



Brussels, 2.2.2016
C(2016) 701 final

COMMISSION OPINION

of 2.2.2016

**pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of
Directive 2009/73/EC - United Kingdom- Certification of Gas Networks Ireland (UK)**

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I. PROCEDURE

On 4 December 2015, the Commission received a notification from the UK regulatory authority responsible for Northern Ireland, Northern Ireland Authority for Utility Regulation (hereafter "NIAUR"), of a draft decision on the certification of Gas Networks Ireland (UK) (hereafter "GNI (UK)") as transmission system operator for gas.

On 10 December 2015, the Commission received a notification from the UK regulatory authority responsible for Great Britain, Authority for Gas and Electricity Markets (hereafter "Ofgem"), of a draft decision on the same issue.

Pursuant to Article 10 Directive 2009/73/EC¹ (hereafter "Gas Directive") and Article 3 Regulation (EC) No 715/2009² (hereafter "Gas Regulation") 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 Article 10(2) and Article 9 of Directive 2009/73/EC.

In view of the fact that the notifications by NIAUR and Ofgem concern the same TSO and concern the same issue, the Commission has decided to adopt a single Opinion directed at both regulators.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

GNI (UK) is the transmission system operator for two gas interconnectors from Moffat in Scotland to the end of UK Territorial Waters. GNI (UK) also owns and operates the South-North and North-West Pipelines in Northern Ireland and holds all the necessary approvals and consents to operate the transportation system.

GNI (UK) is a wholly owned subsidiary of Gas Networks Ireland (hereafter "GNI") which is also seeking certification as an ownership unbundled TSO, for which a decision will be taken by the Commission for Energy Regulation in Ireland ("CER").

GNI was incorporated in 2015 as a wholly owned subsidiary of Ervia, company owned by the Irish state with responsibility for the delivery of gas and water infrastructure and services in Ireland. Ervia was then re-organised such that GNI has subsidiary companies of Gaslink (non-trading), GNI (UK) and GNI (IOM). Prior to incorporation, GNI (then named Bord Gáis

¹ 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 211/94 of 14.8.2009.

² 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 211/36 of 14.8.2009.

Networks) was associated with Bord Gáis Éireann (BGÉ), a state owned vertically integrated utility company active in generation and supply, and was certified in this capacity as an Independent Transmission Operator (ITO) in July 2013. BGÉ's interest in supply and production, Bord Gáis Energy, was sold in June 2014.

In order to comply with the applicable rules on the unbundling of transmission system operators, GNI (UK) has applied for certification according to the Ownership Unbundling ("OU") model as laid down to in Article 9 Gas Directive.

NIAUR and Ofgem have analysed whether and to what extent GNI (UK) complies with the unbundling rules of the OU model. NIAUR and Ofgem have come to the preliminary conclusion that GNI (UK) complies with these requirements.

III. COMMENTS

On the basis of the present notification the Commission has the following comments on the draft decision.

1. Exercise of control and rights in the applicant

Article 9(1)(b)(ii) Gas Directive prohibits the same person or persons from directly or indirectly exercising control over a transmission system operator 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.

GNI (UK)'s parent company, Ervia, also owns Irish Water, Ireland's national water utility company, which performs water and waste water services in Ireland.

Irish Water electricity is generated at 23 wastewater treatment plants. With one exception, all electricity is generated and consumed at the relevant sites. The total generating capacity stands at just over 8MW, potentially rising to just over 10MW. The maximum value of Irish Water's electricity generation is less than 1% of its annual turnover. One unit (3.1MW) exports electricity to the grid, which GNI indicates is used in rare instances for grid stabilisation, approximately 30-40 minutes per year.

The Commission recalls that pursuant to Article 9(3) Gas Directive, the unbundling requirements set out in Article 9(1)(b) are applicable also between gas transmission and electricity generation and supply, and vice versa. The Commission also notes that the unbundling rules enshrined in the Gas Directive do not envisage a *de minimis* threshold on the levels of production or supply.

However, the Commission agrees with NIAUR's and Ofgem's assessment that in view of the very low levels of Irish Water's electricity production which is almost exclusively for self-consumption and the fact that the plants are connected to the distribution network in Ireland to which GNI (UK)'s gas interconnector assets are not connected, there is a no identifiable risk of an ability or incentive for GNI (UK) to abuse its position as gas transmission system operator to favour generating units at the facilities of Irish Water over other generating units.

Therefore, the Commission considers that Ervia's ownership of Irish Water should not be an obstacle to the certification of GNI (UK).³

In their preliminary decisions, NIAUR and Ofgem also state that Ervia participates together with Mountside Partners in a joint venture, Greener Ideas, which owns three sites, each with planning permission for a 98 MW gas-fired power plant. However, NIAUR and Ofgem point out that Greener Ideas does not yet perform the function of an electricity producer and that 3 years would be necessary before the plants are operational. Moreover, Ervia has provided assurances that Greener Ideas would not act as a producer so long as Ervia retains rights in the business. A licence condition will be implemented requiring GNI (UK) to inform NIAUR and Ofgem of any changes in this regard.

The Commission considers that should Greener Ideas assume activities of generation or supply of gas or electricity, GNI (UK) may no longer be considered compliant with the unbundling requirements laid out in Article 9(1) of the Gas Directive. The Commission agrees with the condition imposed by NIAUR and Ofgem that GNI (UK) must immediately notify them of any potential or actual activation of any dormant or non-trading companies in Ervia Group. The Commission considers that this condition is sufficient to ensure GNI (UK)'s compliance with the unbundling requirements, but points out that the generation or supply activities by companies in the same group as the TSO should be considered immediate grounds for a reopening of the certification procedure.

2. Contracting of services

Article 9(1)(a) Gas Directive requires that in the OU model each system owner acts as a TSO, while Article 13 Gas Directive sets out a detailed list of the tasks of a TSO, including the operation, the maintenance and the development of a secure and reliable system.

GNI (UK) has sub-contracted a range of TSO services to GNI under a service agreement. In relation to the GB interconnector assets, the service agreement includes tasks such as the provision of maintenance, grid control and technical services. In relation to the Northern Ireland assets, the agreement envisages the provision of secretarial and financial services, operation and maintenance services and services in connection with GNI (UK)'s Northern Ireland licence. In their preliminary decisions, NIAUR and Ofgem allow GNI (UK) to exercise its right to sub-contract some of the tasks to GNI, and do not request that a TSO carry out all or any of the tasks of the system operation. Large TSOs in Europe such as National Grid Gas already contract certain services, most commonly maintenance and GNI (UK) is therefore not unique in this regard.

The Commission considers that in the present case the envisaged sub-contracting of certain services does not constitute an obstacle to GNI (UK)'s certification, since the execution of the tasks in question are being sub-contracted to GNI, which is also seeking certification as an ownership unbundled TSO in Ireland, and of which GNI (UK) is a wholly owned subsidiary. In view of these specific circumstances, and provided that GNI (UK) remains ultimately responsible for the tasks in question, the Commission is of the view that GNI (UK) can be considered as compliant with the requirements for OU.

3. Separation within the State

³ See *Unbundling: The Commission's practice in assessing a conflict of interest including in the case of financial investors* (SWP (2013) 177).

Article 9(6) Electricity Directive opens up the possibility, within the ownership unbundling model, of the State controlling transmission activities, as well as generation, production and supply activities, provided however that the respective activities are exercised by separate public entities. For the purpose of the rules on OU, two separate public bodies should therefore be seen as two distinct persons and should be able to control production and supply activities on the one hand and transmission activities on the other, provided that it can be demonstrated that they are not under the common influence of another public entity in violation of the rules on ownership unbundling. The public bodies concerned must be truly separate. In these cases, it must be demonstrated that the requirements of OU of Article 9 Electricity and Gas Directives are enshrined in national law and are duly complied with.

Ervia, GNI and GNI (UK) were formerly under the control of the Ireland's Minister for Communication, Energy and Natural Resources (MCENR) which also controls other companies active in energy production or supply. Further to the recently adopted 'MSM Commencement Order,' MCENR's control of the Ervia Group had been divested and transferred to the Ireland's Minister for Environment, Community and Local Government (MECLG). NIAUR and Ofgem state in their preliminary decisions that the MECLG has no role in relation to companies active in energy production or supply and thus has no possibility of exercising decisive influence on an undertaking performing any of the functions of production or supply. Therefore, NIAUR and Ofgem are of the view that GNI (UK) is compliant with the respective unbundling requirements.

However, the Commission is of the view that NIAUR and Ofgem have not sufficiently assessed in their preliminary decisions whether the separation within the state is ensured by the degree of independence that the MECLG has in the exercise of their functions in relation to Ervia, GNI and GNI (UK), i.e. whether it can be demonstrated that MCENR and MECLG are 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.

The Commission therefore invites to NIAUR and Ofgem to assess in their respective final decisions the degree of independence which the MECLG enjoys in the exercise of their function in relation to Ervia, GNI and GNI (UK). The Commission considers that NIAUR and Ofgem should only certify GNI (UK) if further to such assessment full compliance with the unbundling requirements pursuant to Article 9(1) *juncto* Article 9(6) Gas Directive can be established.

IV. CONCLUSION

Pursuant to Article 3 Gas Regulation, NIAUR and Ofgem shall take utmost account of the above comments of the Commission when taking their final decisions regarding the certification of GNI (UK), and when they do so, shall communicate their 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.

The Commission will publish this document on its website. The Commission does not consider the information contained therein to be confidential. NIAUR and Ofgem are 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, 2.2.2016

For the Commission
Miguel ARIAS CAÑETE
Member of the Commission

