

The Authority's final decision and analysis on the application for certification as unbundled by Nemo Link Limited

This document explains the Authority's final decision on compliance by Nemo Link Limited ('Nemo') 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 Nemo, the Authority² concludes that Nemo 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 the applicant if each of the following five tests is passed*". According to the Electricity and Gas (Ownership Unbundling) Regulations 2014 which came into force in January 2015, 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. Nemo holds an Electricity Interconnector Licence granted under Section 6(1)(e) of the Electricity Act 1989 to operate the Nemo Link interconnector.
- 3.2. Nemo is a joint venture between Elia System Operator NV/SA ('Elia') (the Belgian TSO) and National Grid Interconnector Holdings Limited, a subsidiary company of National Grid Plc ('NG') (ultimate controller of National Grid Electricity Transmission plc, the GB system operator and a TSO).

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. Nemo has confirmed that it does not hold shares in, nor control, any other company. Furthermore, Nemo has provided a signed undertaking that, during the term of its interconnector 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, Nemo 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. Nemo 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 Nemo confirms that none of its directors is also a senior officer of an electricity undertaking which is a relevant producer or supplier. Nemo 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. Nemo is ultimately controlled by National Grid Plc ('NG', a UK registered company) and Publi-T, via Elia (Publi T is a Belgian registered company and Elia is the Belgian electricity TSO). Neither of Nemo's ultimate controllers, or intermediate controllers, controls or has a majority shareholding in a relevant producer or supplier. We are therefore satisfied that none of the controllers of the Applicant control or have a majority shareholding in a relevant producer or supplier. Therefore, the Applicant meets the requirements of the fourth and fifth tests.
- 4.9. We note interests in generation held within the National Grid group. The Applicant has identified a number of generation interests held by the National Grid group in the United States. The facts submitted by the Applicant in respect of the relationship between NG and these generation interests are the same as those presented in previous applications for certification for National Grid Electricity Transmission Plc, National Grid Gas Plc and National Grid Interconnectors Limited, where NG was also the ultimate controller. In its opinion in respect of these undertakings, the European Commission agreed⁴ with us that NG's ownership interests in various generators in the United States did not prevent the certification of these TSOs.
- 4.10. We maintain the same view in this case, and consider that these interests are not relevant producers or suppliers within the meaning of section 100 of the Electricity Act, as in force at the time of Nemo's application, because they are located outside the EEA. We also consider that NG's interests in identified generators in the US do not raise any risk of discrimination, due to the characteristics of the transmission system

⁴ European Commission's opinion of 19 April 2012:
https://ec.europa.eu/energy/sites/ener/files/documents/2012_010_011_012_uk_en.pdf

to be operated by Nemo, and the lack of a direct interface between the generation interests and the relevant transmission system.

- 4.11. We are therefore satisfied that none of the controllers of Nemo controls or has a majority shareholding in a relevant producer or supplier. Therefore, Nemo meets the requirements of the fourth and fifth tests.

5. European Commission Opinion

- 5.1. The Commission's opinion is dated 7 February 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 Nemo.
- 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. The Commission also set out their view that 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 noted that it had previously considered NG's interests in respect of National Grid Electricity Transmission (NGET) and National Grid Interconnectors Limited (NGIL), and did not object to certification of those undertakings as TSOs. The Commission commented that "*the reasons for which NG's subsidiaries NGET and NGIL, and Elia are already certified in accordance with the ownership unbundling model according to Article 9(1) of the Electricity Directive are also valid as regards Nemo*".
- 5.5. The Commission confirmed that "*According to the information provided, Nemo satisfies the ownership unbundling requirements according to Article 9 of the Electricity Directive.*"
- 5.6. The Commission also recalled the obligation in the Electricity Directive for national regulatory authorities to monitor continuing compliance of TSOs with the unbundling requirements. 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 Nemo continues to apply, and will include a condition in our final certification decision which requires Nemo to regularly report to us on the relevant circumstances.