



IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1440/7/7/22

BETWEEN:

CLARE MARY JOAN SPOTTISWOODE CBE

Class Representative

- v -

- (1) **NEXANS FRANCE S.A.S.**
(a company incorporated under the laws of France)
(2) **NEXANS S.A.**
(a company incorporated under the laws of France)
(3) **NKT A/S (formerly NKT HOLDING A/S)**
(a company incorporated under the laws of Denmark)
(4) **NKT VERWALTUNGS GMBH (formerly NKT CABLES GMBH)**
(a company incorporated under the laws of Germany)
(5) **PRYSMIAN CAVI E SISTEMI S.R.L.**
(a company incorporated under the laws of Italy)
(6) **PRYSMIAN S.P.A.**
(a company incorporated under the laws of Italy)

Defendants

Case No: 1518/5/7/22

BETWEEN:

- (1) **LONDON ARRAY LIMITED**
(2) **RWE RENEWABLES UK LONDON ARRAY LIMITED (FORMERLY KNOWN AS E.ON CLIMATE & RENEWABLES UK LONDON ARRAY LIMITED)**
(3) **ORSTED LONDON ARRAY LIMITED (FORMERLY KNOWN AS DONG ENERGY LONDON ARRAY LIMITED)**
(4) **ORSTED LONDON ARRAY II LIMITED (FORMERLY KNOWN AS DONG ENERGY LONDON ARRAY II LIMITED)**
(5) **MASDAR ENERGY UK LIMITED**

Claimants

- v -

- (1) **NEXANS FRANCE S.A.S.**
(2) **NEXANS S.A.**

Defendants

ORDER FOLLOWING JOINT CASE MANAGEMENT CONFERENCE

UPON holding a joint Case Management Conference on 22 May 2024 in Case No. 1440/7/7/22 (the “**Spottiswoode Proceedings**”) and Case No. 1518/5/7/22 (the “**London Array Proceedings**”)

AND UPON hearing counsel for the Class Representative, for the London Array Claimants, and for the Defendants

AND UPON the Tribunal having made concurrently herewith an order establishing a regime for the disclosure in the Spottiswoode Proceedings of documents which are (or are claimed to be) confidential (the “**Spottiswoode CRO**”)

AND UPON the Defendants holding a copy of the version of the Commission Decision in Case AT.39610 *Power Cables* (the “**Decision**”), as the same was disclosed in claim number HC-2017-682 (CAT Case 1370/5/7/20 (T)) (the “**Vattenfall Proceedings**”)

AND UPON the Defendants holding copies of the documents on the Commission’s administrative file relating to the investigation in the *Power Cables* case to which they were granted access pursuant to the Notice on access to file OJ C 325 of 22 December 2005, as such documents were disclosed in the Vattenfall Proceedings

IT IS ORDERED THAT:

A. DIRECTIONS FOR TRIAL OF THE ROC ISSUE

(1) Trial listing

1. There shall be a trial of the matters listed in the Annex to this Order (the “**ROC Issue**”).
2. The trial of the ROC Issue shall be listed for hearing on 19-23 May and 3 to 6 June 2025 and shall be attended by the parties to the London Array Proceedings and the Spottiswoode Proceedings (the “**London Array Parties**” and the “**Spottiswoode Parties**” respectively; collectively the “**Parties**”). For the avoidance of doubt, the Tribunal shall not sit in the Whitsun Vacation 2025.
3. The time estimate for the trial of the issues in the London Array Proceedings other than the ROC Issue shall be reduced from four to three weeks, such trial to take place from 29 April 2025 to 16 May 2025.
4. Save as aforesaid, the detailed timetable for the said trials (including arrangements in relation to reading days) shall be considered at a subsequent CMC or at the PTR for which provision is made below.

(2) Disclosure

5. The Parties shall liaise and seek to agree any required categories of non-party disclosure in relation to the ROC Issue, and appropriate custodians of such non-party disclosure, so that joint and/or individual letters can be sent by the Parties to such custodians by 5 June 2024, requesting such disclosure and seeking responses by 5 July 2024.
6. If any of the Parties wishes to make a disclosure application against any Party or non-party, they shall do so by 15 July 2024. To the extent that such applications are unopposed, they shall be determined on the papers. To the extent that they are contested, they shall be heard at a joint CMC listed to take place at 10.30am on 30 July 2024.

(3) Witness statements of fact

7. The Parties shall serve any witness statements of fact in respect of the ROC Issue by 4 October 2024.

(4) Expert evidence

8. The Parties each have permission to rely on their own expert evidence, including that already filed and served in the Spottiswoode Proceedings, in respect of the ROC Issue provided that: (i) only a single expert may be instructed in respect of the ROC Issue by any Parties within the same corporate group; and (ii) the Claimants in the London Array Proceedings shall collectively instruct a single expert. The London Array Parties may rely on evidence from a separate expert to the expert engaged to address the issues in sub-paragraphs 12(a) and 12(c) of the Tribunal's Order made on 26 June 2023 in the London Array Proceedings.
9. Expert reports (including any further expert evidence served on behalf of any Spottiswoode Parties) must be served by 20 November 2024.
10. Expert reports in response must be served by 20 December 2024.
11. Any expert reports filed by the Defendants in the London Array Proceedings and First and Second Defendants in the Spottiswoode Proceedings ("Nexans") and/or the Third

and Fourth Defendants in the Spottiswoode Proceedings (“**NKT**”) must not duplicate expert evidence filed by the Fifth and Sixth Defendants in the Spottiswoode Proceedings (“**Prysmian**”).

12. Following service of the expert reports in response, the experts shall meet (without the Parties) and discuss on a without prejudice basis according to the provisions of Civil Procedure Rule 35.12, and identify in a joint memorandum concerning the ROC Issue, with the assistance of the Parties’ legal representatives where necessary:
 - (a) the areas where there is agreement between them;
 - (b) the areas in dispute between them;
 - (c) whether each area in dispute is material to the outcome of the ROC Issue; and
 - (d) in relation to each material area in dispute:
 - (i) the extent to which it is material and why;
 - (ii) any assumptions underpinning each expert’s views;
 - (iii) a summary of each expert’s criticism of the other expert’s position;
 - (iv) all key documents and/or pieces of evidence which are relevant to the particular areas of dispute between them and its resolution; and
 - (v) their opinions on what the Tribunal has to decide in order to resolve the particular areas of dispute and how this can be achieved.
13. The joint memorandum of the experts is to be completed and filed with the Tribunal by 31 January 2025.
14. If the experts’ reports cannot be agreed, the Parties are to be at liberty to call expert witnesses at the trial, limited to those experts whose reports have been served pursuant to this Order.

15. For the avoidance of doubt, any experts instructed by the Class Representative, Prysmian, and/or NKT are not required to address sub-issue 4 of the ROC Issue as set out in the Annex hereto.

(5) Trial bundles and PTR

16. Trial bundles for the trial of the ROC Issue in electronic or hard copy form (or part electronic, part hard copy) are to be filed with the Tribunal no later than 4pm on 14 March 2025. The trial bundle for the trial of the ROC Issue must be prepared in conjunction with the bundle for the trial of all other issues relevant to the London Array Proceedings.
17. There shall be a pre-trial review, in conjunction with the pre-trial review for all other issues relevant to the London Array Proceedings, which shall be no later than 28 March 2025.

B. CONFIDENTIALITY RING IN RELATION TO COMMON ISSUES

18. A separate Confidentiality Ring Order shall be established for the purposes of the determination of the ROC Issue. The parties are to liaise (with each other and with any non-party as referred to in paragraphs 5-6 above) to seek to agree the terms of such Order. Should they fail to reach agreement, the Tribunal will resolve any outstanding issues.

C. DISCLOSURE IN THE SPOTTISWOODE PROCEEDINGS OF THE COMMISSION DECISION AND FILE

(1) Definitions

19. The following terms as used herein bear the corresponding meanings as set out in the table below:

Term	Meaning
------	---------

“Disclosure Notification”	The notification obligation created by paragraph 20 hereof.
“Vattenfall Versions”	(1) the version of the Decision and Annexes most recently disclosed to the defendants in the Vattenfall Proceedings, prior to the date of this Order; and (2) the contents of the Commission’s investigation file most recently disclosed to (or by) the defendants in the Vattenfall Proceedings, prior to the date of this Order.

(2) First stage

20. The Defendants to the Spottiswoode Proceedings shall by 5 June 2024 notify the European Commission and the other Addressees of the Decision of their intention to disclose and provide inspection to the Class Representative of the Vattenfall Versions upon the terms of the Spottiswoode CRO, providing the said notified parties with a period of 14 days following such notification to make an application to the Tribunal that such disclosure should not be given or that further redactions should be applied, supported by reasons.

21. Subject to paragraph 23 hereof, the Defendants to the Spottiswoode Proceedings shall disclose and provide inspection to the Class Representative of the Vattenfall Versions upon the terms of the Spottiswoode CRO within one business day after the expiry of the 14-day period following notification in paragraph 20 hereof, unless any party to whom the Disclosure Notification has been given has within such 14-day period made an application to the Tribunal that such disclosure should not be given or that further redactions should be applied. In that event, until the application is determined, disclosure shall not be given of such part of the Vattenfall Versions as is the subject-matter of the application.

22. Provided no objections are received to the Disclosure Notification within a period of 14 days following notification, the Defendants to the Spottiswoode Proceedings have permission to disclose the Vattenfall Versions pursuant to Rule 102(2)(b) of the Competition Appeal Tribunal Rules 2015.

23. The Defendants to the Spottiswoode Proceedings shall be entitled to redact from the documents to be disclosed pursuant to paragraph 21 above information:
- (a) referring to material that is protected from disclosure under Article 48 of the Charter of Fundamental Rights of the European Union and Article 339 of the Treaty on the Functioning of the European Union as applied in Case T-474/04 *Pergan* [2007] ECR 11-4225 (“**Pergan Material**”);
 - (b) that relates to leniency (as defined in Article 2(16) of Directive 2014/104/EU) (“**Leniency Material**”); and/or
 - (c) referring to privileged material (“**Privileged Material**”).
24. If the Defendants to the Spottiswoode Proceedings withhold any material from inspection pursuant to paragraph 23 above over and above the redactions appearing in the Vattenfall Versions, they shall clearly identify the material so withheld and describe the nature of the documents and the reason(s) why they are withheld in sufficient detail to enable the Class Representative to challenge such assertion, if so advised. Any steps the Defendants to the Spottiswoode Proceedings are required to take under this paragraph shall be completed no later than the time the documents themselves are provided for inspection.

D. SHARING OF DOCUMENTS FROM THE LONDON ARRAY PROCEEDINGS

25. The London Array Parties shall provide (and they shall continue to provide) to the Spottiswoode Parties all documents disclosed, filed and/or served in the London Array Proceedings which are relevant to the common issues in the Annex hereto. The Parties are to seek to agree what documents fall within this paragraph; in the event they fail to reach agreement, the Tribunal shall resolve any disagreements.

E. COSTS

26. Costs in the case. (That is to say, for the avoidance of doubt, that the costs incurred by the London Array Parties shall be costs in the London Array Proceedings whilst the

costs incurred by the Spottiswoode Parties shall be costs in the Spottiswoode Proceedings.)

F. LIBERTY TO APPLY

27. The Class Representative, the Defendants, the London Array Claimants and the other Addressees referred to in paragraph 20 have permission to apply.

Andrew Lenon KC
Chair of the Competition Appeal Tribunal

Made: 22 May 2024

Drawn: 7 June 2024

Annex: The ROC Issue

Issues to be resolved so as to be binding in both the London Array and Spottiswoode Proceedings

(1) In respect of the Renewables Obligation Order 2009 and/or the Renewables Obligation Order 2010 (referred to collectively as the “Orders”), what is the appropriate value of commerce in respect of the benchmark windfarms relevant for the purposes of determining question 2, both as a total amount and by reference to the relevant categories of costs?

(2) In respect of each Order, assuming that the benchmark windfarms relevant to those Orders were subject to an overcharge, resulting from the infringement as found by the Commission’s decision in Case AT.39610 *Power Cables*,¹ at the rate of 26%, would the number of ROCs per MWh awarded to offshore wind have been less in the counterfactual?

(3) If the answer to question (2) above is “yes” (in respect of either Order), and in light of the value of commerce as found under question (1) above, what is the minimum level of total elevated cost on the relevant benchmark windfarms that would on the balance of probabilities have resulted in fewer ROCs per MWh being awarded in the counterfactual (the “Minimum Cost Elevation”)?

Issue to be resolved so as to be binding in the London Array Proceedings only

(4) Based on the material before the Tribunal and the pleaded issues in those proceedings, was the Minimum Cost Elevation met or exceeded for the Renewables Obligation Order 2010 and, if so, with what effect on the number of ROCs per MWh awarded?

¹ As against each Defendant, the Commission’s decision applies variously, and as modified following appeal.