

## Annex 2

### **Policy Decision on the framework applicable to the procedural steps, assessment, and decision-making for Pre-Operational Force Majeure requests made by Third Window licensees.**

#### Purpose

1. This Decision sets out the provisions that apply in circumstances where a licensee (and a participant of the Third Window) considers that the licensee's interconnector Regime Start Date (the RSD-IPA) has been delayed due to an event or circumstance of Pre-Operational Force Majeure.
2. This Policy Decision sets out the procedural steps, the assessment, and the decision-making processes applicable to a licensee's request for an adjustment to the RSD-IPA due to delays caused by Pre-Operational Force Majeure.

#### Scope

3. This Policy Decision applies to requests for an adjustment to the Regime Start Date (RSD-IPA) due to delays caused by Pre-Operational Force Majeure, submitted by a relevant licensee to the Authority<sup>1</sup> during the period between:
  - a) the date of Ofgem's IPA decision relating to the licensee's interconnector project; and
  - b) the point in time when standard licence condition (SLC) 26B<sup>2</sup> takes effect in the licensee's licence.

#### Process for submitting requests

4. If a licensee considers that an event or circumstance of Pre-Operational Force Majeure has occurred and caused a delay to its interconnector project's Regime Start Date, the licensee may, within a reasonable timeframe<sup>3</sup> of that event or circumstance occurring, submit a written request to us for the Regime Start Date to be adjusted to reflect the delay caused by that event or circumstance of Pre-Operational Force Majeure.
5. Any request submitted to us by the licensee under paragraph 4 of this Policy Decision must include:
  - (a) full details of the event or circumstance that the request relates to and the reason(s) why the licensee considers it to be an event or circumstance of Pre-Operational Force Majeure;

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<sup>1</sup> The words "Authority", "we", "our" and "us" are used interchangeably in this decision.

<sup>2</sup> Once SLC 26B, containing the Pre-Operational Force Majeure mechanism for the Third Window is in effect in a licensee's electricity interconnector licence, the licensee should raise any Pre-Operational Force Majeure requests pursuant to SLC 26B.

<sup>3</sup> What constitutes a reasonable timeframe may differ from case to case, depending on the underlying circumstances. We would encourage relevant licensees to consider submitting their Pre-Operational Force Majeure request alongside their Final Project Assessment (FPA) or their Post-Construction Review (PCR) submissions – if possible. However, equally we expect the licensees to exercise good judgement in deciding whether it is appropriate to submit their Pre-Operational Force Majeure request alongside the FPA or the PCR submissions. In particular, licensees are required to ensure the robustness of the evidence supporting their Pre-Operational Force Majeure request.

- (b) the length of any resulting delay that the licensee considers to have been caused as a result of that event or circumstance and its proposed revised Regime Start Date;
  - (c) how the licensee has calculated the resulting delay; and
  - (d) any analysis or information, which the licensee considers sufficient to enable us to fully assess the event or circumstance to which the request relates.
6. For the purposes of paragraph 5 above, where any additional analysis or information is not available to the licensee at the time of the request, the licensee should:
- (a) specify any such additional analysis or information items in its request together with an indication of when the licensee expects these items to become available; and
  - (b) provide these items as soon as reasonably practicable after they become available.
7. The licensee must provide us with any additional information that may be reasonably required to facilitate our consideration of the licensee's request. Such additional information should be submitted within a reasonable timeframe that is agreed between us and the licensee.

#### Decision making process and application of the Payback Mechanism for Delays

8. If, in our opinion, the Regime Start Date:

- (a) **has been delayed** by an event or circumstance of Pre-Operational Force Majeure and such event or circumstance has been appropriately mitigated and managed by the licensee, the Regime Start Date shall fall on such later date as we may specify in a decision under this Policy Decision; or
- (b) **has not been delayed** by an event or circumstance of Pre-Operational Force Majeure, we shall confirm by way of a decision issued under this Policy Decision:
  - (i) that the licensee's Regime Start Date shall be revised to fall on a new Regime Start Date; and
  - (ii) that the licensee shall be subject to the Payback Mechanism for Delays and shall repay<sup>4</sup>, during the Payback Period<sup>5</sup>, any received floor top-up payments, incurred during the Exposure Period; and
  - (iii) the start and end dates of the Exposure Period.

9. Before we issue a decision under paragraph 8 of this Policy Decision, we will give notice to the licensee of our minded-to decision, specifying:

- (a) where we consider that project delivery **has been delayed** by an event or circumstance of Pre-Operational Force Majeure:
  - (i) the length of any delay that, in our opinion, was caused by an event or circumstance of Pre-Operational Force Majeure; and

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<sup>4</sup> We expect that any relevant floor top-up repayments will be made by the "equity side" investor(s) / stakeholder(s). This "equity side" floor top-up repayment arrangement may be particularly relevant to the interconnector projects delivered under the project finance route or any other route that involves considerable amounts of external debt finance that are repaid over the cap and floor regime duration.

<sup>5</sup> The exact repayment method, whether a single bullet repayment or more than one periodic repayment, is not being prescribed. The reasonable and appropriate repayment method can be proposed by the licensee and ultimately will be set by the Authority (following consultation with the licensee), taking into account any relevant provisions under the Connection and Use of System Code - CUSC.

- (ii) a revised Regime Start Date that takes any such delay into account; or
  - (b) where we consider that project delivery **has not been delayed** by the Pre-Operational Force Majeure:
    - (i) that the licensee's Regime Start Date shall be revised to fall on a new Regime Start Date; and
    - (ii) that the licensee shall be subject to the Payback Mechanism for Delays and shall repay, during the Payback Period, any received floor top-up payments, incurred during the Exposure Period; and
    - (iii) the start and end of the Exposure Period.
  - (c) the reasons for our minded-to decision; and
  - (d) the period (not being less than 14 days from the date of the notice, or such other period as may be agreed in writing between the licensee and the Authority) within which the licensee may make representations or objections.
10. Before issuing a decision pursuant to paragraph 8 (a) or (b), we shall consider any representations or objections raised by the licensee.
11. The decision we issue under paragraph 8 (a) or (b) of this Decision shall state the reasons for the decision.
12. We shall issue a decision under paragraph 8 of this Decision, as soon as reasonably practicable after receipt of all necessary information that we may reasonably require.

### Definitions

13. For the purposes of this Decision:

Pre-Operational Force Majeure	<p>means</p> <p>(a) an event or circumstance which is beyond the reasonable control of the licensee, including act of God, act of the public enemy, strike, lockout and other industrial disturbance, war declared or undeclared, threat of war, terrorist act (or threat of), blockade, revolution, riot, insurrection, civil commotion, public demonstration, sabotage, act of vandalism, governmental restraint, provided that lack of funds of the licensee shall not be interpreted as a cause beyond the reasonable control of the licensee and provided that weather and ground conditions which are reasonably to be expected at the location of the event or circumstance</p>
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	<p>are also excluded as not being beyond the reasonable control of the licensee; and</p> <p>(b) where such event or circumstance has occurred or commenced between:</p> <p>(i) the date of our Initial Project Assessment Decision with respect to the licensee's interconnector; and</p> <p>(ii) the successful completion of such procedures and tests in relation to the licensee's interconnector that are in accordance with, at the time they are undertaken, Good Industry Practice for commissioning that type of interconnector in order to demonstrate that the licensee's interconnector is available for the use of conveyance of electricity at the Rated Capacity.</p>
Backstop Date	means 31 <sup>st</sup> December 2032, the date set by the Authority and by which the licensee's interconnector project must connect to the grid and must achieve its Regime Start Date.
Exposure Period	<p>means a period in the final years of the licensee's Regime Duration which:</p> <p>a) corresponds to the length of the delay(s), experienced by the licensee's interconnector:</p> <p>(i) which were not approved by the Authority under the Pre-Operational Force Majeure mechanism or the Reasonable Delay Event mechanism; and/or</p> <p>(ii) for which no request under the Pre-Operational Force Majeure mechanism or the Reasonable Delay Event mechanism was submitted by the licensee; and</p> <p>b) exposes the licensee to the repayment obligation of any incurred floor top-up payments during this period.</p>
Good Industry Practice	means in relation to any undertaking and any circumstances, the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same type of undertaking under the same or similar circumstances

Initial Project Assessment (IPA) Decision	means the Authority's decision, published on its website, on the initial project assessment for the licensee's interconnector.
Payback Mechanism for Delays	<p>means a mechanism:</p> <p>1) that applies in circumstances where the licensee's Regime Start Date:</p> <ul style="list-style-type: none"> <li>(a) has been delayed beyond the Backstop Date and has not been approved by the Authority under the Pre-Operational Force Majeure mechanism; or</li> <li>(b) has been delayed to a date that falls before the Backstop Date and that delay has not been approved by the Authority: <ul style="list-style-type: none"> <li>(i) under the Reasonable Delay Event mechanism; or</li> <li>(ii) under the Pre-Operational Force Majeure mechanism, or</li> </ul> </li> <li>(c) has been delayed but no request has been submitted by the licensee under the Reasonable Delay Event mechanism or the Pre-Operational Force Majeure mechanism; and</li> </ul> <p>2) through which, the licensee repays, during the Payback Period, any received floor top-up payments, incurred during the Exposure Period.</p>
Payback Period	<p>means a period:</p> <ul style="list-style-type: none"> <li>- that is triggered by the licensee receiving the first floor top-up payment, incurred during the Exposure Period;</li> <li>- during which the licensee repays any received floor top-up payments incurred during the Exposure Period; and</li> <li>- which applies until the licensee repays, during the Regime Duration and during the Post Regime Duration (if relevant), all received floor top-up payments incurred during the Exposure Period.</li> </ul>

Post Regime Duration	<p>for the purposes of this policy decision, means the period falling immediately after the end of the Regime Duration:</p> <ul style="list-style-type: none"> <li>- during which the licensee repays any outstanding floor top-up payments that it has incurred during the Exposure Period and which fall under the Payback Mechanism for Delays; and</li> <li>- which lasts and applies until the licensee repays all received floor top-up payments incurred during the Exposure Period.</li> </ul>
Rated Capacity	means the maximum capacity of the relevant interconnector (in MW hours).
Regime Duration	means a period of 25 years.
Regime Start Date	<p>means the earlier of</p> <ul style="list-style-type: none"> <li>(a) the successful completion of such procedures and tests in relation to the licensee's interconnector that are in accordance with, at the time they are undertaken, Good Industry Practice for commissioning that type of interconnector in order to demonstrate that the licensee's interconnector is available for the use of conveyance of electricity at the Rated Capacity;</li> <li>(b) the latest Regime Start Date approved by the Authority.</li> </ul>
Reasonable Delay Event	has the meaning given to this term in our Decision on Timelines and Incentives changes for the Third Cap and Floor Window for Interconnectors, dated 14/11/2023.
Final Project Assessment (FPA) Decision	means the Authority's decision, published on its website, on the final project assessment for the licensee's interconnector.
Third Window	means the third round of the cap and floor regime, with the application period between 1 <sup>st</sup> September 2022 and 10 <sup>th</sup> January 2023.