

The Authority's final decision and analysis on the application for certification as unbundled by ElecLink Limited

This document explains the Authority's final decision on compliance by ElecLink Limited with the requirements of the Third Package¹² for transmission system operators ('TSOs') to unbundle from generation, production and supply undertakings as implemented into domestic legislation in Great Britain ('GB').

1. Certification Decision

1.1. Having taken utmost account of the European Commission's (the 'Commission') opinion on our preliminary certification decision on the application for certification submitted by ElecLink Limited, the Authority³ concludes that ElecLink Limited complies with the requirements of the ownership unbundling model as set out in GB legislation and should therefore be certified as ownership unbundled.

2. GB Legislation – Transposition of Directive 2009/72

2.1. In GB the ownership unbundling requirements set out in the Electricity Directive have been transposed through the Electricity and Gas (Internal Markets) Regulations 2011 which inserted sections 10A to 10O into the Electricity Act 1989 (the 'Electricity Act'). Section 10F of the Electricity Act – 'the ownership unbundling requirement' – states that "*the ownership unbundling requirement is met by an applicant for certification if in relation to each of the five tests below – (a) the Authority thinks that it is passed, or (b) it is treated as passed by virtue of subsection (7), (9) or (9A)*". In accordance with subsection 10F(9A), where one or more of the tests is not passed, we may decide to treat such tests as passed if the Authority is satisfied that there is no risk of discrimination and it would be appropriate and in line with our principal objective and general duties to do so.⁴

¹ The term "Third Package" refers to Directive 2009/72/EC of the European Parliament and of the Council of 13 July

² concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC ('Electricity Directive'); 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 ('Electricity Regulation'); 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 ('Gas Directive'); Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 ('Gas Regulation'); and Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

³ The Gas and Electricity Markets Authority (the 'Authority'). In this document, the terms "Authority", "Ofgem", and "us" are used interchangeably.

⁴ https://www.ofgem.gov.uk/system/files/docs/2017/08/certification_open_letter_2017.pdf ⁴ <https://www.ofgem.gov.uk/publications-and-updates/elecLink-limited-notice-grant-electricityinterconnector-licence>

3. The Applicant

- 3.1. ElecLink Limited holds an electricity interconnector licence granted under section 6(1)(e) of the Electricity Act 1989 to operate the ElecLink interconnector.⁴
- 3.2. ElecLink Limited is a private company limited by shares. It is a subsidiary company 100% owned by GET Elec Limited, which in turn is 100% owned by GetLink S.E. ('GET') (formerly Groupe Eurotunnel S.E.). ElecLink Limited is currently constructing and plans to own and operate an electricity interconnector linking the British and French electricity markets through the Channel Tunnel. The interconnector will connect with the national grids of France at Les Mandarins substation and Great Britain at Sellindge substation, with a capacity of 1,000 MW flow in either direction.

4. Summary of Ofgem analysis

- 4.1. *First test: The applicant (a) does not control a relevant producer or supplier; (b) does not have a majority shareholding in a relevant producer or supplier; and (c) will not, on or after the relevant date, exercise shareholder rights in relation to a relevant producer or supplier.*
- 4.2. ElecLink Limited has confirmed that it does not hold shares in, nor control, any other company. Furthermore, ElecLink Limited has provided a signed undertaking that, during the term of its interconnector licence, it will not exercise, or cause to be exercised on its behalf, any shareholder rights in relation to a relevant producer or supplier that it might acquire during the currency of the undertaking. Therefore, ElecLink Limited meets the requirements of the first test.
- 4.3. *Second Test: Where the applicant is a company, partnership or other business, none of its senior officers has been, or may be, appointed by a person who (a) controls an electricity undertaking which is a relevant producer or supplier; or (b) has a majority shareholding in an electricity undertaking which is a relevant producer or supplier.*
- 4.4. The ElecLink Limited has provided details of the process for appointing directors. The right to appoint ElecLink Limited's directors sits with ElecLink Limited's board and GET Elec (the sole 100% shareholder of ElecLink Limited). Based on the information provided by ElecLink Limited, we consider that none of ElecLink Limited's directors has been, or can be, appointed by a person that controls or has a majority shareholding in a relevant producer or supplier. Therefore, ElecLink Limited meets the requirements of the second test.
- 4.5. *Third Test: Where the applicant is a company, partnership or other business, none of its senior officers is also a senior officer of an electricity undertaking which is a relevant producer or supplier.*
- 4.6. The information provided by ElecLink Limited confirms that none of its directors is also a senior officer of an electricity undertaking which is a relevant producer or supplier. ElecLink Limited therefore meets the requirements of the third test.

- 4.7. *Fourth and Fifth Tests: The applicant is not controlled by a person who (a) controls a relevant producer or supplier; or (b) has a majority shareholding in a relevant producer or supplier.*
- 4.8. ElecLink Limited is ultimately controlled by GET, a public company registered in France, via its wholly owned subsidiary GET Elec a private company registered in England and Wales. The largest shareholder of GET, Atlantia S.p.A ('Atlantia')(with a minority shareholding in GET), has some small scale generation interests, however, we consider Atlantia does not control ElecLink Limited. Based on the information provided by ElecLink Limited, neither its ultimate controller GET, nor its direct shareholder and controller GET Elec, control or have a majority shareholding in a relevant producer or supplier. ElecLink Limited therefore passes the fourth and fifth tests.

5. European Commission Opinion

- 5.1. The Commission's opinion is dated 11 December 2018.
- 5.2. Pursuant to Article 3(2) of the Electricity Regulation, Ofgem is required to take "utmost account" of the Commission's opinion in reaching its final certification decision. We summarise below how we have taken "utmost account" of the Commission's opinion on our preliminary certification decision in relation to ElecLink Limited.
- 5.3. In its opinion the Commission set out the relevant legislation. Articles 9(1)(b)(i) and 9(1)(b)(ii) of the Electricity Directive prohibits the same person or persons from directly or indirectly exercising control over a TSO or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of production or supply, and vice versa.

Rights of shareholders

- 5.4. The Commission agreed with the assessment of Ofgem as regards the absence of control over ElecLink by GET's shareholders. However, the Commission was of the opinion that "Article 9(1)(b)(i) of the Electricity Directive, considers not only the exercise of control, but also the exercise of any right over a TSO and that "pursuant to Paragraph 2 of Article 9 Electricity Directive, 'any right' includes the power to exercise voting rights, the power to appoint board members and the holding of a majority share." The Commission considered that "the voting rights of shareholders in holding companies which – directly or indirectly – hold 100% of the share capital of a TSO qualify as "any rights" in the meaning of Paragraph 2 Article 9 of the Electricity Directive." The Commission invited CRE and Ofgem to consider whether the shareholders of GET exercise any rights over the operation of ElecLink, and to assess whether any potential conflict of interest would result from controlling participations in generation and supply held by GET's shareholders, in relation to the operation of ElecLink.
- 5.5. Upon this recommendation, Ofgem undertook a further review of GET's shareholding arrangements to assess whether there is a potential conflict of interest in light of the fact that some excess energy produced by GET's shareholders is sold onto consumers.
- 5.6. Based on information we received from GET, Atlantia, which holds 15.49 % of the share capital in GET (via its subsidiary Aero 1 Global & International S.a.r.l.), does sell on a

small amount of energy via two companies in which it owns a majority share: however, this power is primarily generated for the purpose of supplying its own interests.

5.7. We note the Commission's point that rights attached to an indirect minority shareholding could be considered 'any right' within the meaning of the Directive, however, in the case of GET, there are specific governance arrangements in place to prevent GET shareholders with generation or supply interests from exercising rights over ElecLink.

5.8. GET has made amendments to the GET Board of Directors Rules of Procedures, implemented on 24 January 2019, to ensure that shareholders of GET with any generation or supply interests do not exercise any rights over ElecLink through minority voting rights.

5.9. These amendments ensure:

- Board members representing Atlantia on the board of directors of GetLink S.E. and any board member representing or having a professional activity in an undertaking performing any of the functions of electricity generation or supply shall not make decisions or vote on any strategy guidelines applicable to ElecLink as long as Atlantia holds an interest in an undertaking performing any of the functions of electricity generation or supply or as long as that board member represents or has a professional activity in an undertaking performing any of the functions of electricity generation or supply; and
- No commercially sensitive information in respect of the business of ElecLink can be transmitted to any member of the GetLink S.E. board of directors, who at the time, represents or has a professional activity in an undertaking performing any of the functions of electricity generation or supply.

5.10. The above amendments make it clear that shareholders of GET who hold interests in or represent undertakings performing generation or supply activities, cannot vote on decisions pertaining to ElecLink Limited, and cannot receive commercially sensitive information about ElecLink. Therefore, we consider that there is no potential conflict of interest in relation to GET shareholders and ElecLink, and there is no risk that GET's shareholders could exercise a right over or influence ElecLink Limited's decision making in a way that could lead to discrimination in favour of a shareholder's generation or supply interests.

5.11. In addition, ElecLink Limited's interconnector licence contains conditions preventing it from disclosing information that may be advantageous in respect of generation or supply activities, or from misusing commercially sensitive information from third parties in providing or negotiating access to its interconnector (in the context of sales or purchases of electricity by related undertakings). The licence also prohibits ElecLink Limited from discriminating between users or classes of users, particularly in favour of a related undertaking. We consider that these obligations further limit the possibility that ElecLink Limited could discriminate in favour of any relevant producers or suppliers controlled by GET's shareholders.

- 5.12. The Authority can and will enforce compliance with these obligations through financial penalties (up to 10% of turn over) or licence revocation for serious breaches. Given the penalties for non-compliance, we consider ElecLink Limited would have significant disincentives to discriminate in favour of any relevant producers or suppliers controlled by GET's shareholders in a way that would jeopardise its interconnector licence.

Rights of Directors

- 5.13. The Commission welcomed the planned changes as regards the governance of the board of GET and recognised that this change *"further reduced the risk of a conflict of interest between the operation of ElecLink and the interests of Atlantia in generation and supply."*
- 5.14. However, the Commission considered that the possibility of a conflict of interest remained, as one of the Directors of GET is also a Director of EDF. The Commission considered that these parallel directorships create a potential conflict of interest which is incompatible with the objective of the unbundling rules as set out in Article 9 Electricity Directive. Therefore, the Commission was of the view that *"the envisaged change of the rules of procedure of GET's board should therefore not only prohibit the transmission of commercially sensitive information to board members, who represent or have a professional activity in an undertaking performing any of the functions of electricity generation or supply, but should also restrict their voting rights in the same manner as envisaged for the board members representing Atlantia."*
- 5.15. As set out in 5.8 above, GET has now implemented amendments to its rules of procedure for GET's board of directors. This extends the restriction of voting rights and transmission of information from board members representing Atlantia to 'anyone who represents or has a professional activity in an undertaking performing any of the functions of electricity, generation or supply'.
- 5.16. Accordingly, the Director of GET who is also a Director of EDF will also be subject to the same restrictions at Atlantia's board members. We believe this adequately addresses any risk of conflict of interest in relation to the rights of directors.

6. Ongoing monitoring

- 6.1. We note that the Commission highlighted the obligation in the Electricity Directive for national regulatory authorities to monitor continuing compliance of TSOs with the unbundling requirements.
- 6.2. The GB legal framework provides a number of measures to ensure the robustness of our certification decisions on an ongoing basis. The Authority has an obligation under section 10I, 10J and 10L of the Electricity Act to monitor and review whether a certified person should remain certified according to the process set out in the Electricity Act. We require certified parties to inform the Authority of any significant changes that are relevant to our certification decisions promptly and to provide the Authority with an annual update.

6.3. In compliance with the GB legal framework and the Electricity Directive, we will continue to monitor whether the basis on which the Authority decided to certify ElecLink Limited continues to apply.