

Decision

Ofgem's final Decision on GNI's application for certification: summary of analysis

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Contact: Kevin Hughes

Team: Gas Team, Wholesale Markets

Tel: 0141 331 3633

Email: Kevin.Hughes@ofgem.gov.uk

1. Executive Summary

- 1.1 Having taken "utmost account" of the European Commission's (the "Commission's") opinion on our preliminary certification decision on GNI¹ and its compatibility with Articles 9 and 10 of Directive 2009/73/EC (the "Gas Directive"), the Authority concludes that the first certification ground set out in section 8G(3) of the Gas Act 1986 (the "Gas Act")² has been complied with and that GNI should therefore be certified (on the basis of ownership unbundling) and should be designated as a TSO³. This decision is set out in the accompanying Decision Letter.

2. GB Legislation – Transposition of the Gas Directive

- 2.1 The grounds for certification (including the ownership unbundling requirements) set out in the EU Gas Directive have been transposed in GB through the Electricity and Gas (Internal Market) Regulations 2011 (the "Regulations") which inserted sections 8C

¹ In accordance with Article 3(2) of Regulation (EC) No 715/2009.

² <http://www.legislation.gov.uk/ukxi/2011/2704/part/3/made>

³ Set out in section 8G(3) of the Gas Act.

to 8Q into the Gas Act. Section 8G of the Gas 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 8H of the Gas Act. Section 8H of the Gas Act provides that the ownership unbundling requirement is met if the Authority considers that each of the five tests set out in section 8H is passed.

3. The Applicant

- 3.1 On 9 March 2020, Gas Networks Ireland (GNI) (the “Applicant”) submitted an application for certification under the ownership unbundling requirements pursuant to section 8H of the Gas Act 1986 (the “Gas Act”).
- 3.2 GNI along with its subsidiary GNI (UK) Limited (“GNI (UK)”) own the interconnector between Moffat in Scotland to the end of UK Territorial Waters. GNI alone is the owner of sections of the Moffat interconnector pipeline between the limit of UK Territorial Waters and the UK Continental Shelf. GNI’s application relates to the pipelines between the limit of UK Territorial Waters and the UK Continental Shelf. With respect to the remaining section between Moffat in Scotland to the end of UK Territorial Waters, GNI (UK) were certified under the ownership unbundling requirements in 2016.⁴
- 3.3 GNI was granted a gas interconnector licence under section 7ZA of the Gas Act on 12 July 2020.⁵ The Applicant is a person required to be certified as independent under section 8C(2) of the Gas Act.
- 3.4 We have assessed the information sent by GNI to the Authority against the five tests in section 8H of the Gas Act. We consider that GNI complies with the five tests and

⁴ [Ofgem 2016 decision’s to grant certification to GNI\(UK\).](#)

⁵ [Notice of Grant of a Gas Interconnector Licence.](#)

can be certified under the first certification ground of ownership unbundling and designated as a gas transmission system operator for the purposes of Article 10(2) of the Gas Directive. This document provides a summary of our analysis.

4. Summary of Ofgem analysis

Certification Tests

4.1 First Test

- 4.1.1 The First test: the applicant (a) does not control a relevant producer or supplier (RPOS) as defined in section 8Q of the Gas Act; (b) does not have a majority shareholding in an RPOS; (c) will not exercise shareholder rights in relation to an RPOS.
- 4.1.2 We consider that the applicant, GNI, has no shareholding or control in an RPOS. GNI controls three subsidiaries. They are GNI (UK), GNI (IOM) and Gaslink Independent System Operator (Gaslink), a non-trading subsidiary.
- 4.1.3 GNI (UK) is the owner and operator of certain gas interconnector assets between Scotland and Ireland, owner and operator of gas transmission assets in Northern Ireland, and owner and operator of South North Pipeline in the Republic of Ireland. GNI (IOM) owns the spur pipeline connecting the Isle of Man (IOM) to the Interconnector System. Neither GNI (UK) nor GNI (IOM) produce or supply electricity or gas.
- 4.1.4 Gaslink was the Independent System Operator, responsible for the development and maintenance and operation of the gas distribution and transmission Networks. Gaslink transferred its assets to GNI and is retained as a dormant subsidiary of GNI for tax purposes.

4.2 Second Test

- 4.2.1 The Second test: that none of the applicant’s senior officers has been, or may be, appointed by a person who:

- (a) controls a gas undertaking which is an RPOS, or
- (b) has a majority shareholding in a gas undertaking which is an RPOS.

- 4.2.2 Ervia is the parent company of GNI and its board is responsible for appointments to the GNI board. Article 14.2 of GNI’s Articles of Association notes that “The power to appoint Directors (whether to fill casual vacancies or as an addition to the Board) and the power to remove any Director, howsoever appointed, shall reside exclusively in Ervia.”⁶
- 4.2.3 GNI has provided a list of Ervia’s shareholdings and subsidiary companies. Based on the information provided, we do not consider any of these companies to be an RPOS or a barrier to certification.
- 4.2.4 For the avoidance of doubt, we also note none of the directors of Ervia control or exercise decisive influence over a gas undertaking which is an RPOS.
- 4.2.5 The MSM’s consent is required for the appointment of a director of GNI. We considered whether the Minister should be considered as having a power of appointment, therefore falling within the remit of the second test.⁷
- 4.2.6 In our opinion, we would distinguish between (a) the power to propose appointments to a board from (b) a right to veto appointment proposed by others. While other interpretations are not unarguable, we think the better interpretation is that Test 2 is only intended to capture (a). Furthermore, based on the provisions of Article 14.2 of GNI’s Articles of Association noted above, we consider that the MSM’s interest falls short of this standard. Regardless of the interpretation applied, for the purposes of

⁶ GNI’s Articles of Association are available on GNI’s [website](#).

⁷ See section 14.2 (c) of GNI’s Articles of Association.

complying with the fourth and fifth tests, we have considered the MSM’s voting rights, majority rights or power to appoint board members in an RPOS in paragraph 4.4.5 below.

4.2.7 We therefore consider that GNI meets the requirements of the second test.

4.3 Third Test

4.3.1 The third test: none of the applicant’s senior officers is also a senior officer of a gas undertaking which is an RPOS.

4.3.2 None of GNI’s directors are directors of any other company. GNI has provided declarations signed by its directors confirming they are not a senior officer of an undertaking involved in the production, generation or supply of gas and/or electricity.

4.3.3 We will monitor GNI’s board membership. Under the gas interconnector licence, GNI is required to notify us of any changes that may affect their eligibility for certification. Therefore, any relevant interests of GNI board members will be notified so that they can be considered by Ofgem.⁸

4.4. Fourth and Fifth Tests

4.4.1 The fourth and fifth test: The fourth test is that a person who controls an RPOS does not control the applicant. The fifth test is that the applicant is not controlled by a person who has a majority shareholding in an RPOS.

4.4.2 We consider the fourth and fifth tests are passed. We are satisfied that Ervia and the MSM do not have control or a majority shareholding in an RPOS.

⁸ In accordance with SLC 22 of the GB gas interconnector licence.

- 4.4.3 GNI is part of the Ervia group. Ervia is a company in the Republic of Ireland owned by the Irish State, which has a sponsor Minister who acts as shareholder. In GNI’s application, this Minister is referred to as the Majority Shareholding Minister (“MSM”). Ervia controls the applicant as they are responsible for the appointment of GNI board members. The MSM must consent to any appointment. In this case, the MSM is the Minister for Housing, Planning and Local Government (“MHPLG”). The Minister has “no interests in any companies involved in energy generation, production or supply” as stated in a letter from the Department of Communications, Climate Action and Environment (“DCCAE”).
- 4.4.4 GNI has provided a list of Ervia’s and GNI’s shareholdings and subsidiary companies. As described in section 4.2 above, we do not consider any of these companies to be an RPOS or a barrier to certification.
- 4.4.5 When GNI (UK) submitted its application for certification in 2015, MCENR still exercised control over the Ervia Group and held similar roles over other companies engaged in supply activities. In 2015, legislation was passed in the Republic of Ireland that provided for the appointment of an MSM. The MSM appointment order was made on the 23 of November 2015, thereby appointing Minister for Environment, Community and Local Government (“MECLG”), now the MHPLG, as the MSM of Ervia and all of its subsidiary companies including GNI. The Minister is responsible for the appointment of the board members of Ervia and certain consenting requirements, as set out in Irish legislation. This includes granting consent to appointment of GNI board members.
- 4.4.6 We consider that GNI passes the five tests to meet the ownership unbundling requirements set out in section 8H of the Gas Act and therefore meets the grounds for certification under section 8G(3) of the Gas Act.
- 4.4.7 Ofgem also considers that GNI fulfils the requirements under Article 9 of the Gas Directive.

5. European Commission Opinion

5.1.1 Pursuant to Article 3(2) of Regulation (EC) No 715/2009, 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 GNI. The Commission’s opinion is published on the Commission’s website.⁹

5.1.2 The Commission returned their opinion on Ofgem’s preliminary decision on 28 October 2020. The Commission were content with our assessment of GNI’s application for certification.

5.2 Ofgem Monitoring

5.2.1 The Commission recalled 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.

5.2.2 The Commission invited Ofgem to continue monitoring compliance including 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.

5.2.3 GNI is required to advise us if and when circumstances change that may affect its eligibility for certification, in accordance with standard licence condition (“SLC”) 22 of the GB gas interconnector licence and Condition C.9 of this certification decision, contained in our decision letter.

⁹ [The European Commission’s opinion.](#)

- 5.2.4 In accordance with SLC 22 of the GB gas interconnector licence, GNI is required to inform Ofgem each year whether anything has happened which may affect its eligibility for certification.

6. Conclusion

- 6.1 Our decision is that GNI should be certified and designated as a TSO. We consider that GNI passes the five tests to meet the ownership unbundling requirements set out in section 8H of the Gas Act and therefore meets the grounds for certification under section 8G(3) of the Gas Act. Ofgem also considers that GNI fulfils the ownership unbundling requirements under Article 9 of the Gas Directive.

7. Annex 1: Requirements of Article 13 of the Gas Directive as Transposed to GB Legislation

Ref	Tasks of the TSO – Article 13 Requirements	Confirmation
13(1)	Each transmission, storage and/or LNG system operator shall:	
13(1)(a)	operate, maintain and develop under economic conditions secure, reliable and efficient transmission, storage and/or LNG facilities to secure an open market, with due regard to the environment, ensure adequate means to meet service obligations;	<p>SLC 19(2): <i>"The licensee shall operate, maintain and develop an economic, efficient, secure and reliable interconnector".</i></p> <p>SLC 19(3): <i>"The licensee shall promote security of supply by taking into account all economically reasonable and technically feasible demands for capacity on the licensee’s interconnector."</i></p> <p>SLC 19(1): <i>"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: (a) to properly and efficiently participate in the operation of the interconnector; and (b) to comply in all respects with its obligations under this licence, the Act, the Regulation and any other legislation as the Authority may direct from time to time for the purpose of this licence condition."</i></p>

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Ref	Tasks of the TSO – Article 13 Requirements	Confirmation
13(1)(b)	refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;	<p>SLC 20(1) requires that <i>"The licensee shall not discriminate between users or classes of users particularly in favour of a related undertaking."</i></p> <p>Under SLC 11A, licensees are required to submit their access rules for Authority approval.</p> <p>SLC 11A(4) requires that the licensee’s access rules comply with the Gas Regulation.</p> <p>SLC 11A(5) requires that the licensee’s access rules are transparent, objective, non-discriminatory and compliant with the Gas Regulation and any relevant legally binding decision of the Commission and/or the Agency for the Cooperation of Energy Regulators (ACER).</p>
13(1)(c)	provide any other transmission system operator, any other storage system operator, any other LNG system operator and/or any distribution system operator, sufficient information to ensure that the transport and storage of natural gas may take place in a manner compatible with the secure and efficient	SLC 5 requires the licensee to furnish any relevant gas transporter or operator of an interconnected system information concerning the operation and technical specifications of the licensee’s interconnector in such manner and at such times as may reasonably be required by the operator of an interconnected system for the purposes of ensuring the secure and efficient operation of the interconnected system.

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Ref	Tasks of the TSO – Article 13 Requirements	Confirmation
	operation of the interconnected system; and	
13(1)(d)	provide system users with the information they need for efficient access to the system.	<p>Under SLC 11A, licensees are required to submit their access rules for Authority approval.</p> <p>SLC 11A(4) requires that the licensee’s access rules comply with the Gas Regulation, including containing arrangements for users to obtain interconnector capacity at appropriate timescales, including where relevant, the auction rules and procedures for nominating gas flows against the capacity.</p> <p>SLC 11A(15) requires the licensee to publish its access rules (as soon as practicable after Authority approval and no later than 28 days prior to coming into effect).</p> <p>SLC 11A(16) requires the licensee to send a copy of its access rules (or any proposed modification to them) to anyone who requests them.</p>
13(2)	Each transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity and taking into	<p>SLC 19(2): <i>"The licensee shall operate, maintain and develop an economic, efficient, secure and reliable interconnector".</i></p> <p>SLC 19(3): <i>"The licensee shall promote security of supply by taking into account all economically reasonable and technically feasible demands for capacity on the licensee’s interconnector."</i></p>

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Ref	Tasks of the TSO – Article 13 Requirements	Confirmation
	account security of gas supply.	SLC 19(1): <i>"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: (a) to properly and efficiently participate in the operation of the interconnector; and (b) to comply in all respects with its obligations under this licence, the Act, the Regulation and any other legislation as the Authority may direct from time to time for the purpose of this licence condition."</i>
13(3)	Rules adopted by transmission system operators for balancing the gas transmission system shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by transmission system operators shall be	<p>Under SLC 11A, licensees are required to submit their access rules for Authority approval.</p> <p>SLC 11A(4) requires that the licensee’s access rules comply with the Gas Regulation.</p> <p>SLC 11A(5) requires that the licensee’s access rules <i>"be transparent, objective, non-discriminatory and compliant with the [Gas] Regulation ..."</i></p> <p>SLC11A(15) requires the licensee to publish its access rules (as soon as practicable after Authority approval/after modification/28 days prior to coming into effect).</p>

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Ref	Tasks of the TSO – Article 13 Requirements	Confirmation
	established pursuant to a methodology compatible with Article 41(6) in a non-discriminatory and cost-reflective way and shall be published.	SLC 11A(16) requires the licensee to send a copy of its access rules (or any proposed modification to them) to anyone who requests them.
13(4)	The regulatory authorities where Member States have so provided or Member States may require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.	SLC 19(2): <i>"The licensee shall operate, maintain and develop an economic, efficient, secure and reliable interconnector".</i>
13(5)	Transmission system operators shall procure the energy they use for the carrying out of their functions according to transparent, non-discriminatory and market based procedures.	SLC 19(4) requires the licensee to <i>"procure the energy used for participating in the operation of the interconnector according to transparent, non-discriminatory and market based procedures."</i>

