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COMMISSION OPINION

of 11.12.2018

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive
2009/72/EC - France and Great Britain - Certification of ElecLink**

(Only the English and French versions are authentic)

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I. PROCEDURE

On 17 October 2018 the Commission received a notification from the French national regulatory authority *Commission de Régulation de l'Energie* (hereafter "CRE") and 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 draft decisions on the certification of the interconnector ElecLink Limited (hereafter "ElecLink").

Pursuant to Article 3(1) Regulation (EC) No 714/2009² (hereafter, "Electricity Regulation") the Commission is required to examine the notified draft decisions and deliver an opinion to the relevant national regulatory authorities as to their compatibility with Article 10 (2) and Article 9 of Directive 2009/72/EC. In view of the fact that the notifications by Ofgem and CRE concern the same TSO, the Commission has decided to adopt a single Opinion directed at both regulators.

II. DESCRIPTION OF THE NOTIFIED DECISIONS

ElecLink is an electricity interconnector linking the Great Britain and French markets through the Channel Tunnel.

On 28 August 2014, CRE and Ofgem adopted a joint opinion granting ElecLink an exemption under Article 17 of Regulation (EC) no 714/2009 from certain provisions of EU law. This joint opinion was adopted following the Commission decision of 28 July 2014 on the exemption of ElecLink³. In its Article 2, the Commission decision provided that :

"The Joint Opinion and the Exemption Decisions shall be amended so as to provide that the exemption from the application of the rules on ownership unbundling in Article 9 of Directive 2009/72/EC shall be granted only if:

- *ElecLink Limited first applies for certification pursuant to the ownership unbundling model in Article 9 of Directive 2009/72/EC; and*
- *CRE and Ofgem conclude that ElecLink Limited does not meet the requirements of ownership unbundling in Article 9 of Directive 2009/72/EC."*

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 L211/55 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.

³ Commission Decision of 28.7.2014 on the exemption of ElecLink Limited under Article 17 of Regulation (EC) No 714/2009 for an electricity interconnector between France and Great Britain, C(2014) 5475 final.

On the basis of the above-mentioned Commission decision, the final exemption decisions of CRE and Ofgem requested that ElecLink applies for certification under the full ownership unbundling model to both regulators.

In accordance with the above mentioned joint opinion and the final exemption decisions, on 9 February 2018, ElecLink applied for certification with Ofgem and CRE under the full ownership unbundling model laid out in Article 9 of Directive 2009/72/EC. Following a change in ownership after this initial submission, ElecLink updated its application to reflect its new ownership structure.

CRE and Ofgem have analysed whether and to what extent ElecLink complies with the unbundling requirements stipulated by the Electricity Directive and more specifically with the full ownership unbundling model as laid down in the French and UK legislation transposing the Electricity Directive. CRE and Ofgem have come to the preliminary conclusion that ElecLink complies with these rules.

ElecLink is 100% owned by Get Elec, who has no other equity interest and is 100 % owned by GetLink S.E. (formerly Groupe Eurotunnel S.E.) (hereafter “GET”). GET is identified as ultimate controller of ElecLink. Consequently CRE and Ofgem have examined the shareholding of GET in order to establish whether or not any of the shareholders of GET are directly or indirectly exercising control over ElecLink. GET is the parent company of 56 subsidiaries primarily involved in management and operation of the Channel tunnel between Great Britain and France, transport services and associated businesses, but according to Ofgem, GET does not have any interests in electricity generation or supply.

GET has around 202,000 shareholders⁴. According to the information provided by CRE and Ofgem, the main shareholder of GET and the only shareholder having representatives in GET’s board is Atlantia S.p.A. (hereafter “Atlantia”). Atlantia, via its 100% subsidiary Aero I Global and International S.à.r.l., is holding 15.49% of GET’s capital and has 26.66% of voting rights. Atlantia is a company publicly traded on the Milan stock exchange whose main business is the operation of motorways in Italy. In this context, Atlantia holds small scale generation interests.

Ofgem and CRE considers that none of GET’s shareholders control GET. Nevertheless, they report that GET’s Chairman provided written assurance that the board of GET will amend its rules of procedure to ensure that the two board members representing Atlantia shall not take decisions or vote on any strategic guidelines concerning ElecLink nor receive commercially sensitive information from ElecLink as long as Atlantia holds interests in electricity generation or supply.

Ofgem furthermore outlines that one Director on GET’s board is also Director of EDF Energy, which is a “relevant producer or supplier” under UK law. However, Ofgem considers that one Director alone would unlikely to be able to exercise significant influence. Furthermore, GET’s Chairman provided written assurance that the board of GET will change its rules of procedure to ensure no board member who, at the time, represents or has a professional activity in an undertaking performing any of the functions of electricity generation or supply, can receive commercially sensitive information in respect of the business of ElecLink.

⁴ <https://www.getlinkgroup.com/uk/shareholders-and-investors/key-figures/shareholder-analysis/>

III. COMMENTS

On the basis of the present notifications the Commission has the following comments on CRE's and Ofgem's draft decisions:

1. Rights of shareholders

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

In its preliminary decision CRE and Ofgem assess in detail the shareholding of ElecLink in order to establish whether or not the companies owning ElecLink perform the functions of generation, production or supply of electricity or hold participations in companies that perform such activities and to what extent that influences ElecLink's compliance with the French and UK legislation transposing Article 9(1)(b)(i) of the Electricity Directive.

Based on the shareholding of GET and the governance structure of GET, GET Elec and ElecLink, both CRE and Ofgem conclude that none of the shareholders of GET (as the ultimate controller of ElecLink) exercise control or any rights over ElecLink. In particular, CRE and Ofgem note that none of GET's shareholders have a majority shareholding, nor veto rights, in the decisions of the board, nor de facto control through a majority of voting rights present at GET's general assembly meetings. This includes Atlantia as the largest shareholder of GET with 15,49 % of the share capital and 26.66% of the voting rights.

The Commission agrees with the assessment of CRE and Ofgem as regards the absence of control over ElecLink by GET's shareholders. However, Article 9(1)(b)(i) of the Electricity Directive, considers not only the exercise of control, but also the exercise of any right over a TSO. Pursuant to paragraph 2 of Article 9 Electricity Directive, "any right" includes the power to exercise voting rights, the power to appoint board members and the holding of a majority share. It is evident from the logic of Article 9 that voting rights do not have to confer control in order to qualify as any rights in the meaning of Article 9 paragraph 2. In particular, the Commission considers that the voting rights of shareholders in holding companies which – directly or indirectly – hold 100% of the share capital of a TSO qualify as "any rights" in the meaning of Article 9 paragraph 2 of the Electricity Directive. Therefore, the Commission disagrees with the conclusions of CRE and Ofgem that the shareholders of GET do not exercise any rights over ElecLink. The Commission invites CRE and Ofgem to revise their final decisions in this respect.

As indicated above, Article 9(1)(b)(i) prohibits the exercise of any rights over a TSO by persons which directly or indirectly exercising control over an undertaking performing any of the functions of production or supply.

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, on the one hand, generators/producers and suppliers and, on the other hand, TSOs. As explained in the Staff Working Paper 'Ownership 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 and ability for a shareholder in a TSO to influence the TSO's decision making in order to favour its generation, production and/or supply interests 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 their draft decisions, CRE and Ofgem note that Atlantia holds interests in electricity generation or supply. According to the information provided by ElecLink, these interests are primarily related to the operation of airports and motorways and the main purpose of these on-site tri-generation and renewables installations is to produce heat, cold and electricity for own consumption, but with excess energy supplied to other consumers.

The Commission is of the opinion that the potential conflict of interest resulting from any controlling participations in generation and supply held by GET's shareholders should be sufficiently assessed in the draft decisions submitted by CRE and Ofgem. Therefore, the Commission invites CRE and Ofgem to assess in their final decisions whether the controlling participations in generation and supply held by Atlantia and any other shareholders of GET would result in a conflict of interest in relation to the operation of ElecLink, in particular in light of the fact that excess energy produced is supplied to other consumers.

2. Rights of Directors

As indicated above, ElecLink provided written assurance that the board of GET will amend its rules of procedure to ensure that:

- the board members representing Atlantia will not take decisions in relation to ElecLink, and that
- board members who represent or have a professional activity in an undertaking performing any of the functions of electricity generation or supply, do not receive any commercially sensitive information in respect of the business of ElecLink.

The Commission welcomes the planned changes as regards the governance of the board of GET as they further reduce the risk of a conflict of interest between the operation of ElecLink and the interests of Atlantia in generation and supply.

However, as noted by Ofgem, one of the Directors of GET is also Director of EDF Energy, a large electricity producer and supplier in the UK. The Commission considers that these parallel directorships create a potential conflict of interest which is incompatible with the objective of the unbundling rules as set out in Article 9 Electricity Directive.

Therefore, the Commission is of the view that the envisaged change of the rules of procedure of GET's board should therefore not only prohibit the transmission of commercially sensitive information to board members, who represent or have a professional activity in an undertaking performing any of the functions of electricity generation or supply, but should also restrict their voting rights in the same manner as envisaged for the board members representing Atlantia.

3. 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.

Should Ofgem and CRE decide to certify ElecLink, the Commission invites Ofgem and CRE to continue monitoring the case also after the adoption of the final certification decision in order to satisfy themselves that no new facts emerge which would justify a change of their assessment.

IV. CONCLUSION

Pursuant to Article 3 of the Electricity Regulation, CRE and Ofgem shall take utmost account of the above comments of the Commission when taking their final decisions regarding the

certification of ElecLink, and when they do 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. CRE and Ofgem are invited to inform the Commission within five working days following receipt whether they consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which they wish to have deleted prior to such publication. Reasons should be given for any such request.

Done at Brussels, 11.12.2018

For the Commission

Member of the Commission

