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COMMISSION DECISION

of 10.8.2016

**prolonging the exemption of ElecLink Limited under Article 17 of Regulation (EC) No
714/2009 for an electricity interconnector between France and Great Britain**

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 (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 (hereinafter "Regulation No. 714/2009")¹, and in particular Article 17(8) thereof,

Whereas:

1. Background

(1) ElecLink Limited (hereinafter "ElecLink") is the company seeking to develop, construct and operate an electricity interconnector linking the British and French electricity markets through the Channel Tunnel (hereinafter, the "Project"). ElecLink will connect with the national grids of France at Les Mandarins substation and of the Great Britain at Sellinge substation.

2. Procedure

- (2) In August 2013 ElecLink submitted to the National Regulatory Authorities in France (Commission de Regulation de l'énergie – hereinafter, "CRE") and Great Britain (Office of Gas and Electricity Markets – hereinafter, "Ofgem") (hereinafter, "NRAs") an application² for an exemption in accordance with Article 17 of Regulation No 714/2009. The authorities undertook an assessment of this request and concluded that, subject to certain terms and conditions, ElecLink has met the requirements to be granted an exemption from Article 16(6) of the Electricity Regulation (i.e. use of congestion revenues) and Articles 9 (ownership unbundling) and 32 (third party access) of the Electricity Directive.
- (3) By its Decision of 28 July 2014³, the Commission agreed to the granting of an exemption for ElecLink under Article 17 of Regulation (EC) No 714/2009 (hereinafter, "Commission Exemption Decision 2014"), provided that the NRAs amend partially their exemption decisions. Subsequently, the NRAs issued a Final Joint Opinion on ElecLink's exemption request under Article 17 of Regulation EC No

¹ OJ L 211, 14.09.2009, p. 15.

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 C(2014) 5475 final,
https://ec.europa.eu/energy/sites/ener/files/documents/2014_eleclink_decision_en.pdf

714/2009 (hereinafter, "Final Joint Opinion 2014") and final separate exemption decisions adopted on 28 August 2016 by CRE and on 16 September 2014 by Ofgem⁴.

- (4) The exemption was granted for twenty-five years from the date that the interconnector commences commercial operation⁵, which means the time when the interconnector has been commissioned and is available for physical flow of electricity on the market⁶.
- (5) Article 4 of the Commission Exemption Decision 2014 contains provisions making the Commission's approval of the exemption granted to ElecLink conditional on the start of the construction of the interconnector by a certain date and on the interconnector becoming operational by a certain date, in accordance with Article 17(8) Regulation No 714/2009. This conditionality is consequently reflected in the Final Joint Opinion 2014.
- (6) On 27 April 2016 CRE and on 29 April 2016 Ofgem received a request from ElecLink to prolong the above-mentioned time limitations under Article 17 of Regulation (EC) No 714/2009 i.e. to postpone the date by which the construction of the interconnector should start ("construction deadline") from 28 July 2016 to 31 July 2017 and the date the interconnector should become operational ("operational deadline") from 28 July 2019 to 31 July 2020 (hereinafter, "ElecLink request").
- (7) On 3 May 2016 Ofgem and CRE transmitted copies of the ElecLink request for information to the European Commission.
- (8) On 14 June 2016 Ofgem notified its decision together with the Joint Opinion of the CRE and Ofgem on ElecLink's request (hereinafter, "Joint Opinion 2016") to the Commission in accordance with Article 17(7) of Regulation No 714/2009. The notification of CRE's decision with the Joint opinion 2016 followed on 16 June 2016.
- (9) On 27 June 2016, ElecLink provided additional information on the construction period, submitting schedules to the engineering, procurement and construction ("EPC") contracts. On 28 June 2016, the European Commission services met with ElecLink. ElecLink provided additional information at this meeting.

3 Assessment

3.1 Relevant legal provisions

- (10) In accordance with Article 17(8) Regulation No 714/2009, Article 4 of the Commission Exemption Decision 2014 states that the Commission's approval of the Exemption decisions shall expire 2 years after the date of adoption of this Decision in the event that construction of the ElecLink interconnector has not started by that date and five years after the date of adoption of this decision if the ElecLink interconnector has not become operational by that date, unless the Commission decides that the delay is due to major obstacles beyond the control of ElecLink.

⁴ 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; and

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>

⁵ 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

⁶ Final joint exemption decision 2014, Schedule A, Para 1.56.

- (11) The Final Joint Opinion 2014 adopted by CRE and Ofgem also reflects this provision in its Schedule A, paragraphs 1.53 and 1.54, according to which the Exemption Decision shall continue to be in force where the European Commission decides, pursuant to subparagraph 5 of Article 17(8) that any delay is due to major obstacles beyond the control of ElecLink.
- (12) The validity of the Commission's approval of an exemption can be prolonged provided that, based on an analysis by the NRAs concluding that a prolongation is justified, the Commission decides, first, that any delay is due to major obstacles and, second, that those obstacles are beyond control of the person to whom the exemption has been granted.⁷

3.2 ElecLink's request

- (13) ElecLink requests that the validity period of the exemption decisions of the NRAs adopting the Final Joint Opinion 2014 and the Commission Exemption Decision 2014 be extended to 31 July 2017 in respect of the date by which construction of the ElecLink interconnector must have started; and to 31 July 2020 in respect of the date by which the ElecLink interconnector must be operational. To support its request, ElecLink provided an introduction to the Project, details of the progress made to date, details of the major obstacles encountered by ElecLink which have been beyond its control, and the analyses of the impact of such major obstacles on the Project.
- (14) ElecLink supported its request by information on the already made investments for the development of the Project, contractual agreements with NGET and RTE, obtained licences and permits and enabling works started in March 2016. ElecLink indicated in its request the timeline for each stage of the projects describing the preparation and construction works to be completed, committed by the engineering, procurement and construction (EPC) contractors for the converter stations and cable systems.

3.3 Grounds put forward by ElecLink

3.3.1 The postponement of the construction deadline

- (15) ElecLink mentions the following reasons for the postponement of the construction deadline:
- (16) First, additional safety and security measures had to be taken by ElecLink due to security breaches and disruptions of service in the Channel Tunnel in the period from May to October 2015 caused by an increased number of migrants in the Calais area and the number of attempted and successful intrusions in the Eurotunnel infrastructure in Coquelles. ElecLink argues that the security situation on the construction site changed significantly in May 2015 in comparison to previous months. ElecLink claims that significant management and physical resources were focused on preventing intrusion attempts. According to ElecLink, the construction could not start due to the

⁷ 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.

shift of financial resources towards security measures to prevent injuries and fatalities on the construction site, the need to ensure safety of the construction personnel and ensure that the start of the construction works does not introduce additional safety risks.

- (17) Second, building permits and preliminary work authorisation which were received by ElecLink in France, were subject to legal proceeding before the French administrative courts. ElecLink argues that these legal challenges have delayed the Project development and have resulted in material legal costs. ElecLink presents the view that court's administrative procedures and especially response time are matters beyond the control of ElecLink and may delay the development plan. Furthermore, ElecLink received a new building permit for a modified design of its converter station in France and indicated the likelihood that this permit be challenged in court as well.
- (18) Third, in the view of ElecLink, exceptional uncertainty for investors and lenders due to the referendum on UK's membership of the European Union, announced on 20 February 2016, has had an impact on the implementation of the project. This is said to be due to the unpredictability of the influence of the "leave" vote on the UK energy market and pressure on financial markets resulting from this uncertainty. This uncertainty has led ElecLink to postpone the finalization and execution of the engineering, procurement, construction and financing agreements.

3.3.2 *The postponement of the operational deadline*

- (19) ElecLink states that in normal operating conditions the timetable committed by the engineering, procurement and construction contractor is scheduled to last thirty six months. Provided that the construction is commenced by 31 July 2017, commercial operations are expected to commence by 31 July 2020.
- (20) To support this claim, ElecLink provided the NRAs with copies of the EPC contracts, on which basis the NRAs confirmed that the construction period is of at least 36 months. The schedules to the EPC contracts submitted to the Commission contain individual timelines for elements of the construction process, such as design, surveys, excavation, road construction, cable delivery and installation, jointing, testing, drilling, assembly, and trial operation.

3.4 **Assessment by the NRAs of ElecLink's request**

- (21) CRE and Ofgem assessed the three grounds put forward by ElecLink and came to the following conclusions:

3.4.1 *Postponement of the construction deadline*

- (22) As regards the legal challenges, the NRAs take the view that the circumstances described by ElecLink are not uncommon in relation to an infrastructure project of this nature. Therefore NRAs consider them not to be of an exceptional nature that could contribute to the justification of the requested extension.
- (23) As regards the additional safety and security measures, the NRAs consider that the reasons for such measures were difficult to anticipate and were beyond ElecLink's control and that they could have had a significant impact on the business model of ElecLink, including on the construction costs and timing. The NRAs consider this ground to be a major obstacle beyond the control of ElecLink. The NRAs consider that a six month postponement of the construction deadline for this ground is appropriate.
- (24) As regards the uncertainty caused by the referendum on the UK's membership of the European Union, the NRAs agree that it introduced uncertainty for the Project. NRAs

take the view that ElecLink was not in a position to move on with the auctioning of the capacity to the market and with raising of non-recourse project finance and could not start the execution of the EPC contracts without facing financial risks. As a consequence, financial close had to be postponed. NRAs are therefore of the view that this constitutes a major obstacle beyond ElecLink's control. NRAs consider it appropriate to grant an additional six month extension to the construction deadline based on this ground.

3.4.2. Postponement of the operational deadline

- (25) NRAs assessed the copies of the EPC contracts provided by ElecLink in support of its request. NRAs take the view that these contracts confirm that the construction programme has a total duration of 36 months and cannot be reduced. NRAs also took into consideration that the period provided in the Regulation No714/2009 between the date by which the construction works have started and the commissioning date is 36 months, therefore it is appropriate to maintain the same period between the new deadline for the construction works and the deadline for the commissioning date. NRAs agree that it is appropriate to give ElecLink a corresponding one year extension of the operational deadline.

3.5 Assessment by the Commission

3.5.1 Importance of a date which can be foreseen with a reasonable degree of certainty

- (26) The Commission stresses that the objectives of Regulation No 714/2009 require that an exemption from the application of the regulatory regime, granted under Article 17 of the Regulation, has a clear end date and that this date is not later than what is strictly necessary.
- (27) 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 provided for limited periods of time and should, in particular, not last beyond what is strictly necessary. It follows from this that the precise date by which the construction of the infrastructure starts and the date by which the infrastructure becomes operational must be foreseeable with a reasonable degree of certainty.
- (28) The Commission takes the view that this condition is fulfilled now that the ElecLink has notified a narrow time period in which the construction of the interconnector will start and the interconnector will become operational, and that it is reasonably certain that no further postponements will take place.
- (29) Furthermore, and based on the assessment of the contractual commitments between ElecLink and its EPC contractors, and the annexed construction programmes and timetables for the converter stations and high voltage cable systems, as well as the additional information regarding the completion of financial close provided by ElecLink, the Commission considers the further realisation of the project a probable, despite any uncertainty linked to the above-mentioned referendum in the UK.

3.5.2 As regards the postponement of the construction deadline.

- (a) "Delay is due to major obstacles"

Legal challenges

- (30) The Commission agrees with the view of the NRAs that the claims against the building permit and preliminary work authorisation have a usual character for such infrastructure projects. Furthermore, in the view of the Commission due to the legal challenges of both building permit and preliminary work authorisation, those never resulted in the actual annulment of the named permits and authorisations and the claimants' arguments were rejected. Legal challenges of such character cannot be considered in the view of the Commission as a major obstacle for a delay in the implementation of the Project. Therefore the Commission agrees with the NRAs that the first ground put forward by ElecLink does not justify a prolongation of the construction deadline.

Additional safety and security measures

- (31) In the Commission's view, the need to take additional safety and security measures to prevent injuries and fatalities on the construction site can be considered as a major obstacle to begin the construction works. ElecLink has plausibly described that the additional security measures on the construction site led to a shift of management and financial resources and therefore made it difficult to commence construction. The Commission also understands that ElecLink had to ensure safe, secure and uninterrupted access to the construction site for the construction personnel, material and equipment. Events which led to these measures have exceptional character, as proved by the Exhibit I of the ElecLink request and could not be predicted by ElecLink. The need to take additional measures reacting to these events is seen by the Commission as a major obstacle for the beginning of the construction works.

Uncertainty due to the referendum in the UK

- (32) The question whether the UK referendum itself created additional uncertainty and therefore caused unforeseeable delay can be left open, as in the view of the Commission, the substantial and unforeseeable challenges created by the security situation in Calais, combined with some potential uncertainty linked to the referendum, are sufficient to justify a project delay of 12 months.

(b) "Delay is beyond control of the person to whom the exemption has been granted"

- (33) The delay caused by the additional safety and security measures which had to be taken could not have been predicted by ElecLink, nor could have ElecLink predicted or controlled the events which led to the need for these measures. Furthermore, as showed by the ElecLink, the measures were taken to prevent injuries and fatalities and were induced by the public authorities. There is no doubt that significant efforts were made by the project promoter trying to drive forward the project. Therefore, the European Commission supports the assessment made by NRAs and agrees that delay caused by additional measures was beyond the control of ElecLink.

3.5.2 As regards the postponement of the operational deadline.

- (34) The deadlines for the start of construction and the start of operation of an exempted infrastructure are distinct deadlines, the prolongation of which has to be separately assessed; where a delay in the start of operation is required, this does not automatically justify a delayed start of construction works.⁸ This being said, the start of construction will have an inevitable impact on the start of operation if and to the extent that the length of the construction period is identical to the period between both deadlines and

⁸ 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.

cannot be shortened with a reasonable effort. This has been the conclusion reached by the NRAs.

- (35) The Commission does not share the view of the NRAs that the period of 36 months foreseen under Regulation (EC) 714/2009 between start of construction and start of operations is meant to be maintained in all cases. Rather than foreseeing a period of two years for the start of construction and a period of three years thereafter for construction to take place and operation to start, the Regulation foresees two separate deadlines, both starting from the date of adoption of the exemption decision. Furthermore, while most major new infrastructures will require lengthy construction periods, these can just as much exceed 36 months as they can be shorter, thus excluding an automatic link between both prolongations.
- (36) This being said, the authorities did not base their prolongation of the period for start of operation only on the 36 months between both deadlines under the Regulation. Rather, ElecLink has demonstrated on the basis of its EPC contracts that the construction works are foreseen to take a total of 36 months, and that this period cannot be contractually reduced. The legally binding schedules to the EPC contracts submitted to the Commission are sufficiently precise to show that a construction period of 36 months is realistically required for the project to be implemented. Against this background, the delay for start of construction in this particular case makes it impossible for ElecLink to respect the operation deadline. The prolongation of this latter deadline is thus similarly justified.

4 Conclusion

- (37) The Commission takes the view that sufficient grounds exist to postpone the latest date by which the construction of the interconnector should have started until 31 July 2017 and the latest date by which the interconnector has to become operational until 31 July 2020, in order for the Commission's approval of the exemption and consequently, the exemptions granted by the exemption decisions of Ofgem and CRE, to retain their effect.

HAS ADOPTED THIS DECISION:

Article 1

In Commission Exemption Decision of 28 July 2014, Article 4 is replaced by the following:

"Article 4

In line with Article 17(8) of Regulation (EC) No 714/2009, the Commission's approval of the Exemption decisions shall expire in the event that construction of the ElecLink interconnector has not yet started by 31 July 2017 and in the event that the infrastructure has not become operational by 31 July 2020, unless the Commission decides that any further delay is due to major obstacles beyond the control of ElecLink Limited."

Ofgem's "Final decision on ElecLink's request for an exemption under Article 17 of Regulation (EC) 714/2009 for a Great Britain-France electricity interconnector of 16 September 2014" and CRE's "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" shall be amended accordingly.

Article 2

This Decision is addressed to:

- 1) the Gas and Electricity markets Authority
- 2) the Commission de la Regulation de l'Energie.

Done at Brussels, 10.8.2016

*For the Commission
Violeta BULC
Member of the Commission*

