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**COMMISSION DECISION**

**of 11.9.2020**

**on the exemption of Piemonte Savoia 2 S.r.l under Article 63 of Regulation (EU)  
943/2019 for an electricity interconnector between Italy and France**

(Only Italian and French versions are authentic)

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## on the exemption of Piemonte Savoia 2 S.r.l under Article 63 of Regulation (EU) 943/2019 for an electricity interconnector between Italy and France

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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 on the internal market for electricity (hereinafter "Electricity Regulation") and in particular Article 63 thereof,

Whereas:

- (1) Article 63 of the Electricity Regulation provides for the possibility for Member States authorities to exempt new electricity interconnectors from Article 19(2) and (3) of the Electricity Regulation and Articles 6 and 43, Article 59(7) and Article 60(1) of Directive (EU) 2019/944 on common rules for the internal market for electricity (hereinafter "Electricity Directive") provided certain conditions are fulfilled.
- (2) Article 63(7) of the Electricity Regulation provides for the Commission to be notified of the decision by the national authorities on an exemption request and its Article 63(8) provides the possibility for the Commission to request the notifying bodies to amend or withdraw the decision to grant an exemption.

### 1. Procedure

- (3) On 26 July 2019, the company Piemonte Savoia 2 S.r.l (hereinafter "Pi.Sa.2") submitted to the Italian Ministry of Economic Development (Ministero dello Sviluppo Economico - hereinafter, "MISE") the exemption application of part of a direct current (DC) interconnector between the electrical substations of Piovascote, in the province of Turin, and of Grande-Ile, in French territory (hereinafter "Piemonte-Savoia interconnector").
- (4) According to the relevant Italian legislation Decree Law n° 93/2011, MISE is the relevant body to grant such an exemption while the National Regulatory Authority in Italy (Autorità di Regolazione per Energia Reti e Ambiente – hereinafter, "ARERA"), is requested to issue a qualified opinion.
- (5) On 11 February 2020, ARERA adopted its decision No 38/2020/R/EEL, setting out its opinion on the Pi.Sa.2 exemption application.
- (6) On 6 February 2020, the National Regulatory Authority in France (Commission de Régulation de l'Énergie – hereinafter, "CRE") issued its deliberation on the exemption request. Since no exemption has been requested on the French side of the interconnector, CRE relies on the ARERA opinion to issue its decision.

- (7) On 5 March 2020 the MISE adopted a decree in which it followed the opinion of ARERA and granted an exemption to Pi.Sa.2 from Article 43 of the Electricity Directive<sup>1</sup> and from Article 19(2) of the Electricity Regulation on the Italian side of the interconnectors.
- (8) On 21 February 2020 and on 9 March 2020 the Commission was notified the decision of CRE and MISE on the exemption request, in accordance with article 63 of Regulation (EU) 2019/943.
- (9) On 4 May 2020, the Commission addressed to CRE and MISE a request for additional information, in order to allow for a full assessment and understanding of the exemption decisions. The information was provided on 7 July 2020. The request triggered the extension of the deadline for the treatment of the case by a period of 50 working days starting from the day following receipt of the complete information and ending on 16 September 2020, as provided for in Article 63(8) of the Electricity Regulation.

## **2. Description of the project and of the requested exemption**

### Description of the project

- (10) The Piemonte-Savoia interconnector between Italy and France is a 190 km high voltage direct current (HVDC) underground cable connection with a nominal capacity of 1200 MW divided into two bipolar lines of 600 MW nominal value. It will connect the substation of Piossasco of Turin, Italy and Grand-Ile, in France, crossing the border along the Fréjus motorway tunnel.
- (11) In France both bipolar sections will be owned and managed by Réseau de Transport d'Électricité (RTE), the French Transmission System Operator.
- (12) In Italy:
  - (a) One portion (350 MW) of the Italian section is currently owned by the company Piemonte Savoia S.r.l (hereinafter "Pi.Sa"). This portion was granted in 2016 an exemption for a period of 10 years by the national authorities after receiving approval from the Commission<sup>2</sup>;
  - (b) the second portion of 250 MW is currently owned by the company Pi.Sa.2 - the Applicant. The investment cost of this portion is estimated at Euro 300 million. Pi.Sa 2 requests an exemption of this section of the cable for 10 years, starting from the date of its commercial operation.
  - (c) both portions will be operated under the responsibility of the Italian Transmission System Operator (Terna), under the same conditions as if it were the owner.
  - (d) Pi.Sa and Pi.Sa.2, have a specific mandate from the entities ("the Assignees") selected by Terna S.p.A for the financing of the Piemonte-Savoia interconnector to obtain the requested exemption, on the basis of Article 32 of

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<sup>1</sup> The notified decision grants exemption from Article 9 Directive 2009/72/EC, the identical predecessor of Article 43 Directive (EU) 2019/944. For ease of reference, the present decision always refers to Article 43 Directive (EU) 2019/944 even where the notified acts still refer to the previous Directive. This has no impact on substance.

<sup>2</sup> [https://ec.europa.eu/energy/sites/ener/files/documents/2016\\_piemonte-savoia\\_decision\\_en.pdf](https://ec.europa.eu/energy/sites/ener/files/documents/2016_piemonte-savoia_decision_en.pdf).

Law 99/09, as explained below. The exemption is requested in the interest of the Assignees. Pi.Sa and Pi.Sa.2 currently belong to the Terna group but will be sold to the Assignees before the commercial operation of the interconnector;

- (13) The new interconnector was expected to begin commercial operations at the end of 2019, but has suffered several delays and its operation will begin between the end of this year and June 2021.

#### Background on the project exemption – Italian law 99/09

- (14) The exemption request has to be considered in relation to the legal framework set out by the Italian Law of 23 July 2009, n. 99 (Law 99/09).
- (15) Article 32 of the Italian Law 99/09 includes provisions on the planning, construction and operation by Terna of one or more upgrades to the international interconnection infrastructures in the form of “interconnectors”, as referred to in the Regulation (EC) No. 1228/2003, replaced by the Electricity Regulation, in the presence of specific financing from third party investors.
- (16) Under this provision, Terna gave MISE and ARERA notification of a list of possible infrastructures to be built and arranged a tender procedure for the selection of entities that intended to provide support in the funding of these infrastructures. Article 32 of Law 99/09, limits the participation to tendering procedures to end customers (also grouped together in the form of consortia) which are:
- (a) holders of consumption units each with an available withdrawal capacity of not less than 10 MW, characterized by a utilization factor - on average in the previous three years - of not less than 40% (excluding the fifteen days with the lowest electricity withdrawal on an annual basis);
  - (b) committed to make their withdrawals interruptible upon the direct control of Terna in case of critical network conditions.
- (17) Under the legal framework described above, Terna identified a share of the Piemonte-Savoia interconnector capacity as a possible project to be financed.
- (18) The shareholders of the new interconnector (the Assignees) were selected during tender procedures launched by Terna in 2009/2010, as for the first section of the Piemonte-Savoia interconnector.
- (19) The selected Assignees are 71 industrial customers operating in the field of production and processing of steel, chemicals and paper. Pi.Sa.2 states that most of them are not active in any branch of the electricity supply chain, while those few that perform some activity within the industry, mainly for self-consumption or optimization of supplies, have absolute negligible market shares both in the Italian and French electricity markets.
- (20) In December 2013, a Memorandum of Understanding was signed by Terna and the trade associations of the end customers (Federacciai, Assocarta, Federchimica, Aitec/Cemento and Assovetro) which defined the major mutual commitments. Under this agreement, the Assignees were given the right to form an ad hoc company in order to finance the project.
- (21) Three vehicle companies were set up:

- (a) Terna Interconnector, jointly owned by Terna S.p.A. (65%), Terna Rete Italia (5%) and Transenergia (30%), is responsible for the tender procedure regarding the civil construction works and the related tender contract on the basis of a specific mandate from the Assignees, in accordance with Article 32, paragraphs 1 and 3 of Law 99/09;
- (b) Pi.Sa, whose purpose was to manage the exemption request on the first section of the Piemonte-Savoia interconnector;
- (c) Pi.Sa.2, set up to manage the exemption application on behalf of the Assignees on the second section of the Piemonte-Savoia interconnector. If the exemption is granted, Pi.Sa.2 will be transferred to the Assignees.

### Exemption request

- (22) Pi.Sa.2 requests exemption from the provisions of:
  - (a) Article 19(2) of the Electricity Regulation, regarding the congestion income. The exception will apply to a share of the congestion income corresponding to five twelfths (250 MW) of the congestion rents attributable to the Italian side only.
  - (b) Article 43 of the Electricity Directive, regarding unbundling, if deemed necessary by the competent Authority.
- (23) ARERA underlines that the allocation of the total corresponding cross-border capacity will be managed according to the existing regulatory framework, based on Regulation (EU) 1222/2015 (CACM GL), Regulation (EU) 2016/1719 (FCA GL) and Regulation (EU) 2017/2195 (EB GL).
- (24) Although the two parts of the project will be subject to two distinct exemption regimes (the first part under the exemption granted to Pi.Sa in 2016 and the second part to Pi.Sa.2, if granted), they ought to be functionally considered as a single project. Therefore, the assignment of the works and the subsequent construction phases of the project are carried out jointly.

### **3. Relevant legal provisions**

- (25) Article 63(1) of the Electricity Regulation states:

New direct current interconnectors may, upon request, be exempted, for a limited period, from Article 19(2) and (3) of this Regulation and from Articles 6 and 43, Article 59(7) and Article 60(1) of Directive (EU) 2019/944 provided that the following conditions are met:

- (a) the investment enhances competition in electricity supply;
- (b) the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted;
- (c) the interconnector is owned by a natural or legal person which is separate, at least in terms of its legal form, from the system operators in whose systems that interconnector is to be built;
- (d) charges are levied on users of that interconnector;
- (e) since the partial market opening referred to in Article 19 of Directive 96/92/EC of the European Parliament and of the Council, no part of the capital or

operating costs of the interconnector has been recovered from any component of charges made for the use of transmission or distribution systems linked by the interconnector; and

- (f) (f) an exemption would not be to the detriment of competition or the effective functioning of the internal market for electricity, or the efficient functioning of the regulated system to which the interconnector is linked.

#### **4. Description of the notified decisions**

##### The CRE decision

- (26) The CRE decision underlines that the exemption request relates only to the Italian part of the interconnector and it is not likely to produce effects on the French electricity market, on the French public electricity transmission network or on the conditions of access to the interconnector. Thus, CRE gives its agreement to the granting of a derogation based on ARERA being responsible for examining the criteria for granting the exemption as well as the scope and conditions attached to this exemption, and its analysis is favorable.

##### The MISE decision

- (27) Based on the ARERA analysis described below, the MISE decision establishes that the company Pi.Sa.2 is granted an exemption from the provisions of Article 19(2), regarding congestion income, of the electricity regulation and from the provisions of Article 43, regarding unbundling, of the Electricity Directive, for a portion equal to 250 MW of power generated by a section of the Piemonte-Savoia interconnector, under the conditions set out in Part 3 of ARERA's Opinion on the Pi.Sa.2 exemption application, namely:
  - (a) The notified exemption decision expires if either two years after the date the exemption decision is adopted by the Commission the construction of the Interconnector has not started or the Interconnector has not become operational after five years. However, the notified exemption decision also states that it continues to apply if the Commission decides, pursuant to subparagraph 5 of paragraph 8 of Article 15 of the Electricity Regulation that any delay is due to major obstacles beyond the control of Pi.Sa.2.
  - (b) The interconnector shall be operated by Terna based on a "Technical Operation contract" to be signed by Pi.Sa.2, and Terna in accordance with Article 36(9) of Legislative Decree n. 93 of June 1<sup>st</sup> 2011, and to be approved by the Italian Authority.
  - (c) The commercial arrangements for the transfer of revenues by Terna to Pi.Sa.2, representing five twelfths of the congestion rents corresponding to the Italian side, shall be defined in a commercial contract and shall be approved by the Italian Authority.
  - (d) Prior to the entry into service of the interconnector, the share capital of Pi.Sa.2, shall be transferred to the Assignees, therefore Terna shall not have any direct or indirect stake in the company. Any change in the composition of Pi.Sa.2's share capital, including any change in the share of the Assignees, shall be communicated to the Regulators for their evaluation.

- (e) If, directly or indirectly, an undertaking acquires joint or sole control over or merges with Pi.Sa.2, the latter must notify it to each of the relevant national authorities concerned, which shall assess whether the conditions under which the exemption was granted are still met.
- (f) The ownership of the interconnector will be transferred to Terna S.p.A. after the expiry date of the exemption. The value of the asset shall not exceed the residual book value with re-evaluation and be determined on the basis of efficient costs.

#### The ARERA opinion

- (28) Regarding the business case, ARERA believes that the key variables for the investment risk are two: the price differentials between the French and Italian bidding zones and the investment costs. Taking into account the historical values for price differentials and the risks associated to the evaluation of the future values, ARERA thinks that the price differentials (11.6-12 €/MWh) are slightly overestimated but still reasonable to be used as a reference in the business plan. According to ARERA, the share and the amount of costs presented in the business plan are in line with the expected costs of projects with similar characteristics.
- (29) Regarding the fulfillment of conditions of Article 63(1)(a), “*the investment enhances competition in electricity supply*”, ARERA considers that the new interconnector is likely to increase competition in the internal market by increasing cross-border capacity and widening the potential supply sources of the connected markets. As the new capacity will be available to all market participants and the transmission capacity will be allocated according to the rules in place for cross border capacity allocation, the new capacity will also be available to TSOs and balancing service providers. As a side-benefit, the interconnector will improve operational reliability of both systems and the diversification of electricity sources.
- (30) Regarding the fulfillment of conditions of Article 63(1)(b), “*the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted*”, ARERA considers that the exemption will allow it to recover construction, operation and maintenance costs, and provide a return that it considers adequate. Only in case the exemption is granted the Assignees will be able to finance additional 250 MW on the Italian side, whose costs will therefore not be included into the national transmission tariff.
- (31) Regarding the fulfillment of conditions of Article 63(1)(c), “*the interconnector is owned by a natural or legal person which is separate, at least in terms of its legal form, from the system operators in whose systems that interconnector is to be built*”, ARERA considers that the information provided by the Applicant prove that the Assignees are independent (as regard to both their legal form and ownership structure) from the Italian Transmission System Operator.
- (32) Regarding the fulfillment of conditions of Article 63(1)(d), “*charges are levied on users of that interconnector*”, ARERA confirms that the interconnector capacity will be allocated according to the ordinary rules applicable at European level on cross-border capacity allocation. Therefore, users will pay the value of the capacity determined in accordance with the implicit and explicit auctions rules used to allocate the capacity.

- (33) Regarding the fulfillment of conditions of Article 63(e), “since the partial market opening referred to in Article 19 of Directive 96/92/EC of the European Parliament and of the Council (24), no part of the capital or operating costs of the interconnector has been recovered from any component of charges made for the use of transmission or distribution systems linked by the interconnector”, the Applicant declared that no part of interconnector’s costs will be recovered from any component of charges. Moreover, the costs incurred by Pi.Sa.2 before its transfer to the Assignees will be refunded to Terna by the Assignees, and ARERA will check and assure this compliance.
- (34) Regarding the fulfillment of conditions of Article 63(1)(f), “an exemption would not be to the detriment of competition or the effective functioning of the internal market for electricity, or the efficient functioning of the regulated system to which the interconnector is linked”, ARERA states that the realization of the interconnector does not seem detrimental to the proper market functioning. As explained before, the new capacity will be available to all market participants as from the beginning of operation according to European regulation. In addition, the new Interconnector will be operated under the direct responsibility of the Italian TSO, therefore the Assignees (which are the ultimate beneficiaries of the exemption) will not have any role in the management and allocation of the interconnector capacity.
- (35) In light of the foregoing, ARERA is of the opinion that an exemption from the provisions of Article 19(2) and (3) of Regulation (EU) 2019/943 should be granted to the company Pi.Sa.2.
- (36) In addition, an exemption from Article 43 of the Electricity Directive should be granted in compliance with the Article 63 of the Electricity Regulation. In order to prevent any potential risk of undue influence by the Assignees, the Technical Operation contract mentioned in paragraph (27)(d), shall contain adequate measures ensuring compliance with article 41 of the Electricity Directive. In addition, the aforementioned contract shall contain a clause that forbids the disclosure of any technical/commercially sensitive information.
- (37) During the exemption period, ARERA may take all the necessary measures to ensure that:
- (a) the exemption from Article 43 is not detrimental to competition or the effective functioning of the internal electricity market, or the efficient functioning of the regulated system to which the interconnector is connected;
  - (b) the operator of the interconnector complies with the tasks defined under Article 40 of Directive 2019/944.
- (38) The exemption is planned to be granted for a period of 10 years and a capacity of 250 MW, starting from the beginning of the commercial operations of the new interconnector, under the above-mentioned conditions.

## **5 Assessment by the Commission**

- (39) The Commission underlines that the requirements of Article 63(1) of the Electricity Regulation have to be fully complied with, and that the compliance with the conditions shall be cumulative.
- (40) The Commission shares the view from ARERA regarding the fulfillment of the following conditions of Article 63(1)(a), (c), (d) and (f) of the Electricity Regulation:



- (a) Article 63(1)(a) - *“the investment enhances competition in electricity supply”*. The Interconnector is likely to enhance competition since the new capacity would be available to all market participants and would be allocated according to the EU rules for cross border capacity allocation. In addition, none of the stakeholders of the Interconnector has so far a significant presence in the electricity markets of both Italy and France. Therefore, the Commission considers that this requirement is fulfilled.
  - (b) Article 63(1)(c) - *“the interconnector is owned by a natural or legal person which is separate, at least in terms of its legal form, from the system operators in whose systems that interconnector is to be built”*. The exemption is requested by Pi.Sa.2 for the benefit of the Assignees, who are a group of industrial companies. According to the information received, all of them are legally independent from Terna, the system operator in whose systems the interconnector will be built. Thus, this requirement can be considered fulfilled.
  - (c) Article 63(1)(d) - *“charges are levied on users of that interconnector”*. The capacity of the Interconnector will be allocated through ordinary Union law rules on cross border capacity allocation resulting from the network codes. The users will therefore pay the value of the capacity determined in accordance with explicit and implicit auctions used to allocate the capacity. This requirement can be thus considered to be fulfilled.
  - (d) Article 63(1)(f) - *“an exemption would not be to the detriment of competition or the effective functioning of the internal market for electricity, or the efficient functioning of the regulated system to which the interconnector is linked”*. The Commission notes that one concern would be on possible effects of granting an exemption on other competing projects; since to the knowledge of the Commission there are no other pending projects to develop new interconnections between Italy and France, this does not seem relevant in the current case. Additionally, since the Assignees will not have any role in the in the allocation of the interconnector capacity and this will be done following standard EU rules, the exemption would not threaten the efficient functioning of the system. Thus, this criterion can be considered complied with.
- (41) However, the Commission takes the view that the conditions of Article 63(1)(b) and 63(1)(e) of the Electricity Regulation are not fulfilled:

Article 63(1)(b) - *“the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted”*. The Commission underlines that the current exemption differs fundamentally from the exemption granted in 2016 in that it relates to a project that is in the final stages of development and which had for a long time been developed as a fully regulated project. The project is almost fully constructed (75% by March 2020, according to the information received from MISE) and will be operational between the end of this year and June 2021. It is not excluded that exemptions could exceptionally be granted to projects under construction, notably if it can credibly be demonstrated that the investment decision was taken subject to the condition of finalizing the project in a non-regulated framework. However, in the present case, in early 2019 (when the decision was taken to open the second part of the project to private investors), approximately 50 % of the project was already finalized. Importantly, it is undisputed by the national authorities that the project would also be finalized as a fully regulated project if the exemption

was not granted. The risk criterion is thus difficult to be fulfilled, since it is a fact that most of the investment has taken place without any formal exemption being granted. Much of the investment occurred in view of finalization as a fully regulated project, and finalization based on the original project plan remains a credible alternative. It is important to note in this context that pursuant to Article 63 of the Electricity Regulation, exemptions are not an alternative option to the regulated system which may be freely chosen. Rather, exemptions are exceptions, justified only where they are shown to be necessary for the investment to take place. Otherwise, the Electricity Directive and Electricity Regulation set up a standard regulatory framework under which network infrastructures, including interconnections, should generally be developed. The aim of the exemption provision is to enable additional projects to be developed which contribute to market integration, competition and security of supply and would otherwise not be realized.

It is clear that merely theoretical alternatives to a proposed project cannot be seen as sufficient to reject an exemption. While in theory, given enough time, almost any project could be replaced by a regulated project, the regulated alternative is not merely theoretical in the case at hand. Instead, this part of the project was initially planned as fully regulated, was started and advanced in this way, and could be expected to be finalized as fully regulated if no exemption was granted. Against this background, the level of risk cannot be deemed to be such that the investment would not take place if the exemption was not granted.

This is also not put into question by the arguments raised in the reply from MISE of 7 July 2020. MISE argues that the project is subject to market risks, regulatory risks, investment, development and construction risks as well as operation and maintenance risks. It is clear that for a project which relies on revenues from congestion rents, there is a considerable market and to some extent also a regulatory risk. Similarly, the construction of high-voltage direct current connections in the Alps is subject to significant technical risks. These risks would all be relevant if they put into question the realization of the interconnector in the absence of an exemption. But, contrary to the situation in 2016 for the other part of the project, it has not been put into question that the interconnector will be finalized and operating in the near future, whether or not the exemption is granted. The risks are thus in this concrete case not of a nature which would put into question the investment into the new direct current interconnector as set out in Article 63.

Therefore, the Commission considers that this requirement is not fulfilled.

- (a) Article 63(1)(e) - “since the partial market opening referred to in Article 19 of Directive 96/92/EC of the European Parliament and of the Council (24), no part of the capital or operating costs of the interconnector has been recovered from any component of charges made for the use of transmission or distribution systems linked by the interconnector”.

According to the information received from MISE, since the Piemonte-Savoia 2 interconnector was initially started as a public asset, some of the expenses during the planning and construction period were recognised – according to “Work In Progress” remuneration rules – in transmission tariffs. The MISE underlines that the costs incurred by Pi.Sa.2 before its transfer to the Assignees

will be refunded to Terna by the Assignees, and ARERA will check and assure this compliance.

One could argue that Article 63(1)(e) does not allow at all for such ex-post compensation, as it excludes any project which, in the past, has received any funding from network tariffs. However, even if one were to accept the possibility of exceptionally providing interim funding from network tariffs where this funding is reimbursed at a later stage, the case at hand seems difficult to bring in line with the requirements of Article 63(1)(e). Again, it is important to underline the advanced stage of the project, including the long time it was developed as fully regulated, and the long duration of preparatory works at the point in time at which an exemption is requested, which clearly differentiates this project from the situation in 2016. This being said, it can be left open whether the requirement under Article 63(1)(e) can be deemed fulfilled as the risk criterion in Article 63(1)(b) is already not met.

#### **4 Conclusion**

- (42) The Commission takes the view that, based on the information received, the request for exemption does not fulfil all the requirements of Article 63(1) of Regulation (EU) 943/2019. Thus, the Commission has decided to request MISE and CRE to withdraw the decisions granting an exemption.

HAS ADOPTED THIS DECISION:

##### *Article 1*

The exemption decisions by the Commission de Regulation de l'Énergie (CRE) and the Italian Ministero dello Sviluppo Economico (MISE), notified to the Commission on 21 February 2020 and on 9 March 2020 respectively, shall be withdrawn on a finding that such decisions do not comply with the condition established in Article 63(1)(b) of the Regulation (EU) 2019/943.

##### *Article 2*

This Decision is addressed to the Ministero dello Sviluppo Economico and the Commission de la Regulation de l'Énergie.

Done at Brussels, 11.9.2020

*For the Commission*  
*Kadri SIMSON*  
*Member of the Commission*