SINGLE ASSET INTERCONNECTORS: REGULATORY ISSUES AND RECENT CASE LAW

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Abstract

Interconnectors are the 'hardware' of the integration of the European electricity markets. Whilst historically developed and operated by national or regional TSOs, there is an increase in single asset interconnectors sponsored, developed and operated by other parties (single asset transmission system operators, "SITSOs"). Yet, EU legislation regarding interconnectors is often not geared towards the specific structural differences and challenges of SITSOs. This article explores some of the regulatory issues encountered by SITSOs in light of two recent judgments by the European Court of Justice and attempts a brief outlook towards the future of such interconnectors in the EU.

1 Introduction

Throughout her career, Martha has focussed on the development of the European energy market and the evolving shape of the same. She has been a sharp and insightful legal com-

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mentator of the liberalisation and simultaneous integration of the European internal energy market over the years.

Even before I met Martha, her writings on the (then beginning) liberalisation of the European energy markets were recommended to me in the early 2000s as an introduction to European energy law. I have known Martha for nearly 20 years, first, as the formidable instigator and organiser of the European Energy Law seminar which I first attended as a then newly qualified solicitor to start my journey into European energy law. Subsequently, Martha kindly agreed to supervise my PhD thesis. Little did she know at the time that this would turn out to be a long-term commitment! Martha is famously demanding of her students, yet she has also been very supportive of my various academic endeavours over the years and had an open ear to talk through any challenges which arose in the context of my research or my attempt to combine work in private practice and academia.

In this chapter, I will outline some issues pertaining to the 'hardware' of European energy market integration, i.e. cross-border infrastructure. In particular, I will consider the role of single asset interconnectors developed by sponsors other than the relevant national or regional transmission system operator ("TSO") and the regulatory challenges associated with such interconnector projects as reflected in recent case law and attempt an outlook towards the future of such interconnectors in the EU.

2 The Role of and Support for Interconnectors in the Internal Energy Market

Electricity interconnectors are key to the completion of the internal energy market, contributing to security of supply, cross-border trade and the development of renewable energy generation. Today, electricity interconnectors are also an increasingly attractive asset class for private sponsors and investors – not only in the United Kingdom, where non-TSO sponsored and developed interconnectors are a common occurrence, but also in jurisdictions such as Germany (Neuconnect)[2] and Italy (Savoia – Piemonte)[3].

However, historically, electricity interconnection capacity has largely relied on development by national or, in jurisdictions with several TSOs, regional, incumbent TSOs (ie, TSOs which operate one of the transmission grids to which an interconnector connects)

2 https://neuconnect-interconnector.com/ This interconnector project is currently in the planning and financing stage of its development.

3 For the somewhat complex arrangement to allow for non-TSO private investors to participate in this interconnection project, see also the relevant exemption decision by the European Commission, available here: https://ec.europa.eu/energy/sites/ener/files/documents/2020_piemonte-savoia_decision_en.pdf. This project is currently in the construction phase.

connecting the territory of their jurisdiction with another. By contrast, there are only a few sub-sea, direct current electricity interconnectors developed by private, non-incumbent developers in Europe that have commenced construction or are in operation as at the time of writing.[4]

Development activity of new interconnection projects by incumbent TSOs is limited by the pool of capital to which the relevant TSOs have access (noting that their interconnector projects are often balance-sheet financed), as well as by the internal resources available (for example in terms of the number of staff and their experience).[5]

So far, the investment made by incumbent TSOs has not been sufficient to meet the EU requirements for the volume of interconnection.[6] Consequently, private investment from non-TSO companies in electricity interconnectors has the potential to benefit EU consumers by bringing innovation, new skills and new sources of capital into a sector that has, for the most part, been dominated by incumbent TSOs and to complement the investments made by the incumbent TSOs in delivering the necessary volume of interconnection in the EU.[7]

According to a study prepared for the Commission,[8] the potential increase in social welfare from fully integrating Europe's electricity markets could be in the range of €16 billion to €43 billion annually by 2030, depending on the extent to which Europe's generation portfolio is optimised; the development of adequate interconnector capacity; and

4 In addition to the Savoia- Piemonte interconnector, the 500MW Moyle Interconnector between Scotland and Northern Ireland, the 1000MW ElecLink interconnector between Great Britain and France and the 350MW EstLink 1 Interconnector between Estonia and Finland fall into this category. See particulars of sub-sea, direct current, cross border, electricity interconnectors in the EU that are either in operation or in construction in Annex A.3. The Baltic Cable interconnector between Sweden and Germany is a special case in that it is ultimately 100% owned by the state-owned Norwegian company Statkraft Asset Holding AS. Due to uncertainties around projects that have not yet commenced construction, such projects have been excluded from this analysis.

5 EWEA, 'Financing cross-border electricity infrastructure – why public money is needed', http://www.ewea.org/fileadmin/files/library/publications/research-notes/120229_EWEA_briefing_on_financing_cross_border_infrastructure.pdf.

6 Bernard Energy, 'ACER's Recent "AQUIND Decision": How it may jeopardize the realization of the internal energy market', http://bernardenergy.com/wp-content/uploads/woocommerce_uploads/2018/10/2018-10-10_ACER%E2%80%99S-RECENT-%E2%80%9CAQUIND-DECISION%E2%80%9D.pdf.

7 Adina Valean, No chance of meeting EU renewable goals if infrastructure neglected, https://euobserver.com/opinion/142922.

8 Booz & Co. (2013). Benefits of an integrated European energy market. Retrieved from the European Commission website: https://ec.europa.eu/energy/sites/ener/files/documents/20130902_energy_integration_benefits.pdf.

the extent to which demand response mechanisms are applied across the electricity system.

Reflecting the importance and potential benefits of electricity interconnectors, the European Council has set targets to achieve 10% electricity interconnection by 2020 and 15% by 2030.[9] In 2016, an electricity interconnector expert group (the "Expert Group") was established to provide the Commission with technical advice on reaching these targets. In its first report, "Towards a sustainable and integrated Europe" published in November 2017,[10] the Expert Group concluded that "the socio-economic value of electricity interconnectors stems from their ability to increase the efficiency of the electricity systems by reducing the costs of meeting electricity demand and in parallel improving security of supply and facilitating […] the cost effective integration of the growing share of renewable energy sources".[11] Interconnectors are therefore a crucial 'hardware' component of Europe's energy transition. The Expert Group also suggested that options for further interconnectors should be urgently investigated in countries where nominal transmission capacity of interconnectors is below 30% of peak load or below 30% of installed renewable generation capacity.[12]

The European legislators have over time recognised that interconnector projects are capital intensive, complex and often high-risk projects to implement and have provided for a number of regulatory support mechanisms for such projects.

These support mechanism include:

1. The award of the status of "Project of Common Interest" ("PCI") pursuant to Regulation 347/2013 (the " TEN-E Regulation)[13] which seeks to ensure the timely develop-

9 (i) Outcome of the October 2014 European Council: https://data.consilium.europa.eu/doc/document/ST-169-2014-INIT/en/pdf; and (ii) COM(2014) 330, Communication from the Commission to the European Parliament and the Council, dated 28.5.2014: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0330&from=EN

10 Report of the Commission Expert Group on electricity interconnection targets: https://ec.europa.eu/energy/sites/ener/files/documents/report_of_the_commission_expert_group_on_electricity_interconnection_targets.pdf

11 Ibid, footnote 10, page 10

12 Towards a sustainable and integrated Europe Report of the Commission Expert Group on electricity interconnection targets, November 2017, page 7: https://ec.europa.eu/energy/sites/ener/files/documents/report_of_the_commission_expert_group_on_electricity_interconnection_targets.pdf.

13 Regulation (EU) No 347/2013 of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, available here: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0347&from=en

ment and interoperability of trans-European energy networks by promoting the development of PCIs. The award of PCI status enables project promoters to (a) take advantage of a streamlined, coordinated and accelerated permit granting process;[14] (b) submit an investment and cross-border cost allocation request to the relevant national regulatory authorities ("NRAs") to ensure that efficiently incurred investment costs are recoverable from networks users;[15] and (c) apply for funding from the Connecting Europe Facility ("CEF").[16] The PCI list is updated every two years,[17] and, in order to be included on the list, projects at present seem to require the support of the Member States whose grids they are proposing to connect.[18]

2. As mentioned above, PCIs have the opportunity to submit an investment request and cross-border cost allocation ("CBCA") pursuant to Article 12 TEN-E Regulation. If such a request is granted, the relevant decision will allocate the costs of the relevant interconnection projects between the TSOs of the relevant EU- Member State and also designate a regulatory incentive regime for the relevant project.
3. Since the adoption of the Electricity Regulation in 2003,[19] it has been possible for sponsors of new interconnectors to apply for an exemption from various regulatory provisions. Pursuant to the currently applicable version of the Electricity Regulation of 2019 (the "ElReg 2019")[20], it is possible, according to article 63 ElReg 2019, to apply for an exemption from the regulatory provisions pertaining to the treatment of congestion charges, third party access, the unbundling regime, and the need for NRA approved tariffs, provided that a set of six conditions specified pertaining, broadly, to the risk associated with, and the competition and supply security of, the relevant interconnector project, is met.

Whilst the above regulatory support mechanisms are in principle and de jure available to interconnector projects (provided always they meet the relevant criteria), promoters

14 See Chapter III of the TEN-E Regulation

15 Article 12 of the TEN-E Regulation

16 For more information on the Connecting Europe Facility, please see also: https://ec.europa.eu/inea/en/connecting-europe-facility/cef-energy/cef-energy-projects-and-actions

17 Article 3(4) of the TEN-E Regulation

18 The question as to whether the PCI list is a matter for the Member States or the Commission to decide is currently the subject of ongoing litigation, see: Aquind Ltd and Others v European Commission, Case T-885/19, available at: https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=T-885/19&jur=T

19 Article 7 of Regulation (EC) No 1228/2003 of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity,https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R1228&from=EN

20 Regulation (EU) 2019/943 of 5 June 2019 on the internal market for electricity, available here:

(typically non-incumbent TSOs) of single asset interconnectors (ie, interconnectors which are the sole transmission asset of the relevant sponsors and which are developed separately from the relevant national grid TSOs) face more difficulties than established TSOs not only to avail themselves of the relevant incentives and support mechanisms, but also to apply the regulatory regime for TSO-sponsored interconnectors. This is due to the implicitly underlying assumption for both the EU-level and national regulatory regimes for interconnectors that such projects are being developed by incumbent national or regional TSOs and that only such TSOs will benefit from the relevant congestion income.

Such difficulties were evidenced in two recent decisions by the Court of Justice of the European Union (the "Court") in relation to Baltic Cable interconnector as well as the planned Aquind interconnector. In the following section I shall summarise the relevant facts and issues arising from the relevant judgments.

3 Baltic Cable

1. Baltic Cable is a subsea high-voltage direct current interconnector linking Lübeck in Germany and Kruseberg in Sweden which has been in operation since 1994.[21]
2. The case[22] considered by the Court following two decisions concerning Baltic Cable AB by the Swedish national regulatory authority Energimarknadsinspektionen (the Energy Markets Inspectorate, "EMI") in front of the Administrative Court of Linköping (the "ACL"), concerning the use of revenues, resulting from the allocation of capacity on the Baltic cable interconnector pursuant to Article 16(6) of Regulation (EC) No 714/2009 (the "ElReg 2009")[23] since its congestion revenues represent around 70% of its revenues.
3. By way of background, the EMI had, in its decision of 9 June 2016, Article 16(6), requested that Baltic Cable place its congestion revenues (ie revenues resulting from the allocation of capacity on the interconnector) for the periods from 1 July 2013 to

21 For more details about this interconnector, see: https://balticcable.com/

22 C-454/18 Baltic Cable AB v Energimarknadsinspektionen, Judgment of the Court of Justice of the European Union (Third Chamber) of 11 March 2020, available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=D787FFB71EBEED828F0D5B1698D75D28?text=&docid=224342&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1565747

23 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, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex-%3A32009R0714

30 June 2014 and from 1 July 2014 to 30 June 2015, in a separate internal account line until such time as the company could use the revenues to guarantee the actual availability of the allocated capacity and/or to maintain or increase interconnection capacities through network investments, in particular in new interconnectors.

4. Baltic Cable requested that it be permitted to use its congestion revenues as revenues which should be taken into account by the EMI when approving the method for calculating network access tariffs and/or fixing those network tariffs. On 2 November 2017, the EMI refused Baltic Cable's request.
5. Baltic Cable brought an action against both EMI decisions before the ACL who in turn submitted a request for a preliminary ruling to the Court.

In its claim before the ACL, Baltic Cable argued that Article 16 could not apply to it as it applied only to TSOs within the meaning of Article 2(4) of Directive 2009/72, and entities which merely operate an interconnector. In the alternative, Baltic Cable argued that if Article 16 were to apply to single asset interconnector operators such as Baltic Cable, then Article 16(6) must be construed as meaning that companies merely operating an interconnector are free to dispose of the congestion revenues resulting from the interconnector in which they have invested. Further, Baltic Cable argued that the EMI's decisions failed to take account of the "principle of proportionality by disproportionately impairing Baltic Cable's ability to pursue its business and by undermining the objectives pursued by [ElReg 2009] to effectively maintain interconnection capacity."[24]

By contrast, the EMI argued that (a) Article 16 (6) applied to Baltic Cable and, (b) whilst it recognised that Baltic Cable's position was such that the application might have difficult and disproportionate consequences, it did not have the authority to interpret 16 (6) *contra legem*.

Given that the case raised questions of interpretation and validity of EU law, the ACL referred the question as the applicability of Art 16 (6) to Baltic Cable (and, by implication, single asset interconnectors generally) to the Court for a preliminary ruling. In addition, the ACL requested that the Court clarify whether an undertaking which merely operates an interconnector is a TSO.

In its judgment, the Court held that Article 16(6) must be interpreted as applying to an undertaking which merely operates a cross-border interconnector. It also held that when a transmission company merely operates a single cross-border interconnector, the relevant company is a TSO[25] but that the operation and maintenance costs of the relevant

24 Paragraph 25 of the Baltic Cable Judgment, see footnote 21

25 For ease of reference, I shall refer in the remainder of this article to such TSOs as single interconnector TSO or "SITSO".

interconnector cannot be regarded as network investments to maintain or increase interconnection capacities within the meaning of that provision.

The Court also held that the second subparagraph of Article 16(6) must be interpreted as meaning that, when an NRA applies that provision to a SITSO, it is for that authority to authorise that interconnector to use part of its congestion revenues to make a return as well as for the operation and maintenance of the relevant interconnector, in order to prevent it being discriminated against by comparison with other, classical, TSOs concerned and to ensure that it is in a position in which it is able to carry out its activity in financially acceptable conditions, including making an appropriate profit.

This is effectively a recognition of the structural differences between the classical TSOs which operate a national or regional grid as well as one or more interconnectors and SITSOs.

In recognising this difference, the Court also implicitly acknowledged that the existing European regulatory framework for TSOs is not prima facie suitable for SITSOs as it was designed for incumbent, often State-owned national or regional TSOs and did therefore not recognise the different challenges and needs of SITSO and developers of SITSO, who will often need to project finance their interconnector projects.

4 The Case of Aquind

Aquind is a planned 2GW HVDC subsea electricity interconnector that is being developed between the south coast of England and Normandy in France.

In May 2017, Aquind submitted an application to the national regulatory authorities of France (CRE) and the UK (Ofgem) for an exemption pursuant to Article 17 EIReg 2009 (the "Exemption Request"). As CRE and Ofgem were unable to reach a joint decision regarding the Exemption Request, they referred the decision to ACER in December 2017. By way of further background, and separately to the Exemption Request, Aquind obtained PCI status in April 2018 in the Third PCI List.[26]

ACER refused the application in June 2018, on the basis that the condition laid down in Article 17(1)(b) EIReg 2009 was not met. This condition stipulates that "*the level of risk attached to the investment is such that the investment would not take place unless an exemption is granted*". In its decision, ACER considered that as a PCI, Aquind was entitled to request an investment and cross-border cost allocation ("CBCA") pursuant to Article 12 TEN-E Regulation and that an exemption was therefore not necessary in order for the

26 See https://ec.europa.eu/energy/sites/ener/files/documents/annex_to_pci_list_final_2017_en.pdf for the full list.

investment to take place. ACER emphasised that a regulated regime should be the norm for interconnectors and that exemptions should only be granted in exceptional circumstances.

Aquind appealed this decision to ACER Board of Appeal ("BoA") without success – in October 2018 the BoA upheld the ACER decision and refused the request for an exemption. In December 2018 Aquind appealed the decision of the BoA to the Court.

In November 2020, the Court, in Case T-735/18,[27] annulled the BoA decision finding in favour of Aquind. In its decision, the Court considered both procedural matters pertaining to the scope of the BoA as well as substantive matters pertaining to the relationship between a possible regulated route pursuant to Article 12 TEN-E Regulation and the exempt route pursuant to Article 17 EIReg 2009. For the purposes of this article, I shall summarise the relevant substantive issues in relation to the relationship of hierarchy (if any) between Article 17 EIReg 2009 and Article 12 TEN-E Regulation.

In this regard, the Court held that:

1. while the possibility of funding under Article 12 TEN-E Regulation may be a relevant criterion for determining the level of risk attached to the investment, that criterion cannot constitute a separate condition which must be satisfied in order to obtain an exemption. To that effect, the absence of a prior request for financial support under Article 12 TEN-E Regulation for a PCI cannot, in itself, constitute a ground for concluding that the risk attached to the investment was not demonstrated; and
2. there is no legislative provision which permits the inference that the legislature accorded priority to one scheme over the other.

Furthermore, the Court confirmed that it is apparent from the wording of the relevant Articles that promoters, where a project has PCI status, have the freedom to choose between requesting a CBCA pursuant to Article 12 TEN-E Regulation or to request an exemption pursuant to Article 17 EIReg 2009. The judgment expressly notes that "*the two schemes may be applied in the alternative*" and that "*promoters have the freedom to choose between the applicable procedures*".[28]

Therefore, the BoA had wrongly established an additional condition for an exemption which is not laid down in Article 17(1) EIReg 2009.

The fact that a regulated route pursuant to the TEN-E Regulation is itself a risk was also apparent during the period between Aquind's application to the Court and the

27 Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018TJ0735

28 See paragraph 106 of the Aquind Judgment, see footnote 26

judgment being given, as Delegated Regulation (EU) 2020/389[29], did not include Aquind in the PCI list applicable from 2020 – 2022, which meant that Aquind would no longer be eligible for a CBCA. This was further demonstrated by the fact that CRE suspended work on the investment request Aquind had made pursuant to Article 12 TEN-E Regulation in order to mitigate its regulatory situation as soon as Aquind had lost its PCI status.[30]

The Court's judgment as to the relationship between the possibility of a CBCA pursuant to Article 12 of the TEN-E Regulation or an exemption pursuant to Article 17 EIReg 2009 (now Article 63 EIReg 2019) provides clarity to project promoters as to the regulatory support available to them. SITSOs especially will benefit from this clarification as they are more likely than incumbent TSOs to need to rely on an exemption to realise their interconnector projects, given that incumbent TSOs are more likely to be able to rely on their national regulatory regime for support for their interconnector projects.

This is supported by the fact that, with the exception of the BritNed exemption granted in 2007,[31] all exemptions pursuant to 17 ElReg 2009 (or Art 63 ElReg 2019, as the case may be) were granted to planned SITSOs or such interconnectors developed by incumbent TSOs with a significant (part-) ownership or capital contribution by non-TSO companies.[32]

By contrast, there are no examples of planned SITSOs, but multiple examples of TSO-sponsored interconnectors, successfully submitting an investment request and obtaining a cross-border cost allocation pursuant to Article 12 TEN-E Regulation.[33]

ACER has appealed the Court's judgment; at the time of writing, the appeal is pending with a hearing expected in 2022.

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29 Commission Delegated Regulation (EU) 2020/389 of 31 October 2019 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest, available here: https://ec.europa.eu/energy/sites/ener/files/c_2019_7772_1_annex.pdf

30 Information relayed by Aquind to the author.

31 Available here: https://ec.europa.eu/energy/sites/ener/files/documents/2007_britned_decision_en.pdf

32 The full list of exemption decisions pursuant to Article 17 ElReg 2009 and Article 63 ElReg 2019 is available here: https://ec.europa.eu/energy/sites/default/files/documents/exemption_decisions2018.pdf

33 See, for instance, https://www.cru.ie/wp-content/uploads/2019/01/CRU18265-Celtic-Interconnector-CRU-assessment-of-the-Celtic-investment-request-Consultation-Paper.pdf

5 Conclusion and Outlook

1. There are structural differences between classical TSOs and SITSOs which mean that the "one size fits all"[34] approach of the current regulatory regime is not suitable for SITSOs.
   In order to unlock the investment potential for SITSOs (and therefore the achievement of the EU interconnection targets), the EU regulatory regime for interconnectors needs to be adapted to reflect these differences appropriately – developers and operators of SITSOs should not need to have to rely – often lengthy- court proceedings to obtain an appropriate regulatory settlement.
2. The recognition of SITSOs as TSOs will be helpful and confer additional rights, such as full membership in ENTSO-E (which in turn will result in SITSOs having a seat at the table when it comes to, for instance, the Ten-Year- Network Development Plan by ENTSO-E or the further development of European network codes).
3. An additional issue that will need to be addressed is the PCI process – at present, it is awarded every two years in a complex decision-making process. As demonstrated in the case of Aquind, the award of PCI status is too precarious and, given the involvement of Member States national governments in the decision-making process, politically charged to serve as foundation for an interconnector's regulatory status.
4. Both the Baltic Cable and the Aquind cases will help strengthen the position of SITSOs which in turn will contribute to enabling a wider pool of possible investors and interconnector sponsors, which in turn will help build out interconnector capacity in Europe and meet the EU's interconnection targets. The willingness of non-TSO companies to invest in interconnectors is certainly strong – as a briefing by the MUFG bank of August 2020 demonstrates.[35]

In short, there is plenty of potential for more SITSOs contributing towards the EU interconnection target – but some adjustments of the regulatory framework to cater for their particular characteristics will be required.

34 On this perspective, see also the podcast commentary by Leigh Hancher of the Florence School of Regulation, available at: https://fsr.eui.eu/the-baltic-cable-case/

35 "Financing Electricity Interconnectors and offshore transmission in the EMEA region", Briefing August 2020, available at: https://www.mufgemea.com/images/mufg/202008_Interconnectors.pdf