

ANNEX 14

LICENCES AND AUTHORISATIONS FOR THE FDP IMPLEMENTATION COMPANY

This Annex sets out the potential licences and authorisations that may be required for the FDP Implementation Company to carry out its permitted activities as provided for in the FAP. The analysis in this Annex is relevant to the Board's consideration of the Guiding Factor 7 (*Fund structure*) in terms of the independence of the Fund and insolvency remoteness.

1. ENERGY SECTOR LEGISLATION

There are no provisions under the relevant energy sector legislation (primarily the 1989 Act, the 2008 Act and the 2022 Act) that would impose any licensing or authorisation requirements on the FDP Implementation Company. While an approved FDP is a central requirement of the legislation, the segregated FDP Implementation Company structure itself is not specifically addressed.

2. FCA AUTHORISATION

- 2.1 The key concern identified by our review of potentially applicable licensing requirements is the obligation to obtain an FCA authorisation to conduct regulated activities under Section 19 of FSMA as supplemented by the Regulated Activities Order 2001 ("**RAO**"). Given the expanded role of the FDP Implementation Company in setting the Investment Strategy on Sizewell C compared to the HPC FundCo, there are potential areas of overlap with the regulated activities prohibited under FSMA (such as safeguarding and administering investments).
- 2.2 From our review, it appears that the investment provisions in the FAP are structured in such a way that the FDP Implementation Company is not likely to be considered to be engaging in any regulated activities requiring FCA authorisation – detailed analysis is set out in the table below.

	RAO Ref	Regulated Activity	Analysis
1.	14, 21	Dealing in investments as principal or agent	For an activity to be caught by Article 14 or 21 of the RAO, the following conditions need to be met: (i) the relevant entity must buy, sell, subscribe for or underwrite securities or contractually based investments as principal or agent; and (ii) the relevant entity must deal in investments "by way of business". Clause 11.1.1 (<i>FDP investments must be made under Investment Orders</i>) of the FAP prohibits the FDP Implementation Company from Dealing Directly with the Fund Assets (i.e., the FDP Implementation Company is not permitted to acquire or dispose of such investments directly as principal). Instead, the FDP Implementation Company (or an authorised investment representative) must issue

	RAO Ref	Regulated Activity	Analysis
			Investment Orders to be implemented by an Investment Execution Manager. Therefore, the FDP Implementation Company itself is not engaging in the activities outlined in limb (i) as principal, though the Investment Execution Manager would be caught by limb (i) above (acting as an agent). Furthermore, the FDP Implementation Company's activities are focused on managing the Fund Assets in accordance with the FAP for a specific purpose (decommissioning and waste management), rather than engaging in investment activities by way of business – for example, profit generation or speculative purposes (which are the typical investment activities that Articles 14 or 21 of the RAO target). As such, the FDP Implementation Company is unlikely to be found to be dealing in investments in a manner that would require FCA authorisation under Articles 14 or 21 of the RAO.
2.	37	Managing investments	To fall within Article 37 of the RAO, the FDP Implementation Company must satisfy the following conditions: (i) the assets under management must consist of or include securities, structure deposits or contractually based investments; (ii) the assets under management must belong beneficially to another person; and (iii) discretion is exercised in relation to the composition of the portfolio under management. The structure of the FDP and the incorporation of the FDP Implementation Company are intended to ensure that the FDP Implementation Company (and not the Operator) has beneficial ownership of the Fund Assets, subject only to a contractual requirement under the FAP to liquidate Fund Assets in order to make DTM Payments during the Decommissioning Period. If it were to be held that, on its true construction, the contractual structure in fact constituted a constructive trust with the Operator retaining the beneficial interest in the Fund Assets, then there is a theoretical risk that the FDP Implementation Company may need to obtain FCA authorisation in order to manage the Fund Assets. However, for the reasons set out in paragraph 2.3 below, we think it is

	RAO Ref	Regulated Activity	Analysis
			unlikely that the Operator would be found to have a beneficial interest in the Fund Assets. In essence: • The FDP Implementation Company holds beneficial ownership of the Fund Assets and exercises control over their management, as per the FAP; • The funds are specifically earmarked for decommissioning and waste management costs, which distinguishes the management activities from typical investment management that would fall under Article 37 of the RAO; and • The Operator's role is primarily supervisory, ensuring compliance with the FAP, rather than directly managing the assets. It is also relevant that there are similar structures that handle funds for specific purposes without requiring FCA authorisation, the focus being the end-use of the funds, rather than the financial management activities themselves, which supports the position that the FCA authorisation should not be required for the FDP Implementation Company.¹ Therefore, while there is a theoretical risk requiring FCA authorisation if a constructive trust were found to have arisen, the overall structure and purpose of the FDP Implementation Company suggest that it is unlikely to be caught by Article 37 of the RAO (and thus it is unlikely to require FCA authorisation).
3.	40	Safeguarding and administering investments	To fall within Article 40 of the RAO, the FDP Implementation Company must satisfy the following conditions: • carrying out activities necessary to manage or administer the assets, including activities related to the management or administration of assets, which consist of or include securities, such as shares and debentures, or contractually based investments; • having control over the assets belonging beneficially to another person, which implies that the entity must have

¹ **Note:** For example, the oversight for the decommissioning funds in the oil and gas industry typically comes from the Oil and Gas Authority (now the North Sea Transition Authority), rather than the FCA. Also, the Board understands the Nuclear Liabilities Fund is not required to have an FCA authorisation.

	RAO Ref	Regulated Activity	Analysis
			control over the assets, where the beneficial ownership belongs to another person; and both elements of the activity must be carried on i.e., safeguarding and administering assets. Materially the same considerations with respect to beneficial ownership of the Fund Assets apply as set out in relation to Article 37 above.

2.3 Beneficial interest

In light of the reference to beneficial interest in Article 37 of the RAO, the Board and its legal advisers have considered whether the arrangements between the Operator and the FDP Implementation Company could be construed to find that the Operator retains a beneficial interest in the Fund Assets held by the FDP Implementation Company. There is nothing in these arrangements that suggest an express or implied intention to create such a beneficial interest; indeed, the intention appears to be the opposite – clause 10 (*FDP Implementation Company will hold the Fund Assets Remote from the Operator*) of the FAP expressly grants beneficial ownership of the Fund Assets to the FDP Implementation Company, demonstrating a clear intention for the FDP Implementation Company, rather than the Operator, to hold the beneficial ownership. It is, however, possible that a constructive trust may arise by operation of law.

Looking at the circumstances of the arrangements, the Board and its legal advisers have considered the following relevant factors in relation to whether such constructive trust may arise.

Factor	In favour of constructive trust	Against constructive trust
Who benefits?	The Operator ultimately benefits from the Fund Assets in that during the Decommissioning Period, the Fund Assets are released to fund the Allowable Costs, essentially comprising of decommissioning and waste management costs that the Operator is permitted to discharge using Fund Assets (see Part B (<i>Life Cycle of the FAP</i>) of Annex 7 (<i>Funded Decommissioning Programme</i>) for further details). This could suggest that the Operator has an economic	The object of the FDP Implementation Company is to implement its obligations and exercise its rights under the FAP, the Section 46 Agreement and the Security Trust and Intercreditor Deed. It has no other objectives. Therefore, it is also for the "benefit" of the FDP Implementation Company to prudently provide for the decommissioning and waste management costs in accordance with the FAP. The British public and the consumers would benefit from such prudent provision as well.

Factor	In favour of constructive trust	Against constructive trust
	interest in the funds as they will be used to cover its costs.	Further, the FAP (clause 37.3 (<i>DTM Purpose Trust</i>)) is specific in requiring that the disbursement of the Fund Assets (as DTM Payments) (from the FDP Implementation Company to the Operator) must only be used by the Operator to fund Allowable Costs (with the Operator holding these funds on trust for the FDP Implementation Company for this sole purpose). The FAP also requires the Operator to submit an Annual Work Plan and Budget to the FDP Implementation Company and the Independent Technical Verifier, as well as providing that the FDP Implementation Company (rather than the Operator) shall calculate the Annual DTM Payment due to the Operator on each Annual DTM Payment Date. The strict limitations on the use of funds and the procedural requirements for disbursements and the provision for an express DTM Purpose Trust (with the Operator acting as trustee) support the position that the FDP Implementation Company holds the beneficial ownership.
Role in investing Fund Assets	The Operator has a significant role in the preparation of the Investment Strategy for the FDP Implementation Company, in that the Operator is permitted to challenge the Investment Strategy if the Operator believes it is materially inconsistent with the requirements set out in schedule 7 (<i>Investment Rules</i>) of the FAP. This involvement could suggest a level of control or influence over the funds, implying a potential beneficial interest.	The ultimate responsibility (including for preparing the Investment Strategy) and investment decision-making authority remain with the FDP Implementation Company, not the Operator. The Operator's role, and ability to challenge, is limited to monitoring compliance with schedule 7 (<i>Investment Rules</i>) of the FAP, not direct management or control over investment. Further, in the event that the Operator raises a challenge of non-compliance, the decision as to any such non-compliance is to be resolved by an independent expert, rather than the Operator itself. This separation of powers highlights the Operator's limited

Factor	In favour of constructive trust	Against constructive trust
		role, being one of oversight rather than control.
Who contributes to the Fund Assets?	The Operator is the entity that provides the Contributions to fund the Fund Assets in accordance with the FAP. This financial input could imply an ownership stake or beneficial interest in the Fund Assets.	Whilst the Operator makes the Contributions to fund the Fund Assets, these Contributions are backstopped by the FDP Allowance Building Block under the SZC Economic Licence and ultimately funded by consumers, indicating a structured mechanism for funding rather than direct ownership. The Contributions are regulated and ensured through specific structures which suggests a lack of beneficial interest held by the Operator.
Who receives the surplus?	Clause 71.2 (<i>Winding-up of the FDP Implementation Company</i>) of the FAP and Article 33.4 (<i>The Non-Voting Operator Share</i>) of the FDP Implementation Company AoA provide that any surplus assets upon the winding up of the FDP Implementation Company will be transferred to the Operator. This transfer of surplus assets might suggest that the Operator has a residual beneficial interest in the funds.	The flow of surplus from the FDP Implementation Company to the Operator is only to occur upon the winding up of the FDP Implementation Company, which would only happen after the company's objective noted above has been discharged (i.e., when there are no more decommissioning and waste management costs that can be funded by the Fund Assets) or is to be otherwise provided for, for example by implementing the Nuclear Transfer Scheme. In any event, the transfer of surplus assets is contingent upon the completion of FDP Implementation Company's decommissioning activities, indicating that it is a concluding arrangement rather than an indication of ongoing beneficial interest. This is distinct from, for example, where the surplus Fund Assets are transferred to the Operator and the FDP Implementation Company continues to exist for some other purpose. In addition, the Board has been instructed pursuant to paragraph 1(H) of

Factor	In favour of constructive trust	Against constructive trust
		Annex 3 (<i>Assumptions</i>) to assume that any remaining assets/surplus of the FDP Implementation Company after the FDP Implementation Company ceases to have any further obligations to the Operator under the FAP shall ultimately be for the benefit of consumers. The Board has been assured by DESNZ and the Operator that the mechanism for application / transfer of such surplus assets for the benefit of consumers will be documented in due course.

Ultimately, the presumption at law is that beneficial title mirrors legal title,² and in the Board's view, the factors listed above do not rebut that presumption. Also, the courts are generally reluctant to declare a constructive trust in favour of an experienced commercial party that is legally represented in drafting of the arrangements.³ In this regard, it is relevant that the Operator is a well-advised and sophisticated party (e.g., it is the Operator's counsel that has drafted the FAP), as opposed to the FDP Implementation Company which did not have its own legal advisers at the time of drafting and negotiating the FAP. The arguments against the Operator holding beneficial interest are stronger due to the defined structure, control and specific purpose outlined for the FDP Implementation Company. All these factors, and the absence of any express intention to create a beneficial interest for the Operator, support the conclusion that the FDP Implementation Company, rather than the Operator, holds beneficial ownership of the Fund Assets.

Therefore, the Board's view upon consultation with its legal advisers is that the Operator is unlikely to be found to have a beneficial interest in the Fund Assets.

2.4 FCA Authorisation Process

In the event that the FDP Implementation Company is found to require FCA authorisation in order to perform its obligations under the FAP, the Board expects that it is likely to be possible to obtain such authorisation subject to completion of the FSMA Part 4A permission application processes.

A successful Part 4A application, if required, would likely entail the FDP Implementation Company retaining its own senior management, compliance, IT, legal and other professionals (in order to ensure that it complies with the "appropriate resources" and "effective supervision"

² **Note:** See, for example, *Stack v Dowden* [2007] UKHL 17; and *Jones v Kernott* [2011] UKSC 53.

³ **Note:** See, for example, *Generator Developments LLP v Lidl UK GmbH* [2016] EWHC 814 (Ch); and *Crossco No 4 Unlimited volan Ltd* [2011] EWCA Civ 1619.

FSMA threshold conditions). This would increase operating costs beyond those implied by the FDP Implementation Company organisational structure currently contemplated in the FAP and the Ancillary Documents.

The additional expenditure incurred by the FDP Implementation Company in respect of a Part 4A application should be compensated under the FDP Budget and Services Agreement as amounts incurred in connection with the performance of the FDP Implementation Company's obligations under the FAP. The entire process would likely take in excess of six (6) months. The FDP Implementation Company may face restrictions in its investment of the Fund Assets during the application process.