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**COMMISSION OPINION**

**of 12.4.2018**

**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 Diamond Partners BBE  
Limited OFTO**

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### I. PROCEDURE

By letter dating 16 February 2018, the Commission received a notification from the national regulatory authority in the United Kingdom (UK) responsible for Great Britain, the Office of Gas and Electricity Markets (hereafter “Ofgem”), of a preliminary decision concerning the certification of Diamond Transmission Partners BBE Limited (hereafter “DTP”) as transmission system operator for electricity.

Pursuant to Article 3 of Regulation (EC) No 714/2009<sup>1</sup> (hereafter "Electricity Regulation") and Articles 10 and 11 of Directive 2009/72/EC<sup>2</sup> (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 Articles 9, 10(2) and 11(7) of Directive 2009/72/EC.

### II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

On 25 July 2017, DTP was announced as the preferred bidder for the Burbo Bank Extension (hereafter “BBE”) offshore transmission project. The purpose of the project is to connect the extension of the existing Burbo Bank Offshore Wind Farm (located in the Liverpool Bay on the West Coast of Great Britain) with the onshore network. Neither the wind farm<sup>3</sup> nor the onshore transmission system are owned or operated by DTP. DTP was set up as special purpose vehicle for the purpose of owning and operating the BBE offshore transmission system and would be a licensed offshore transmission system owner (hereafter “OFTO”) under the specific national regime for such projects (OFTO Regime).

Ofgem identifies Mitsubishi Corporation (hereafter “MC”), HICL Infrastructure Company Limited (hereafter “HICL”) and InfraRed Capital Partners (Management) LLP (hereafter “InfraRed”) as ultimate controllers of DTP.

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<sup>1</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.

<sup>2</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>3</sup> The Burbo Bank Extension offshore wind farm is operated by Ørsted, formerly known as DONG Energy (cf. <http://www.thecrownestate.co.uk/energy-minerals-and-infrastructure/offshore-wind-energy/offshore-wind-electricity-map/>). Ørsted owns 50% of the wind farm, KIRKBI A/S and Danish Pension Fund PKA each own 25% (<https://orsted.co.uk/Generating-energy/Offshore-wind/Our-wind-farms>).

DTP is a 100% subsidiary of Diamond Transmission partners BBE (Holdings) Limited (hereafter "HoldCo"). 50% of shares of HoldCo are held by Diamond Transmission Corporation Limited (hereafter "DTC") which is a 100% subsidiary of MC, a global integrated business enterprise. The other 50% of HoldCo's shares will be indirectly held by HICL, a long-term equity investor in infrastructure registered in Guernsey, through its subsidiary Infrastructure Investments Ltd Partnership (see Figure 1 below). Infrastructure Investments Ltd Partnership is controlled by InfraRed. The control stems from an Operator Agreement, giving Infrastructure Investments General Partner Ltd, a subsidiary of InfraRed, responsibility for the management and operation of Infrastructure Investments Ltd Partnership.

The purpose of DTC is to act as holding company for offshore transmission investments of MC in Europe, including the four Blue Transmission OFTOs which were the subject of Commission opinion C(2016)27 final.

Ofgem has analysed whether DTP complies 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 DTP complies with these requirements.

Furthermore, given that MC is registered in Japan (next to being registered as an overseas company in England and Wales) and that HICL is registered in Guernsey, hence in third countries, Ofgem was also required to ascertain that granting the certification would not put at risk the security of energy supply of the UK 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 certification of DTP.

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 DTP'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.

In relation to electricity generation or supply participations of the ultimate controllers of DTP, Ofgem notes that both MC and InfraRed have controlling interests over "relevant producers or suppliers" as defined in UK law, whereas HICL does not have any interests in or control over "relevant producers or suppliers".

According to the draft certification decision by Ofgem, MC and InfraRed hold the following participations in the EEA which qualify as "relevant producers or suppliers" under UK legislation:

### *Participations of MC*

- The Luchterduinen Offshore Wind Farm Project ('Luchterduinen Project'): MC has a 50% share in this 129MW wind farm, located off the coast of The Netherlands.
- A 48MW battery energy storage system project in Germany ('BESS Project'): MC has a 50% equity interest in the BESS Project. The BESS Project connects to the TenneT transmission system in Germany.
- ElectroRoute Holdings Limited ('ElectroRoute'): MC holds a 57.7% share in this Irish energy trading company that trades in electricity markets located in the EEA, including GB markets.

### *Participations of Infrared*

- Afton Wind farm ('Afton'): InfraRed has a 100% share in this 50MW wind farm near Cumnock, in Scotland, GB.
- Crystal Rigg II Limited ('Crystal Rigg II'): InfraRed has 49% share in this 67MW onshore wind farm located in the east of Scotland, GB.
- Statera Energy Ltd ('Statera Project'), InfraRed has 70% share in this project, which is proposing to fund the roll-out of a pipeline of flexible gas (three 50MW) and one 50MW battery storage projects in UK.
- Ibereolica Solar Oliveniza S.L. ('Oliveniza Project'): InfraRed has a 14% share in this 50MW solar plant located in Spain.
- Ibereolica Solar Moron S.L. ('Moron Project'): InfraRed has a 15% share in this 50MW solar plant located in Spain.
- Sheringham Shoal Offshore wind farm: Infrared has indirect control of this 316.8MW offshore wind farm located off the coast of GB.
- Green Frog Power Limited and GFPII Limited ('Green Frog'): InfraRed holds a 51% equity interest in Green Frog. Green Frog provides balancing services in the UK electricity market. It owns 12 diesel and 8 gas-fired generation sites located throughout UK, and it also has a power trading business, providing a route to market for its generation assets.

According to the draft decision, the ultimate controllers of the Applicant also have some minority interests in small-scale generation below the capacity threshold of "relevant producer or supplier" as defined in UK law. Ofgem notes that, as pointed out by the Commission on the occasion of past certifications, the Electricity Directive does not limit relevant generation or supply interests to those over a certain capacity. Ofgem states that it has therefore considered these small-scale interests for the purpose of assessing whether there is any risk of discrimination.

Ofgem notes that MC and InfraRed also hold minority interests in a number relevant producers or suppliers that are located outside the EEA. MC and InfraRed also have interests in future generation projects which will become operational between 2019 and 2021. Ofgem notes that these projects are not covered by the assessment on which the draft decision is based, but will be kept under review.

In its draft decision, Ofgem notes that, as the owner and operator of an offshore transmission system, DTP has a very limited role compared to onshore TSOs, having no control or direct influence over the network beyond the onshore connection point. Ofgem also notes that whereas in theory, DTP has the ability to impact on the profitability of the wind farm or to create an opportunity for another generator to provide balancing services, there would be limited incentive to do so since any reduction in the availability of the DTP's offshore transmission system below 98% is penalised through a reduction in its revenue. Ofgem adds that potential concerns regarding information sharing are addressed via conditions in DTP's licence that ensure that information about the transmission business cannot be shared with any associated business, including anyone within the corporate groups of the DTP's ultimate controllers. In view of the penalties for breach of these conditions, Ofgem considers that there is no realistic prospect or incentive for DTP or its controllers to discriminate in favour of associated companies by sharing information available to DTP.

With regard to the total generation capacity linked to the above-mentioned participations, Ofgem considers that in the context of the EEA/EU generation market as a whole, MC and InfraRed have a relatively small share of less than 0.1% (including generation interests where they do not have control). Ofgem considers that this share is not sufficient to give either of these controllers significant market power or the ability to discriminate in favour of either their generation or supply interests, or in favour of DTP or their other transmission interests.

With regard to the participations of MC and InfraRed in energy trading Ofgem notes that respective geographical locations of these companies and DTP are not in close proximity to each other.

In relation to MC, Ofgem adds that MC does not have the ability to influence DTP's decisions in favour of its relevant production or supply interests, as its JV partner (HICL), which owns 50% of DTP, is not an investor in any of MC's interests, and would have no incentive to allow this to happen.

Ofgem points out that the preliminary assessment excludes the potential development of a North Sea Offshore Grid and the possibility of the Dutch electricity transmission system becoming directly linked to the transmission lines of DTP, but intends to keep developments in this regard under review.

Ofgem concludes, that for the reasons given above, there is no scope for DTP to discriminate against other users of the GB transmission system or any other national transmission system and no scope for discrimination in relation to generation and supply interests of its ultimate controllers, and that DTP would have no incentive (and significant disincentive) to discriminate in favour of any relevant producers or suppliers in a way that would jeopardise its own transmission availability and revenue stream.

#### *Commission assessment*

As a preliminary comment, the Commission welcomes the recognition by Ofgem of the Commission's position that the Electricity Directive does not specify any "de minimis" or other thresholds in the definitions of generation or supply in Article 2, paragraphs (1) and (19) and hence that Ofgem included in its assessment the small-scale generation interests and entities in which MC and InfraRed hold participations.

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 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 notes that any reduction in the availability of the DTP's offshore transmission system below 98% is penalised through a reduction in its revenue, which limits the incentive to use DTP's transmission monopoly to favour its own generation business. The Commission also welcomes that Ofgem plans to impose specific requirements in the licence further limiting the possibility of DTP to discriminate in favour of other interests of MC or InfraRed.

The Commission notes that the transmission system to be operated by DTP remains of a limited nature when compared with the size of the UK grid, its total capacity and peak loads. The TSO responsibilities of DTP 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 DTP's ultimate controllers.

The Commission also notes that several of the participations in generation concerns assets that are geographically distant from the transmission system operated by DTP.

However, as regards Ofgem's considerations in relation to the total generation capacity of MC's and InfraRed's participations, the Commission considers that Ofgem should assess the market share and the potential market impact associated with these assets not only in relation to the EU market as a whole but also with regard to the UK market.

Moreover, the Commission notes that the future generation projects in which MC and InfraRed hold participations are likely to add a significant amount of generation capacity to the portfolio of DTP's ultimate controllers. While the Commission accepts Ofgem's decision not to consider these projects for the purpose of the present certification, the Commission urges Ofgem to monitor and assess the impact of each of the projects in question on DTP's compliance with the unbundling requirements at the time these projects become operational.

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

Consequently, the Commission considers that in the present case, and subject to the continued monitoring of future generation projects by Ofgem, a refusal of certification would run counter to the principle of proportionality.

## **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

UK or the EU. In present case, the application of Article 11 is triggered due to the fact that MC is registered in Japan and that HICL is registered in Guernsey.

In this context, Ofgem enquired with the Department for Business, Energy & Industrial Strategy (hereafter “BEIS”) if the certification of DTP would put the security of electricity supply of the UK or any other EEA States at risk.

BEIS concluded that this is not the case, since i) DTP would only control a specific OFTO without much impact on the UK electricity system as a whole, and ii) from the perspective of BEIS’ wider work on potential risks of foreign investment in the UK energy system, companies from Japan or Guernsey do not, in and of itself, trigger particular concerns.<sup>4</sup>

In relation to the first point, BEIS notes that the windfarm connected by DTP has a capacity of 254.2MW, whilst the UK has a peak demand of around 60GW, and is connected with the national transmission system operated by NGET on a point-to-point basis and is thus not part of a meshed network.

#### *Commission assessment*

Guernsey is not a sovereign country, but as Crown Dependency a territory for which the UK is responsible. For example, the Bailiwick of Guernsey cannot independently sign international treaties<sup>5</sup>. Furthermore, the close link of Guernsey with the UK and the EU is enshrined in EU legislation: According to Protocol 3 (Channel Islands and the Isle of Man) to the Act concerning the Conditions of Accession [of Denmark, Ireland and the UK] and the Adjustment of the Treaties<sup>6</sup>, Guernsey is part of the customs territory of the EU and “the rights enjoyed by Channel Islanders [...] in the UK shall not be affected by the Act of Accession”. Finally, via Jersey, Guernsey is closely linked by interconnectors with the French electricity grid from which it receives around 85% of its electricity supply<sup>7</sup>.

Japan is an OECD member and – as also most EU Member States – a member of the International Energy Agency (IEA), an organisation which has among its main tasks to increase the security of the energy supply of its members. Both the EU and Japan are cooperating on energy issues in the G7 context and are partners through the multilateral ITER Project. An Economic Partnership Agreement between the EU and Japan was finalised in 2017<sup>8</sup> and, conditional to approval by the European Parliament and EU Member States, is scheduled to enter into force in 2019. Furthermore, at the EU and Japan Summit on 6 July 2017 a political agreement was achieved on the main elements of a Strategic Partnership Agreement to increase cooperation including on energy<sup>9</sup>, which is expected to be provisionally applicable later this year. On 11 July 2017 a ‘Memorandum of Cooperation between the EU and Japan on promoting and establishing a liquid, flexible and transparent global Liquefied Natural Gas (LNG) market’ was signed, further showing how closely the EU and Japan are cooperating in addressing issues of security of supply.

In view of the above, and given both the limited amount of generation capacity connected via the DTP system and the limited impact of DTP on the operation of the UK's national

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<sup>4</sup> Ofgem forwarded BEIS’ conclusion to the Commission on 1 March 2018.

<sup>5</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/564373/factsheet-on-the-uks-relationship-with-the-crown-dependencies.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/564373/factsheet-on-the-uks-relationship-with-the-crown-dependencies.pdf);  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/293235/government-response-justice-select-committees-report-crown-dependencies-developments-2010.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/293235/government-response-justice-select-committees-report-crown-dependencies-developments-2010.pdf)

<sup>6</sup> Official Journal of the European Communities, Special Edition, 27 March 1972.

<sup>7</sup> <https://www.electricity.gov.uk/customer-information/faqs/>

<sup>8</sup> [http://europa.eu/rapid/press-release\\_IP-17-5142\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5142_en.htm)

<sup>9</sup> [http://europa.eu/rapid/press-release\\_IP-17-1927\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1927_en.htm)

transmission system mentioned by BEIS, the Commission shares the view that the granting of certification to DTP would not put at risk the security of supply of the UK or the Union.

### **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 decide to certify DTP, 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 particular, the start of operations of the future generation projects in which the ultimate controllers of DTP hold participations may require a renewed assessment.

## **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 Diamond Transmission Partners BBE Limited, 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.

Since the UK notified on 29 March 2017 its intention to leave the EU, pursuant to Article 50 of the Treaty on European Union, the Treaties will cease to apply to the UK from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification, unless the European Council in agreement with the UK decides to extend this period. As a consequence, and without prejudice to any provisions of the withdrawal agreement, the EU legislation on which this opinion is based on and refers to will only apply to the UK until the UK ceases to be a Member State.

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, 12.4.2018

*For the Commission*  
*Miguel ARIAS CAÑETE*  
*Member of the Commission*

