Hornsea Project Four

Platform Repurposing: Transfer of Regulation

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Revision Summary

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Revision Change Log

Rev	Page	Section	Description
01	NA	NA	Submitted at Deadline 7

1 Foreword

1.1.1.1 The advice note enclosed with this submission has been prepared by Pinsent Masons LLP.

1.1.1.2 The note considers the regulatory framework for the transfer of an oil and gas platform jacket, including decommissioning liabilities, from the oil and gas regime to the offshore wind regime. It concludes that, with some input from the relevant Government departments, this would be possible.

1.1.1.3 In addition to the regulatory transfer of the asset, there would also be a transfer of ownership.

1.1.1.4 At paragraph 1.3.4 (c) of the advice note from Pinsent Masons, to effect the transfer it is envisaged that there would be a sale of the jacket to the Applicant.

1.1.1.5 There are various ways to structure the ownership of such infrastructure and the likely approach is that Alpha and Energean (the current owners of the Wenlock platform) will sell the platform to the Applicant.

1.1.1.6 All liabilities for decommissioning would be transferred to the Applicant and therefore delayed until a later date in the future.

1.1.1.7 The Parties current thinking is that it may be sensible that this is dealt with via an Option Agreement (call option in favour of the Applicant) subject to discharging the third-party approvals which are required and would be listed as conditions.

1. INTRODUCTION AND OVERVIEW

1.1 Orsted Hornsea Project Four Limited (**Orsted**) is developing the Hornsea Project Four Offshore Wind Farm (**Hornsea Four**) which will be located off the coast of the East Riding of Yorkshire in the southern North Sea. Hornsea Four will comprise an offshore wind generating station (turbines and array cables), plus offshore and onshore transmission infrastructure.

1.2 As part of the development consent order (**DCO**) application for Hornsea Four, Orsted is proposing the repurposing of an existing oil and gas jacket to provide an artificial nest structure to compensate for potential impacts from Hornsea Four on kittiwake.

1.3 This note considers whether the regulation of the jacket, including decommissioning liabilities, could be transferred from the oil and gas regime to the offshore wind regime. It concludes that, with some input from the relevant Government departments, this would be possible.

Summary

1.3.1 Works for repurposing could be regulated via the marine licensing regime under the Marine and Coastal Access Act 2009 (**2009 Act**), as with works required for any new structure (i.e. not repurposed).

1.3.2 The jacket could fall within the definition of “renewable energy installation” for the purposes of the Energy Act 2004 (**2004 Act**) and therefore its provisions regulating decommissioning could apply.

1.3.3 The marine licence could be conditioned to require decommissioning, with or without reference to the decommissioning programme under the 2004 Act.

1.3.4 To effect the transfer, certain steps would require to be undertaken in respect of the jacket under (1) the oil and gas decommissioning regime and (2) the offshore wind regime, however, we believe it is possible to interpret the current legislative frame-work to give effect to that:

(a) Approval by the Offshore Petroleum Regulator for Environment and Decommissioning (“**OPRED**”) to an amendment to any approved Statutory Decommissioning Programme to remove the jacket from that Statutory Decommissioning Programme;

(b) Amendment of the existing S.29 Notices issued under the Petroleum Act 1998 on the current licencees to disapply those notices in respect of the jacket (this may not be required if the Statutory Decommissioning Programme has already been approved, in which case all stakeholders may agree that its amendment only is sufficient – to be explored further);

(c) Sale of the jacket to Orsted; and

(d) As a condition to that sale, confirmation would be required that the use (including modifications) and decommissioning of the jacket would, from completion of the sale, be governed by the marine licensing / Energy Act 2004 regime (including with regards to the provision of security for decommissioning costs).

1.3.5 A derogation from OSPAR Decision 98/3 would not be required as Orsted is not seeking to retain the jacket in situ in perpetuity.

1.3.6 These steps are explored in more detail in the sections below.

2. REGULATION OF REPURPOSED ASSET VIA THE OFFSHORE WIND REGIME

Requirement for a marine licence

2.1 The marine management organisation (**MMO**) is the competent authority to grant marine licences pursuant to the 2009 Act.

2.2 A marine licence is required to carry out licensable marine activities in the UK marine licensing area (which includes the Exclusive Economic Zone). Marine licensable activities (s66) include:

"To construct, alter or improve any works within the UK marine licensing area either: (a) in or over the sea, or (b) on or under the sea bed."

2.3 It could therefore be competent for the MMO to grant a marine licence to allow works to be carried out for repurposing, and subsequent maintenance.

2.4 We do not consider s77(1) of the 2009 Act (which disapply the marine licensing regime in certain circumstances to oil and gas activities) to necessarily preclude the application of the marine licensing regime as:

2.4.1 The works will not be done in the course of carrying out an activity which is licensed under the Petroleum Act 1998 and so s77(1)(a) does not apply;

2.4.2 It is possible to interpret s77(1)(c) of the 2009 Act and s44 of the Petroleum Act 1998 together so that the works are not regarded as "for the purpose of establishing or maintaining an offshore installation" within the meaning of Part 4 of the Petroleum Act 1998 and so s77(1)(c) would not apply;

2.4.3 S77(1)(b) and (d) are not relevant as they relate to pipelines and gas/carbon storage.

2.5 If a marine licence is granted, the MMO could attach conditions to the licence to regulate and require decommissioning. S71(3)(d) and (e) of the 2009 Act provide that marine licence conditions can include conditions:

"(d) for the removal, at the end of a specified period, of any object or works to which the licence relates;

(e) for the carrying out, at the end of a specified period, of such works as may be specified for the remediation of the site or of any object or works to which the licence relates"

2.6 The MMO would also have the power to require security for decommissioning costs as a condition of the marine licence via the broad scope of its broad "incidental powers" as provided for in s31 of the 2009 Act:

"(1) The MMO may do anything which appears to it to be incidental or conducive to the carrying out of its functions or the achievement of its general objective.

(2) In particular, the MMO may—
(a) enter into agreements;
(b) acquire or dispose of land or other property;
(c) subject to the restrictions imposed by sections 33 and 34, borrow money;
(d) subject to the approval of the Secretary of State, form bodies corporate or acquire or dispose of interests in bodies corporate;
(e) accept gifts;
(f) invest money"

2.7 As such, there is a functioning regime which could regulate works to and maintenance of the jacket following its transfer.

Energy Act 2004 regime

2.8 The decommissioning of the jacket could also fall within the 2004 Act regime, which will regulate the decommissioning of the Hornsea Four wind farm structures (e.g. turbines).

2.9 Section 105(2) of the 2004 Act permits the Secretary of State to require by notice the submission of a decommissioning programme for a "relevant object".

2.10 A "relevant object" means the whole or part of (a) a renewable energy installation; or (b) an electric line that is or has been a related line (s105(10)).

2.11 "Renewable energy installation" includes (s104):

"an offshore installation used for purposes connected with the production of energy from water or winds"

….

(5) The purposes referred to in subsection (3)(a) include, in particular—
(a) the transmission, distribution and supply of electricity generated using water or winds; and
(b) the doing of anything (whether by way of investigations, trials or feasibility studies or otherwise) with a view to ascertaining whether the generation of electricity in that manner is, in a particular case, practicable or commercially viable, or both

2.12 A key criterion for the jacket to fall within the definition of "renewable energy installation" is that the installation is, was or is to be used for purposes connected with the production of energy from water or winds. It is notable that the list of "purposes" in s104(5) is not exhaustive.

2.13 If granted, it is anticipated that the Hornsea Four DCO will include a condition which will prevent operation of the Hornsea Four wind turbines (and thus the production of energy from winds) until an artificial nest structure has been constructed/repurposed.

2.14 As such, the artificial nest structure can reasonably be said to be "for a purpose connected with the production of energy from…winds" and therefore to fall within the definition of a renewable energy installation.

2.15 The well-established provisions of Chapter 3 of the Energy Act 2004 would therefore apply to regulate the asset's decommissioning, as it would with the other Hornsea Four infrastructure. Orsted would inform the Secretary of State that it has become responsible for the jacket pursuant to s112 of the Act. The Secretary of State could therefore require a decommissioning programme for the jacket to be submitted, and security to be provided to secure compliance with the programme and its conditions (s105 and s106(4)). The security can be in the form of a deposit of money, performance bond or guarantee or letter of credit (amongst others) (s114(2)).

2.16 In those circumstances, a marine licence would still be required to carry out licensable activities to repurpose the structure, and we would expect a standard condition attached to the licence as follows:

> *"This licence remains in force until the authorised project has been decommissioned in accordance with a programme approved by the Secretary of State under section 106 (approval of decommissioning programmes) of the 2004 Act, including any modification to the programme under section 108, and the completion of such programme has been confirmed by the Secretary of State in writing."*

2.17 This form of condition or similar is commonplace in deemed marine licences granted as part of the DCO process and subsequently regulated by the MMO.

3. TRANSFER OF DECOMMISSIONING LIABILITIES FROM O&G REGIME

Key Steps

3.1 We believe that the following steps would be required in order to effect the transfer of the jacket's decommissioning liability to Orsted (and regulation of the same under the Marine Licensing and Energy Act regimes). Some or all of these steps could potentially be set out as conditions in the sale and purchase agreement for the sale of the jacket to Orsted:

3.1.1 Approval by OPRED to an amendment to any approved Statutory Decommissioning Programme to remove the jacket from that Statutory Decommissioning Programme (with possibly a statement within that amended Statutory Decommissioning Programme that the jacket is to be re-purposed for use in Hornsea Four);

3.1.2 Amendment of the existing S.29 Notices issued under the Petroleum Act 1998 on the current licencees for the 'installation', to remove their application to the jacket (this may not be required if the Statutory Decommissioning Programme has already been approved, in which case all stakeholders may agree that its amendment only is sufficient – to be explored further);

3.1.3 Issuing of the marine licence to apply to the jacket by the MMO – we would anticipate that this licence would attach the standard condition as to decommissioning noted at para 2.16 above; and

3.1.4 The jacket being considered a "renewable energy installation" for the purposes of the 2004 Act, and liable to the provision of a decommissioning programme and security to the Secretary of State on request (as with the other wind farm structures e.g. turbines).

3.2 We do not believe that it would be necessary (or desirable) to transfer the relevant petroleum licences to Orsted in order to effect a transfer of the jacket.

Orsted continuing liability under Petroleum Act 1998

3.3 Given that Orsted would become the owner of the jacket (and would therefore fall within S.30(1) (d) of the Petroleum Act 1998), we do not see a legislative barrier to OPRED being entitled to serve a S.29 Notice on Orsted. However OPRED may be comfortable in not serving a S.29 Notice on Orsted, given:

3.3.1 the decommissioning of the jacket will additionally be regulated by the Marine Licensing / Energy Act regime (and as noted above, Orsted could be required to provide the Secretary of State and/or the MMO with decommissioning security - we understand from Orsted that on other projects Orsted has provided this security via a guarantee);

3.3.2 OPRED would, should it become necessary in the future, be able to then serve a S.29 Notice on Orsted in relation to the jacket.

3.4 If OPRED were able to take comfort from 3.3.1 and 3.3.2, this would provide Orsted (and any other developers who may also wish to repurpose oil and gas infrastructure in this way) with clarity as to which decommissioning regime applies in practice to the repurposed infrastructure – e.g. if Orsted is not served with a S.29 Notice, Orsted will not have to submit a costed decommissioning programme for the jacket to OPRED and will focus on the requirements of the Marine Licensing / Energy Act regimes, however OPRED can take comfort in the fact that if Orsted failed to satisfy the requirements under the Marine Licensing / Energy Act regime, OPRED could then attach liability to Orsted for decommissioning the jacket through serving a S.29 Notice on Orsted).

3.5 For completeness, it should be noted that a derogation under OSPAR Decision 98/3 is only relevant if Orsted is seeking to have the jacket retained in situ in perpetuity. That is not the case, and thus a derogation under the OSPAR Decision 98/3 is not relevant to the transfer, ongoing regulation or decommissioning of the jacket.

3.6 It is likely that the Hornsea Four DCO will permit Orsted to remove the jacket with the consent of the Secretary of State, subject also to receiving necessary consents to authorise the removal works.

Under the existing oil and gas regulatory framework the jacket could only be decommissioned with the consent of the Secretary of State, and so there would be no substantive change.

20 April 2022 and updated on 6 May 2022

Pinsent Masons LLP