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interconnector owners and
operators, suppliers and other
interested parties

Date: 9 April 2014

Dear Colleague,

ElecLink Limited – Decision on request for an exemption under Article 17 of Regulation (EC) 714/2009 for a Great Britain-France electricity interconnector

Summary

ElecLink Limited is a joint venture between Star Capital Partners Limited and Groupe Eurotunnel. ElecLink proposes to build, own and operate a 1000MW electricity interconnector between Great Britain (GB) and France.

ElecLink requested an exemption from having to comply with aspects of European legislation which:

- Govern how revenue from interconnection may be used;
- Require unbundling of transmission systems and transmission system operators; and
- Relate to requirements to offer terms for Third Party Access (TPA) and the need for regulatory approval of charging methodologies.

Ofgem and the Commission de Régulation de l'Énergie (CRE) in France have decided to grant ElecLink a partial exemption subject to a number of conditions. In GB, this decision will need to be given effect through ElecLink's interconnector licence under the process described in more detail below.

Background and process

Article 17 of Regulation (EC) 714/2009 (the Regulation) provides that investments in new direct current interconnectors may, upon request, be exempted for a limited period of time from certain legal provisions of the Regulation and of Directive 2009/72/EC (the Directive) concerning TPA, regulatory approval for tariffs, use of revenue and ownership unbundling.

The Regulation permits the Authority¹ as the concerned National Regulatory Authority (NRA) for GB to, in agreement with the other relevant concerned NRA, in this instance the CRE, to exempt ElecLink from the above provisions. To qualify for an exemption an interconnector project must meet a number of conditions² (the exemption conditions)

¹ Ofgem is the Office of the Gas and Electricity Markets Authority, which supports the Gas and Electricity Markets Authority, the regulator of the gas and electricity industries in Great Britain. The terms "Ofgem", "we" and "the Authority" are used interchangeably in this document.

² Paragraphs 1(a) to (f) of Article 17 of the Regulation.

broadly aimed at ensuring the exemption is not detrimental to competition and development of the single European market.

In September 2013, ElecLink submitted a request for an exemption under Article 17 of the Regulation for a period of 25 years.³

Following a joint Ofgem/CRE public consultation on ElecLink's exemption request and a coordinated assessment with CRE on whether the exemption conditions have been met, the NRAs have granted ElecLink a partial exemption from certain provisions of the Regulation and the Directive under Article 17 of the Regulation.⁴ A non-confidential version of the NRAs' Joint Opinion is attached at Annex 1.

A non-confidential version of the NRAs' exemption decisions (each NRA decision together referred to as the Exemption Decision) as well as the conditions that the Exemption Decision is subject to, are set out in the accompanying Schedule A to the Joint Opinion attached at Annex 1 to this letter. Due to the confidential nature of Schedules B and C of the Exemption Decision, which set out details of the mechanisms for profit sharing and limitation on total capacity that may be allocated through multi-year products, we have not published these documents alongside the Exemption Decision.

The Exemption Decision

The Exemption Decision is subject to compliance by ElecLink with certain conditions that are designed to ensure that the exemption is appropriate and proportionate. In summary, the Exemption Decision includes the following conditions:

- Use of Revenues – A partial exemption from the use of revenue requirements is given and includes a profit sharing mechanism that will provide an adequate return to shareholders and ensure that excessive profits are shared with GB and French network users.
- Ownership Unbundling Rules – A partial exemption from ownership unbundling is awarded that requires ElecLink to comply with an amended unbundling model. This model will not compromise the investment strategy of ElecLink's existing shareholders, subject to adequate business separation and within pre-defined limits. ElecLink will be required to be certified⁵ and ensure that it is fully compliant with the conditions contained in the Exemption Decision, prior to the start of commercial operation of the interconnector.
- Third Party Access – A partial exemption from TPA is granted for the multi-year capacity that ElecLink will allocate through their Open Season.⁶ Limits are included on the maximum duration and volume of multi-year capacity along with a limit on the amount of multi-year capacity that can be awarded to any one party. ElecLink will be subject to market coupling and will be required to put in place measures to ensure all un-nominated capacity is made available for short-term trading.
- Approval of Access Rules and Charging Methodologies/tariffs – No exemption is given from requirements to submit to both NRAs the access and charging arrangements for both the capacity allocated through the Open Season, and non-

³ ElecLink's exemption request can be found here: <https://www.ofgem.gov.uk/ofgem-publications/84673/appendix1-eleclinksexemptionrequest.pdf>

⁴ In accordance with Article 17 of the Regulation, the exemption is subject to approval and possible amendment by the European Commission.

⁵ In accordance with Article 10 or 11, as the case may be, of Directive 2009/72/EC and s.10E of the Electricity Act 1989.

⁶ Open Season means the capacity allocation process proposed by ElecLink to offer its multi-year products to the market.

exempt capacity. The NRAs will assess whether the arrangements for the Open Season comply with the principles set out in the Exemption Decision. In GB access and charging arrangements for non-exempt capacity will need to be submitted and approved as described in Standard Licence Conditions (SLC) 10 and 11A of ElecLink's interconnector licence.

The Exemption Decision under the Regulation will need to be given effect in GB through ElecLink's interconnector licence following submission of an application by ElecLink under SLC 12 of its interconnector licence. SLC 12 allows the Authority to issue an exemption order directing that the relevant parts of the SLCs that correspond to the provisions of European legislation from which ElecLink has been granted an exemption shall be switched off. This decision will remain subject to compliance with the conditions set out in the Exemption Decision and consideration of the application by the Authority. Further details on this process are set out below.

Article 17 of the Regulation provides that investments in new direct current interconnectors may, upon request, be exempted for a limited period of time from some or all of the following provisions in European legislation:

- **Article 16(6) of the Regulation**, which governs how revenue resulting from the allocation of interconnector capacity may be used.
- **Article 9 of the Directive**, which stipulates that the same person cannot exercise direct or indirect 'control' over a transmission system operator (TSO) or transmission system and at the same time exercise direct or indirect 'control' over or have any right over an undertaking performing the functions of generation or supply.⁷
- **Articles 32, 37(6) and 37(10) of the Directive**, which concern requirements relating to TPA and regulatory approval of charging methodologies and access rules.

The NRAs do not consider it appropriate for the reasons set out in the Joint Opinion for ElecLink to be exempted from paragraphs 6 or 10 of Article 37 of the Directive. This means that in GB, requirements to submit charging methodologies for approval by the Authority in accordance with SLC 10 of ElecLink's interconnector licence will continue to apply.⁸

It should also be noted that, in GB, the requirement to submit Access Rules (as defined in the interconnector licence) for approval by the Authority is set out in SLC 11A of the interconnector licence which, unlike SLCs 9, 10 and 11, cannot be switched off.⁹

Following ElecLink's exemption request in September 2013, the NRAs published a joint consultation on the request in November 2013.¹⁰ This joint consultation set out the conditions that ElecLink must satisfy under Article 17 of the Regulation in order for an exemption to be granted. It also outlined the evidence provided by ElecLink in its request in support of its view that it should be granted an exemption. The consultation sought views from interested parties on whether ElecLink had met the exemption conditions set out in Article 17 of the Regulation.

⁷ Article 9 also stipulates that the same person cannot exercise direct or indirect 'control' over an undertaking performing the functions of generation or supply and at the same time exercise direct or indirect 'control' over or have any right over a TSO or transmission system.

⁸ And will not be switched off by the exemption order issued under SLC 12 in accordance with the process described below.

⁹ Under SLC 12, the Authority may direct that certain conditions cease to have effect, this does not extend to SLC11A.

¹⁰ Ofgem/CRE joint consultation on ElecLink's exemption request is available here: <https://www.ofgem.gov.uk/ofgem-publications/84734/elecinkconsultation.pdf>

The NRAs also published a summary report by London Economics¹¹ who were commissioned by the NRAs to conduct an independent assessment of ElecLink's analysis and evidence. This report covered the impact of ElecLink's proposed interconnector on competition, revenues (both ElecLink's revenues and the impact on revenues of regulated interconnectors) and social welfare.

In addition, Ofgem also published a supplementary assessment of the additional information to be taken into account by Ofgem in assessing the impact of the ElecLink interconnector (draft Impact Assessment).¹² We note that no responses were received to the draft Impact Assessment.

Article 17 of the Regulation requires the NRAs to reach an agreement on whether the exemption should be granted within 6 months of the date of receipt of the exemption request.¹³ The decision has been communicated to the European Commission who may, within 2 months¹⁴ from the day following receipt of the Exemption Decision, require the NRAs to amend or withdraw their respective decisions.

Consultation responses

A total of 11 consultation responses were received to the joint consultation. Respondents included the national electricity transmission system operators in GB and France (National Grid Electricity Transmission and Réseau de Transport d'Électricité (RTE)), as well as EDF, EDF Energy, ElecLink, GDF-SUEZ, National Grid European Business Development, and RTE's elected administrators sponsored by FNME-CGT.

Please note that non-confidential responses to specific consultation questions, where addressed, can be found in the respective responses and have not been replicated here. All non-confidential responses have been published on our website.

Most respondents were either neutral or broadly supportive, subject to certain conditions, of ElecLink's exemption request, with one respondent clearly indicating that it did not support the request.

A number of respondents noted that the scope of the exemption request was quite broad and should be limited to what is strictly necessary to realise the investment. This is in line with guidance from the European Commission which states that "*Exemptions are an exception to the general rule of regulated TPA. Such exceptions have to be limited to what is strictly necessary to realise the investment and the scope of the exemptions has to be proportionate...*".¹⁵

Respondents emphasised the need to consider the potential negative impact of ElecLink on competition – particularly given the allocation of capacity through multi-year contracts – and the impact on other interconnector and generation investments.

Respondents also highlighted that whilst an exemption from ownership unbundling may be appropriate, there should be measures imposed on ElecLink to prevent conflicts of interest between the interconnector and possible future generation or supply undertakings.

¹¹ A copy of the summary report by London Economics can be found on Ofgem's website at: <https://www.ofgem.gov.uk/publications-and-updates/request-eleclink-exemption-under-article-17-regulation-ec-7142009-gb-france-interconnector>

¹² The draft Impact Assessment set out additional impacts of the ElecLink interconnector that are relevant for Ofgem's assessment of the impacts of the project as required under Section 5A of the Utilities Act 2000.

¹³ From the date the exemption request is received by the last of the two concerned NRAs. Accordingly, Ofgem and CRE were required to make a decision on whether to grant ElecLink's request for exemption by 17 March 2014.

¹⁴ This may be extended by a further two months where the European Commission requests further information.

¹⁵ Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity: http://ec.europa.eu/energy/infrastructure/infrastructure/gas/doc/sec_2009-642.pdf

Finally, some respondents were concerned about the possible impact of ElecLink's exemption on the GB transmission system should a full exemption be granted – particularly if this permitted ElecLink to operate in a significantly different way to other GB interconnectors. They stressed the need for a level playing field between interconnector use and operation, including for capacity allocation, to ensure that the objectives of the internal market are not eroded.

We have taken account of consultation responses during the course of our assessment of ElecLink's exemption request. We consider that the conditions imposed on ElecLink through the Exemption Decision address these concerns and ensure that the scope of the exemption is appropriate and proportionate.

Next steps – exemption order under SLC 12 of the interconnector licence

The Authority has the ability to grant licences to electricity interconnector operators under the Electricity Act 1989 (the Act). The Authority granted an interconnector licence to ElecLink on 19 November 2013.¹⁶

The Exemption Decision under the Regulation does not automatically switch off corresponding requirements relating to TPA and use of revenues in ElecLink's interconnector licence.

In order to give effect to the Exemption Decision in ElecLink's GB interconnector licence and exempt it from corresponding requirements under that licence, the Authority must first direct that those corresponding provisions in ElecLink's licence are suspended or cease to have effect.

SLC 12 of the interconnector licence allows the Authority to issue an exemption order directing that any or all of the following conditions may be suspended or not have effect in ElecLink's licence:

- Condition 9: Use of Revenues; and
- Condition 11: Requirement to offer terms for access to the licensee's interconnector.¹⁷

SLC 12 allows for the whole or only part of these conditions to be switched off. To begin this process, ElecLink will first need to submit a request to the Authority, under SLC 12 of its licence, for an exemption order to be issued. In accordance with SLC 12, ElecLink's request for an exemption order will need to include, for the Authority's approval, the terms for access (Access Rules) to the ElecLink interconnector.¹⁸ These Access Rules must be approved by the Authority before an exemption order can be made.¹⁹

Any exemption order issued by the Authority under SLC 12 of ElecLink's interconnector licence is expected to reflect the Exemption Decision.²⁰ For the avoidance of doubt this means that the exemption order is expected to direct that, subject to the conditions set out in the Exemption Decision, the relevant parts of SLC 9 and SLC 11 of ElecLink's interconnector licence be switched off to reflect the Exemption Decision.²¹

¹⁶ Notice of licence grant can be found here:

<https://www.ofgem.gov.uk/ofgem-publications/84513/elecLinklimitedelecinterconnectorlicencwebnotice.pdf>

¹⁷ SLC 12 also allows for 'SLC 10: Charging methodology' to apply to third party access to the licensee's interconnector, to be switched off. However, this condition will not be included in any exemption order issued by the Authority as the Exemption Decision does not include an exemption from these requirements.

¹⁸ The process for submission and approval of Access Rules is set out in SLC11A of the electricity interconnector licence.

¹⁹ As required by paragraph 7 of SLC 12.

²⁰ Subject to any changes required as a result of a European Commission request in accordance with Article 17 of the Regulation.

²¹ Subject to compliance with the conditions specified in the Exemption Decision.

No further or different exemption will be granted to ElecLink under its licence. The exemption order is the means of implementing the Exemption Decision as set out in Schedule A of the Joint Opinion, under the GB licensing regime. For the avoidance of doubt, it should be noted that the relevant sections of SLC 9 and 11 will remain switched on unless and until an exemption order is issued by the Authority under SLC 12 directing that they be switched off.

Should you wish to discuss any aspect of this Exemption Decision please contact Matthew Grant (matthew.grant@ofgem.gov.uk) or Ikbal Hussain (ikbal.hussain@ofgem.gov.uk) in the first instance.

Yours sincerely,

Kersti Berge
Partner, Smarter Grids & Governance (Transmission)