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COMMISSION OPINION

of 28.10.2020

**pursuant to to Article 3 of Regulation (EC) No 715/2009 and Article 10(6) of Directive
2009/73/EC – United Kingdom – Certification of Gas Networks Ireland (GNI) as
transmission system operator for gas**

(ONLY THE ENGLISH VERSION IS AUTHENTIC)

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I. PROCEDURE

On 4 September 2020, the Commission received an initial notification from the regulatory authority in the United Kingdom (UK) responsible for Great Britain (hereafter “GB”), the Office of Gas and Electricity Markets (hereafter “Ofgem”), of a preliminary decision concerning the certification of Gas Networks Ireland (hereafter “GNI”) as transmission system operator for gas (hereafter “TSO”).

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

Pursuant to Article 3 of Regulation (EC) 715/2009¹ (hereafter "Gas Regulation") and Article 10 of Directive 2009/73/EC² (hereafter "Gas 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 9 and 10(2) of the Gas Directive.

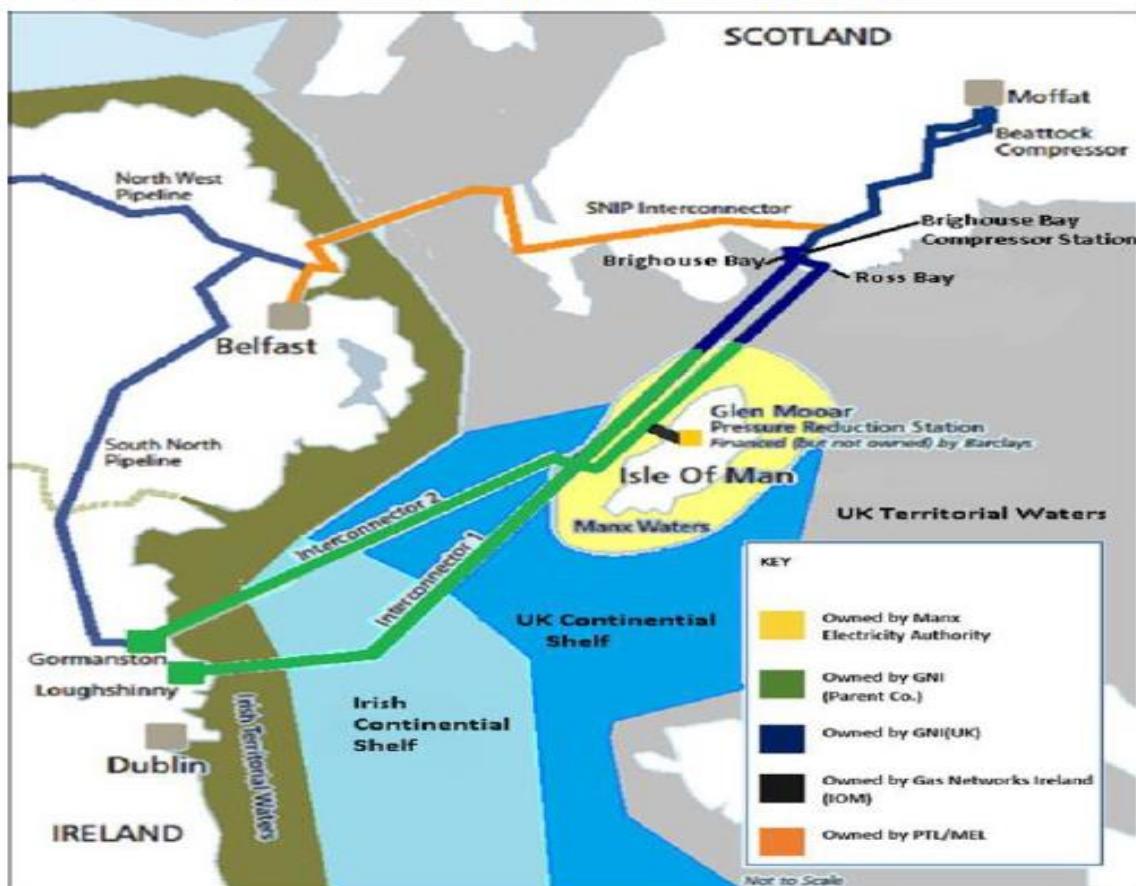
II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

The present preliminary decision concerns the certification of GNI as a TSO for those parts of the “Moffat” interconnector (linking Ireland and GB) which are located on the UK continental shelf (see figure 1, territory in blue colour), but outside UK territorial waters and outside Manx waters (waters around the Isle of Man, which is not part of the UK).

¹ 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. OJ L 211, 14.8.2009, p. 36.

² 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. OJ L 211, 14.8.2009, p. 94.

Figure 1: Map of GNI and GNI (UK) assets



GNI was certified as TSO in the Republic of Ireland under the ownership unbundling model by the regulatory authority of Ireland on 5 April 2016. This certification was subject to a Commission Opinion of 29 January 2016³.

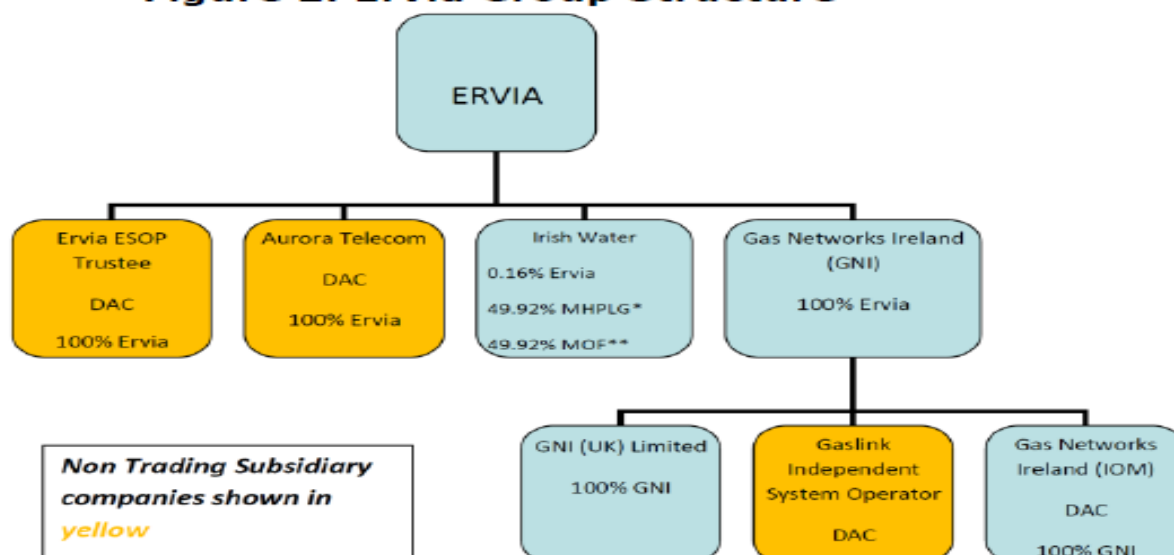
The sections of the Moffat interconnector on UK land and within UK territorial waters are directly owned and operated by GNI’s 100% subsidiary Gas Networks Ireland (UK). Gas Networks Ireland (UK) was certified as UK TSO under the ownership unbundling model by Ofgem on 4 April 2016. The certification was subject to a Commission Opinion of 2 February 2016⁴. Another 100% GNI subsidiary, Gas Networks Ireland (IOM) owns and operates the spur pipeline in Manx Waters.) This structure is in place since, in 2015, Ervia, a company owned by the Irish Government, consolidated its gas assets into a single subsidiary.

GNI is fully owned by Ervia, a company owned by the Irish Government. Until January 2015, Ervia directly held the subsidiary companies of GNI (formerly Bord Gáis Energy (BGE)) and GNI (UK) (former BGE (UK)). Ervia was then reorganised such that GNI, a 100% subsidiary of Ervia, was made the holding company of the subsidiaries Gaslink (non-trading), Gas Networks Ireland (UK) and Gas Networks Ireland (Isle of Man (IOM)) (see figure 2).

³ C(2016) 655 final

⁴ C(2016) 701 final

Figure 2: Ervia Group Structure



* MHPLG – Minister for Housing, Planning and Local Government

** MOF – Minister for Finance

This means that GNI now directly or indirectly owns not only the pipeline section in the Manx Waters, but also the section on the UK Continental Shelf (see blue territory in figure 1 above), thus requiring certification as a TSO in the UK.

Ofgem concludes that GNI fulfils the unbundling requirements under Article 9 of the Gas Directive as well as the respective provisions of UK legislation and can therefore be certified as a TSO.

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. Separation within the State

In accordance with Article 9(6) of the Gas Directive, entities owned by a Member State or another public body can ensure compliance with the unbundling requirement by two separate public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of production or supply on the other hand.

Ervia is fully owned by the Irish Government and pursuant to Irish law controlled by the Minister for Housing, Planning and Local Government (hereafter “MHPLG”)⁵.

⁵ MHPLG is the “Majority Shareholding Minister” with a 90% share, shares of 5% each are hold by the Minister for Communication, Climate Action & Environment and the Minister for Public Expenditure & Reform. The post of MHPLG is now called Minister for Housing, Local Government and Heritage (<https://www.housing.gov.ie/>), but in line with the preliminary certification decision notified by Ofgem this Opinion uses the abbreviation MHPLG.

In a letter to GNI of 31 July 2020 provided as supporting document to Ofgem’s notified preliminary certification decision, the Department of Communications, Climate Action & Environment states that the MHPLG “*has no interests in any companies involved in energy generation, production and supply. Ervia, and its subsidiary network company GNI, are not involved in energy generation, production and supply and have been so certified by the Commission for Regulation of Utilities [the Irish regulatory authority] under the Full Ownership Unbundling provisions of Directive 2009/73/EC on 29th March 2016*”.

In its Opinions of 26 January 2016 and 2 February 2020 on the certification of GNI and of Gas Networks Ireland (UK), the Commission had invited the respective regulatory authorities to assess in their final certification decisions the degree of independence the responsible government entity enjoys in the exercise of its functions in relation to Ervia and GNI or Ervia, GNI and Gas Networks Ireland (UK) and whether it can be demonstrated that this government entity is not under the common influence of another public entity in relation to their functions in gas transmission activities on the one hand and generation and supply activities on the other hand.

Ofgem, based on the analysis done by the Irish regulatory authority for energy, considers MHPLG to have sufficient independence to fulfil the unbundling requirements: Irish legislation stipulates that each Minister has individual ministerial responsibility for his or her department including all subsidiary entities. This independence of individual Ministers in the areas under their jurisdiction also precludes the Taoiseach (head of the Irish government) from giving orders or instructions to the relevant Ministries. Ofgem notes that Irish law sets out consultative roles for other ministers, for example the Ministers for Finance or for Public Expenditure, in certain processes and that board member appointments require the approval of the whole government. However, Ofgem considers such arrangements to ensure proper scrutiny of the financial aspects of such appointments as being common for state owned entities.

In view of the above, the Commission agrees with Ofgem’s conclusion that the controlling Minister, the MHPLG, has sufficient independence to fulfil the unbundling requirements due the provisions in Irish law stipulating the Minister’s departmental responsibility. The national rules which envisage a degree of oversight by government entities responsible for the budget constitute common practice and are as such no impedient to the separation required by Article 9(6) of the Gas Directive.

However, would the MHPLG acquire such interests in the future, then Ofgem would need to reconsider GNI’s certification⁶.

2. Generation and supply interests linked to GNI’s controllers

Background to the Commission’s assessment

Article 9(1)(b)(i) of the Gas 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) of the Gas 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

⁶ The Commission also notes that MHPLG at least indirectly has interests in undertakings performing any of the functions of production or supply, since Ervia’s subsidiary Irish Water owns and operates electricity generation units.

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 by requiring the structural separation between generation/supply and transport infrastructure, which excludes the possibility to use the infrastructure to influence competition.

Nevertheless, the objective and purpose of the EU unbundling rules should be kept in mind in the certification of 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), 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 interests 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.

Assessment of a possible conflict of interest

Ervia is a multi-utility company also responsible for water⁷. While neither Ervia itself nor its subsidiary GNI nor GNI's subsidiaries produce or supply electricity or gas, Ervia's subsidiary Irish Water produces a limited amount of electricity. Although Ervia only has a 0.16% share in Irish Water, a further 49.92% of shares are owned by MHPLG, the same ministry which owns Ervia⁸. Irish Water owns and operates water and sewerage assets in the Republic of Ireland. At 23 wastewater treatment plants, Irish Water operates solar, hydro or micro combined heat and power electricity generation units with a total capacity of currently 8.3 MW, almost exclusively for self consumption. In case upgrades would take place, this total would increase to around 10.4 MW, which would be less than 0.065% of combined electricity production in the Republic of Ireland and Northern Ireland. Only one of those generation units, which has a capacity of 3.1 MW, can export power to the distribution grid and this capability is only used in emergencies to stabilise the distribution grid to which it is connected.

Those electricity generation units were already in place when the Commission provided its Opinions of 29 January 2016 and 2 February 2016 on the certification of GNI and of Gas Networks Ireland (UK). In those Opinions, the Commission agreed with the assessments made by the regulatory authority of the Republic of Ireland and by Ofgem, that due to the low levels of electricity production compared to the overall electricity demand of the isle of Ireland and in view of the fact that the electricity is produced almost exclusively for self-consumption, there is no identifiable risk of an ability or incentive for Ervia or GNI to abuse its position as gas TSO to favour Irish Water's electricity generation units over generation units of competitors. Therefore, Ervia's ownership of Irish Water should not be an obstacle to the certification of GNI or Gas Networks Ireland (UK).

For the purpose of the present certification procedure, the Commission maintains its view expressed in its Opinions of 29 January 2016 and 2 February 2016 on the certification of GNI and of Gas Networks Ireland (UK): The Commission thus agrees with the assessments made

⁷ <https://www.ervia.ie/who-we-are/>.

⁸ The remaining 49.92% share is held by the Ministry of Finance.

by Ofgem, that due to the low levels of electricity production compared to the overall electricity demand of the isle of Ireland and since the electricity is produced almost exclusively for self-consumption, there is no identifiable risk of an ability or incentive for Ervia or GNI to abuse its position as gas TSO to favour Irish Water's electricity generation units over generation units of competitors.

Therefore, the Commission considers that the participations of Ervia and MHPLG in Irish Water should not be an obstacle to the certification of GNI.

Additionally, in its Opinion of 2 February 2016 on the certification of Gas Networks Ireland (UK), the Commission raised potential concerns as regards Ervia's participation in the joint venture "Greener Ideas". The Commission notes that Ervia in the meantime divested its participations in entities which own or plan to develop electricity generation units.

3. Ongoing monitoring

The Commission recalls the obligation set out in Article 10(4) of the Gas Directive for regulatory authorities to monitor the continued compliance of TSOs with the unbundling requirements of Article 9 of the Gas Directive.

Should Ofgem decide to certify GNI, 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 3 of the Gas Regulation, Ofgem shall take utmost account of the above comments of the Commission when taking its final decisions regarding the certification of GNI, 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.

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, 28.10.2020

For the Commission
Kadri SIMSON
Member of the Commission

