AQUIND Limited

AQUIND INTERCONNECTOR

Applicant's Response to Deadline 7c Submissions - Appendix A Applicant's Response to Mr Geoffrey and Mr Peter Carpenter

The Planning Act 2008

Infrastructure Planning (Examination Procedure) Rules 2010, Rule 8(c)

Document Ref: 7.9.45.1

PINS Ref.: EN020022

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DOCUMENT: 7.9.45.1

DATE: 1 MARCH 2021

WSP

WSP House

70 Chancery Lane

London

WC2A 1AF

+44 20 7314 5000

www.wsp.com

APPLICANT'S RESPONSE TO THE DEADLINE 7C SUBMISSIONS ON BEHALF OF MR GEOFFREY AND MR PETER CARPENTER (REP7C-029 AND REP7C-030)

1. INTRODUCTION

1.1 This note sets out the Applicant's responses to the following Deadline 7c Submissions on behalf of Mr Geoffrey and Mr Peter Carpenter (the "**Affected Party**" or "**AP**"):

1.1.1 Statement on Scope of Statutory Purposes & The Development (REP7c-029) ("**Statement A**"); and

1.1.2 Statement on Funding & Compulsory Acquisition Compensation (REP7c-030) ("**Statement B**").

1.2 The Applicant considers that a number of the representations made within Statement A and Statement B are either wrong or misleading and the purpose of this response is to identify these, to explain why and to set out the correct position.

1.3 In providing responses to these submissions the Applicant has sought to proportionately respond to matters raised where it is considered it will be of assistance to the Examining Authority ("**ExA**"). As such, this response does not seek to address all points raised, noting many of the points raised have already been addressed, either in the written submissions of the Applicant, or on behalf of the Applicant at the hearings into the application for the AQUIND Interconnector Order (the "**Application**") held in the weeks commencing 7 and 14 December 2020 and 15 February 2021.

1.4 In particular, the power to grant development consent under the Planning Act 2008 ("**PA 2008**") in relation to the Fibre Optic Cables with spare capacity for use for commercial telecommunications and the ORS and Telecommunications Buildings is extensively addressed in the Applicant's Statement in Relation to FOC (REP1-127), its responses to ExA Q2 and in the Applicant's responses to the AP's Deadline 6 submissions on the Scope of the Authorised Development (REP7-075). The Applicant's position in respect of this matter is well known and therefore has not been repeated in this note.

2. RESPONSE TO STATEMENT A

2.1 The principal substance of Statement A amounts to a collateral challenge to the making of the section 35 Direction by the Secretary of State. It is contended that neither the use of the spare FOC for commercial telecommunications and the Telecommunications Buildings fall within the "*field of energy*" for the purposes of 14(6) of the PA 2008, that it is not open to the Secretary of State to make a direction under section 35(1) other than for development within one of the section 14(6) fields and that the power to grant consent for associated development is similarly restricted (see Statement A, Section B paragraphs 14 and 15-22 and Section E paragraphs 40-44). It is further contended that section 35(2)(a) does not allow a direction to be made in respect of a project which entails a commercial profit (Section D paragraph 38 of Statement A).

2.2 The Applicant has addressed the substance of these contentions in its responses to ExA Q2 setting out why the making of the Direction by the Secretary of State was within the powers available to him (REP7-038). The development as set out within the Direction is development in the field of energy or forms part of project in the field of energy as required by section 35(1) of the PA 2008. The effect of the Direction is that "*the proposed Development together with any development associated with it, is to be treated as development for which development consent is required…*"

2.3 The Applicant recognised in its responses to ExA Q2 (REP7-038) that those opposed to the making of the DCO might advance a different view and it has advocated a precautionary approach, namely that the ExA and the Secretary of State should determine whether the those buildings which are required solely in connection with the commercial use of the fibre optic cables (the Telecommunications Buildings) and those parts of others which are associated with the commercial use only (so the parts of the ORS not provided solely in connection with the operation of the interconnector) are associated development.

2.4 Whilst it remains the case that it is the Section 35 Direction which confirms that development consent is required for associated development and would authorise this instead of Section 115 of the PA 2008, on a precautionary approach the ExA and the Secretary of State would in making their recommendation and decision respectively consider whether they are, in any event, satisfied that such buildings can properly be construed to be associated development.

2.5 On this approach, the ExA should consider the definition of associated development provided in Section 115 of the Planning Act 2008, as well as having regard to the Guidance on associated development applications for major infrastructure projects (DCLG, April 2013) (which it is noted of course does not bind the Secretary of State, save for the need for him to act rationally having taken into account its contents). The Applicant has demonstrated why the use of the spare FOC capacity and the ORS and Telecommunications Buildings are properly to be treated as associated development in its Statement in Relation to FOC (REP1-127).

2.6 In this context, it should be noted that there is nothing in section 115 of the PA2008 which requires associated development to have a shared function with the development for which development consent is required. Further, the inclusion of "*related housing development*" as a separate category of development for which development consent may be granted shows, the grant of development consent for development which has no shared functional purpose within the section 14(6) PA 2008 fields is not contrary to the policy or the objects of the 2008 Act.

2.7 Further, there is nothing in section 115 of the PA 2008 which proscribes associated development which is capable of generating a commercial return. In addition, the fact that the PA 2008 affords compulsory acquisition powers to the relevant statutory undertaker which might not be available to promoters of other projects is a consequence of the acceptance of the national importance of the project. Such acceptance justifies the different treatment and, rather than representing a misuse of the powers provided by the PA 2008, is part of their rationale.

2.8 Further, as highlighted in Annex A of the Applicant's Statement in Relation to FOC (REP1-127), the FOC infrastructure complies with the core principles in the '*Planning Act 2008 Guidance: associated development applications for major infrastructure projects'* (April 2013), including paragraph 5 (iv) which specifically recognises that overcapacity may be appropriate for certain types of infrastructure projects.

2.9 It follows that, whether the conclusion reached is that commercial use of the FOC Infrastructure is development for which development consent is required or is development which satisfies the legal requirements for associated development in accordance with the requirements of section 115 of the PA 2008, the Secretary of State's direction was lawfully made and the making of the DCO as sought falls squarely with the scope of the direction and Secretary of States relevant powers.

Swansea Bay Tidal Lagoon DCO ("Swansea Bay DCO") and Thorpe Marsh Gas Pipeline DCO ("Thorpe Marsh DCO")

2.10 The AP seeks to rely on the decisions in relation to the Swansea Bay and Thorpe Marsh DCO's in supporting their contentions (see Statement A, Section A paragraphs 3, 4, 22, Section F paragraph 45, Section I paragraphs 118 and 131).

2.11 The reference in Statement A (Section paragraph 3) to the "*same consideration of the jurisdictional boundary of the PA 2008 was considered and addressed*" in the Swansea Bay DCO is not accurate. There was no section 35 Direction in that case (the land being in Wales) and as at the date of the consideration of that DCO, section 115(4) of the PA 2008 provided that the only description of development which could be treated as associated development in Wales had to be with underground gas storage. Associated development was therefore not capable of being authorised for that project (see the ExA's report dated 10 March 2015, paragraphs 3.3.10 and 3.3.11 p.24).

2.12 As to the Thorpe Marsh DCO, it is not clear how the AP considers that decision assists their argument. There was no section 35 Direction in that case and the definition of the Authorised

Development was simply descriptive of what had been applied for. It cannot be inferred from either the ExA's report or the Secretary of State's decision, neither of which had to consider jurisdictional issues of the kind raised by the AP, that they lend any support to the AP's arguments.

Section I '*AP Responses to Applicant Limited Company Appendix A of [REP7-075]*'

2.13 Section I to Statement A contains the AP's responses to the Applicant's Responses to Deadline 6 Submissions (REP7-075). The Applicant is content that its existing responses adequately address the issues raised but would note the following:

2.13.1 At paragraph 70 of Statement A the AP makes the claim that there is no power to acquire land under section 122 for the purposes of landscaping the Proposed Development because such landscaping is not itself development. That is simply wrong. Necessary landscape mitigation is "*required to facilitate….*" The consented development and falls within the scope of the compulsory acquisition powers (see paragraph 105 of the '*Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land'* ("the **Guidance**");

2.13.2 At paragraph 86 to 87 the AP seeks to draw an analogy to the Norfolk Vanguard DCO and draw an "inference" from the design and access statement that there is no real risk of transformer failure during the operational lifetime of the Converter Station. This is not considered to be a credible argument because whilst the transformers will be designed to not fail, it is inevitably impossible to unequivocally rule out any possibility of failure and it is incumbent of an operator of nationally significant energy infrastructure to ensure those circumstances are accounted for.

2.13.3 The AP goes on to suggest that the Applicant has failed to consider transformer failure as a major risk in its EIA Assessment. At paragraphs 88- 102, the AP seeks to contend that the scoping out from the Environmental Assessment for the project of any likely significant effects relating to Major Disasters associated with transformer failure in some sense undermines the need for the permanent access road. That is misconceived. Transformer failure is unlikely to result in any "Disaster" or "Major Accident" in this context and therefore is not likely to give rise to significant environmental impacts in that regard. However, it would have very significant effects in terms of national energy capacity and, whilst a rare event, proper provision must be made for it.

Appendix G – AP Haul Road Access Note

2.13.4 Appendix G to Statement A has been prepared based on the AP's position that the Access Road is not required for the period of the Converter Station being in operation. The Applicant maintains its position as set out in its responses the APs Deadline 6 and Deadline 7 Submissions (REP7-075 and REP7c-014 respectively) that the Access Road is required during for the operational period.

2.13.5 At paragraph 2.2.3 to 2.2.8 of Appendix G the AP continues to suggests that the Applicant could store up to four spare transformers within the existing parameter volume of the Converter Station. For the reasons set out in paragraph 2.8 of the Applicant's response to the AP's Deadline 6 submissions (REP7-075) this is not a technically feasible approach.

2.13.6 At paragraph 2.2.6 of Appendix G the AP states it cannot be rationally said that a failed transformer could not (in some way) be unwired and the wires be re-wired to a close by spare (operational) transformer whilst leaving the then redundant transformer in situ. Contrary to the AP's assertion, it absolutely can be rationally said that this is not a realistic proposal. This would not be an operationally safe approach and would therefore not be acceptable, and its suggestion should not be taken into account as a reasonable alternative. Furthermore, the Applicant has clearly explained that there is not space for a disassembled crane at the Converter Station Area, and even if there were this does not assist the AP because any failed transformer would need to be removed from the Converter

Station Area, with an Access Road of suitable width and construction being available to do so[1].

2.13.7 In response to the comment at paragraph at 2.2.8 of Appendix G the Applicant highlights that the design of the Converter Station is not to be self-extinguishing in the event of fire. The Converter Station is to be designed to be fire resistant, further detail of which is confirmed in the Description of the Proposed Development (APP-118) Design and Access Statement (REP7-021). It is of course still absolutely necessary to ensure there is a safe and suitable means of access to high voltage electrical infrastructure for emergency response vehicles for in the event of an emergency, including in the event of a fire. It is for this reason the Access Road has been specifically designed to be of a suitable width for fire and rescue service vehicles (see paragraph 5.2.9.3 – 5.2.9.4 of the DAS). This contention of the AP is a further example of the misconstruing of documents and information to obtain support for a position which cannot otherwise be advanced.

2.13.8 In response to the comment made at paragraph 2.4 on behalf of the AP that there is no objective reasonable requirement for abnormal vehicles, nor heavy maintenance, nor emergency vehicles, to have a permanent access, the Applicant has clearly and consistently set out why there is a requirement for the Access Road to be in situ permanently. This is required for the potential removal and emergency replacement of high voltage plant such as transformers and reactors and for emergency response vehicles to attend where necessary to do so.

2.13.9 At paragraph 4.9 the AP advances that the Applicant has identified a transformer, where this fails, would not need to be replaced for a period of nine months. This statement is made to support the AP's submissions that a temporary Access Road could be laid within this timeframe to allow for the replacement of a faulty transformer (thereby acknowledging the need for an Access Road to do so and that the provision of temporary Access Road is by no means an instantaneous operation). This is not correct, the Applicant has identified at paragraph 2.8.1 of Appendix A of REP7-075 that the lead time for a new transformer to be manufactured and brought to site is nine months. Replacement is required as soon as reasonably practicable following a failure, which is the reason for a spare being located on site so as to ensure necessary resilience. Heavy machinery would be required for this operation, which the Access Road will be required to facilitate the movement of.

2.13.10 Despite the assertions by the AP, the storage of four spare transformers at the Converter Station is not a '*reasonable alternative*' in accordance with paragraph 4.4.3 of NPS EN-1, and taking into account the need otherwise for the Access Road does not in any event assist the AP in seeking its removal following the construction of the Proposed Development. It should be noted that the storage of two spare transformers instead of four, as advanced at paragraph 4.33 of Appendix G makes no difference to this. The Access Road is required regardless of how many spare transformers are located at the Converter Station, as is set out in paragraph 2.8 of the Applicant's response to the AP's Deadline 6 submissions (REP7-075). Should there be a fault to one of the transformers connected to the live system, this needs to be removed and transported off site.

2.13.11 At paragraphs 4.26 to 4.27 of Appendix G the AP refers to the Norfolk Vanguard DCO and states that the DAS for that project did not contain details of the need to transport spare transformers after its converter station was constructed. From this, the AP seeks to conclude that an access road is not necessary. Norfolk Vanguard is an entirely different project and the Applicant is not responsible for the contents of that application. The omission of information from that application

[1] See paragraph 3.3.4 of REP7c-014.

cannot be inferred to mean the Applicant is not correct in setting out why the Access Road is needed, as it has done so.

2.13.12 At paragraph 4.31 of Appendix G the AP suggests that transformer failure could be a major disaster and the EIA assessment is flawed, and consequently CA powers cannot be sought for the Access Road. There is no sound basis on which to make this allegation and this contention again misconstrues the relevant law and guidance to support a position which otherwise could not be advanced. As set out above, transformer failure is not likely to result in any "Disaster" or "Major Accident" in an EIA context and for this reason an EIA of transformer failure is not required. However, transformer failure would have very significant effects in terms of national energy capacity and, whilst a rare event, proper provision must be made for it.

2.13.13 The Applicant has clearly set out the need for a permanent access road. With that in mind, the Applicant has not sought to comment on the temporary access road proposals contained in Appendix 4 to Statement A as they do not represent reasonable alternatives, because a permanent access road is required.

3. RESPONSE TO STATEMENT B

The relevant tests for authorising the inclusion of compulsory acquisition powers in a DCO

3.1 In support of their contention that all compulsory powers should be removed from the dDCO (Statement B, paragraph 11), the AP advances an interpretation of the '*Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land*' ("**the Guidance**") which is wrong. The AP contends that it is the effect of the Guidance that the Applicant must be able during the Examination to demonstrate that it either has the funds to fund the necessary compulsory acquisitions and the project more generally; those funds are immediately available to it or that there is a binding and certain framework to ensure, on terms, requisite funds becoming available, including for blight (Statement B, paragraph 5). The claimed basis for these contentions is set out in Sections B and F of Statement B which, in substance, contend that in the absence of the Applicant being able to show now that it can presently fund the project, the powers of compulsory acquisition should be removed from the dDCO.

3.2 In response, the Applicant would stress that it is important that the Guidance is correctly interpreted and applied, that all the Applicant's evidence is taken into account in forming the necessary judgement and that that evidence is not misrepresented and/or mischaracterised.

3.3 Contrary to the submissions made by the AP in Statement B, it is *not* a requirement for the satisfaction of the section 122(1) PA 2008 tests or of the Guidance, that the Applicant must be able to evidence the immediate availability of draw down funds, secured identifiable funding for the land acquisition costs or a binding and certain framework to ensure, on terms that the requisite funds become available. The AP's contentions are based on a misunderstanding and misapplication of the Guidance.

3.4 The point at which the Secretary of State must be satisfied that the requirements of section 122 of the PA 2008 are met is the date of the decision on the Applicant's application for the DCO. In that decision, the issue of scheme cost funding is relevant to the second of the section 122(1) tests (i.e. whether the Secretary of State is satisfied that the there is a compelling case in the public interest for the compulsory acquisition). Whilst, relying on paragraph 9 of the Guidance, the AP contends that funding is relevant to both of the section 122(1) tests, that is based on a misreading of paragraph 9. Paragraph 9 advises that the applicants must have a clear idea of how they intend to use the land which it proposed to be acquired, which is relevant to the first test and then, separately, that they should be able to demonstrate that there is a reasonable prospect of the requisite costs for acquisition becoming available. That is relevant to the second test. This is the context for the final sentence of paragraph 9 of the Guidance.

3.5 In relation to demonstrating that the two tests are satisfied, paragraph 7 of the Guidance stresses that applicants must be prepared to justify their proposals for compulsory acquisition of any land to the satisfaction of the Secretary of State who is the ultimate decision maker. The same paragraph advises that, separately they need to be ready to defend such proposals throughout the examination of the application as the Applicant has. Paragraph 7 does nothing more than emphasise that the burden of demonstrating that the statutory tests are satisfied rests on an applicant. Contrary to the AP's contentions, it does not provide some overarching requirement that all funding for a projects costs must be in place during the examination.

3.6 This is clear when, as paragraph 7 requires, paragraphs 8-19 of the Guidance are read together and as a whole. The wording of paragraph 9 of the Guidance, shows that the Secretary of State considers that a clear idea of how the applicant intends to use land which it is proposed to acquire and a reasonable prospect of the requisite funds becoming available for acquisition, are both important factors in satisfying the requirements of section 122(1).

3.7 The "*reasonable prospect"* wording is carefully and deliberately chosen. The word *"prospect"* makes it clear that the decision maker must look to the future (i.e. after the order is made). The word *"reasonable"* means objectively reasonable and recognises that there may be more than one reasonable view. Taken as whole, the decision maker is required to make a present judgement as to what is reasonably likely to occur in the future. Paragraph 9 must be read with paragraph 18 of the Guidance in which the Secretary of State provides guidance as to what is a reasonable horizon for that judgement as to future state of affairs, i.e. an applicant should be able to demonstrate that adequate funding is likely to be available to enable compulsory acquisition within the statutory period following the order being made and that the possible resource implications of a possible acquisition resulting from a blight notice have been taken account of.

3.8 That there is not a requirement that the Applicant has to be able, at the point of examination, to demonstrate the immediate availability of funding or secured funding, is self-evident from the use of the reasonable prospect test and paragraph 17 of the Guidance, which expressly recognises that details of funding may not be capable of being finalised until there is certainty about the assembly of land. In such circumstances, the requirement is that the Applicant should indicate how it is intended the project and acquisition will be funded.

3.9 Further, the reasonable prospect test is carefully chosen to avoid imposing on applicants the impossible task of demonstrating that NSIPs are free of all constraints and all possible impediments to delivery. The carefully chosen wording requires a judgment to be made as to the likely outcome of any outstanding applications/consents procedures having regard to *all* rather than selected extracts. It also enables the decision maker to make the necessary judgement that powers of compulsory acquisition should be authorised without prejudging the outcome of other decisions. As paragraph 19 of the Guidance makes clear, what the Secretary of State is seeking is assurance that any potential risks and impediments are being properly managed.

3.10 The Applicant has clearly demonstrated that the requirements of section 122(1) and the Guidance itself are met. The updated Funding Statement (REP6-021), the Applicant's response to the further written question of the ExA with reference CA2.3.2, submitted at Deadline 7 (REP7-038), Appendix B of the Applicants Responses to Deadline 6 Submissions- Hearing Appendices (REP7-075) and Applicant's response to Deadline 7 and 7a Submissions on Behalf of Mr Geoffrey Carpenter and Mr Peter Carpenter at Deadline 7 (REP7c-014) set out the basis on which is expected regulatory status will be obtained and project financing secured and the Applicant has clearly demonstrated the rational basis upon which it is properly concluded that there is a reasonable prospect of the requisite funds becoming available within the statutory period.

3.11 In particular, the Applicant has explained the levels of revenues which are to be generated from the Project and the levels of the costs associated with the operation and maintenance of the Project in its response to the ExA's first written question with reference CA1.3.10 (REP1-091). This confirmed that in the light of the operational costs being up to 2% of the capital costs of delivering the Project, operational revenues are expected to leave sufficient

cash flows available to repay the project finance debt and provide adequate returns to investors.

The Trade and Cooperation Agreement ("the TCA")

3.12 The principal objective of the AP in advancing a misapplication of the Guidance appears to be to support a contention that one result of the UK's withdrawal from the European Union is that there is such uncertainty over future exemption arrangements, that the Secretary of State can only conclude that the Applicant has failed to manage the risks to the project and there is no reasonable prospect that funding can be obtained (see Statement B, section B). However, this is based on a misunderstanding of the status of the Applicant's exemption request presently before the ACER Board of Appeal, and in any event is also an irrational position to advance.

3.13 Following the decision of the General Court of the European Court of Justice to annul the decision of the ACER Board of Appeal to refuse the Applicant's exemption request, the Board has now re-opened the exemption procedure and is proceeding with the next steps in the determination of the request. The exemption request survives the withdrawal from the European Union because the result of the successful appeal is that the procedure is re-opened. The TCA is not relevant to that ongoing procedure.

3.14 The Applicant has set out in its post hearing note to CAH3 in respect of the non UK Planning Consents and Approvals required (AS-069) the basis upon which the Secretary of State can be satisfied that the current exemption application is likely to succeed. The Applicant is therefore unlikely to need an exemption granted through the arrangements contained in the TCA.

3.15 However, should, against all expectations, the Applicant not be awarded an exemption through a decision by the ACER BoA or the BoR, it also may avail itself of the exemption route offered by the TCA and the procedure is summarised in the Applicant's post hearing note (AS-069) at paragraphs 3.17 to 3.23.

Applicant's Assessment of CPO Compensation

3.16 The AP, in arguing that the Applicant has underestimated the maximum amount of compensation that it would need to pay (Statement B, Section E), persists in its misunderstanding of Article 30 of the dDCO and of the Land Plans (REP-003) and the Book of Reference (REP7-019) and misrepresenting the Applicant's evidence as to the land to which the land acquisition costs of £1.277m relates).

3.17 The full extent of the land likely to be acquired has been valued for the purposes of this figure. The Applicant's maximum likely exposure to compulsory acquisition costs reflects all types of compulsory acquisition powers and powers of temporary possession and a full break down is contained in paragraph 5.6 of the updated Funding Statement submitted at Deadline 6 (REP6-021).

3.18 Separately the AP contends that the Applicant's estimate of compensation liability is unsound because it significantly underestimates the value of the AP land and fails to take into account the potential resource implications of a possible acquisition resulting from a blight notice (Statement B, paragraphs 254 -265 and supporting statements of Henry Brice of Ian Judd & Partners and Jonathan Stott of Gateley Hamer at Appendices 7 and 8).

3.19 The Applicant rejects these assertions. The Applicant's assessment of its compensation liability has been prepared by the Applicant's agent, Mr Alan O'Sullivan, the Land Acquisition lead and reviewed by, amongst others, Ms. Virginia Blackman. Ms. Blackman holds a BSc(Hons) in Rural Estate and Land Management, has been a Member of the Royal Institution of Chartered Surveyors since November 2000 and is a Registered Valuer. Ms. Blackman is also the National Head of the Site Assembly and Compulsory Purchase team at Avison Young. The Applicant's agent has assessed national, regional and local data and has undertaken engagement with other agents practising in the Hampshire area to seek their views on local values to ensure the basis of the offers made were both reasonable and above market. The Applicant has also settled option agreements in respect of similar land in the

same area for a price per acre which is not dissimilar to the price per acre offered to the AP. The assessment is robust.

3.20 The AP's contention that the Applicant's Agent has based his offers on the figure of £1.08m listed in the title register for the property as at 13 August 2013 in Her Majesty's Land Registry is not correct.

3.21 In relation to the issue of blight, as the Funding Statement records, it is not anticipated that any claims for blight will arise. The Applicant has given careful consideration to whether the draft DCO or the Proposed Development might have such an effect on any property as to allow for a valid blight notice to be served and has concluded that there is not a prospect of that occurring.

3.22 The Applicant's assessment of its potential maximum exposure to compulsory acquisition costs is thus robust.

Enforcement of Compulsory Acquisition Claims

3.23 At Section G of Statement B, the AP claims that the definition of "Undertaker" in the dDCO has the effect that the Applicant does not know against who claims for compensation could be enforced against and their capacity to meet such claims. A guarantee has been included at Article 51 of the dDCO to provide assurances that the powers of compulsory acquisition will not be capable of exercise until the Undertaker has evidence that the funds for compensation are satisfactorily secured which addresses this issue. It will also always be known who the Undertaker is for the purposes of the Order.

Herbert Smith Freehills LLP

1 March 2021

18857/30985781