

The Authority's review of certification of Blue Transmission Walney 1 Limited, Blue Transmission Walney 2 Limited, Blue Transmission Sheringham Shoal Limited and Blue Transmission London Array Limited

1. Certification Decision

- 1.1. Having taken utmost account of the European Commission's (the 'Commission') opinion¹ of our preliminary decision on the review of the certification status of Blue Transmission Walney 1 Limited ('Walney 1'), Blue Transmission Walney 2 Limited ('Walney 2'), Blue Transmission Sheringham Shoal Limited ('Sheringham Shoal') and Blue Transmission London Array Limited ('London Array') (collectively and individually the 'Certified Persons'), the Authority² concludes that the certification of each of the Certified Persons is continued as the certification basis in respect of each of the Certified Persons continues to apply in accordance with the (amended unbundling legislation) as detailed below.
- 1.2. This document provides a summary of the assessment of information submitted by the Certified Persons to the Authority and the Commission. The information comprised updates that constitute a change to the circumstances relevant to the joint venture which owns the Certified Persons since their previous certification decision.

2. GB Legislation – Transposition of Directive 2009/72

- 2.1. In Great Britain ('GB'), the Electricity and Gas (Internal Markets) Regulations ('the 2011 Regulations'), which came into force on 10 November 2011, transposed the ownership unbundling requirements set out in the Third Package into section 10A to 10O of the Electricity Act 1989 ('the Electricity Act') and section 8 of the Gas Act 1986 ('the Gas Act').
- 2.2. The Department of Energy and Climate Change (DECC) made changes to the ownership unbundling provisions of the Electricity Act and Gas Act. The amending regulations, the Electricity and Gas (Ownership Unbundling) Regulations 2014, came into force on 15 January 2015³ ('the 2014 Regulations').⁴ The 2014 Regulations allows the Authority to use some discretion when applying the five certification tests where the application received meets specific requirements. Specifically, where one or more of the tests is not passed, we may decide to treat such tests as passed if the Authority is satisfied that there is no risk of discrimination and it would be in line with our principal objective and general duties to do so.

3. Certified Persons

- 3.1. The Certified Persons are licensed offshore transmission system operators (OFTOs) responsible for the operation, maintenance and development of an offshore transmission system located inside the territorial waters of GB.
- 3.2. Walney 1 has been certified since February 2013, and the other three Certified Persons since April 2013.

¹ The Commission's opinion can be viewed online on:

https://ec.europa.eu/energy/sites/ener/files/documents/2015_119_ofotos_en.pdf

² The Gas and Electricity Markets Authority (the 'Authority'). In this document, the terms "Authority", "Ofgem", "we" and "us" are used interchangeably.

³ http://www.legislation.gov.uk/ukxi/2014/3333/pdfs/ukxi_20143333_en.pdf;

https://www.ofgem.gov.uk/sites/default/files/docs/2015/03/certification_arrangements_in_great_britain_following_amendments_to_the_ownership_unbundling_requirements_of_the_gas_act_1986_and_the_electricity_act_1989_1.pdf

⁴ A separate transposition for Northern Ireland came into force on 5 June 2015.

- 3.3. Following a change in the ownership of the Certified Persons, we adopted a further certification decision on 2 April 2014 by which it confirmed the certification status of the Certified Persons.
- 3.4. Each of the Certified Persons is ultimately owned and controlled by the same persons, is part of the same corporate group and has the same sole business focus.
- 3.5. Since 8 November 2013, the Certified Persons 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%.
- 3.6. Both 3i and Mitsubishi hold participations in several electricity producers; 3i for onshore windfarms and solar plants in UK and Italy; Mitsubishi for renewable energy producers in Spain, France, Portugal, Italy and the Netherlands.

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- 3.7. The review of their certification was triggered, in accordance with section 10I(5)(b) of the Act, by the Authority's receipt of information regarding three potential changes of circumstances reported by the Certified Persons.
 - An offshore windfarm in the Netherlands ('Q10', also known as Luchterduinen) that is part of MC's generation investment portfolio 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 MC and Eneco Holdings NV.
 - There have been changes to the individual directors on the board of each of the Certified Persons since the application submitted in 2013. The information provided by the Certified Persons shows the appointment of three new members (two by 3i; one by Mitsubishi) since the last certification application.
 - Some changes to MC's portfolio of generation interests in renewable energy undertakings in other Member States. These changes include:
 - Disposals of three wind-based generators with a gross capacity of 25MW in France and two solar voltaic-based generators with a gross capacity of 10MW in Bulgaria.
 - New joint venture acquisitions in five wind-based and five photovoltaic-based generators in France, and 22 separate solar photovoltaic-based generators in Italy. None of the acquisitions has a capacity that is more than 21MW.⁵

4. Summary of Our Analysis

First test: The applicant (a) does not control a relevant producer or supplier; (b) does not have a majority shareholding in a relevant producer or supplier; and (c) will not, on or after the relevant date, exercise shareholder rights in relation to a relevant producer or supplier.

- 4.1. Following the changes set out above, it remains that the Certified Persons do not have any shareholding in or control any other company. Furthermore, each of them has a signed undertaking that during the term of their OFTO licence, they will not exercise, or cause to be exercised on their behalf, any shareholding rights in relation to a relevant producer or supplier that they might acquire during the currency of the undertaking. We consider that the Certified Persons therefore continue to meet the requirements of the first test.

⁵ None of the directors of the Certified Persons is also a director of any of the European generation assets in which MC has an interest.

Second Test: Where the applicant is a company, partnership or other business, none of its senior officers has been, or may be, appointed by a person who (a) controls an electricity undertaking which is a relevant producer or supplier; or (b) has a majority shareholding in an electricity undertaking which is a relevant producer or supplier.

4.2. The governance in this regard remains the same. The Certified Persons continue to meet the requirements of the second test as none of their senior officers has been, or may be, appointed by a company or a natural person who (a) controls an electricity undertaking which is a relevant producer or supplier; or (b) has a majority shareholding in an electricity undertaking which is a relevant producer or supplier.

4.3. On this basis we consider that the Certified Persons continue to meet the requirements of the second test.

Third Test: Where the applicant is a company, partnership or other business, none of its senior officers is also a senior officer of an electricity undertaking which is a relevant producer or supplier.

4.4. The information provided by the Certified Persons confirms that none of their new directors or senior officers is also a senior officer of electricity undertaking which is a relevant producer or supplier. The Certified Persons therefore continue to meet the requirement of the third test.

Fourth and Fifth Tests: The applicant is not controlled by a person who (a) controls a relevant producer or supplier; and, (b) has a majority shareholding in a relevant producer or supplier.

4.5. The Certified Persons have provided a comprehensive account of the corporate structures of their controllers. We accept the arguments provided by the Certified Persons that while Q10 is a 'relevant producer and supplier', it is appropriate for the Authority to apply its discretion and treat the fourth ownership unbundling test as passed on the ground that any of the Certified Persons does not have a relationship with Q10 which might lead the Certified Persons to discriminate in favour of Q10. Further information on the factors that we consider to be particularly relevant to assessing the risk of discrimination and our ability to exercise discretion are detailed in our March 2015 open letter⁶ and are reflected in the Commission's opinion⁷.

4.6. We have assessed the new electricity undertakings acquired by MC based on the Certified Person's submissions and are satisfied that none of these investments constitutes a relevant producer or supplier.

4.7. On this basis, we consider that the Certified Persons continue to meet the requirements of the fourth test.

4.8. There is no change to the circumstances in respect of the fifth test. It remains that none of the controllers have a majority shareholding in a relevant producer or supplier (Mitsubishi's interest in Q10 is 50%). Therefore, we consider that the Certified Persons continue to meet the requirements of the fifth test.

5. European Commission's Opinion

5.1. The Commission's opinion is dated 6 January 2016.

⁶ See footnote 3.

⁷ See footnote 1.

- 5.2. Having considered the assessment of the change of circumstances presented in our preliminary decision notified in November 2015, the Commission “agrees with Ofgem’s conclusions ... that in the present case a certification can be renewed (or re-confirmed)”.
- 5.3. The Commission did note, however, that our assessment of the directors of each of the Blue Transmission OFTOs directors should comply with the requirements of Article 9(1)(d) of Directive 2009/72/EC (‘the Directive’)⁸ and not be limited to the Mitsubishi’s generation or supply interests in other Member States which exceed the threshold of “relevant producer or supplier” in UK national law.
- 5.4. In view of the above, we have extended our assessment of the functions that the directors of the Certified Persons observe in across the undertakings active in generation and supply in other Member States in which Mitsubishi holds ownership involvement but not limited to exceeding the threshold of “relevant producer or supplier” in UK national law . We have assessed all of the electricity undertakings that Mitsubishi have an involvement in based on the Certified Person’s’ submissions and are satisfied that the information provided confirms that the directors of the Certified Persons do not exercise control over any of the interests. The rationale for this view is that Mitsubishi does not hold a majority shareholding (interest is not greater than 50%) in any of the new electricity generation acquisitions in other Member States listed in the submitted application. There appears to be no scope to contravene the requirements of Article 9(1)(d).
- 5.5. On this basis, we consider that the Certified Persons continue to meet the unbundling requirements in accordance with the Directive and the 2014 Regulations.

6. Conclusion: Continuation of Certification

- 6.1. Having taken utmost account of the Commission’s opinion the outcome of which accords with the Authority’s Preliminary Decision, the Authority concludes that its decision is to continue the certification of the Certified Persons.

7. Monitoring

- 7.1. The Commission recalled the obligation set out in Article 10(4) of the Electricity Directive to monitor the continuing compliance of TSOs with the unbundling requirements.
- 7.2. The GB legal framework provides a number of measures to ensure the robustness of our certification decisions on an ongoing basis. The Authority has an obligation under section 10I, 10J and 10L of the Regulations to monitor and review whether a certified person should remain certified according to the process set out in the Regulations. We require certified parties to inform the Authority of any significant changes that are relevant to our certification decisions promptly.
- 7.3. In compliance with the GB legal framework and the Electricity Directive, we will continue to monitor whether the basis on which the Authority decided to certify the Certified Persons continues to apply, and will include a condition in our final certification decision which requires the Certified Persons to regularly report to us on the relevant circumstances in this respect.

⁸ Article 9(1)(d) states that “the same person is not entitled to be a member of the supervisory board, the administrative board or bodies legally representing the undertaking, of both an undertaking performing any of the functions of generation or supply and a transmission system operator or a transmission system.”