of Article 263 TFEU. This ground of appeal is in two parts.

101    By the first part of the fifth ground of appeal, the appellant maintains that the General Court erred in law in so far as it accepted that the decision at issue does not disclose that the Commission did, as a matter of fact, carry out an examination of the principle of energy solidarity, whereas a decision that is erroneous only from a formal aspect should not be automatically annulled.

102    According to the Federal Republic of Germany, under the second paragraph of Article 263 TFEU, decisions that are materially correct, albeit unlawful on procedural grounds, are not to be annulled.

103    The second part of the fifth ground of appeal relates to the fact that the General Court allegedly erred in law by taking into account the argument of the Republic of Poland concerning the alleged breach of the principle of energy solidarity, which should have been invoked in the context of an action against Decision C(2009) 4694. Accordingly, that argument, raised before the General Court in the context of an action for annulment of the decision at issue, is, it is claimed, out of time and should not therefore have been taken into account in this action.

104    The Republic of Poland and the Republic of Lithuania contend that the fifth ground of appeal is unfounded.

105    The Republic of Latvia and the Commission did not comment on the fifth ground of appeal.

*Findings of the Court*

106    As regards the first part of the fifth ground of appeal, it must be observed that, contrary to the appellant’s claims, and as has been noted in paragraphs 97 and 99 of the present judgment, the General Court did not annul the decision at issue because of a failure to state reasons. In particular, in paragraphs 83 and 84 of the judgment under appeal, the General Court held that the decision at issue was adopted in breach of the principle of energy solidarity and that, therefore, that decision was to be annulled to the extent that it breached that principle. It follows that the first part of this ground of appeal is ineffective.

107    As regards the second part of the fifth ground of appeal, it is sufficient to note that the decision at issue amended the exemption conditions laid down in Decision C(2009) 4694 and that these two decisions are independent of one another, as the General Court stated in paragraph 57 of the judgment under appeal, to which the appeal does not refer; therefore the argument of the Federal Republic of Germany to the effect that the action brought by the Republic of Poland against the decision at issue is out of time because the Republic of Poland had not brought an action against Decision C(2009) 4694 cannot succeed.

108    It follows that the second part of the fifth ground of appeal is unfounded.

109    Consequently, the fifth ground of appeal must be rejected as being in part ineffective and in part unfounded.

110    It follows from all of the foregoing considerations that, since none of the grounds of appeal has been upheld, the appeal must be dismissed in its entirety.

**Costs**

111    Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings.

112    Since the Republic of Poland has applied for costs to be awarded against the Federal Republic of Germany, and since the latter has been unsuccessful, the Federal Republic of Germany must be ordered to bear its own costs and to pay those incurred by the Republic of Poland.

113    In accordance with Article 140(1) of the Rules of Procedure, also applicable to appeal proceedings by virtue of Article 184(1) thereof, the Member States and institutions which have intervened in the proceedings are to bear their own costs. Where an intervener at first instance, who has not brought the appeal, participates in the proceedings before the Court, the Court may, under Article 184(4) of the Rules of Procedure, decide that the intervener is to bear its own costs.

114    Since the Republic of Latvia, the Republic of Lithuania and the Commission participated in the proceedings before the Court, they must be ordered to bear their own costs.

On those grounds, the Court (Grand Chamber) hereby:

**1.      Dismisses the appeal;**

**2.      Orders the Federal Republic of Germany to bear its own costs and to pay those incurred by the Republic of Poland;**

**3.      Orders the Republic of Latvia, the Republic of Lithuania and the European Commission to bear their own costs.**

**Doc 2 – Transport activities – articulation with internal market – CJUE, 20 december 2017, C-434/15, Asociación Profesional Élite Taxi c. Asociación Profesional Élite Taxi, Uber Spain**

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça, J. Malenovský and E. Levits, Presidents of Chambers, E. Juhász, A. Borg Barthet, D. Šváby (Rapporteur), C. Lycourgos, M. Vilaras and E. Regan, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 November 2016,

after considering the observations submitted on behalf of:

–        Asociación Profesional Elite Taxi, by M. Balagué Farré and D. Salmerón Porras, abogados, and J.A. López-Jurado González, procurador,

–        Uber Systems Spain SL, by B. Le Bret and D. Calciu, avocats, R. Allendesalazar Corcho, J.J. Montero Pascual, C. Fernández Vicién and I. Moreno-Tapia Rivas, abogados,

–        the Spanish Government, by M.A. Sampol Pucurull and A. Rubio González, acting as Agents,

–        the Estonian Government, by N. Grünberg, acting as Agent,

–        Ireland, by E. Creedon, L. Williams and A. Joyce, acting as Agents, and A. Carroll, Barrister,

–        the Greek Government, by M. Michelogiannaki, acting as Agent,

–        the French Government, by D. Colas, G. de Bergues and R. Coesme, acting as Agents,

–        the Netherlands Government, by H. Stergiou and M. Bulterman, acting as Agents,

–        the Polish Government, by B. Majczyna, acting as Agent,

–        the Finnish Government, by S. Hartikainen, acting as Agent,

–        the European Commission, by É. Gippini Fournier, F. Wilman, J. Hottiaux and H. Tserepa-Lacombe, acting as Agents,

–        the EFTA Surveillance Authority, by C. Zatschler, Ø. Bø and C. Perrin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 May 2017,

gives the following

**Judgment**

1        This request for a preliminary ruling concerns the interpretation of Articles 56 TFEU, Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ 1998 L 204, p. 37), as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (OJ 1998 L 217, p. 18) (‘Directive 98/34’), Article 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) (OJ 2000 L 178, p. 1), and Articles 2 and 9 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

2        The request has been made in proceedings between Asociación Profesional Elite Taxi (‘Elite Taxi’), a professional taxi drivers’ association in Barcelona (Spain), and Uber Systems Spain SL, a company related to Uber Technologies Inc., concerning the provision by the latter, by means of a smartphone application, of the paid service consisting of connecting non-professional drivers using their own vehicle with persons who wish to make urban journeys, without holding any administrative licence or authorisation.

**Legal context**

***EU law***

*Directive 98/34*

3        Article 1(2) of Directive 98/34 provides:

‘For the purposes of this Directive, the following meanings shall apply:

…

(2)      “service”, any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

–        “at a distance” means that the service is provided without the parties being simultaneously present,

–        “by electronic means” means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

–        “at the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

…’

4        In accordance with Articles 10 and 11 of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1), Directive 98/34 was repealed on 7 October 2015. Nevertheless, Directive 98/34 remains applicable *ratione temporis* to the dispute in the main proceedings.

*Directive 2000/31*

5        Article 2(a) of Directive 2000/31 provides that, for the purposes of the directive, ‘information society services’ means services within the meaning of Article 1(2) of Directive 98/34.

6        Article 3(2) and (4) of Directive 2000/31 states:

‘2.      Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

…

4.      Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a)      the measures shall be:

(i)      necessary for one of the following reasons:

–        public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

–        the protection of public health,

–        public security, including the safeguarding of national security and defence,

–        the protection of consumers, including investors;

(ii)      taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii)      proportionate to those objectives;

(b)      before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

–        asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

–        notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.’

*Directive 2006/123*

7        According to recital 21 of Directive 2006/123, ‘transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive’.

8        Article 2(2)(d) of Directive 2006/123 provides that the directive does not apply to services in the field of transport, including port services, falling within the scope of Title V of Part Three of the EC Treaty, which is now Title VI of Part Three of the FEU Treaty.

9        Under Article 9(1) of Directive 2006/123, which falls under Chapter III thereof, headed ‘Freedom of establishment for providers’:

‘Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a)      the authorisation scheme does not discriminate against the provider in question;

(b)      the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c)      the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.’

10      Under Chapter IV of the directive, headed ‘Free movement of services’, Article 16 lays down the procedures enabling service providers to provide services in a Member State other than that in which they are established.

***Spanish law***

11      In the metropolitan area of Barcelona, taxi services are governed by Ley 19/2003 del Taxi (Law No 19/2003 on taxi services) of 4 July 2003 (DOGC No 3926 of 16 July 2003 and BOE No 189 of 8 August 2003) and by Reglamento Metropolitano del Taxi (Regulation on taxi services in the metropolitan area of Barcelona) of 22 July 2004 adopted by the Consell Metropolitá of the Entitat Metropolitana de Transport de Barcelona (Governing Board of the Transport management body for the metropolitan area of Barcelona, Spain).

12      Under Article 4 of that law:

‘1.      The provision of urban taxi services is subject to the prior grant of a licence entitling the licence holder for each vehicle intended to carry out that activity.

2.      Licences for the provision of urban taxi services are issued by the town halls or the competent local authorities in the territory where the activity shall be carried out.

3.      The provision of interurban taxi services is subject to the prior grant of the corresponding authorisation issued by the ministry of transport of the regional government.’

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

13      On 29 October 2014, Elite Taxi brought an action before the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona, Spain) seeking a declaration from that court that the activities of Uber Systems Spain infringe the legislation in force and amount to misleading practices and acts of unfair competition within the meaning of Ley 3/1991 de Competencia Desleal (Law No 3/1991 on unfair competition) of 10 January 1991. Elite Taxi also claims that Uber Systems Spain should be ordered to cease its unfair conduct consisting of supporting other companies in the group by providing on-demand booking services by means of mobile devices and the internet. Lastly, it claims that the court should prohibit Uber Systems Spain from engaging in such activity in the future.

14      The Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) noted at the outset that although Uber Systems Spain carries out its activity in Spain, that activity is linked to an international platform, thus justifying the assessment at EU level of the actions of that company. It also observed that neither Uber Systems Spain nor the non-professional drivers of the vehicles concerned have the licences and authorisations required under the Regulation on taxi services in the metropolitan area of Barcelona of 22 July 2004.

15      In order to determine whether the practices of Uber Systems Spain and related companies (together, ‘Uber’) can be classified as unfair practices that infringe the Spanish rules on competition, the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) considers it necessary to ascertain whether or not Uber requires prior administrative authorisation. To that end, the court considers that it should be determined whether the services provided by that company are to be regarded as transport services, information society services or a combination of both. According to the court, whether or not prior administrative authorisation may be required depends on the classification adopted. In particular, the referring court takes the view that if the service at issue were covered by Directive 2006/123 or Directive 98/34, Uber’s practices could not be regarded as unfair practices.

16      To that end, the referring court states that Uber contacts or connects with non-professional drivers to whom it provides a number of software tools — an interface — which enables them, in turn, to connect with persons who wish to make urban journeys and who gain access to the service through the eponymous software application. According to the court, Uber’s activity is for profit.

17      The referring court also states that the request for a preliminary ruling in no way concerns those factual elements but solely the legal classification of the service at issue.

18      Consequently, the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No 3, Barcelona) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1)      Inasmuch as Article 2(2)(d) of [Directive 2006/123] excludes transport activities from the scope of that directive, must the activity carried out for profit by [Uber Systems Spain], consisting of acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources — in the words of [Uber Systems Spain], “smartphone and technological platform” interface and software application — which enable them to connect with one another, be considered to be merely a transport service or must it be considered to be an electronic intermediary service or an information society service, as defined by Article 1(2) of [Directive 98/34]?

(2)      Within the identification of the legal nature of that activity, can it be considered to be … in part an information society service, and, if so, ought the electronic intermediary service to benefit from the principle of freedom to provide services as guaranteed in [EU] legislation — Article 56 TFEU and Directives [2006/123] and … [2000/31]?

(3)      If the service provided by [Uber Systems Spain] were not to be considered to be a transport service and were therefore considered to fall within the cases covered by Directive 2006/123, is Article 15 of Law [No 3/1991] on unfair competition [of 10 January 1991] — concerning the infringement of rules governing competitive activity — contrary to Directive 2006/123, specifically Article 9 on freedom of establishment and authorisation schemes, when the reference to national laws or to legal provisions is made without taking into account the fact that the scheme for obtaining licences, authorisations and permits may not be in any way restrictive or disproportionate, that is, it may not unreasonably impede the principle of freedom of establishment?

(4)      If it is confirmed that Directive [2000/31] is applicable to the service provided by [Uber Systems Spain], are restrictions in one Member State regarding the freedom to provide the electronic intermediary service from another Member State, in the form of making the service subject to an authorisation or a licence, or in the form of an injunction prohibiting provision of the electronic intermediary service based on the application of the national legislation on unfair competition, valid measures that constitute derogations from Article 3(2) of Directive [2000/31] in accordance with Article 3(4) thereof?’

**The jurisdiction of the Court**

19      Elite Taxi claims that the legal classification of the service provided by Uber does not fall within the Court’s jurisdiction because that classification requires a decision on issues of fact. In those circumstances, according to Elite Taxi, the Court has no jurisdiction to answer the questions referred.

20      In that regard, it should be recalled that the referring court has clearly stated, as is apparent from paragraph 17 above, that its questions concern solely the legal classification of the service at issue and not a finding or assessment of the facts of the dispute in the main proceedings. The classification under EU law of facts established by that court involves, however, the interpretation of EU law for which, in the context of the procedure laid down in Article 267 TFEU, the Court of Justice has jurisdiction (see, to that effect, judgment of 3 December 2015, *Banif Plus Bank*, C‑312/14, EU:C:2015:794, paragraphs 51 and 52).

21      The Court therefore has jurisdiction to reply to the questions referred.

**Consideration of the questions referred**

***Admissibility***

22      The Spanish, Greek, Netherlands, Polish and Finnish Governments, the European Commission and the EFTA Surveillance Authority note that the order for reference is insufficiently precise as regards both the applicable national legislation and the nature of the activities at issue in the main proceedings.

23      In that regard, it should be recalled that the Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to enable it to give a useful answer to the questions submitted to it (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C‑74/16, EU:C:2017:496, paragraph 25).

24      On that last point, the need to provide an interpretation of EU law which will be of use to the referring court requires that court, according to Article 94(a) and (b) of the Rules of Procedure of the Court, to define the factual and legislative context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based (see judgment of 10 May 2017, *de Lobkowicz*, C‑690/15, EU:C:2017:355, paragraph 28).

25      Furthermore, according to the settled case-law of the Court, the information provided in orders for reference not only enables the Court to give useful answers but also serves to ensure that the governments of the Member States and other interested persons are given an opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is for the Court to ensure that that opportunity is safeguarded, given that, under Article 23, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language of each Member State, but excluding any case file that may be sent to the Court by the national court (judgment of 4 May 2016, *Pillbox 38*, C‑477/14, EU:C:2016:324, paragraph 26 and the case-law cited).

26      In the present case, it must be noted that the order for reference, while brief in its reference to the relevant national provisions, nevertheless serves to identify those that may apply to the provision of the service at issue in the main proceedings, from which it would follow that a licence or prior administrative authorisation is required for that purpose.

27      Similarly, the referring court’s description of the service provided by Uber, the content of which is set out in paragraph 16 above, is sufficiently precise.

28      Lastly, in accordance with Article 94(c) of the Rules of Procedure, the referring court sets out precisely the reasons for its uncertainty as to the interpretation of EU law.

29      Consequently, it must be held that the order for reference contains the factual and legal material necessary to enable the Court to give a useful answer to the referring court and to enable interested persons usefully to take a position on the questions referred to the Court, in accordance with the case-law referred to in paragraph 25 above.

30      The Polish Government also expresses its doubts as to whether Article 56 TFEU, inter alia, is applicable to the present case, on the ground that the matter in the main proceedings is allegedly a purely internal matter.

31      However, it is apparent from the order for reference, in particular the information referred to in paragraph 14 above and the other documents in the file before the Court, that the service at issue in the main proceedings is provided through a company that operates from another Member State, namely the Kingdom of the Netherlands.

32      In those circumstances, the request for a preliminary ruling must be held to be admissible.

***Substance***

33      By its first and second questions, which should be considered together, the referring court asks, in essence, whether Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123 and Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, is to be classified as a ‘service in the field of transport’ within the meaning of Article 58(1) TFEU and, therefore, excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31, or whether, on the contrary, the service is covered by Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

34      In that regard, it should be noted that an intermediation service consisting of connecting a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey is, in principle, a separate service from a transport service consisting of the physical act of moving persons or goods from one place to another by means of a vehicle. It should be added that each of those services, taken separately, can be linked to different directives or provisions of the FEU Treaty on the freedom to provide services, as contemplated by the referring court.

35      Accordingly, an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and the non-professional driver who will carry out the transportation using his or her own vehicle, meets, in principle, the criteria for classification as an ‘information society service’ within the meaning of Article 1(2) of Directive 98/34 and Article 2(a) of Directive 2000/31. That intermediation service, according to the definition laid down in Article 1(2) of Directive 98/34, is ‘a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’.

36      By contrast, non-public urban transport services, such as a taxi services, must be classified as ‘services in the field of transport’ within the meaning of Article 2(2)(d) of Directive 2006/123, read in the light of recital 21 thereof (see, to that effect, judgment of 1 October 2015, *Trijber and Harmsen*, C‑340/14 and C‑341/14, EU:C:2015:641, paragraph 49).

37      It is appropriate to observe, however, that a service such as that in the main proceedings is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey.

38      In a situation such as that with which the referring court is concerned, where passengers are transported by non-professional drivers using their own vehicle, the provider of that intermediation service simultaneously offers urban transport services, which it renders accessible, in particular, through software tools such as the application at issue in the main proceedings and whose general operation it organises for the benefit of persons who wish to accept that offer in order to make an urban journey.

39      In that regard, it follows from the information before the Court that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.

40      That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as ‘an information society service’ within the meaning of Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, but as ‘a service in the field of transport’ within the meaning of Article 2(2)(d) of Directive 2006/123.

41      That classification is indeed confirmed by the case-law of the Court, according to which the concept of ‘services in the field of transport’ includes not only transport services in themselves but also any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport (see, to that effect, judgment of 15 October 2015, *Grupo Itevelesa and Others*, C‑168/14, EU:C:2015:685, paragraphs 45 and 46, and Opinion 2/15 *(Free Trade Agreement with Singapore)* of 16 May 2017, EU:C:2017:376, paragraph 61).

42      Consequently, Directive 2000/31 does not apply to an intermediation service such as that at issue in the main proceedings.

43      Such service, in so far as it is classified as ‘a service in the field of transport’, does not come under Directive 2006/123 either, since this type of service is expressly excluded from the scope of the directive pursuant to Article 2(2)(d) thereof.

44      Moreover, since the intermediation service at issue in the main proceedings is to be classified as ‘a service in the field of transport’, it is covered not by Article 56 TFEU on the freedom to provide services in general but by Article 58(1) TFEU, a specific provision according to which ‘freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport’ (see, to that effect, judgment of 22 December 2010, *Yellow Cab Verkehrsbetrieb*, C‑338/09, EU:C:2010:814, paragraph 29 and the case-law cited).

45      Accordingly, application of the principle governing freedom to provide services must be achieved, according to the FEU Treaty, by implementing the common transport policy (judgment of 22 December 2010, Y*ellow Cab Verkehrsbetrieb*, C‑338/09, EU:C:2010:814, paragraph 30 and the case-law cited).

46      However, it should be noted that non-public urban transport services and services that are inherently linked to those services, such as the intermediation service at issue in the main proceedings, has not given rise to the adoption by the European Parliament and the Council of the European Union of common rules or other measures based on Article 91(1) TFEU.

47      It follows that, as EU law currently stands, it is for the Member States to regulate the conditions under which intermediation services such as that at issue in the main proceedings are to be provided in conformity with the general rules of the FEU Treaty.

48      Accordingly, the answer to the first and second questions is that Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123 and Article 1(2) of Directive 98/34, to which Article 2(a) of Directive 2000/31 refers, must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as ‘a service in the field of transport’ within the meaning of Article 58(1) TFEU. Consequently, such a service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.

49      In the light of the answer given to the first and second questions, it is not necessary to provide an answer to the third and fourth questions, which were referred on the assumption that Directive 2006/123 or Directive 2000/31 applied.

**Costs**

50      Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

**Article 56 TFEU, read together with Article 58(1) TFEU, as well as Article 2(2)(d) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, as amended by Directive 98/48/EC of the European Parliament and of Council of 20 July 1998, to which Article 2(a) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) refers, must be interpreted as meaning that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as ‘a service in the field of transport’ within the meaning of Article 58(1) TFEU. Consequently, such a service must be excluded from the scope of Article 56 TFEU, Directive 2006/123 and Directive 2000/31.**

**Doc. 3 – Network activities – General Court (Trib. UE), 8 february 2023, T-295/20, Aquind LtD**

**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.

unsuccessful, they must be ordered to bear their own costs and to pay those of the Commission, in accordance with the latter’s pleadings.

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 eac**