

The Authority's final decision and analysis on the application for certification as unbundled by Diamond Transmission Partners BBE Limited

This document explains the Authority's final decision on compliance by Diamond Transmission Partners BBE Limited ('the Applicant') with the requirements of the Third Package¹ for transmission system operators ('TSOs') to unbundle from generation, production and supply undertakings as implemented into the domestic legislation in Great Britain ('GB').

1. Certification Decision

- 1.1. Having taken utmost account of the European Commission's (the 'Commission') opinion on our preliminary certification decision on the application for certification submitted by the Applicant, the Authority² concludes that The Applicant complies with the requirements of the ownership unbundling model as set out in GB legislation and should therefore be certified as ownership unbundled.

2. GB Legislation – Transposition of Directive 2009/72

- 2.1. In GB the ownership unbundling requirements set out in the Electricity Directive have been transposed through the Electricity and Gas (Internal Markets) Regulations 2011 which inserted sections 10A to 10O into the Electricity Act 1989 (the 'Electricity Act'). Section 10F of the Electricity Act – 'the ownership unbundling requirement' – states that "*the ownership unbundling requirement is met by an applicant for certification if in relation to each of the five tests below – (a) the Authority thinks that it is passed, or (b) it is treated as passed by virtue of subsection (7), (9) or (9A)*". In accordance with subsection 10F(9A), 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 appropriate and in line with our principal objective and general duties to do so.³

3. The Applicant

- 3.1. Diamond Transmission Partners BBE Limited is expected to become the licensed offshore transmission owner ('OFTO') for the BBE offshore transmission project in April 2018.

4. Summary of Ofgem analysis

- 4.1. *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,*

¹ The term "Third Package" refers to 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 ('Electricity Directive'); 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 ('Electricity Regulation'); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC ('Gas Directive'); Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 ('Gas Regulation'); and Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

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

³ https://www.ofgem.gov.uk/system/files/docs/2017/08/certification_open_letter_2017.pdf

on or after the relevant date, exercise shareholder rights in relation to a relevant producer or supplier.

- 4.2. The Applicant has confirmed that it does not hold shares in, nor control, any other company. Furthermore, the Applicant has provided a signed undertaking that, during the term of its electricity transmission licence, it will not exercise, or cause to be exercised on its behalf, any shareholder rights in relation to a relevant producer or supplier that it might acquire during the currency of the undertaking. Therefore, the Applicant meets the requirements of the first test.
- 4.3. *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.*
- 4.4. The Applicant has provided details of the process for appointing directors. It meets the requirements of the second test as none of its senior officers has been, or may be, appointed by a company or 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.
- 4.5. *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.*
- 4.6. The information provided by the Applicant confirms that none of its directors is also a senior officer of an electricity undertaking which is a relevant producer or supplier. The Applicant therefore meets the requirement of the third test.
- 4.7. *Fourth and Fifth Tests: The applicant is not controlled by a person who (a) controls a relevant producer or supplier; or (b) has a majority shareholding in a relevant producer or supplier.*
- 4.8. The Applicant is ultimately controlled by Mitsubishi Corporation ('MC'), HICL Infrastructure Company Limited ('HICL') and InfraRed Capital Partners (Management) LLP ('InfraRed'). The Applicant has provided a comprehensive account of the corporate structures of its controllers. MC and InfraRed hold the following participations in the EEA which qualify as "relevant producers or suppliers":
- 4.9. *MC*
 - The Luchterduinen Offshore Wind Farm Project ('Luchterduine 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.
- 4.10. *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, and
- 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.

4.11. Section 10F9(A) of the Electricity Act provides that the Authority can use its discretion to treat one or more of the five tests as passed in certain circumstances. Further information on the factors that we consider to be particularly relevant assessing the risk of discrimination and our ability to exercise discretion are detailed in our August 2017 open letter (the 'open letter')⁴ and are reflected in the Commission's opinion.

4.12. While the Applicant's controllers do also control and in some cases hold a majority shareholding in relevant producers or suppliers, the Applicant has demonstrated to our satisfaction that it does not have a relationship with these relevant producers or suppliers that might lead the Applicant to discriminate in favour of those producers or suppliers. The Authority considers it appropriate to treat the fourth and fifth tests as passed in accordance with section 10F(9A) of the Electricity Act. The Applicant therefore meets the requirements of the fourth and fifth tests.

5. European Commission Opinion

5.1. The Commission's opinion is dated 12 April 2018.

5.2. Pursuant to Article 3(2) of the Electricity Regulation, Ofgem is required to take "utmost account" of the Commission's opinion in reaching its final certification decision. We summarise below how we have taken "utmost account" of the Commission's opinion on our preliminary certification decision in relation to the Applicant.

5.3. In its opinion the Commission set out the relevant legislation. Articles 9(1)(b)(i) and 9(1)(b)(ii) of the Electricity Directive prohibits the same person or persons 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 production or supply, and vice versa.

5.4. As a preliminary comment, the Commission welcomed our recognition the Electricity Directive "*does not specify any minimum threshold in the definitions of generation or supply in Article 2(1) or Article 2(19) respectively*". The Commission "*considers that the objective which the unbundling rules of the Electricity and Gas Directives pursue*

⁴ <https://www.ofgem.gov.uk/publications-and-updates/certification-arrangements-great-britain-following-amendments-ownership-unbundling-requirements-gas-act-1986-and-electricity-act-1989-0>

is the removal of any conflict of interest between, on the one hand, generators/producers and suppliers and, on the other hand, TSOs".

- 5.5. The Commission went on to note that *"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 concluded that *"given the nature of DTP's responsibilities, the size of its network and the lack of a direct interface with the generation 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"*.
- 5.6. The Commission stated *"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"*.
- 5.7. In our open letter we note that we will have particular concerns about the risk of discrimination where an Applicant has a relationship with relevant producers or suppliers that have a large market share. A large market share increases the potential for any one generator to influence price.
- 5.8. We have considered whether the Applicant or its controllers have any opportunity to discriminate as a result of MC or InfraRed's share in the GB electricity generation market (in addition to our assessment of relevant shares in the EU generation market, noted by the Commission in its opinion). Our State of the Energy Market Report 2017⁵ notes that the wholesale electricity market in GB is moderately concentrated, with eight generators providing three-quarters of metered volumes (with between 4% and 24% market share).
- 5.9. We note that neither MC nor Infrared are among these eight majority generators. Further, we have estimated the total combined GB market share of the Applicant's controllers (MC and Infrared) as just over 1%.⁶ As such, none of the Applicant's controllers (either separately or in combination) has a large share of the market, and have limited market power as a result of this very small market share. We have concluded that there is no scope for discrimination as a result of GB market share.
- 5.10. The Commission noted *"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 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 Applicant continues to apply, including in respect of any future generation interests that may be acquired, and will include a condition in our final certification decision which requires the Applicant to regularly report to us on any relevant changes in circumstances.

⁵ Page 46 and 47 of our report refer:

https://www.ofgem.gov.uk/system/files/docs/2017/10/state_of_the_market_report_2017_web_1.pdf

⁶ The Applicants market share within the EEA is estimated at under 0.1%.

5.11. The Commission confirmed that *"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"*.

6. Controller from a third country

6.1. Mitsubishi Corporation is incorporated and registered in Japan, and HICL is incorporated and registered in Guernsey. As both are from a third country for the purposes of this certification assessment and section 100 of the Electricity Act, we notified our Government on 17 January 2018 in accordance with section 10B(3) of the Electricity Act. On 1 March 2018, our Government concluded that certifying the Applicant would not put the security of electricity supplies in the UK or any other EEA states at risk. The Commission also concluded the same in its opinion of 12 April 2018.