



Brussels, 23.6.2021
C(2021) 4746 final

COMMISSION DECISION

of 23.6.2021

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

(Only the French text is authentic)

COMMISSION DECISION

of 23.6.2021

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

(Only the French text is authentic)

THE EUROPEAN COMMISSION,

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

Having regard to Article 309 of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part,

Whereas:

1. Background

- (1) The United Kingdom withdrew from the European Union as of 1 February 2020. Pursuant to Article 309 of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part ('TCA') both the Union and the United Kingdom are to ensure that exemptions granted to interconnectors between the Union and the United Kingdom under Article 63 of Regulation (EU) 2019/943 of the European Parliament and of the Council¹, the terms of which extend beyond the transition period, which ended on 31 December 2020, continue to apply in accordance with the laws of their respective jurisdictions and the terms applicable.
- (2) ElecLink Limited ('ElecLink') is a company developing, constructing and seeking to 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.

¹ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (OJ L 158, 14.6.2019, p. 54).

2. Procedure

- (3) In August 2013, ElecLink submitted a request² to the national regulatory authorities in France (Commission de Régulation 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 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) No 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 of 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 25 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 stated that the Commission's approval of the exemption decisions granted to ElecLink was to expire 2 years after the date of adoption of the Commission decision in the event that construction of the Project had not started by that date and 5 years after the date of adoption of the decision in the event that the Project had not become operational by that date, in line with Article 17(8) of Regulation (EC) No 714/2009 (now Article 63(8) of Regulation (EU) 2019/943). Those deadlines are reflected in the Final Joint Opinion of 2014.

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

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 L 211, 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, paragraph 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, paragraph 1.56. (for link see footnote 8)

- (7) On 18 October 2017, the IGC withdrew its conditional consent to the Project, which had initially been granted in 2014. Without that consent, ElecLink was not able to complete the Project and therefore was not in a position to meet the operational deadline of 31 July 2020.
- (8) As a consequence, those deadlines were subsequently extended several times, most recently until 30 June 2021.
- (9) In its Decision of 17 December 2020, the Commission explained that once the consent by the IGC has been reinstated, it would be possible to estimate a reliable date when the interconnector could start operations. Furthermore, the Commission explicitly states that ElecLink would then need to request a new extension of the operational deadline.
- (10) On 10 December 2020, the ICG reinstated its consent and on 31 March 2021, CRE and Ofgem received a request from ElecLink for a further extension of the operational deadline to 15 August 2022.
- (11) On 20 April 2021, CRE notified its Opinion on ElecLink's request to the Commission pursuant to Article 63(8) of Regulation (EU) 2019/943. CRE is in favour of extending the operational deadline to 15 August 2022 as requested by ElecLink.
- (12) On 23 April 2021, the Commission published a notice on its website informing the public of the notification by CRE and inviting third parties to send their observations by 7 May 2021. The Commission did not receive any observations in response.

3 Assessment

3.1 Relevant legal provisions

- (13) 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 granted¹⁰.
- (14) Article 4 of Decision C(2014) 5475 final, as amended by the Commission Decision of 17 December 2020, states that the Commission's approval of the exemption decisions is to expire in the event that the infrastructure has not become operational by 30 June 2021, unless the Commission decides that any further delay is due to major obstacles beyond the control of ElecLink Limited.
- (15) All terms of the exemption extend beyond the transition period except the precise date of the operational deadline, which was extended beyond the transition period by the Commission in its Decision of 17 December 2020.

3.2 ElecLink's request

¹⁰ 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 for example, 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.

- (16) 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.
- (17) The IGC reinstated its consent on 10 December 2020, subject to certain conditions, including the carrying out of tests to prove the safety of the installations and the obtaining of an explicit authorisation from the IGC for commercial operation. In its request ElecLink indicated the timeline for each of the remaining steps of the Project, which require a total of 88 weeks from the date on which the IGC consent was reinstated, until the interconnector can enter into operation.
- (18) Consequently, ElecLink requests that the operational deadline be extended to 15 August 2022.

3.3 Reasoning put forward by ElecLink

- (19) 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 major obstacles beyond its control.
- (20) 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.
- (21) Second, ElecLink has completed all other regulatory approvals and relevant contracts.
- (22) 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. As of 31 December 2020, according to ElecLink, the total investment in the Project amounted to EUR 705 million. ElecLink was willing to pull the DC cables in the tunnel in a de-energised inert state, but this was not permitted by the IGC.
- (23) Fourth, ElecLink has engaged in an intensive iterative process with the IGC and other relevant bodies and has undertaken a number of additional actions promoting the rigorous application of the common safety method for risk evaluation and assessment provided for in Commission Implementing Regulation (EU) No 402/2013¹¹, including the performance of additional studies, hiring technical experts and enhancing the ElecLink security plan. The IGC decided to reinstate its consent on 10 December 2020, allowing ElecLink to continue implementing the Project.
- (24) ElecLink describes the steps necessary to finish the Project from the date that the IGC consent was reinstated. ElecLink estimates that it will need 88 weeks from that date to commence commercial operations. Three stages are envisaged: (i) cable pulling activities inside the tunnel (38 weeks); (ii) testing and commissioning of the interconnector (28 weeks); and (iii) IGC validation (34 weeks). Steps (ii) and (iii) will overlap by 12 weeks.

3.4 Assessment by CRE of ElecLink's request

- (25) CRE notes that the IGC's consent is necessary for the Project to progress and that the withdrawal of IGC's prior consent had presented a major obstacle, beyond the control of ElecLink, which prevented the completion of the Project. Since the implementation of the Project could only continue when the IGC reinstated its consent on 10

¹¹ 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 L 121, 3.5.2013, p. 8).

December 2020, CRE agrees that it is not possible for ElecLink to meet the operational deadline of 30 June 2021.

- (26) CRE is of the view that an extension of the current operational deadline until 15 August 2022 should be granted to ElecLink. Such an extension would not go beyond what is necessary for ElecLink to finalise the Project and to commence commercial operations, taking into account the remaining risks for the completion of the Project.

3.5 Assessment by the Commission

- (27) Without the IGC's consent, the cables could not be pulled through the tunnel, far less enter into operation. The absence of consent was therefore a major obstacle.
- (28) 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".
- (29) Furthermore, the Commission notes that ElecLink reduced the risk of further delays by completing all works possible without IGC's consent. It further notes that ElecLink has updated its timetable for the completion of the Project up to the commencement of operations, taking into account the experiences from the ongoing discussions with the IGC and the conditions attached to the decision of the IGC to reinstate its consent. The Commission agrees with CRE that the timetable presented is credible and does not go beyond what is necessary for ElecLink to finalise the Project and commence commercial operations, taking into account the remaining risks for the completion of the Project.

4 Conclusion

- (30) The Commission takes the view that, based on the information received, the delay is due to major obstacles beyond the control of ElecLink. However, since the IGC consent has now been reinstated, a definitive operational deadline can now be established. The operational deadline should therefore be extended to 15 August 2022, as requested by ElecLink.
- (31) Article 309 of the TCA provides for the continued application of exemption decisions taken before the end of the transition period beyond that date, hence beyond 31 December 2020, on condition that the terms of the exemption essentially remain unchanged, as in this case. While the ICG decided to reinstate its consent on 10 December 2020, this was too late for the Commission to adopt a decision based on a Joint Opinion by the NRAs before the operational deadline lapsed. For that reason, the Commission, in order to avoid the approval of the exemption lapsing entirely, adopted Decision C(2020) 9474 final on 17 December 2020, explicitly postponing the setting of a final date for the operational deadline beyond the end of the transition period. This gave specific and precise legitimate expectations to ElecLink that the Commission would adopt a new decision setting the operational deadline after 31 December 2020.
- (32) Article 309 of the TCA will no longer provide a legal basis for a further extension, beyond 15 August 2022.

HAS ADOPTED THIS DECISION:

Article 1

In Commission Decision C(2014)5475 final Article 4 is replaced by the following:

“Article 4

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 15 August 2022, in the event that the ElecLink interconnector has not become operational by that date.”

Article 2

This Decision is addressed to the Commission de Régulation de l’Energie (CRE) ;
15, Rue Pasquier, 75008 Paris, France.

Done at Brussels, 23.6.2021

For the Commission
Kadri SIMSON
Member of the Commission