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## **COMMISSION OPINION**

**of 4.2.2014**

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of  
Directive 2009/72/EC – United Kingdom – Blue Transmission Walney 1 Limited, Blue  
Transmission Walney 2 Limited, Blue Transmission Sheringham Shoal Limited and  
Blue Transmission London Array Limited**

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## I. PROCEDURE

On 5 December 2013 the Commission received a notification from the national regulatory authority in the United Kingdom responsible for Great Britain, the Authority for Gas and Electricity Markets, (hereafter, "Ofgem"), in accordance with Article 10(6) of Directive 2009/72/EC<sup>1</sup> (hereafter, "the Electricity Directive"), of a draft decision on the certification of offshore Transmission System Operators (TSOs) for electricity. The notified draft decision relates to the change in ownership of Blue Transmission Walney 1 Limited, Blue Transmission Walney 2 Limited, Blue Transmission Sheringham Shoal Limited and Blue Transmission London Array Limited (together „the Blue Transmission Companies“) each of which has already been certified as a TSO.

Pursuant to Article 3(1) Regulation (EC) No 714/2009<sup>2</sup> (hereafter, "Electricity Regulation") the Commission is required to examine the notified draft decision and deliver an opinion to the relevant national regulatory authority as to their compatibility with Article 10(2) and Article 9 of Directive 2009/72/EC.

## II. DESCRIPTION OF THE NOTIFIED DECISION

Ofgem made final decision in relation to the certification of the Blue Transmission Companies on 28 February 2013 and 11 April 2013, taking account of the views set out in Commission Opinion (2013) 979 of 15 February and Commission Opinion C(2013) 2030 of 5 April 2013 respectively.

Each of the Blue Transmission Companies was certified as complying with the full ownership unbundling model, the sole unbundling option available under the Electricity Directive for transmission systems not in place on 3 September 2009, as was the case for each of the applicants.

Each of the Blue Transmission Companies is ultimately owned and controlled by the same persons, is part of the same corporate group and has the same sole business focus. Until 8 November 2013, each was joint venture between Barclays Infrastructure Funds Management Limited and Diamond UK transmission, ultimately owned and controlled by Barclays PLC (hereafter, "Barclays") and Mitsubishi Corporation (hereafter, "Mitsubishi"). On 8 November 2013 3i Group plc (hereafter "3i") acquired Barclay's interests in the Blue Transmission

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<sup>1</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211/55 of 14.8.2009.

<sup>2</sup> Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211/15 of 14.8.2009.

Companies<sup>3</sup>. 3i is a manager of third-party and proprietary capital listed on the London stock Exchanges.

Article 10(4) Electricity Directive obliges National Regulatory Authorities to monitor the continuing compliance of TSOs with the unbundling requirements, which entails i.a. a possibility to open a new certification procedure upon notification of a TSO or on their own initiative where a change in the rights or influence over a TSO may lead to an infringement of unbundling rules or they have reasons to believe that such an infringement may have occurred.

Ofgem has analysed whether and to what extent the Blue Transmission Companies continue to comply with the requirements of the ownership unbundling model, as laid down in the UK legislation transposing the Electricity Directive. In its draft decision, Ofgem has found that the basis on which it decided to certify the Blue Transmission Companies continues to apply.

On this basis, Ofgem submitted its draft decision to the Commission, requesting an opinion.

### **III. COMMENTS**

Offshore transmission systems of the type operated by the Blue transmission Companies are specific to the UK and were the subject of Commission Opinions C(2012) 3006, C(2013) 281, C(2013) 979, C(2013) 2030 C(2013) 2566 and C(2013) 3705.

Commissions Opinion C(2013) 979 and C(2013) 2030, related to the Blue Transmission Companies. In these opinions the Commission considered that the information provided supported the conclusion of Ofgem that the then existing production or supply interests of Barclays and Mitsubishi did not constitute a risk of discrimination in the operation of the network or to adequate investment in the network controlled by the Applicant. Consequently, an obstacle to certification could not be identified.

On the basis of the present notifications the Commission has the following comments on the draft decision. These comments are confined to the interests of 3i as these are the only matters which have changed since the Commission adopted its previous opinions in relation to the Blue Transmission Companies.

#### **EXERCISE OF CONTROL AND RIGHTS IN THE BLUE TRANSMISSION COMPANIES**

Article 9(1)(b)(i) Electricity Directive prohibits the same person(s) from directly or indirectly exercising control over an undertaking performing any of the functions of generation or supply, and directly or indirectly exercising control or exercising any right over a TSO or over a transmission system. Article 9(1)(b)(ii) Electricity Directive prohibits the same person(s) from directly or indirectly exercising control over a TSO or over a transmission system, and directly or indirectly exercising control or exercising any right over an undertaking performing any of the functions of generation or supply.

Article 9(1)(c) Electricity Directive requires that members of the management of the TSO and persons that have the right to appoint them, must fulfil certain requirements of independence. In particular, the same person or persons are not entitled to directly or indirectly control or exercise any right over an undertaking performing any of the functions of production or supply and at the same time be or appoint members of the supervisory board, the administrative board or bodies legally representing the undertaking.

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<sup>3</sup> 3i controls the Blue Transmission Companies via subsidiary companies. These are set out in Figure 1b of Appendix 2 of the notified review of certification.

## GENERATION INTERESTS OF 3i

3i has a 13.3% beneficial ownership of Elenia, a 56 MW combined heat and power plant in Finland, and a contract to manage this plant on behalf of 45% of its shareholders. Elenia serves 17 local areas in Finland. It normally exports less than 50 MW to the grid.

## OFGEM'S ASSESSMENT

According to the legislation transposing the unbundling obligations in Great Britain, relevant producers are generators within the European Economic Area with a capacity above the 50 MW threshold for which a generation licence is required in Great Britain. Ofgem considers Elenia to be a relevant producer, within the meaning of UK legislation.

However, Ofgem sets out that it considers that 3i does not control the generation interests described above within the meaning of the Merger Regulation, nor does 3i hold a majority shareholding in Elenia. Further Ofgem is satisfied that none of the senior officers of any of the Blue Transmission Companies are also senior officers of a relevant producer or supplier.

Ofgem considers that both the specific requirements on offshore transmission systems in the United Kingdom and additionally, the rules governing the independence of investment funds and the associated compliance arrangements serve to minimise the risk of discrimination.

Ofgem further notes the submission by the Blue Transmission Companies that there is no realistic prospect of the Applicant discriminating in favour of any of the electricity undertakings active outside Great Britain.

## COMMISSION VIEW

The Commission notes that the Electricity Directive does not specify any threshold in the definitions of generation or supply in Article 2(1) and Article 2(19) respectively. The Commission considers that the objective which the unbundling rules of the Electricity and Gas Directives pursue is the removal of any *conflict of interest* between generators/producers, suppliers and TSOs. As explained in the Staff Working Paper *Unbundling: The Commission's practice in assessing a conflict of interest including in the case of financial investors* (SWP (2013) 177), it would not be in line with this objective if certification of a TSO were to be refused in cases where it can be clearly demonstrated that there is no incentive for a shareholder in a TSO to influence the TSO's decision making in order to favour its generation, production and/or supply interest to the detriment of other network users.

In its previous opinions related to Blue Transmission Companies the Commission considered the role of the Blue Transmission Companies as offshore transmission operators to be limited as a result of its small size and restricted geographic scope. The Commission also considered that as well as the small size of this system, potential information flows between the Blue Transmission Companies and the generation interests of its controllers were limited because the need to ensure the effective operation of the wider Great Britain system meant that the day to day operation of the offshore transmission is carried out by National Grid and information regarding planned production and availability of generation connected to an offshore electricity transmission system are sent to National Grid and not the Applicant. These same rules and practices continue to apply equally. The potential information available to the Blue Transmission Companies, and thus to their controllers, continues to be extremely limited as a result of the Blue Transmission Companies restricted role in relation to the operation of the overall UK transmission system.

The Commission considers that the size and location of the 56 MW combined heat and power plant in Finland mean that the size and market share of generation interests of the parties controlling the Blue Transmission Companies continue to be small on an individual and collective basis. They are located in another Member State without any interface with the offshore transmission system controlled by the Applicants.

The Commission therefore considers that these considerations set out in Commission Opinion C(2013) 979 and Commission Opinion (2013) 2030 continue to apply also when applied to the several OFTOs considered collectively.

Consequently, the Commission considers in this case a refusal or revocation of certification would run counter to the principle of proportionality given the fact that the generation interests of 3i, who control the TSOs, do not constitute a risk of discrimination in the operation of the networks or to adequate investment in the networks controlled by the Applicants and an obstacle to continued certification cannot be identified.

#### **ONGOING MONITORING**

The Commission recalls the obligation set out in Article 10(4) of the Electricity Directive for national regulatory authorities to monitor the continuing compliance of TSOs with the unbundling requirements of Article 9 Electricity Directive.

The Commission invites Ofgem to continue monitoring the case also after the adoption of the certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment in respect of the existing generation interests of 3i or Mitsubishi.

#### **IV. CONCLUSION**

Pursuant to Article 3(2) Electricity Regulation, Ofgem shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of the Applicant, and when it does so, shall communicate this decision to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* national regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* national authorities responsible for the transposition of EU legislation as regards the compatibility of any national implementing measure with EU law.

The Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. Ofgem is invited to inform the Commission within five working days following receipt whether it considers that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which it wishes to have deleted prior to such publication. Reasons should be given for any such request.

Done at Brussels, 4.2.2014

*For the Commission  
Günther OETTINGER  
Member of the Commission*

