Ofgem’s final decision and analysis on Moyle Interconnector Limited’s (“MIL’s”) application for certification

This document sets out Ofgem’s final decision on MIL’s compliance with the requirements of the Third Package for transmission system operators (“TSOs”) to be certified in accordance with implementing legislation in Great Britain (“GB”).

1. Certification Decision

Having taken utmost account of the European Commission’s (the “Commission’s”) opinion on our preliminary certification decision on MIL and its compatibility with Articles 9 and 10 of the Electricity Directive, the Authority concludes that the first certification ground set out in section 10E(3) of the Electricity Act 1989 (the “Electricity Act”) has been complied with and that MIL should therefore be certified (on the basis of ownership unbundling) and should be designated as a TSO.

2. GB Legislation – Transposition of the Electricity Directive

In GB the grounds for certification and the ownership unbundling requirements set out in the Electricity Directive have been transposed through the Electricity and Gas (Internal Markets) Regulations 2011 (the “Regulations”) which insert new sections 10A to 10O into the Electricity Act. Section 10E of the Electricity Act sets out the grounds on which the Authority may decide to certify an applicant. The first of these grounds is that the Authority may decide to certify an applicant if that applicant meets the ownership unbundling requirement in section 10F of the Electricity Act. Section 10F of the Electricity Act provides that the ownership unbundling requirement is met if the Authority thinks that each of the five tests set out in section 10F is passed.

3. The Applicant

3.1. MIL (the “Applicant”) is the sole owner and operator of the high voltage direct current electricity interconnector, linking the electricity grids of Northern Ireland and Scotland through two submarine cables running between converter stations at Ballycronan More in Islandmagee, County Antrim and Auchencrosh in Ayrshire (the “Moyle Interconnector”). The Moyle Interconnector has a technical capacity of 500MW.

3.2. In GB, MIL holds an Electricity Interconnector Licence originally granted by the Department of Trade and Industry under Section 6(1)(e) of the Electricity Act that came into force on 14 August 2006.

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1 The Gas and Electricity Markets Authority (the “Authority”). In this document the terms, "Authority", "Ofgem", "we" and "us" are used interchangeably.
3 In accordance with Article 3(2) of the Electricity Regulation.
4 Pursuant to section 10H(2) of the Electricity Act, implementing Article 10(2) of the Electricity Directive.
5 Set out in section 10E(3) of the Electricity Act.
3.3. This document provides a summary of the analysis of the information submitted by MIL to the Authority and the Commission for the purpose of assessing the Applicant’s compliance with the unbundling requirements (the five tests) and its certification as independent under the GB legislation implementing the unbundling provisions of the Electricity Directive.

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

4.2. MIL has confirmed that it does not hold any shares, contractual or other rights in any other entity. Further, MIL has provided a signed undertaking that it will not, on or after the relevant date, exercise shareholder rights in relation to a relevant producer or supplier. We therefore consider that MIL 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. MIL has provided details of the process for appointing its directors. MIL meets the requirements of the second test as 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.

4.5. **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 MIL confirms that none of the directors or senior officers of MIL is also a senior officer of an electricity undertaking which is a relevant producer or supplier.

4.7. **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.

4.8. MIL is a wholly owned subsidiary of Moyle Interconnector (Financing) plc (“MIFP”), which in turn is a wholly owned subsidiary of Moyle Holdings Limited (“MHL”), which in turn is a wholly owned subsidiary of, and therefore controlled by, Mutual Energy Limited (“MEL”). Our analysis confirms that none of the companies controlled by MEL (as the ultimate parent company of the Applicant) is a relevant producer or supplier and therefore the applicant is not controlled by a person who either controls a relevant producer or supplier or has a majority shareholding in a relevant producer or supplier. The requirements of the fourth and fifth tests are therefore met.

5. **European Commission Opinion**

5.1. 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 decisions. We summarise below how we have taken “utmost account” of the Commission’s opinion of Ofgem’s preliminary certification decision in relation to MIL. The Commission’s opinion is published on the Commission’s website and can be viewed at:
5.2. The Commission commented on two areas of MIL’s arrangements: (i) Carrying out of TSO tasks; and, (ii) European Renewable Energy Fund Limited Partnership. We look at each of these below.

5.3. Carrying out of TSO tasks & enforceability of license conditions:

5.3.1. In its opinion on MIL, the European Commission noted that under Article 9(1)(a) of the Directive, each undertaking which owns a transmission system is required to act as a TSO, including carrying out of all the tasks of a TSO under Article 12 of the Electricity Directive. The Commission states that decisions related to operation, maintenance and development must be made by the TSO, and the network company must have enough resources at its disposal to carry out its tasks under Article 12 of the Electricity Directive independently. The Commission also referred to its opinion in Voralberger Übertragungsnetze GmbH that subcontracting core TSO tasks to a vertically integrated undertaking was not compatible with the full ownership unbundling model. The Commission also noted that “the transfer of TSO functions can be acceptable if the transmission system is operated as part of a wider transmission system,” with the additional requirement that “only other TSOs which meet the unbundling requirements for electricity transmission system operators can provide this joint operation.”

5.3.2. MIL is a single ‘point-to-point’ interconnector, owned and operated as such, and in this respect it differs from a national transmission system operator. MIL performs Article 12 tasks to the extent that they apply to a single ‘point to point’ interconnector such as that operated by MIL. MIL cooperates with National Grid Electricity Transmission plc (“NGET”) as GB system operator, and with its neighbouring TSOs, Scottish Hydro Electric Transmission Limited and SP Transmission Limited, to facilitate the performance of other Article 12 tasks at the interconnection point in GB. NGET performs Article 12 tasks that are relevant to the GB transmission system and performs certain tasks to coordinate GB TSOs.

5.3.3. In our preliminary decision, we set out how Article 12 of the Electricity Directive has been transposed in the GB legislation. To demonstrate that the TSO fulfils the requirements of Article 12 that pertain to it, we provided a table (which can be found in Annex 1) that lists the tasks that the TSO applicant, as an electricity interconnector, fulfils in compliance with Article 12, with specific reference to where these provisions are found in the GB legislation and licences. Specific duties, corresponding to the relevant requirements of Article 12, are imposed on MIL through its electricity interconnector licence granted under the Electricity Act.

5.3.4. As all of the Article 12 tasks are set out in legislation and in licences, the Authority can carry out enforcement action if a TSO licensee does not comply with any of the relevant obligations. Therefore, these powers would be available to the Authority in connection with any of the conditions of MIL’s licence which correspond to the duties imposed on TSOs by Article 12 of the Electricity Directive. Licence holders have to comply with the conditions of their licences i.e. Standard Licence Conditions (“SLCs”). Any failure to do so may constitute a breach of licence and the Authority may take such enforcement action as it considers reasonable in the circumstances. The Authority may amend the SLCs if it considers it appropriate.

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6 The Regulations have amended the licence modification process from requiring a certain level of consent to being imposed subject to an ex-post right of appeal. The licence modification procedure is set out in sections 11A to 11H of the Electricity Act.
5.3.5. The Authority’s enforcement powers are set out in sections 25 to 28 of the Electricity Act. These include an ability to order compliance\(^7\) or issue a penalty of up to ten percent of the licensee’s annual turnover\(^8\). This corresponds with Article 37(4)(d) of the Electricity Directive, which states that a penalty of up to ten percent of the TSO’s turnover may be levied. The Authority can also issue directions in order to require the licensee to remedy any breach of licence. Any failure by a licensee to comply with an enforcement order made by the Authority may ultimately be a ground for revocation of its licence.

5.3.6. We note that the Applicant sub-contracts the physical operation of the Moyle Interconnector to a third-party (SONI, a subsidiary of EirGrid plc), whilst retaining responsibility and decision-making related to operation, maintenance and development. The EirGrid group is responsible for operating the single electricity market in Ireland and Northern Ireland, and the Commission’s opinion on the Commission for Energy Regulation’s (“CER’s”) preliminary certification decision on ESB/EirGrid is supportive of EirGrid being certified as the TSO for Ireland\(^9\). The Commission is also supportive of the operation of the single electricity market in Ireland and Northern Ireland, noting in its opinion on our preliminary certification decision for the Applicant that “[s]uch cross border system operation, including the operation of Moyle by SONI, has the potential to provide real benefits to consumers” and that “[i]t is beneficial that the operation of the interconnector is fully integrated into the wider system operation on the island of Ireland …”.

5.3.7. The Commission noted, however, the importance of TSOs having “the necessary powers and resources both to develop their own system and satisfy themselves that the operation of their system is being carried out in a non-discriminatory way” and having “enough resources at [their] disposal to carry out [their] tasks under Article 12 of the Electricity Directive independently”. As set out in Annex 1 below, MIL is subject to a licence condition (standard licence condition 19) that it “shall at all times act in a manner calculated to secure that it has available to it such resources, including (without limitation) management and financial resources, personnel, fixed and moveable assets, rights, licenses, consents and facilities ... to properly and efficiently participate in the operation of the interconnector ... and ... to comply in all respects with its obligations under this licence, the Act, the Regulation and any other legislation as the Authority may direct …”. As set out above, the Authority may take enforcement action in the event of a breach of licence. We also note that in relation to sufficiency of resources, the Commission invited the Northern Ireland Authority for Utility Regulation (“Utility Regulator”)\(^10\) to verify that MIL has sufficient resources to oversee the actions of SONI (and Eirgrid) in operating its transmission system as part of the wider system on the island of Ireland in addition to having the resources available to manage the financing, maintenance and development of interconnection between Northern Ireland and Great Britain.” Ofgem will co-operate with Utility Regulator where appropriate in this regard.

5.3.8. In the Authority’s opinion, taking utmost account of the European Commission’s opinion, given that MIL (i) retains responsibility for the relevant tasks of the TSO as set out in Article 12 of the Electricity Directive, and (ii) is subject to enforceable licence conditions in this regard, MIL’s decision to meet certain of these obligations through a third party is compatible with the requirements of Article 12 of the Electricity Directive.

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\(^7\) Section 25 of the Electricity Act
\(^8\) Section 27A of the Electricity Act
\(^10\) As the Commission issued a joint opinion on our and Utility Regulator’s preliminary certification decisions for the Applicant.
5.3.9. MIL’s application states that the current sub-contractor is SONI. SONI is not certified under the Third Package. SONI is owned by EirGrid plc, which is an Irish state-owned commercial company. We note that the Irish state also holds interests in the Electricity Supply Board (“ESB”) in Ireland, which includes electricity supply interests. We therefore believe that SONI is part of a vertically integrated undertaking (“VIU”) within the meaning of Article 2(20) of the Electricity Directive. Given that a VIU (or part thereof), performs the role of physical operation of the Moyle Interconnector, we note that it is possible for commercially sensitive information obtained when performing this role to be passed to other companies (or employees of such companies) with production or supply interests. We have therefore considered the issue of protection of commercially sensitive information in line with the principles of ownership unbundling.

5.3.10. In our preliminary decision, we proposed including in our final decision a specific condition relating to information sharing between MIL and its subcontractor. We note that MIL is already subject to the confidentiality requirements of standard licence condition 21 of its electricity interconnector licence. Having considered further, we now believe that standard licence condition 21 is sufficient to address any possible concerns about passing of information to relevant producers or suppliers within the subcontractor’s group; therefore introducing an additional condition is unnecessary in this instance.

5.3.11. We would nevertheless encourage MIL to keep under consideration whether it has put in place appropriate arrangements to ensure that it continues to comply with standard licence condition 21, just as it would if we had imposed an additional condition. It would be for the Applicant to determine that its arrangements (such as contractual arrangements) with the current or any future subcontractor were sufficient to ensure that standard licence condition 21 was met. Breach of this condition would be a ground for withdrawing the certification. Withdrawal of certification may ultimately lead to the Authority taking enforcement action (which may result in it imposing a financial penalty, in line with paragraph 5.3.6 above) as it is a requirement for the Applicant to be certified under section 10A(3) of the Electricity Act.

5.3.12. We conclude that in order to maintain its electricity interconnector licence, the Applicant must demonstrate compliance with the requirements of Article 12. We consider that MIL does so by (i) meeting the unbundling requirements, and (ii) being in a position to ensure that its subcontractor also complies as an enforceable requirement to maintain its licence. It is therefore sufficient for us to certify the Applicant on the basis that, through itself and its subcontractor(s), it satisfies each of the five tests required for ownership unbundling certification, without the need for the Authority to impose additional conditions relating to Article 12.

5.4. European Renewable Energy Fund Limited Partnership:

5.4.1. The Commission agreed with the Authority’s view that MEL’s (the Applicant’s ultimate holding company’s) investment (through a subsidiary company) in the European Renewable Energy Fund Limited Partnership was “confined to a financial interest” and that MEL did not directly or indirectly exercise “rights or control in any of the renewable energy undertakings”. The Commission also noted that given the “small size of the holding and the role of SONI in the day to day operation of the Moyle interconnector this interest does not constitute a barrier to certification of MIL”.

5.4.2. The Commission invited the Authority "to keep under review whether a financial incentive could exist that could influence MEL’s decision-making powers in MIL and, if that is the case, to ensure that remedies are put in place that effectively remove this conflict of interest". The Authority considers that this reassessment is possible under section 10I of the Electricity Act and conditions C2 and C5 of our final decision. If Ofgem deems that the basis for certification has changed and an applicant is no longer
compliant with the ground on which it has been certified, the appropriate action can be taken.

6. **Annex 1: Requirements of Article 12 as Transposed in GB Legislation**

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<th>Article 12, Electricity Directive</th>
<th>Interconnector Compliance in GB as applicable to MIL</th>
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<tr>
<td>12</td>
<td>Each transmission system operator shall be responsible for:</td>
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<td>12(a)</td>
<td>ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity, operating, maintaining and developing under economic conditions secure, reliable and efficient transmission systems with due regard to the environment</td>
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<td>12(b)</td>
<td>ensuring adequate means to meet service obligations;</td>
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<td>SLC 3 of the Electricity Interconnector Licence: &quot;The licensee shall comply with the requirements of the Grid Code ...&quot;. NGET is responsible for ensuring that the GB system is able to meet demand. The Grid Code (<a href="http://www.nationalgrid.com/NR/rdonlyres/67374C36-1635-42E8-A2B8-B7B8B9AF2408/58810/00_GRID_CODE_FULL_I5R2.pdf">http://www.nationalgrid.com/NR/rdonlyres/67374C36-1635-42E8-A2B8-B7B8B9AF2408/58810/00_GRID_CODE_FULL_I5R2.pdf</a>) sets out how users can use the national system. Interconnectors cooperate with the TSO as users of the national system to ensure demand is met.</td>
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<td>SLC 19 of the Electricity Interconnector Licence: SLC 19(3): &quot;The licensee shall ensure adequate interconnector capacity and interconnector reliability to ensure the long-term ability of the interconnector to meet reasonable demands for capacity and contribute to security of supply.&quot; SLC 19(2): &quot;The licensee shall operate, maintain and develop an economic, efficient, secure and reliable interconnector.&quot;</td>
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<td>SLC 19(1)(a) and (b) of the Electricity Interconnector Licence (Operation and development of the interconnector).</td>
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<td></td>
<td>&quot;1. The licensee shall at all times act in a manner calculated to secure that it has available to it such resources, including (without limitation) management and financial resources, personnel, fixed and moveable assets, rights, licenses, consents and facilities, on such terms and with all such rights, as shall ensure that it is at all times able:</td>
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<td>(a) to properly and efficiently participate in the operation of the interconnector; and</td>
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| **12(c)** | contributing to security of supply through adequate transmission capacity and system reliability; | In addition to SLC 19 of the Electricity Interconnector Licence, the National Electricity Transmission System Security and Quality of Supply Standards (SQSS) apply to the National Transmission System.  

http://www.nationalgrid.com/uk/Electricity/Codes/gbsqsscode/DocLibrary/  

The national TSO must ensure that the national system is operated according to the SQSS standards and therefore Interconnectors must work with the National TSO to ensure that these standards are upheld both across the national system and the interconnectors. |
| **12(d)** | managing electricity flows on the system, taking into account exchanges with other interconnected systems. To that end, the transmission system operator shall be responsible for ensuring a secure, reliable and efficient electricity system and, in that context, for ensuring the availability of all necessary ancillary services, including those provided by demand response, insofar as such availability is independent from any other transmission system with which its system is interconnected; | SLC 19 of the Electricity Interconnector Licence (Operation and development of the interconnector) as set out above.  

Further, SLC 19(4) stipulates that: “The licensee shall manage electricity flows on the licensee’s interconnector, taking into account exchanges with any interconnected system and shall ensure the availability of all ancillary services including those provided by demand response, insofar as such availability is independent from an interconnected system.” |
| **12(e)** | providing to the operator of any other system with which its system is interconnected sufficient information to ensure the secure and efficient operation, coordinated development and interoperability of the interconnected system | Condition 5.2(c) of the Electricity Interconnector Licence (Provision of information to a relevant transmission licensee or relevant distribution licensee) provides that:  

“… the licensee shall furnish to any relevant transmission licensee, any relevant distribution licensee or any operator of an interconnected system, information concerning the operation and technical specifications of the licensee’s interconnector in such
| 12(f) | Ensuring non-discrimination as between system users or classes of system users, particularly in favour of its related undertakings; | Condition 20 of the Electricity Interconnector Licence (Prohibition of discrimination and cross-subsidies) provides that:

"The licensee shall not discriminate between users or classes of users particularly in favour of a related undertaking of the licensee.” |

| 12(g) | Providing system users with the information they need for efficient access to the system; and | Condition 11A of the Electricity Interconnector Licence (Approval of terms for access to the licensee’s interconnector) requires the licensee to submit access rules (including rules on arrangements for users to obtain interconnector capacity) to the Authority for approval. It also contains rules on the publication of the licensee’s access rules and provision of the licensee’s access rules to any person who requests them. Modification of the access rules is also subject to Authority approval. |

| 12(h) | collecting congestion rents and payments under the inter-transmission system operator compensation mechanism, in compliance with Article 13 of Regulation (EC) No 714/2009, granting and managing third-party access and giving reasoned explanations when it denies such access, which shall be monitored by the national regulatory authorities; in carrying out their tasks under this Article transmission system operators shall primarily facilitate market integration. | This does not apply to interconnectors as this is an obligation on the Network System Operator ("NETSO"). |