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COMMISSION OPINION

of 12.5.2020

**pursuant to Article 51(1) of Regulation (EU) 2019/943 and Articles 52(6) and 53(6) of
Directive (EU) 2019/944 – United Kingdom – Certification of TC Rampion OFTO
Limited as transmission system operator for electricity**

(ONLY THE ENGLISH VERSION IS AUTHENTIC)

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pursuant to Article 51(1) of Regulation (EU) 2019/943 and Articles 52(6) and 53(6) of Directive (EU) 2019/944 – United Kingdom – Certification of TC Rampion OFTO Limited as transmission system operator for electricity

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I. PROCEDURE

On 28 February 2020, the Commission received a notification from the regulatory authority in the United Kingdom (UK) responsible for Great Britain (GB), the Office of Gas and Electricity Markets (hereafter “Ofgem”), of a preliminary decision concerning the certification of TC Rampion OFTO Limited (hereafter “TC Rampion”) as transmission system operator for electricity (hereafter “TSO”). On 12 March 2020, this notification was completed by the submission of a letter from the Department for Business, Energy & Industrial Strategy (hereafter “BEIS”) responding to Ofgem’s enquiry if the certification of TC Rampion would put the security of electricity supply of the UK or any other EEA States at risk.

Pursuant to Article 51 of Regulation (EU) 2019/943¹ (hereafter "Electricity Regulation") and Articles 52 and 53 of Directive (EU) 2019/944² (hereafter "Electricity Directive"), the Commission is required to examine the notified draft decision and to deliver an opinion within two months to the relevant national regulatory authority as to its compatibility with Articles 43, 52(2) and 53(7) of the Electricity Directive³.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

TC Rampion is a special purpose vehicle established to own and operate the Rampion offshore transmission system which will connect the Rampion Offshore Wind Farm (with an installed capacity of 400 MW, located 13 km from the Sussex coast in GB) with the onshore network at the connection point in Twineham (West Sussex, GB). TC Rampion would be a licensed offshore transmission system owner (hereafter “OFTO”) under the specific national regime for such projects (hereafter “OFTO regime”). The Rampion Offshore Wind Farm is not owned or operated by TC Rampion⁴.

¹ Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity, OJ L 158, 14.6.2019, p. 54.

² Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ L 158, 14.6.2019, p. 125.

³ The United Kingdom withdrew from the European Union as of 1 February 2020. During the transition period, which ends on 31 December 2020, unless extended, Union law, with a few limited exceptions, continues to be applicable to and in the United Kingdom and any reference to Member States in Union law shall be understood as including the United Kingdom.

⁴ <https://www.rampionoffshore.com/about/owners/>

Ofgem has analysed whether TC Rampion complies with the requirements of the ownership unbundling model, as laid down in the UK legislation transposing the Electricity Directive⁵.

Ofgem identifies International Public Partnerships Limited (hereafter "INPP") and HUNT Companies Inc (hereafter "HUNT") as the ultimate controllers of TC Rampion. Both are also the ultimate controllers of seven other previously certified OFTOs: TC Dudgeon OFTO plc, TC Robin Rigg OFTO Limited, TC Gunfleet Sands OFTO Limited, TC Barrow OFTO Limited, TC Ormonde OFTO Limited, TC Lincs OFTO Limited and TC Westernmost Rough OFTO Limited. The certifications of the latter six OFTOs were the subject of a Commission Opinion of 8 October 2018⁶.

TC Rampion is a 100% subsidiary of IPP Holdings 1 Limited. 100% of its shares are held by INPP⁷ which is registered in Guernsey and is an infrastructure fund listed on the London Stock Exchange with no controlling shareholder. Ofgem notes that the circumstances in respect of INPP have not materially changed since their decision to certify TC Dudgeon OFTO plc, which was the subject of a Commission Opinion of 7 August 2018⁸: As already identified in the Commission Opinion of 15 February 2016 on the certification of TC Westernmost Rough OFTO Limited⁹, INPP is a listed infrastructure investment company whose investments span a wide variety of infrastructure sectors, including health, education and custodial public-private partnership projects, as well as infrastructure investments in the road and rail sectors. INPP does not have control over producers or suppliers of electricity or gas.

However, actual control over IPP Holdings 1 Limited is exercised by International Public Partnerships GB Limited, its general partner and a 100% subsidiary of Amber Infrastructure Group Holdings Ltd (hereafter "AIGHL"). HUNT has control over AIGHL, since its 100% subsidiary HUNT Amber 2 Ltd has a 68.9% participation in AIGHL. The other 31.1% are split among four other shareholders¹⁰, whom Ofgem does not consider to exercise decisive influence or control over AIGHL.

HUNT is registered in the United States of America (hereafter "USA") and, according to its website¹¹, is a family-owned international financial investor whose core business is in the USA. Ownership is split among 11 shareholders, none of whom holds a majority share.

In its preliminary decision, Ofgem notes that TC Rampion has confirmed that "none of the companies or persons in the HUNT corporate group has current investments in, or any control whatsoever over, any relevant producer or supplier in the EEA"¹². However, Ofgem notes that the HUNT Group has small scale generation and supply interests in the UK and in the USA:

- An interest in a 6 MW solar generation asset located in Castle Donnington, East Midlands, UK, that supplies a retail outlet through a private wire.

⁵ 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 has in the meantime been replaced by Directive (EU) 2019/944, which needs to be transposed by Member States until 31 December 2020. However, the provisions relevant for this case have not been changed.

⁶ C(2018) 6667 final

⁷ <https://www.internationalpublicpartnerships.com>

⁸ C(2018) 5453 final

⁹ C(2016) 975 final

¹⁰ Orangetone Limited (7.78%), Ambre Holdings Sarl (9.65%), Michael Gregory (0.84%), Amber 2011 Share Trust (12.84% - non-voting)

¹¹ <http://www.huntcompanies.com/>

¹² In the meaning of UK national legislation.

- A 15% interest in Unison Energy, LLC, which owns and operates on-site power generation solutions for clients using combined heat and power in the USA, primarily in New York State.

Ofgem concludes that the risk of TC Rampion discriminating in favour of these generation interest is minimal, since there is no realistic prospect of any of these entities seeking a physical connection to or directly interacting with TC Rampion's transmission system. Furthermore, Ofgem stresses that the OFTO regime prohibits discriminatory and preferential behaviour and provides mechanisms and financial incentives (and disincentives) to support this prohibition.

Ofgem further notes that INPP, through a subsidiary, has a 7.25% non-controlling interest in Cadent Gas, a company owning and operating four of the eight gas distribution systems in GB.

Ofgem reports that, according to information provided by TC Rampion about likely future investments, HUNT or its subsidiaries may in the future have interests in the following generation assets:

- Flint Solar Mine, a 100 MW PV array in New York State (USA) currently under development.
- MI Wind Holdings Limited, two 19.2 MW wind generation projects based in Michigan (USA) in which Amber holds a 50% interest and which are currently in the planning and permitting phase.
- Clapham Park ESCO Ltd, a 2 MW Combined Heat and Power district heating system in London which will be built out over a period from 2018 to 2034.
- Amber Energy Storage XL Limited, a 49 MW battery storage project in early development.
- Amber Energy Storage (ProjectCo Two) Limited, a 2 MW battery storage project currently under construction.

Since none of these producers or suppliers will be in place at the time TC Rampion is expected to be certified, Ofgem did not take them into account for the current assessment.

In its preliminary decision, Ofgem concludes that TC Rampion complies with the requirements of the ownership unbundling model, as laid down in the UK legislation transposing the Electricity Directive.

Furthermore, given that INPP is registered in Guernsey and HUNT is registered in the USA, hence in third countries, Ofgem is 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 53 Electricity Directive. Ofgem asked the BEIS for its opinion. In its letter of 9 March 2020 (submitted to the Commission on 12 March 2020) BEIS concluded that it does not consider that the security of electricity supplies in the UK or in any other EEA state would be put at risk by the certification of TC Rampion.

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 TC Rampion's controllers

Background to the Commission assessment

Article 43(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 43(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. 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.

The Commission considers that the means with which the legislator intended to pursue the objective of removing any conflict of interest between, on the one hand, generators/producers and suppliers and, on the other hand, TSOs is to provide for a structural solution for the problem that owners of electricity or gas infrastructure may use their control over this infrastructure (constituting a natural monopoly or an “essential facility”) to favour their own generation or supply business. The unbundling regime pursuant to EU legislation is meant to prevent such practices and replaces the previous regime of behavioural measures (reporting, ex post control) by a structural separation between generation/supply and transport infrastructure which excludes the possibility to use the infrastructure to influence competition.

Nevertheless, there may be exceptions to the strict application of EU unbundling rules. 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), a certification of a TSO should not 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 and therefore prohibiting person(s) from investing in a TSO would be disproportionate. The Staff Working Paper assumed that such cases would mainly relate to globally active holding companies owning, *inter alia*, a TSO or to financial investors whose investment strategy typically involves investments in both renewable energy generation assets and grid transmission infrastructure with a view to benefiting from regulated income.

One example mentioned in the Staff Working Paper is a case where the holding company of an electricity TSOs also controls generation interests on another continent. Other examples concern electricity TSOs which also own smaller generation assets in other countries, e.g. a waste incinerator or a combined heat and power plant mainly providing heat to a district heating system which also produce electricity and which operate in a regulated system.

Assessment of a possible conflict of interest

The Commission agrees with Ofgem that the generation and supply interests controlled by TC Rampion's ultimate controllers which are located in the USA do not pose a risk as regards a possible conflict of interests: Due to the geographical distance there exists neither a direct link nor is it likely that at any time in the future such a physical connection of the markets in question will be established. Therefore, it is obvious that there is no incentive and ability for a shareholder in a TSO located in the UK to influence the TSO's decision making in order to favour such generation or supply interest to the detriment of other network users.

In relation to the interest in the 6 MW solar generation asset, the Commission considers that given the small scale of this generation asset in the UK and the fact that the electricity is

supplied directly to the final customer, there appears to be no scope for a conflict of interest between this generation interest and the transmission activities of TC Rampion, nor a resulting risk of discrimination of other network users.

The interest in Cadent Gas is not relevant for assessing TC Rampion's compliance with the unbundling rules, since it is an interest in a distribution system operator, not in generation or supply assets.

However, the Commission notes that the future generation and storage projects in which TC Rampion's shareholders hold participations are likely to add a significant amount of generation capacity to their portfolio.

While the Commission accepts Ofgem's decision not to consider these projects for the purpose of the present certification, the Commission is of the view that Ofgem should monitor and assess the impact of each of the projects in question on TC Rampion's compliance with the unbundling requirements at the time these projects become operational.

The Commission sees, for the reasons outlined above, no reason for concern as regards the future interests in the USA. Likewise, the 2 MW combined heat and power district heating system in London (UK) which is currently under construction is likely to be in line with the approach outlined in the above referenced Staff Working Paper. However, this is less likely to be the case as far as the two future interests in energy storage projects in the UK are concerned. The Commission notes that HUNT appears to have the strategy to pursue, in the same market, investment opportunities both in transmission and distribution networks and, via its subsidiary Amber Infrastructure Group, in generation and supply assets¹³. While the existing and planned generation and supply assets are currently relatively minor, this investment strategy could in the future result in a conflict with EU unbundling rules.

Nevertheless, and in view of the above, 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 be disproportionate.

2. Application of Article 53 – Certification in relation to third countries

Pursuant to Article 53 Electricity Directive, 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 the present case, the application of Article 53 is triggered due to the fact that INPP is registered in Guernsey and HUNT in the USA.

In this context, Ofgem enquired with the BEIS if the certification of TC Rampion would put the security of electricity supply of the UK or any other EEA States at risk. BEIS concluded in its letter to Ofgem of 9 March 2020 that this is not the case due to the limited scope of TC Rampion which is licensed to transmit electricity generated from a designated area and has a capacity of 400 MW, whilst the UK has a peak demand of around 60 GW. The offshore wind farm is connected with the national transmission system on a point-to-point basis only and TC Rampion is thus not part of a meshed network. Generally, from the perspective of BEIS' wider work on potential risks of foreign investment in the UK energy system, companies from the USA or Guernsey do not, in and of itself, trigger particular concerns.

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¹³ Cf. <https://www.amberinfrastructure.com/our-sectors/sustainable-energy/>

Guernsey is not a sovereign country, but as Crown Dependency a territory for which the UK is responsible. 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 Treaties¹⁴, 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 supply¹⁵.

The USA are 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 the USA are cooperating on energy issues in the G7 context and are partners through the multilateral ITER Project. Energy cooperation was further enhanced in 2009 with the creation of the EU-US Energy Council¹⁶. The Council meets regularly,¹⁷ chaired by high-level representatives of the EU and the USA.

In view of the above, and given both the limited amount of generation capacity connected via the TC Rampion system and the limited impact of TC Rampion on the operation of the UK's national transmission system mentioned by BEIS, the Commission shares the view that the granting of certification to TC Rampion 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 52(4) of the Electricity Directive for national regulatory authorities to monitor the continued compliance of TSOs with the unbundling requirements of Article 43 Electricity Directive.

Should Ofgem decide to certify TC Rampion, 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.

IV. CONCLUSION

Pursuant to Article 51 Electricity Regulation, Ofgem shall take utmost account of the above comments of the Commission when taking its final decisions regarding the certification of TC Rampion, 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* Member State regulatory authorities on any other notified draft measures concerning certification, or *vis-à-vis* Member State authorities responsible for the transposition of EU legislation, on the compatibility of any national implementing measure with EU law.

¹⁴ Official Journal of the European Communities, Special Edition, 27 March 1972.

¹⁵ <https://www.electricity.gg/customer-information/faqs/> (FAQ “Why is there sometimes smoke coming from the Power Station’s chimney stack?”)

¹⁶ https://ec.europa.eu/energy/topics/international-cooperation/key-partner-countries-and-regions/united-states-america_en

¹⁷ Every second year; the last meeting took place on 12 July 2018.

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, 12.5.2020

For the Commission
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Member of the Commission

