



Brussels, 20.12.2017
C(2017) 9029 final

COMMISSION OPINION

of 20.12.2017

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Articles 10(6) and 11(6) of
Directive 2009/72/EC - United Kingdom - Certification of Greater Gabbard OFTO
Limited PLC**

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I. PROCEDURE

By letter dating 26 October 2017, 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"), of a preliminary decision concerning the renewal of the certification of Greater Gabbard Limited PLC (hereafter "GG") as transmission system operator for electricity.

Pursuant to Article 3 of Regulation (EC) No 714/2009¹ (hereafter "Electricity Regulation") and Articles 10 and 11 of Directive 2009/72/EC² (hereafter, "Electricity Directive"), the Commission is required to examine the notified draft decision and deliver an opinion to the relevant national regulatory authority as to its compatibility with Article 10(2) and Article 9 of Directive 2009/72/EC.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

GG is a licensed offshore transmission system owner (OFTO), responsible for the operation, maintenance and development of an offshore electricity transmission system for the connection of wind generated electricity from offshore wind production and its transportation to the onshore transmission system. GG was originally certified on 2 August 2013. In support of its original certification, the European Commission delivered Opinion C(2013) 3705 of 10. June 2013.

Following a change in circumstances bearing on the ownership of GG, a review of said certification was triggered and Ofgem has examined these changes in its preliminary decision.

Specifically, at the time of the initial certification granted on 2 August 2013, GG was a wholly owned subsidiary of Greater Gabbard OFTO Holdings Ltd ("GG Holdco"). The shares in GG Holdco were held in equal parts (33%) by Equitix Transmission 2 Limited, AMP Capital Investors UK Cable Limited ("AMP") and Balfour Beatty OFTO Holdings Limited ("Balfour Beatty").

GG informed Ofgem on 2 December 2015 that the Equitix group acquired a 100% shareholding in the GG. The ultimate controller is [BUSINESS SECRET], a natural person and a UK citizen, who exerts its control over GG's shareholders within the Equitix group

¹ 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.

² 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.

through its ownership of a company registered in the Cayman Islands, Pace Cayman Holdco Ltd ("Pace Cayman").

Ofgem has analysed whether and to what extent GG continues to comply with the requirements of the ownership unbundling model, as laid down in the UK legislation transposing the Electricity Directive. In its preliminary decision, Ofgem concludes that the changes in ownership and shareholding structure does not stand in the way of a renewal of GG's certification.

Furthermore, given that Pace Cayman is registered in a third country, Ofgem was also required to ascertain that granting the certification would not put at risk the security of energy supply of the United Kingdom and the Union, in accordance with the requirements set out in Article 11 Electricity Directive. In its preliminary decision, Ofgem concludes that no such risk results from the renewal of GG's certification.

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

III. COMMENTS

On the basis of the present notification the Commission has the following comments on the draft decision.

1. Generation and supply interests linked to GG's shareholders

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.

According to Ofgem's draft decision, a number of Equitix managed funds (Equitix Fund III LP, Energy Savings Investments LP, Equitix Energy Efficiency Fund LP, and Equitix MA 1 LP) hold shareholdings in a number of assets for electricity generation located in the UK. All of these are small generation facilities, with the largest generation interest having 23.3MW capacity (not yet in operation), and the majority are under 11MW in capacity.

Additionally, some of the funds managed by the Equitix Group own shareholdings in a number of micro-generation assets (less than 1MW) which include combined heat and power for student accommodation and back-up generation for health facilities, amongst others.

In its draft decision, Ofgem notes that none of the above-mentioned generation assets qualify as "relevant producers or suppliers" within the meaning of Section 100 of the Electricity Act 1989 as they all have a capacity of less than 50MW.

Outwith the Equitix Group of companies, [BUSINESS SECRET] as the ultimate controller of GG also holds controlling interests in a number of electricity undertakings in the UK, including onshore wind farms spread throughout the UK, with capacity below 20MW, and energy-from-waste projects, with a capacity of less than 24MW.

In its draft decision, Ofgem states that none of the controlling or major shareholdings held by [BUSINESS SECRET] qualify as a "relevant producer or supplier". Ofgem also notes that these shareholdings have been reviewed in relation to the compliance with unbundling requirements in the context of [BUSINESS SECRET]'s interests in a number of certified

TSOs, including Humber Gateway OFTO Limited, Gwynt y Mor OFTO plc and Thanet OFTO Limited.

Ofgem's draft decision concludes that as the ultimate controller of the GG, [BUSINESS SECRET], is not in a position to discriminate in favour of any such undertakings, since no act or omission on the part of GG could come to have an influence on such undertakings. Further, none amongst the projects in which Equitix or [BUSINESS SECRET] holds shareholdings, are physically connected to the GG offshore transmission system.

Commission view regarding generation and supply interests held by GG's shareholders

As a preliminary comment, the Commission recalls the fact 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.

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 '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 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.

The Commission has already expressed this view in previous opinions regarding the granting of certifications in the UK. This includes the original Commission opinion on the initial certification of GG as quoted above (C(2013) 3705 final). Moreover, some of the generation interests of GG's ultimate controller were already considered in previous Commission Opinions in relation to its ownership and control of Thanet OFTO (C(2013) 2566 final), Gwynt-y-Môr OFTO Limited (C(2015) 40 final) and Humber Gateway OFTO Limited (C(2016) 3373 final).

Such conclusions relied primarily on the characteristics of the transmission systems in question and their operation and on the fact that there is no direct interface between the generation interests and the said transmission systems. The Commission notes that these considerations continue to apply in the present case.

In particular, the Commission notes that the transmission system to be operated by GG remains of a limited nature when compared with the size of the UK grid, its total capacity and peak loads. GG consists in fact of a point-to-point cable connecting a generation facility located approximately 40km from the coast of Suffolk to its connection point to National Grid. The TSO responsibilities of GG are limited to operating this specific offshore connection.

The limited size of the transmission system, the limited possibilities of influencing its operations and the lack of a direct connection with the above-mentioned generation assets are relevant factors which limit the potential for discrimination in favour of any generation interests held by GG's ultimate controller, [BUSINESS SECRET] or the funds managed by the Equitix group. Moreover, the small size, in terms of generation capacity, of the wind farm connected by the transmission system in question likewise diminishes the potential for any discriminatory behaviour of GG.

These considerations apply both to the interests held by companies under the control of the Equitix Group and to [BUSINESS SECRET] as a natural person. Notwithstanding this, the Commission still invites Ofgem to continue taking into account the combined capacity and

significance of generation assets by a common shareholder or by its ultimate controller when reviewing compliance with unbundling requirements.

In sum, given the nature of GG's responsibilities, the size of its network and the lack of a direct interface with the generations interests held by the natural person, the Commission could not identify a risk of discrimination in the operation of GG that would pose an obstacle to its certification.

Consequently, the Commission considers that in the present case a refusal of certification would run counter to the principle of proportionality given the fact that the interests of the persons controlling the TSO do not lead to a situation that the unbundling rules seek to prevent.

2. Application of Article 11 – Certification in relation to third countries

Pursuant to Article 11, Ofgem is to refuse certification unless it is demonstrated, on the basis of an assessment, that granting certification does not put at risk the security of supply of the United Kingdom or the European Union. In present case, the application of Article 11 is triggered due to the fact that the intermediate holding company of GG, Pace Cayman, is registered in the Cayman Islands.

Under these circumstances, Ofgem has asked the UK Department for Business, Energy and Industrial Strategy ("BEIS"), which is the competent authority in this regard based on the national legislation implementing the Electricity Directive, for its analysis.

BEIS has informed Ofgem of its assessment of risks in relation to the present acquisition of control by a person from a third country. BEIS concludes that the renewal of GG's certification will not increase the risks to security of supply in the UK or in any other EEA country. The physical distance of the Cayman Island and the lack of interconnection between the UK grid and the Cayman Island are cited in support of this assessment. Further, the generation capacity connected via the GG transmission system (504 MW) is not considered as sufficiently large to pose a risk of security of supply in relation to the total generation capacity of the UK market.³ BEIS also notes that the transmission system operated by GG is connected with National Grid's onshore network on a point-to-point basis only and is not part of a meshed network. Hence, GG holds no responsibility for managing electricity flows beyond the onshore connection point.

Further, it is noted that whilst Pace Cayman is registered in a third country, its ultimate controlled is [BUSINESS SECRET], a UK citizen. From this perspective, BEIS concludes that the geographical location of Pace Cayman does not in itself raise particular concerns when assessing the nature of foreign investments into the UK's energy system.

The Commission shares the view that the granting of certification to GG would not put at risk the security of supply of the UK or the Union, noting in particular the fact that the ultimate controller is a UK citizen, the limited impact of GG on the operation of the UK's national transmission system and the limited generation capacity connected via GG.

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.

³ The UK peak demand is noted at 52.7 GW as per BEIS' estimate.

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 GG.

IV. CONCLUSION

Pursuant to Article 3 Electricity Regulation, Ofgem shall take utmost account of the above comments of the Commission when taking its final decisions regarding the certification of GG, and when it does so, shall communicate its decisions 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, on 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 therein to be confidential. Ofgem is invited to inform the Commission within five working days following receipt whether and why 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.

Done at Brussels, 20.12.2017

For the Commission
Miguel ARIAS CAÑETE
Member of the Commission

