

Brussels Office  
Rue Joseph Stevens 7  
1000 Brussels, BELGIUM

**Bert Maes**  
Nemo Link Business Director  
Bert.Maes@nemolink.co.uk

### **Definition of Force Majeure (1)**

As per our comment to the informal consultation we propose that the force majeure definition is changed so that interconnectors subject to the cap and floor regime should be protected against the impact of future legislative changes that may impact on their operability or availability.

We believe that over the 25 year period that the cap and floor will apply there is a significant chance that this type of force majeure event may occur such as:

- Changes to European Codes that cause complete or partial de-energisation, e.g. outages driven by the need for systems to be upgraded to accommodate new rules, or
- changes to European codes that mean that Interconnectors are curtailed as part of the Capacity Calculation Methodology ;
- Outages caused by environmental or health and safety legislative changes e.g. more stringent noise pollution legislation;
- changes at a UK level in the context of the implementation of Brexit, which could affect when interconnector capacity is available for use;

The absence of legislative or regulatory events from the definition of force majeure means the licensee carries the sole risk of such events, both in terms of availability and cost.

Practically, in terms of the impact on availability, the absence of legislative or regulatory changes from the definition of force majeure prevents the licensee from submitting a request to the Authority for consideration of an Exceptional Event. Such a request will ordinarily be made in circumstances where the licensee's actual availability falls below the minimum availability target and, subject to the Authority's approval, is designed to adjust actual availability upwards to take account of the impact of the exceptional event. This supports the underlying principle that the licensee should be able to access the floor payment in circumstances where it fails to meet the minimum availability target for reasons beyond its control.

The events described above could lead to actual availability falling below the minimum availability target and there is currently no recourse to submit a request to the Authority for consideration of an exceptional event. In these circumstances the licensee is exposed to the costs of such events and is also prevented from recovering the floor payment.

Contrary, therefore, to the Authority's position that the minimum availability threshold affords protection, this protection does not extend to the events described above. It is correct that they afford protection in respect of the level of funding in respect of any capacity mechanism or changes to the GB carbon price floor, as noted in paragraph 1.65 of the Ofgem's decision paper dated 2 December 2016 and confirmed, in part, in its decision paper issued August 2016, but this is because those stated events affect revenues without affecting actual availability. The floor is available in circumstances where such events

erode the licensee's revenue and where those events fall within the definition of exceptional events. It is not, however, available for the aforementioned events (because they will not constitute exceptional events) where they result in the actual availability of the interconnector falling below the minimum availability target.

The floor does not therefore provide the protection claimed by the Authority in its various consultation documents. Broadening the definition of force majeure as we have suggested will afford protection to the licensee and future developers.

Practically, in terms of costs, the safeguard which permits the developer to submit a request for an income adjusting event is similarly not available to the licensee because the aforementioned events do not fall within the definition of force majeure. These events could have significant costs consequences for the licensee yet there is no mechanism for the Authority to consider these as income adjusting events.

We are not aware that any other regulated regime places these risks solely with the developer and believe that this approach will be seen as a regressive step and out-of-step with what has now been established as market standard for comfort in relation to protection against change in law in the UK.

Indeed, investor confidence and protection from changes in law have been an important issue in relation to the introduction of CfDs as per the Electricity Market Reform undertaken by the last Government, which includes a sophisticated force majeure clause that includes protection for classes of changes in law. Similarly, the definition of force majeure under the GB offshore transmission license includes for legislative and regulatory changes.

Finally, we do not believe that the aforementioned examples or those that are likely to materialise in the future constitute "government restraint" for the purpose of the force majeure clause.

We therefore consider that it is appropriate that interconnector developers should be afforded protection against this type of issue arising.

### **Definition of Force Majeure (2)**

Ofgem is proposing to remove 'strike, lockout or other industrial disturbance' from the definition of Force Majeure. We do not understand the rationale for this proposal, as these words were included in the definition in the informal consultation and no respondents commented upon their inclusion.

We believe that the implementation of this proposal would be inappropriate and would result in a situation where interconnector licenses are inconsistent with OFTO licenses. (The generic Round 3 OFTO license refers to the definition of Force Majeure in the SO-TO code, which does include 'strike, lockout or other industrial disturbance'.

### **Calculation of Actual Availability**

As per our comment to the informal consultation we propose that the formula that calculates Actual Availability is amended to include adjustment for force majeure related outages. We do not believe that the availability incentive will function as intended if the availability of the cap is not in the control of the licensee due to exceptional events not being taken into account.

### **Service development costs – costs of sale**

We welcome the addition that is proposed to the definition of the Additional Revenue Term to allow for the deduction of 'and relevant costs of sale'. We would like to seek clarification as to what can be included in the costs of sale, for instance, can it include any

capex and opex associated with the development of new services?

## Appendix 5 - Licence consultation response template

Respondent details			Bert Maes, bert.maes@nemolink.co.uk		
Licence/ Document name	Condition/ Section number	Condition/ Section name	Page/Para graph Ref	Comments	Suggested alternative drafting (please use tracked changes wherever possible)
Special Conditions	SpC 1	n/a	Page 3, paragraph 5	Definition of Force Majeure. Definition should include legislative and regulatory changes	Definition of Force Majeure should be changed to:  means an event or circumstance which is beyond the reasonable control of the licensee, including (without limitation) an act of God, <b>strike, lockout or other industrial disturbance</b> , act of the public enemy, war declared or undeclared, threat of war, terrorist act (or threat of), blockade, revolution, riot, insurrection, civil commotion, public demonstration, sabotage, act of vandalism, <b>fire, flood</b> , governmental restraint, <b>Act of Parliament</b> , <b>other legislation, bye law or directive or decision of a court of competent authority or the European Commission or any of the body having jurisdiction over the activities of the licensee</b> provided that lack of funds of the licensee or performance or non-performance by an electricity transmission licensee or equivalent entity 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 are also excluded as not being beyond the reasonable control of the licensee
Special Conditions	SpC 1	n/a	Page 3 paragraph 5	Definition of Force Majeure. 'Strike, lockout or other industrial disturbance' should be re-instated	
<b>Special Condition s</b>	<b>SpC 4</b>	<b>Part D</b>	<b>Page 24, paragraph 18</b>	<b>Calculation of Actual Availability should include Force Majeure related outages</b>	<b>Formula in paragraph 18 should be amended to read:</b>  <b><math>AAt = MPA - \sum IO_t + \sum FO_t</math></b>  <b>Where:</b>  <b><math>\sum FO_t</math> means the total Force Majeure related Outage (in MWh) in Relevant Year t reported by the licensee in its Annual Cap and Floor RIGs Submission for Relevant Year t</b>
Special Conditions	SpC 5	Part D	Page 33, paragraph 12	We seek clarification from Ofgem what can be included as 'costs of sale' in the definition of $\sum(ADRS)_t$	n/a