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6<sup>th</sup> February 2015

**Re.: Proposed Modifications to the Trading and Settlement Code: Mod\_09\_14 and Mod\_10\_14 (Make Whole Payments)**

Dear Laura, Jo

Thank you for your letter of 20 January 2015 in response to our letter of 17 December 2014 concerning Modifications to the Trading and Settlement Code in respect of Make Whole Payments proposed by the Regulatory Authorities ("RAs").

We had explained in detail in our letter the very significant issues which arise from the RAs' proposed Modifications including that their purpose and statutory basis is not clear, they are overtly and unnecessarily discriminatory and they have as their effect, or indeed object, the restriction of export trade over the interconnectors. As such, the proposed Modifications are contrary to statutory requirements, the Third Energy Package and the Treaty on the Functioning of the European Union. For these reasons, we found that the proposed Modifications are clearly inappropriate and unlawful and ought to be withdrawn.

In response, your letter outlines the Modification Process and emphasises that it is under the control of the Modifications Committee, does not distinguish between Modifications Proposals depending on the identity of the proposer and allows for the review of any deficiencies to be taken into account and addressed. You acknowledge that it is open to a proposer to withdraw a proposed Modification but you find that "*in the circumstances... it would be preferable that the Modifications Committee is permitted to continue with its process, taking into account any concerns which [we] may have*".

However, it does not appear to us that in the circumstances, it is in any way either appropriate or reasonable to require the Modifications Committee to proceed with reviewing the Modifications proposals that you have submitted and we do not understand on what basis you found otherwise.

As you acknowledge, the RAs will normally follow the recommendation of the Modifications Committee “*except where there are factors beyond the scope of the Modifications Committee, for example the Regulatory Authorities’ Statutory Duties*”. For the reasons recalled above, the RAs’ Modifications proposals are inconsistent with the RAs’ statutory duties and objectives and unlawful so that the RAs could not, in any event, lawfully adopt such Modifications, even in circumstances where they would have been recommended by the Modifications Committee in a Final Recommendation Report.

In this regard, the Modifications Process may not make any distinctions between proposers but this does not mean that the RAs are like any other proposer. On the contrary, first as regulatory authorities created by statute and second, as the ultimate decision-maker in respect of proposed Modifications, the RAs have duties and obligations that other proposers do not have in drawing up and canvassing proposed Modifications. In particular, it is incumbent upon the RAs to satisfy themselves that any Modifications that they propose are consistent with their statutory duties and objectives and with the applicable legal framework. As such, whether or not Modifications proposals are consistent with the RAs’ statutory duties is not an issue which should arise in respect of Modifications proposed by the RAs and the Modifications Committee may reasonably assume that in making Modifications proposals, the RAs have ensured that such proposals are consistent with statutory duties, objectives and requirements so that if recommended by the Modifications Committee, the proposals may be adopted.

It does not appear, however, that this is an exercise which the RAs have conducted here. We are of the firm view that had the RAs considered the lawfulness of the proposed Modifications and their statutory duties and objectives, these proposals would not have been made. In these circumstances, the appropriate course of action is to withdraw them. It would be inappropriate as well as pointless and wasteful of the Committee’s time for the RAs to require that it considers and makes recommendations in respect of Modifications proposals that the RAs could not in any event adopt.

We repeat accordingly our request that you withdraw your Modifications proposals. A member of the Modifications Panel suggested that ElectroRoute engages with you (or in a working group) with the view to agree Modifications proposals for the review of the Committee. We would have no difficulties with this approach and we are happy to meet to discuss this further at short notice.

Yours sincerely,

Ronan Doherty



Chief Executive Officer

Copy: Modifications Committee