



Ministry  
of Defence



Government  
Legal Department

Ministry of Defence  
Main Building  
Whitehall  
London SW1A 2HB  
United Kingdom

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Department for Energy Security and Net Zero  
3-8 Whitehall Place,  
London,  
SW1A 2EG

Attention: David Wagstaff, Head of Energy Infrastructure Planning.

Herbert Smith Freehills  
Exchange House  
Primrose Street  
London  
EC2A 2EG

Attention: [REDACTED] Senior Associate.

7<sup>th</sup> June 2024

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Dear Sirs

**AQUIND Application for Development Consent Order in respect of electricity interconnector  
Department for Energy Security and Net Zero (DESNZ) letter of 16<sup>th</sup> May**

In general, the Ministry of Defence (MOD) is content with the proposed process. However, we would like to see a number of changes. Herbert Smith Freehill's (HSF) letter of 24<sup>th</sup> May is also noted. And we comment on that below.

1. In relation to paragraph 4(c), the process needs to be more specific in relation to the clearance required by the representative appointed (the Appointed Representative) by the Attorney General. We suggest for further clarity that:
  - a. the Appointed Representative should be developed vetted.
  - b. the process should provide for the Attorney General/Attorney General's Office ("AGO") to consider any views the MOD may have on security clearance, submitted direct to the AGO alone. We consider that if the MOD has any further views the Appointed Representative should be able to see these after appointment.
2. The process should clarify that the Appointed Representative must not communicate with the applicant or any of their advisers directly or indirectly after they have viewed MOD's closed representations.
3. In relation to paragraph 4(d), issues may require an iterative process. We consider:

- a. this paragraph should reflect that when the parties provide information to the Secretary of State, they may do so on the basis that if the information is insufficient for her to make a decision, this will be signalled to the parties with an opportunity to offer up more information.
  - b. That the applicant or its Appointed Representative would be allowed to have the final word in the process of making representations; or to confirm it has nothing further to add.
4. The MOD and the Appointed Representative under para 4(c) should be permitted to see a draft of the Secretary of State's decision before it is finalised to ensure that MOD can ensure that there are no national security concerns with the wording of the decision. It is not sought that this be an opportunity to make further representations, although MOD does consider the Secretary of State may if this was desired, and subject to the views of all parties, consider whether in the highly unusual circumstances of this case, indicate a "minded to" decision with a final opportunity for comments to the Secretary of State.

**Herbert Smith Freehills letter 24 May 2024**

5. We have been taken by surprise by the expansive scope of HSF's 8-page letter, and their suggestion that we presently comment on the same. In order to arrive at a process, it will be necessary to reach agreement or possibly have another round of representations on any revisions to the proposed process that DESNZ consider appropriate. This is a necessarily iterative process. Ultimately it is for DESNZ to determine. We do not therefore seek to comment on every matter raised, which is impracticable in the time available to us. At the current time, we would indicate:
- a. The caselaw references are noted. Any matter is subject to its context. National security is to be considered in the particular context of this application. That defence or national security interests are a proper concern is also reflected throughout NPS-EN1, see e.g. 3.3.63, 4.16 (generally, and including in particular 4.16.1, 4.16.2, 4.16.4, 4.16.5), 5.5.59, 5.5.60. Specifically, 4.16.9 provides:
 

*4.16.9 In exceptional cases, where examination of an application would involve public disclosure of information about defence or national security which would not be in the national interest, the examination of that evidence may take place in a closed session as set out under Examination Procedure Rules.*
  - b. It is contrary to, or would be likely to be contrary to, defence or national security interests to set any requirements for any matters to be confirmed or denied as a matter of procedure in open in the manner suggested by HSF for example in paragraphs 1.6, 1.9.2, 1.9.3, 1.10, 1.11, 1.12. We consider that all and any matters, whether addressed in open or in closed or both, are evidently a matter for submissions and in due course a matter for determination by the Secretary of State for Energy Security and Net Zero, along with whether it is necessary for the material to be dealt with in a closed process. We consider it harms defence or national security for the process to determine otherwise.
  - c. For example, there are real challenges in national security matters through triangulation of information, whereby information which alone may seem to be information which is capable of being disclosed to the public and/or where information alone "*could be dealt with by any means other than a closed process*" but when considered in conjunction with other information, its publication would be contrary to the national interest.
  - d. We have been taken by surprise by the request for "Gateway Representatives" and "Information Representatives". We are considering this carefully. We are not currently convinced that Aquind will require more than a single representative, which reflects section 95A of the Planning Act 2008. It is a principle of national security that sensitive information should be shared on as limited a basis as practicable so we are not in principle supportive of a process which engages more people than are needed.

- e. It seems to us likely that a better route would be to provide for an appropriately qualified legal expert (we prefer the phrase of “Appointed Representative”). The Appointed Representative can consider matters at one or more “Gateway” stages and one or more “substantive” stages, and gives greater flexibility. Noting HSF’s request, it seems to us that the process could well provide for the Appointed Representative to be able to make requests of the Secretary of State for Energy Security and Net Zero which can then be assessed through a process as to whether or not, and if so how, some form of technical or information assistance is required by the Appointed Representative. We would welcome HSF’s views on this and what they envisage such a process to be.
  - f. Our view remains that once any representative has viewed information, there may be no communication with Aquind (1.15).
  - g. Costs (1.19). We do not understand HSF’s comments on costs. It seems to us that the ordinary principles apply; Aquind bears its own costs. It is a matter for DESNZ whether or not it wishes to undertake to pay the fees or make a contribution to the fees of an Appointed Representative.
  - h. Interested Parties (1.20). We wholly agree that as few parties as possible should be involved. We are unaware of why any other interested party would have a genuine reason to see information relevant to defence or national security in this matter.
6. Timescales (section 2).
- a. We note that the original timetable allowed for six weeks from the date when the process was agreed for the MOD to make its representations. This is a reasonable and proportionate time scale and there is no good reason why it needs to be abridged.
  - b. Procedural fairness does not require and is in fact likely to be impeded by an unrealistic timetable. We do not agree with comments in paragraph 3.1 in that respect. In our view the proposed timetable proceeds at such a pace it is impossible for MoD to prepare proper submissions, in particular given the defence and national security sensitivity of these matters. We do not consider the timetable allows for proper consideration and reflection. We consider that discussing and as far as practicable, agreeing a process is important to ensuring procedural fairness in all the circumstances. It is not appropriate for one party to seek to impose an unrealistic timetable on others.
7. Whilst we understand HSF’s desire on behalf of Aquind for a timetable, we do not consider that trying to impose unrealistic timetables on others is appropriate. We do consider that seeking to agree the procedure is an important part of seeking to protect the aims and interests for other parties as far as is reasonably possible.

Yours sincerely

**Ministry of Defence Legal Advisers**  
**Government Legal Department**