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COMMISSION OPINION

of 6.1.2016

**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 12 November 2015 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/EC¹ (hereafter, "the Electricity Directive"), of a draft decision on the certification of the offshore Transmission System Operators (TSOs) for electricity, 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. The review of the Blue Transmission Companies' certification status was triggered *inter alia* by a change in the operational status of an offshore windfarm (‘Q10’) that is part of Mitsubishi Corporation’s generation investment portfolio.

Pursuant to Article 3(1) Regulation (EC) No 714/2009² (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 adopted its final decisions on 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 2013 and Commission Opinion C(2013) 2030 of 5 April 2013 respectively. Each of the Blue Transmission Companies has been certified as complying with the ownership unbundling model pursuant to the Electricity Directive as transposed in the national law of the UK.

Following a change in the ownership of the Blue Transmission Companies, Ofgem adopted a further certification decision on 2 April 2014 by which it confirmed the certification status of the Blue Transmission Companies, taking into account the Commission Opinion C(2014)679 of 4 February 2014.

¹ 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.

² 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.

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.

Since 8 November 2013, the Blue Transmission Companies are ultimately jointly owned and controlled by Mitsubishi Corporation (hereafter, "Mitsubishi") and 3i Group plc (hereafter "3i") on the basis of respective equity interests of 50%.

Both 3i and Mitsubishi hold participations in several electricity producers; 3i³ for onshore windfarms and solar plants in UK and Italy; Mitsubishi for renewable energy producers in Spain, France, Portugal, Italy and the Netherlands.

Article 10(4) Electricity Directive obliges the National Regulatory Authorities to monitor the continuing compliance of TSOs with the unbundling requirements, which entails *inter alia* 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 reviewed three changes of circumstances reported by the Blue Transmission Companies that may affect the assessment of compliance with the ownership unbundling requirements:

An offshore windfarm in the Netherlands ('Q10', also known as Luchterduinen) that is jointly owned and controlled by Mitsubishi and Eneco Holdings NV has been ready for full operation since July 2015.

Changes to Mitsubishi's portfolio of generation interests in renewable energy undertakings in other Member States.

Changes to the board of directors of each of the Blue Transmission Companies.

In its draft decision, Ofgem concludes that further to an assessment of the above-mentioned changes, 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.

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.

On the basis of the present notification the Commission has the following comments on the draft decision. These comments are confined to the above-mentioned changes in circumstances that have occurred since the Commission adopted its previous opinion and which could affect the Blue Transmission Companies' continued compliance with the unbundling requirements.

OFGEM'S ASSESSMENT

³ The portfolio of generation interests held by 3i remains unchanged since the last review by Ofgem.

Mitsubishi's interest in offshore windfarm Q10

According to the draft decision, Mitsubishi has a 50% equity interest in the offshore windfarm Q10, which is located 23km off the coast of the Netherlands and has an installed capacity of 129MW. Q10 has been ready for full operation since July 2015. The day to day operations of Q10 will be the responsibility of a board under the joint control of Mitsubishi's and Eneco Holdings NV.

With regard to Mitsubishi's participation in Q10, Ofgem concluded that there is no practical scope for the Blue Transmission Companies to discriminate against other network users, in particular due to the following characteristics:

the geographic distance and the lack of the physical connection between Q10 and the Blue transmission Companies;

the fixed revenue characteristic of Q10⁴;

the limited range of responsibilities of Blue Transmission Companies in directing the flow of electricity over the national transmission systems of GB or the Netherlands⁵.

Other changes to Mitsubishi's portfolio of generation investments

According to the draft decision, Mitsubishi sold three wind-based generators with a gross capacity of 25MW in France and two solar photovoltaic-based generators with a gross capacity of 10MW in Bulgaria. Mitsubishi also made new joint venture acquisitions in five wind-based and five photovoltaic generators in France, and 22 separate solar photovoltaic-based generators in Italy, none of which have a capacity that is more than 21MW.

Ofgem notes that none of the electricity producers in question has a capacity that exceeds 50MW. Thus, none of them would be required to hold an electricity generation licence if they were operational within GB. Ofgem also refers to the geographic distance and the lack of the physical connection between these newly acquired electricity producers and the Blue Transmission Companies and concludes that these acquisitions do not give rise to any concern of risk of discrimination.

Changes to the board of directors

Of the four members to the board of directors of each of the Blue Transmission Companies, three new members (two by 3i; one by Mitsubishi) were appointed since the last certification application. The appointment of a second Mitsubishi director to the board of each Blue Transmission Company brings Mitsubishi's representation up to the full entitlement.

Further to an assessment of these changes to the board of directors of each of the Blue Transmission Companies, Ofgem concludes in its draft decision that none of the directors or senior officers sitting on management board is also a senior officer of Q10 or any "relevant producer or supplier".

COMMISSION'S VIEW

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

⁴ Ofgem notes in its draft decision that the Q10 project benefits from a feed-in-tariff subsidy under the Dutch Sustainable Energy Incentive scheme. The subsidy covers 119.23MW of Q10's energy generation capacity. The remainder of the electricity is subject to a fixed term (20 year) power purchase agreement with Eneco Energy Trade B.V. as 100% offtaker.

⁵ The special legal regime applicable to OFTOs in the UK is outlined in Annex 3 to the draft decision.

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.

The holding of a joint controlling participation in the offshore windfarm Q10 by Mitsubishi, as the ultimate joint controller of the Blue Transmission Companies, thus conflicts with the requirements of Article 9(1)(b) Electricity Directive.

However, 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. It is therefore necessary to assess whether a risk for discrimination could be excluded in the present case.

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 their transmission assets' small size and restricted geographic scope and given the companies' restricted responsibilities in relation to the operation of the overall UK transmission system. These considerations continue to apply in the present case.

The Commission considers that in view of the location of the offshore windfarm Q10 in the Netherlands and the current lack of a physical connection with the offshore transmission systems controlled by the Blue Transmission Companies, under the current conditions there appears to be no scope for a conflict of interest in relation to the generation interests held by the applicants' shareholders and a resulting discrimination of other network users.

As regards the other changes to Mitsubishi's portfolio of small-generation assets in other Member States, 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. Thus, the individual and aggregate generation capacity of generation assets can only be considered in the context of an *ad-hoc* analysis of potential conflicts of interests as set out in the above-mentioned Staff Working Paper. This being said, the Commission notes that the considerations outlined above with regard to the Mitsubishi's participation in Q10 are applicable also to its newly acquired participations in small-scale renewable energy producers in Italy and France.

By the same token, the Ofgem's assessment as to whether the directors of the Blue Transmission Companies comply with the requirements of Article 9(1)(d) Electricity Directive should not be limited to the functions these persons observe in undertakings active in generation and supply which exceed the threshold of "relevant producer and supplier" as set out in UK national law. The Commission invites Ofgem to extend accordingly the assessment of the Blue Transmission Companies' compliance with Article 9(1)(d) Electricity Directive in its final decision.

However, having considered the respective changes of circumstances notified by Ofgem, the Commission agrees with Ofgem's conclusion in the present case that the limited range of responsibilities of the Blue Transmission Companies in the operation of the GB electricity

network, as well as the geographic distance in relation to the respective electricity generation assets in which Mitsubishi holds participations render the risk of any discriminatory behaviour highly unlikely.

In view of the above, the Commission considers that in present case a certification can be renewed (or re-confirmed) given the fact that the changes to the generation interests of Mitsubishi do not give rise to a risk of discrimination in the operation of the Blue Transmission Companies' networks.

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 final certification decision in order to satisfy itself that no new facts emerge which would justify a change of its assessment in respect of the above-mentioned 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 Applicants, 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, 6.1.2016

For the Commission
Miguel ARIAS CAÑETE
Member of the Commission

