



Brussels, 17.12.2020
C(2020) 9474 final

COMMISSION DECISION

of 17.12.2020

amending Decision C(2014) 5475 final as regards the period of validity of the exemption granted to the ElecLink electricity interconnector from certain provisions of Regulation (EU) 2019/943 and Directive (EU) 2019/944 of the European Parliament and of the Council pursuant to Article 63 of Regulation (EU) 2019/943

Only the English and French texts are authentic

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity¹, and in particular Article 63(8) thereof, in conjunction with Article 131 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community,

Whereas:

1. Background

- (1) The UK withdrew from the European Union as of 1 February 2020. During the transition period, which ends on 31 December 2020, Union law, with a few limited exceptions, continues to be applicable to and in the UK and any reference to Member States in Union law shall be understood as including the UK.
- (2) ElecLink Limited ("ElecLink") is a company seeking to develop, construct and operate an electricity interconnector linking the British and French electricity markets through the Channel Tunnel (the "Project"). The interconnector will connect with the national grids of France at Les Mandarins substation and with the national grids of Great Britain at Sellindge substation.

2. Procedure

- (3) In August 2013, ElecLink submitted a request² to the national regulatory authorities in France (Commission de Regulation de l'énergie – "CRE") and Great Britain (Office of Gas and Electricity Markets – "Ofgem") (together referred to as the "NRAs") for an exemption pursuant to Article 17 of Regulation (EC) No 714/2009 of the European

¹ OJ L158, 14.6.2019, p. 54.

² Application for EU exemption for a new interconnector between France and Great Britain ElecLink Limited August 2013 Version: FINAL Date: 21/08/2013
https://www.ofgem.gov.uk/sites/default/files/docs/2013/11/appendix_1-eleclinks_exemption_request_0.pdf

Parliament and of the Council³. The NRAs undertook an assessment of that request and concluded that ElecLink had met the requirements to be granted an exemption subject to certain terms and conditions, from Article 16(6) of Regulation (EC) 714/2009 (use of congestion revenues), and Articles 9 (ownership unbundling) and 32 (third party access) of Directive 2009/72/EC of the European Parliament and of the Council⁴.

- (4) In Commission Decision C(2014) 5475 final⁵, the Commission approved the granting of an exemption for ElecLink under Article 17 of Regulation (EC) No 714/2009, provided that the NRAs amended their Joint Opinion and their exemption decisions. Subsequently, the NRAs issued a Final Joint Opinion on ElecLink's request for an exemption under Article 17 of Regulation (EC) No 714/2009 (the "Final Joint Opinion 2014") and separate final exemption decisions were adopted on 28 August 2014 by CRE⁶ and on 16 September 2014 by Ofgem⁷.
- (5) The exemption was granted for a period of twenty-five years from the date that the project commences commercial operation⁸, which means the time when the interconnector has been commissioned and is available for physical flow of electricity on the market⁹.
- (6) Article 4 of Decision C(2014) 5475 final states the Commission's approval of the Exemption Decisions granted to ElecLink shall expire 2 years after the date of adoption of the Commission decision in the event that construction of the project has not started by that date and 5 years after the date of adoption of the Commission's approval in the event that the project has not become operational by that date, in accordance with Article 17(8) of Regulation (EC) No 714/2009 (now Article 63(8) of Regulation (EU) 2019/943). These deadlines are reflected in the Final Joint Opinion 2014.
- (7) On 27 April 2016 and 29 April 2016 respectively, CRE and Ofgem received a request from ElecLink for a prolongation of those deadlines.
- (8) On 14 June 2016, Ofgem notified its decision together with the Joint Opinion of CRE and Ofgem on ElecLink's request ("Joint Opinion 2016") to the Commission in

³ 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 L211, 14.8.2009, p. 15).

⁴ Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14.8.2009, p. 55).

⁵ Commission Decision C(2014) 5475 final of 28 July 2014 on the exemption of ElecLink Limited under Article 17 of Regulation (EC) No. 714/2009 for an electricity interconnector between France and Great Britain - https://ec.europa.eu/energy/sites/ener/files/documents/2014_eleclink_decision_en.pdf

⁶ Délibération de la CRE du 28 août 2014 portant décision finale sur la demande de dérogation de la société ElecLink Ltd en application de l'article 17 du règlement (CE) n° 714/2009 du 13 juillet 2009 concernant une interconnexion entre la France et la Grande-Bretagne, 28 Aout 2014; <http://www.cre.fr/documents/deliberations/decision/interconnexion-france-grande-bretagne2>

⁷ Ofgem's Final decision on ElecLink Limited's request for an exemption under Article 17 of Regulation (EC) 714/2009 for a Great Britain-France electricity interconnector, 16 September 2014 https://www.ofgem.gov.uk/sites/default/files/docs/2014/09/eleclink_final_decision_cover_letter_0.pdf

⁸ Final joint exemption decision 2014, Schedule A, Para 1.55. https://www.ofgem.gov.uk/sites/default/files/docs/2014/04/schedule_a_nra_exemption_decision_on_eleclink.pdf

⁹ Final joint exemption decision 2014, Schedule A, Para 1.56.

accordance with Article 17(7) of Regulation (EC) No 714/2009. CRE notified its decision together with the Joint Opinion 2016 on 16 June 2016.

- (9) On 10 August 2016, the Commission adopted decision C(2016) 5285 extending the time-limits laid down in Article 4 of Decision C(2014) 5475 final. The date by which the construction of the interconnector was to start was postponed from 28 July 2016 to 31 July 2017 and the date on which the interconnector was to become operational ("Operational Deadline") was postponed from 28 July 2019 to 31 July 2020 (the "Commission Extension Decision 2016").
- (10) The construction of the interconnector started before the deadline of 31 July 2017 and, according to the information provided by ElecLink, all construction works have now been completed, with the exception of pulling the cables through the tunnel, which requires the consent of the Channel Tunnel Intergovernmental Commission ("the IGC")¹⁰.
- (11) On 18 October 2017,¹¹ the IGC withdrew its conditional consent to the Project, which had initially been granted in 2014. Without that consent, ElecLink could not proceed to complete the Project and therefore was not in a position to meet the Operational Deadline of 31 July 2020.
- (12) On 22 May 2020, CRE and Ofgem received a request from ElecLink for a new extension of the Operational Deadline.
- (13) On 11 June 2020, Ofgem notified the NRAs' Joint Opinion on ElecLink's request to the Commission in accordance with Article 63(7) of Regulation (EU) 2019/943, the successor to Article 17(7) of Regulation (EC) 714/2009. On 18 June 2020, CRE also notified the Joint Opinion to the Commission.
- (14) On 28 July 2020, the Commission adopted decision C(2020) 5293 extending the time-limits laid down in Article 4 of Decision C(2014) 5475 final. The Operational Deadline was postponed from 31 July 2020 to 31 December 2020 (the "Commission Extension Decision July 2020").
- (15) On 4 November 2020, CRE and Ofgem received an additional request from ElecLink for a new extension of the Operational Deadline. On 5 November 2020, CRE and Ofgem shared the ElecLink request with the Commission for information.
- (16) On 12 November 2020, Ofgem notified the NRAs' Joint Opinion on ElecLink's request to the Commission in accordance with Article 63(7) of Regulation (EU) 2019/943. On 17 November 2020, CRE also notified the Joint Opinion to the Commission.
- (17) On 19 November 2020, the Commission published a notice on its website informing the public of the notification and inviting the third parties to send their observations by 2 December 2020. The Commission did not receive any observations in response.

¹⁰ The Intergovernmental Commission (IGC) supervises all matters relating to the construction and operation of the Channel Tunnel on behalf of the French and United Kingdom Governments. The IGC fulfils the role of "safety authority" for the tunnel in accordance with Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive) (OJ L 164, 30.4.2004, p.44).

¹¹ See also <https://www.channeltunneligc.co.uk/Eleclink-Interconnector.103.html?lang=en>.

3 Assessment

3.1 Relevant legal provisions

- (18) Pursuant to Article 63(8) of Regulation (EU) 2019/943 the validity of the Commission's approval of an exemption decision may be prolonged if, on the basis of a reasoned request by the NRAs, the Commission decides, first, that any delay is due to major obstacles and, second, that those obstacles are beyond the control of the person to whom the exemption has been granted.¹²
- (19) The Final Joint Opinion 2014 also reflects that provision in Schedule A, paragraphs 1.53 and 1.54, according to which the Exemption Decision shall continue to be in force where the Commission decides that any delay is due to major obstacles beyond the control of ElecLink.
- (20) Article 4 of Decision C(2014) 5475 final, as amended by the Commission Extension Decision July 2020, states that the Commission's approval of the Exemption Decisions shall expire in the event that the infrastructure has not become operational by 31 December 2020, unless the Commission decides that any further delay is due to major obstacles beyond the control of ElecLink Limited.
- (21) The United Kingdom has left the EU and is no longer a Member State. However, at least until the end of 2020, the provisions of the Treaty on the Functioning of the European Union and Regulation (EU) 2019/943 remain fully applicable to the United Kingdom under the transition period agreed with the United Kingdom.

3.2 ElecLink's request

- (22) ElecLink has provided an overview of the Project, a summary of its credentials, details of the progress made to date, details on the circumstances that have caused the delay, and an estimate regarding the length of the required extension.
- (23) ElecLink explains that on 18 October 2017 the IGC suspended its consent for the Project (which had initially been granted in 2014), and forbade it to commence work on the pulling of the DC cables in the tunnel until the consent had been reinstated. The reasons for the suspension were, according to ElecLink, issues regarding the adequacy of the risk assessment carried out until then, in particular in respect of electromagnetic compatibility in the tunnel.
- (24) In the request, ElecLink indicates the timeline for each of the remaining stages of the Project, which will commence once the IGC consent is reinstated.
- (25) ElecLink requests that the deadline for the interconnector to become operational be extended by 90 weeks from the date on which the IGC consent is reinstated.

¹² The Regulation does not expressly set out the procedure for such a decision on the prolongation of validity. It has been established by the Commission decision-making practice that, based on the principle of parallelism of forms, modifications (including prolongation) of exemption decisions should reflect the process followed for the granting of initial exemption decisions. Thus, the Commission's assessment of requests for prolongation shall be based on a prior assessment by the competent NRAs, to which the Commission may request amendments. See e.g. Commission Decision C(2015) 1852 final of 17 March 2015 prolonging the exemption of the Trans Adriatic Pipeline from certain requirements on third party access, tariff regulation and ownership unbundling laid down in Articles 9, 32, 41(6), (8) and (10) of Directive 2009/73/EC. Commission Decision C(2013) 2947 of 16.5.2013 on a prolongation of the effects of the exemption decision of NABUCCO Gas Pipeline International GmbH from third party access and tariff regulation granted under Directive 2003/55/EC.

3.3 Reasoning put forward by ElecLink

- (26) Eleclink states in its request that it has made every possible effort to keep the Project on schedule, and that the delay is due to obstacles beyond its control.
- (27) First, Eleclink states that the construction works commenced on time at the end of 2016, and that by the end of 2019 all works outside the tunnel had been completed.
- (28) Second, Eleclink has completed all the regulatory approvals and relevant contracts. This includes the ElecLink Access rules (approved by both regulatory authorities in 2019); the certification under the full ownership unbundling model (granted in 2019); the integration in the pan-European market coupling arrangements; the necessary IT changes and contracts needed to use the EU Single Allocation Platform for non-exempt capacity; the operation & maintenance contracts.
- (29) Third, following IGC's suspension of consent, ElecLink has taken measures to avoid interrupting the construction, namely completion of the installation of the support structure and system for the DC cable in the tunnel. ElecLink was also willing to pull the DC cables in the tunnel in a de-energised inert state, but this was not allowed by the IGC. Eleclink points out that the Assessment Body¹³ provided a "non-objection" to the commencement of cable hauling activities in February 2019.
- (30) Fourth, ElecLink has undertaken a number of additional actions with the objective of promoting the rigorous application of the common safety method for risk evaluation and assessment provided for in Implementing Regulation (EU) No 402/2013, including the performance of additional studies; hiring technical experts; enhancing the ElecLink security plan. ElecLink states that EUR 23,4 million were spent on those additional measures.
- (31) ElecLink explains that since the consent was suspended, ElecLink and Eurotunnel (the operator of the Channel Tunnel) have intensively worked with the IGC on the risk and safety assessment required in order for IGC to give its consent. On 26 April 2020, the IGC informed Eurotunnel that ElecLink's safety dossier "can be regarded as '*complet*' in the French sense of the term".
- (32) Eleclink states that at the date of the second request to prolong the validity period of ElecLink's exemption (May 2020), the next IGC meeting was planned to take place on 9 July 2020 during which ElecLink was expecting a decision of the IGC on the ElecLink project. This meeting was finally cancelled by the IGC.
- (33) The IGC meeting took finally place on 8 October 2020. The IGC did not make any decision on the project consent but granted conditional consent to perform the static testing of the converter stations and confirmed its intent to make a decision in the next IGC meeting on 10 December 2020.
- (34) On 9 October 2020 the Channel Tunnel Safety Authority ("CTSA") provided a programme of the additional work required to close out the outstanding issues and finalise the assessment of the safety dossier. The IGC has made clear that no

¹³ In accordance with Commission Implementing Regulation (EU) No 402/2013 of 30 April 2013 on the common safety method for risk evaluation and assessment and repealing Regulation (EC) No 352/2009 (OJ L121, 3.5.2013, p.8), Eurotunnel appointed an Assessment Body. The Assessment Body is mandated to undertake investigations to provide a judgement of the suitability of a system to fulfil the relevant safety requirements.

additional work would be required from Eurotunnel and ElecLink beyond this programme.

- (35) If by the next IGC meeting no decision is taken by the IGC or a disagreement arises between the French and British delegations, the IGC has the possibility to trigger Article 18 of the Treaty of Canterbury. The IGC can consult the two Governments which have a period of 3 months to settle the matter. Should the two Governments not be able to settle it within this period, an arbitral tribunal shall be constituted in accordance with Article 19 of the Treaty of Canterbury. The arbitrators must be appointed within a maximum period of 4 months, but no information is provided on the arbitration process and its duration. Any decision of the tribunal shall be final and binding on the parties.
- (36) Given the proximity to the expiry of the current Operational Deadline, ElecLink submitted a further request to extend the validity period of the Exemption Decision on 4 November 2020. ElecLink has requested that the Operational Deadline be extended by 90 weeks from the date on which the IGC consent is reinstated.
- (37) ElecLink describes the steps necessary to finish the Project, once the IGC consent is reinstated. ElecLink estimates that it will need 90 weeks from that time to be able to commence commercial operations. Three stages are envisaged: 1) Cable pulling activities inside the tunnel (38 weeks); 2) testing and commissioning of the interconnector (26 weeks); 3) IGC validation (estimated at 26 weeks in case IGC requests supplementary information). ElecLink stresses that the 90 week period may need to be modified should the IGC impose any additional conditions in its decision to reinstate the consent.

3.4 Assessment by the NRAs of ElecLink's request

- (38) The NRAs note that the IGC's consent is necessary for the Project to progress and are of the view that the withdrawal of IGC's prior consent has presented an obstacle preventing the completion of the Project to date. In this context, the NRAs agree that it is not possible for ElecLink to meet the Operational Deadline of 31 December 2020.
- (39) The NRAs are of the view that it is not possible for them to issue an informed Joint Opinion, and in particular to assess how long an extension would be appropriate to the Operational Deadline before the IGC has issued its own decision on the re-instatement of the consent. As a consequence, the NRAs consider that a comprehensive assessment of ElecLink's request for an extension of the exemption could not be undertaken before adoption of the IGC decision.
- (40) The NRAs underline the fact that the Exemption Decision will expire in the event that ElecLink has not become operational by the current Operational Deadline of 31 December 2020.
- (41) As a consequence, the NRAs are of the view that a one-year extension to the current Operational Deadline should be granted to ElecLink. Such an extension should allow sufficient time for the IGC to issue its decision, for ElecLink to file a reasoned request to the NRAs, for the NRAs to undertake an informed assessment and issue a Joint Opinion and, finally, for the Commission to take a decision on an eventual extension.

3.5 Assessment by the Commission

- 3.5.1 Is the delay due to a major obstacle which is beyond the control of the person to whom the exemption has been granted?*

- (42) Without the IGC's consent, the cables cannot be pulled through the tunnel, far less enter into operation. The absence of consent is therefore a major obstacle.
- (43) According to the information provided by ElecLink, the delay in obtaining IGC's consent appears to stem from the fact that the project is "first-of-a-kind": it is the first electricity interconnector using a railway tunnel. It is common for "first-of-a-kind" projects that permitting issues, especially those linked to safety and risk management, result in delays. The delay can therefore be considered to be "beyond the control of the person to whom the exemption has been granted".
- (44) Furthermore, the Commission notes that ElecLink has reduced the risk of further delays by already having completed all works possible without IGC's consent.

3.5.2 *Importance of a date which can be anticipated with a reasonable degree of certainty*

- (45) The objectives of Regulation (EU) 2019/943 require exemptions from the application of the regulatory regime, granted under Article 63 of that Regulation, to have a clear end date. That date must be no later than what is strictly necessary.
- (46) In particular, the advantages provided by an exemption may constitute a disincentive to the development of regulated infrastructure which would otherwise compete with the exempted project. Maintaining the validity of an exemption without the infrastructure being constructed may thus impede the development of alternative infrastructures. Consequently, exemptions should be granted for limited periods of time. It follows from this that it must be possible to foresee the precise date by which the construction of the infrastructure will start and the date by which the infrastructure will become operational with a reasonable degree of certainty.
- (47) The Commission takes the view that this condition is currently not fulfilled and that it will not be fulfilled until the IGC takes its decision about the reinstatement of the project consent. The Commission notes that at this stage there are two unknown factors: 1) when the IGC will take its final decision and 2) whether the IGC will actually decide to reinstate its consent, as requested by ElecLink, or will continue to refuse consent. ElecLink's request to extend the Operational Deadline by 90 weeks from the date on which the IGC consent is reinstated would, therefore, not provide a date for the completion of the interconnector, which can be foreseen with a reasonable degree of certainty. It would run counter to the purpose of the provision if any (e.g. due to regulatory obstacles) non-viable project should retain its right to construct interconnection capacities under the exempt route for an unreasonable period of time and thereby possibly deter investments in other projects.
- (48) The information required to establish a sufficiently clear timeline towards the start of operation of the Project will not be available, in any case, before the IGC decides.
- (49) A prolongation until the end of June 2021 seems appropriate. It will have to be determined before the end of June 2021 whether a clear timeline for completion of the Project can be established, in which case a new request for an extension would need to be assessed, or whether it is still impossible to establish a clear timeline.

4 Conclusion

- (50) The Commission takes the view that, based on the information received, the delay is due to major obstacles beyond the control of ElecLink. A new Operational Deadline therefore needs to be established, in a manner which is transparent for third parties. A conditional extension starting at an uncertain point in time (the IGC consent) is not possible. The Operational Deadline should therefore be extended until 30 June 2021.

This will give ElecLink time to obtain the outstanding consent from IGC, or in case this consent is not granted on the 10 December meeting, enough time to the two Governments to settle the matter following Article 18 of the Treaty of Canterbury, as explained in paragraph 35 above.

- (51) Once that consent is granted, it will be possible to estimate a definitive date when the interconnector could start operations. ElecLink will then need to request a new extension of the Operational Deadline,

HAS ADOPTED THIS DECISION:

Article 1

In Commission Decision C(2014) 5475 final, as amended by Commission Decision C(2016) 5285, Article 4 is replaced by the following:

“In line with Article 63(8) of Regulation (EU) 2019/943, the Commission's approval of the Exemption Decisions shall expire on 31 July 2017 in the event that construction of the ElecLink interconnector has not yet started by that date, and on 30 June 2021, in the event that the ElecLink interconnector has not become operational by that date, unless the Commission decides that any further delay is due to major obstacles beyond the control of ElecLink Limited.”

Article 2

This Decision is addressed to:

- 1) the Gas and Electricity Markets Authority (Ofgem)
- 2) the Commission de la Regulation de l'Energie (CRE).

Done at Brussels, 17.12.2020

For the Commission
Kadri SIMSON
Member of the Commission

