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COMMISSION OPINION

of 5.4.2013

**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 2 Limited, Blue
Transmission Sheringham Shoal Limited and Blue Transmission London Array Limited**

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I. PROCEDURE

On 7 February 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/EC¹ (hereafter, "the Electricity Directive"), of a draft decision on the certification of offshore Transmission System Operators (TSOs) for electricity. The applicants are Blue Transmission Walney 2 Limited („Walney 2"), Blue Transmission Sheringham Shoal Limited („Sheringham Shoal") and Blue Transmission London Array Limited („London Array") (together „the Applicants").

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

Currently Walney 2 Limited has a licence under UK law to own and operate an offshore wind energy transmission system; Sheringham Shoal and London Array expect to become a licensed offshore transmission system operator („OFTO") in 2013.

- The total capacity of the Walney 2 offshore transmission system is 184 MW via a 132kV line.
- The total capacity of the Sheringham Shoal offshore transmission system is 315 MW via 2 x 145 kV lines line.
- The total capacity of the London Array offshore transmission system is 630 MW via 4 x 132kV lines.

The Applicants have applied for certification in accordance with the ownership unbundling model. As the transmission systems of the Applicants were not in place on 3 September 2009, the only unbundling option provided for such operators under the Electricity Directive is the full ownership unbundling option.

Each of the Applicants are or will be ultimately owned and controlled by the same persons, are part of the same corporate group and have the same sole business focus. Each of the Applicants is a joint venture between Barclays Infrastructure Funds Management Limited and

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.

Diamond UK transmission and is ultimately owned and controlled by Barclays PLC (hereafter, "Barclays") and Mitsubishi Corporation (hereafter, "Mitsubishi").

Ofgem has analysed whether and to what extent the Applicants 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 Applicants comply with the requirements of the ownership unbundling model. On this basis, Ofgem submitted its draft decision to the Commission, requesting for an opinion.

III. COMMENTS

On the basis of the present notifications the Commission has the following comments on the draft decisions.

EXERCISE OF CONTROL AND RIGHTS IN THE APPLICANT

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 transmission system operator (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.

GENERATION INTERESTS OF MITSUBISHI AND BARCLAYS

OFTO's are specific to the UK and other OFTOs were the subject of Commission Opinion C(2012)3006, Commission Opinion C(2013)281 and Commission Opinion C(2013)979.

In this case the persons controlling the applicants are the same as in the Commission Opinion C(2013) 979 relating to Walney 1.

Both Barclays and Mitsubishi directly or through various subsidiaries control or have rights in electricity undertakings which are involved in the production of electricity. These interests are located in the UK and in Italy in the case of Barclays and in the case of Mitsubishi in Spain, France and Bulgaria.³

Barclays interests comprise:

- [BUSINESS SECRET] of renewable generation located in Scotland, [BUSINESS SECRET] by a fund manager which is a subsidiary company of Barclays;
- a total of [BUSINESS SECRET] of distribution connected generation in the UK [BUSINESS SECRET], [BUSINESS SECRET] owned by a fund manager which is a subsidiary company of Barclays;

³ See table 1 of Appendix 2 of the notified preliminary decision by Ofgem.

- [BUSINESS SECRET] located across the UK, [BUSINESS SECRET] by a fund manager which is a subsidiary company of Barclays;
- [BUSINESS SECRET] in the UK, [BUSINESS SECRET] by a fund manager which is a subsidiary company of Barclays;
- a total of [BUSINESS SECRET] across [BUSINESS SECRET] locations in Italy, [BUSINESS SECRET] by a fund manager which is a subsidiary company of Barclays [BUSINESS SECRET].

Mitsubishi interests comprise:

- [BUSINESS SECRET] of renewable generation at different locations in Spain, [BUSINESS SECRET] owned by Mitsubishi;
- [BUSINESS SECRET] of renewable energy in Spain, [BUSINESS SECRET] owned by Mitsubishi;
- [BUSINESS SECRET] of Renewable Energy in Portugal, [BUSINESS SECRET] owned by Mitsubishi;
- [BUSINESS SECRET] of renewable energy in France, [BUSINESS SECRET] owned by Mitsubishi (with restricted veto right);
- [BUSINESS SECRET] of renewable energy in France, [BUSINESS SECRET] owned by Mitsubishi;
- [BUSINESS SECRET] of renewable energy in France, [BUSINESS SECRET] owned by Mitsubishi;
- [BUSINESS SECRET] in Bulgaria, [BUSINESS SECRET] owned by Mitsubishi;
- [BUSINESS SECRET] in France [BUSINESS SECRET] owned by Mitsubishi.

OFGEM'S ASSESSMENT

Ofgem sets out that the generation interests described above do not involve relevant suppliers or producers within the meaning of the legislation transposing the unbundling obligations in Great Britain, because the capacity of each is below the 50 MW threshold above which a generation licence is required in Great Britain.

Ofgem further sets out a number of reasons why the risk of the Applicant discriminating in favour of these undertakings is minimal. Ofgem sees no realistic prospect of the Applicant discriminating in favour of any of the electricity undertakings active outside Great Britain. In relation to Barclay's UK interests, Ofgem points out that these are not connected to the offshore transmission system which the applicant controls and are not located in close physical proximity to it. 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.

COMMISSION VIEW

In Commission Opinion C(2013)979 the Commission noted that the Electricity Directive does not specify any threshold in the definitions of "generation" or "supply" in Article 2(1) and Article 2(19) Electricity Directive, respectively. In that case, the Commission considered that the information provided in the draft decision 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.

In the present notification the [BUSINESS SECRET] in France with a capacity [BUSINESS SECRET], [BUSINESS SECRET] owned by Mitsubishi, are additional to what was considered in Commission Opinion C(2013)979. The Commission considers that the size and location of these projects do not affect the analysis in that Opinion. In particular, the size and market share of the generation activities continue to be small on an individual and collective basis. As with Mitsubishi's other interests, they are entirely located in another Member State without any interface with the offshore transmission system controlled by the Applicants.

In its Opinion C(2013)979 the Commission also considered the role of the Applicant as offshore transmission operator 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 Applicant and the generation interests of Mitsubishi and Barclays were limited because the need to ensure the effective operation of the wider Great Britain system⁴ 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 apply equally to each of the OFTOs subject to the present application. Additionally, even taking all of the OFTOs controlled by Barclays and Mitsubishi together, their collective size is small compared to the wider UK system, and the potential information available to the Applicants continues to be extremely limited as a result of the Applicants restricted role in relation to the operation of the overall UK transmission system. The Commission considers that these considerations set out in Commission Opinion C(2013)979 continue to apply, not just in respect of the individual OFTOs but also when applied to the several OFTOs considered collectively.

Consequently, the Commission considers in this case a refusal of certification would run counter to the principle of proportionality given the fact that the generation interests of Barclays and Mitsubishi, 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 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. Ofgem sets out in its preliminary decision that certified parties are required to inform them of any significant changes relevant to the certification and to provide in any case an annual update⁵. Ofgem's preliminary decision also refers to Mitsubishi being engaged in negotiations to take an interest in additional electricity undertakings active in electricity generation, but specifically does not consider this as relevant to the current application. 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 Barclays and Mitsubishi. The Commission furthermore invites Ofgem

⁴ This is described Annex 2 of Appendix 2 of Ofgem's preliminary decision.

⁵ Appendix 2 Section 6.

to include a condition in its final certification decision which requires the Applicant to regularly report to it on the relevant circumstances in this respect.

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, 5.4.2013

For the Commission
Günther Oettinger
Member of the Commission

