

French Energy Regulatory Commission public consultation of 26 July 2011 on the possibility of exempting new electricity interconnectors from Article 9 of Directive 2009/72/EC of 13 July 2009

1 Introduction

1.1 Context

Under the 2nd energy package¹ Article 7 of Regulation (EC) No 1228/2003, allowed the national regulatory authorities to wholly or partially exempt new interconnectors from obligations in terms of third party access, allocation of revenues derived from the use of interconnection capacities and the pricing of access to the infrastructure.

Article 17 of Regulation (EC) No 714/2009 of the 3rd energy package², which takes up the essential points of article 7 of Regulation (EC) No 1228/2003, adds a new one to these three possible exemptions: exemption from the provisions of article 9 of Directive 2009/72/EC, i.e. from the unbundling of the operator of a new interconnector vis-à-vis undertakings involved in electricity generation and supply activities. Article 17 of Regulation (EC) No 714/2009 also provides for a change in the exemption procedure as set out in article 7 of Regulation (EC) No 1228/2003, particularly by involving the Agency for the Cooperation of Energy Regulators (ACER), created by Regulation (EC) No 713/2009.

Furthermore, article 6 of Regulation (EC) No 714/2009 provides for the establishment of network codes, the role of which is to precisely determine the way in which congestions are managed at the interconnections and the way in which the transit capacities that they offer are distributed.

These new measures introduced by the 3rd energy package led the French Energy Regulatory Commission (CRE) to update the guidelines contained in its deliberation of 30 September 2010 on the application of article 7 of Regulation (EC) No 1228/2003 and the terms and conditions of access of new exempted interconnectors³ to the French electricity transmission grid.

¹ Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity; Directive 2003/54/EC concerning common rules for the internal electricity market; Directive 2003/55/EC concerning the common rules for the internal natural gas market.

² Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators; Regulation (EC) No 714/2009 on conditions for access to the network for cross-border electricity exchanges ; Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks; Directive 2009/72/EC concerning common rules for the internal electricity market; Directive 2009/73/EC concerning common rules for the internal natural gas market

³ The document (French version) can be downloaded from CRE's website: <http://www.cre.fr/documents/deliberations/communication/nouvelles-interconnexions-exemptees-procedure-de-derogation-et-modalites-d-acces-au-reseau>. For an English version, please contact CRE's services.

1.2 Document organisation

In this consultation, CRE explains the new items contained in Regulation (EC) No 714/2009 compared to Regulation (EC) No 1228/2003, concerning new interconnectors:

- New regulation of third party access by the existence of network codes,
- The possibility of exemption from unbundling provisions.

The proposals in this document are subject to public consultation and are in no way prejudicial to the final guidelines that will be adopted by CRE.

The consultation methods and the next steps are described at the end of this document.

2 Conditions of third party access to new interconnectors

Article 6 of Regulation (EC) No 714/2009 provides for the establishment of network codes "for cross-border network issues and market integration issues", as defined by article 8(7) of the same Regulation. These network codes aim for a higher level of harmonisation than that defined in the 2nd energy package, in particular as far as the new interconnectors are concerned, in the areas of allocations of capacities and congestion management.

In its deliberation of 30 September 2010, CRE expressed its wish that interconnection capacity allocation and management rules applied to a new interconnector for which an exemption has been granted according to article 7 of Regulation (EC) No 1228/2003 be as harmonised as possible with those in force on French regulated interconnections.

Question 1 : *In your opinion, should interconnection capacity management and allocation rules described in network codes apply to new interconnectors for which an exemption has been granted according to article 17 of Regulation (EC) No 714/2009?*

Furthermore, the specific case where the operator of a new interconnector is not totally exempted from non-discriminatory access of third parties, but is directly or indirectly linked to an undertaking that takes part in explicit auctions of capacity, could be seen as problematic. In practice, the undertaking in question, as the beneficiary of at least part of the revenue from congestion, could be able to make offers at higher prices than its competitors and therefore *de facto* profit from a privileged access.

Question 2 : *In your opinion, how should privileged access to interconnection capacity be prevented in this specific case?*

3 Possible exemption of new interconnectors from the obligation of unbundling

3.1 Definition and issues

Under the 2nd energy package, transmission system operators (TSO) had to comply with obligations in terms of independence of legal form, organisation and decision making from undertakings engaged in electricity production and supply activities. Thus, on condition that these obligations were satisfied and, in France, of obtaining an exemption, all undertakings, including electricity producers and suppliers, could become involved in a new interconnector construction and operation project.

The 3rd energy package goes further than the 2nd package in the matter of independence of network operators: article 9 of Directive 2009/72/EC, transposed into French law by article L. 111-8 of the Energy

Code, lays down the principle of unbundling between TSOs and undertakings exercising a generation or supply activity. This principle is binding on every operator of a new transmission system, including new interconnectors.

The aim of this separation is to guarantee independence of TSOs from any generation or supply undertaking. It also aims to guarantee the confidentiality of any commercially sensitive information by eliminating situations of conflict of interest. Therefore, what is required is that *"each undertaking which owns a transmission system acts as a transmission system operator"*. Furthermore, the same person or persons are not entitled to:

- *"directly or indirectly exercise control over an undertaking performing any of the functions of generation or supply, and directly or indirectly exercise control or exercise any right over a transmission system operator or over a transmission system"* and conversely;
 - o *"the rights referred to [...] shall include, in particular: the power to exercise voting rights; the power to appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking; the holding of a majority share;"*
 - o control means *"rights, contracts or any other means which either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising a decisive influence on an undertaking, in particular: ownership or the right to use over all or part of the assets of an undertaking; rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking⁴."*
- *"appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking, of a transmission system operator or a transmission system, and directly or indirectly to exercise control or exercise any right over an undertaking performing any of the functions of generation or supply"*;
- *"to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of generation or supply and a transmission system operator or a transmission system."*

Consequently, without an exemption from the provisions of article 9 of Directive 2009/72/EC, new interconnectors projects supported by electricity producers or suppliers would be unlawful, irrespective of their potentially positive impact on social surplus.

3.2 Stakeholders concerned

An electricity producer or supplier cannot become involved in an undertaking operating a new interconnector without being exempted from the unbundling obligation.

An electricity producer or supplier can participate in an undertaking supporting a new interconnector project either indirectly, in particular, by mass purchase of long term capacities, or by a takeover (in the above sense) via a direct or indirect participation in the capital of an undertaking supporting a new interconnector project.

In its deliberation of 30 September 2010, CRE specified that an *"exemption is granted for a set period of time. If one of the conditions listed in the exemption decision is no longer met, the exemption may be amended or withdrawn"*.

⁴ Article 2.34 of directive 2009/72/EC of the 13th of July 2009 concerning common rules for the internal market in electricity, wording identical to that of 2 of article 3 of regulation (EC) No 139/2004 of the 20 January 2004 on the control of concentrations between undertakings

Question 3 : *In your opinion, is the indirect participation of an electricity producer or supplier by means of a mass purchase of long-term capacities a method that in practice contravenes the spirit of unbundling or the guarantee of the non-discriminatory nature of third party access to a new interconnector?*

Question 4 : *In your opinion, should the indirect participation of an electricity producer or supplier by means of a mass purchase of long-term capacities be one of the practices that are the subject of a revision clause of a granted exemption? Should it be prohibited (from what level)?*

There are three reasons in particular that may lead a stakeholder to wish to become involved in a new interconnector project:

- The existence of a potential new interconnector project reasonably risky and viable,
- a degree of risk aversion lower than the one that regulator is ready to make the TURPE (tariffs for the use of public networks) bear,
- the wish to limit certain risks associated with generation and supply activities via the creation of a structure providing some vertical integration.

Whereas various stakeholders (investment funds, etc.) may become involved in new interconnector projects for the first two reasons mentioned, electricity producers and suppliers are the only stakeholders that may sponsor new interconnector projects aimed at limiting certain risks associated with generation and supply activities via the creation of an integrated structure.

Question 5 : *In your opinion, should the reason for investment be taken into account when making the decision whether or not to grant an exemption from the unbundling obligation to a producer or supplier supporting a new interconnector project? If yes, how?*

3.3 Connection between the exemption from unbundling obligation and exemption from the non-discriminatory nature of third party access

Third party access rights are not in themselves precisely defined by the legal and regulatory texts, either at national or community level. They need to be specified in a set of rules that exhaustively describe the rights and duties of the system operator and the party that accesses the network. In the case of interconnections, the right to access the network is specified by interconnection access rules and will also be specified by network codes in the future. In particular, access to the network is a limited right subject to financial compensation and must be non-discriminatory⁵.

The aim of unbundling of TSOs on the one hand, and producers and suppliers on the other hand is specifically designed to prevent any discriminatory treatment in terms of grid access that would be detrimental to market operations.

Consequently, in the case of new interconnectors, the question of an exemption from the principle of unbundling could legitimately be raised in case of total (the project's sponsor has a priority access to the whole of the new interconnector's capacity for all of the time horizons) or partial exemption (the project's sponsor has priority access to only a part of the new interconnector's capacity or to a defined time horizon) from the non-discriminatory nature of third party access rights.

⁵ Article 32 of Directive 2009/72/EC

Conversely, if the project sponsor is not exempted from the obligation to give non-discriminatory access to third parties, it is necessary to ensure that it does not grant privileged access and complies with its obligations in terms of confidentiality. In this case, exemption from unbundling provisions would be detrimental to the non-discriminatory nature of third party access and contravene the spirit of the 3rd package.

Question 6 : *What is your opinion of the connection made between the exemption from the non-discriminatory nature of third party access to the new interconnection and the exemption from the unbundling principle?*

Question 7 : *In your opinion, should the fact that the exemption from the non-discriminatory nature of third party access is either total or partial have an impact on the decision on exemption from the unbundling principle?*

Question 8 : *In your opinion, should exemption from the unbundling principle be based on characteristics of the third party access other than non-discrimination? Which ones?*

Question 9 : *In your opinion, should exemption from the unbundling principle be based on criteria other than the level and extent of the exemption from third party access? Which ones?*

Question 10 : *Do you think that producers or suppliers of electricity should be able to sponsor new interconnector projects that do not benefit from exemption from the non-discriminatory nature of third party access?*

3.4 Implementation of an exemption from the unbundling principle according to the degree of exemption from the non-discriminatory nature of the third party access

Where the interconnector operator is also involved in an electricity generation or supply activity, it will not only manage the interconnection capacity that may be reserved for it but also the interconnection capacity made available to its competitors. Because of this situation of conflict of interest, proportionate obligations must be imposed in terms of independence and the confidentiality of commercially sensitive information, in order to guarantee non-discriminatory treatment of third parties and the protection of commercially sensitive information.

Under the 2nd energy package, producers and suppliers could become involved in an undertaking operating a new interconnector on condition that they comply with certain obligations in terms of independence and confidentiality (legal form, organisation, decision making, etc.). So, if the project were to be developed under the 2nd energy package, the project's sponsor would have to comply with those requirements. However, the 3rd energy package demonstrates the desire of the European legislator to strengthen the non-discriminatory nature of the third party access. It may then be asked whether, whilst taking account of the specific operation of an interconnector, the provisions adopted should ensure a level of protection for the non-discriminatory nature of third party access and confidentiality at least equivalent to that of the 2nd energy package.

Question 11 : *In your opinion, do the provisions of the 2nd energy package provide a satisfactory minimum level of requirements in terms of the non-discriminatory nature of third party access and confidentiality of commercially sensitive information?*

Question 12 : *In your opinion, what measures for protecting the non-discriminatory nature of third party access and confidentiality of commercially sensitive information should be implemented, as a minimum?*

Protective measures should apply in particular to the functions of the undertaking operating the new interconnector that are the most exposed in terms of risk of discrimination. Within each of the various activities (allocation and nomination of capacities, supervision, upkeep, maintenance, commercial activities - , information system, accounting, billing, customer relations, purchase of losses, etc.), decision-making functions can be distinguished from implementation functions.

Question 13 : *In your opinion, which functions of the operating undertaking should receive particular attention in terms of the non-discriminatory nature of third party access and the confidentiality of commercially sensitive information?*

Question 14 : *In your opinion, what provisions in terms of the non-discriminatory nature of third party access and the confidentiality of commercially sensitive information should apply to new interconnectors?*

4 General questions

As well as consulting on certain specific aspects of the possibility of exemption from the provisions of article 9 of Directive 2009/72/EC, CRE is also looking for more general feedback from stakeholders.

Question 15 : *Do you have any other comments concerning exemption from the provisions of article 9 of Directive 2009/72/EC?*

Question 16 : *In your opinion, following the transposition of the 3rd energy package into French law, what additional developments might be desirable when CRE deliberation of 30 September 2010 will be updated?*

Question 17 : *Do you have any other comments or requests to make to CRE on the subject of new interconnectors to which an exemption is granted by application of article 17 of Regulation (EC) No 714/2009?*

5 Terms of consultation and timetable

CRE invites interested parties to send their contributions by 30 September 2011 at the latest:

- by email to the following address: webmestre@cre.fr,
- by post to the following address:

Commission de régulation de l'énergie
15, rue Pasquier
75379 Paris Cedex 08
France

- by meeting CRE staff:

Direction de l'accès au réseau électrique
Telephone: +33 (0)1 44 50 41 02

The replies to this consultation and their summary will be published on CRE's web site in fall 2011. Contributors are asked to specify in their contributions whether they can be published in its entirety or if they want all or part of their contributions to remain anonymous and/or confidential.

Following the publication of the summary of contributions to this public consultation, an update of the guidelines on the exemption of new interconnectors and the access of new exempted interconnectors to the public electricity transmission system will be published on CRE's web site.