

Ofgem's¹ final decision on GNI(UK) Limited's ("GNI(UK)'s") application for certification: summary of our analysis

This document provides a summary of our analysis underpinning Ofgem's final decision on GNI(UK)'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

1.1. Having taken "utmost account" of the European Commission's (the "Commission's") opinion on our preliminary certification decision on GNI(UK)² and its compatibility with Articles 9 and 10 of 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")³ has been complied with and that GNI(UK) should therefore be certified (on the basis of ownership unbundling) and should be designated as a TSO⁴. 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")⁵ which insert new sections 8C 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. GNI(UK) (the "Applicant") is the owner of the high pressure gas interconnector between Moffat in Scotland to the end of UK Territorial Waters. GNI(UK) is a wholly owned subsidiary of Gas Networks Ireland (GNI) which sits within the Ervia Group. The transmission assets of GNI and GNI(UK) cover three jurisdictions: Ireland, Northern Ireland and Great Britain (GB). Consequently, three energy regulators are involved in this certification process and license the applicant for different assets:

- Ireland: The Commission for Energy Regulation (CER) for transmission assets operated by GNI.
- Northern Ireland: Northern Ireland Authority for Utility Regulation (NIAUR or UR) for transmission assets operated by GNI(UK) in Northern Ireland. NIAUR is responsible for licensing these assets.

¹ The terms "the Authority", "Ofgem", "our" and "we" are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority (the Authority).

² In accordance with Article 3(2) of the Gas Regulation.

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

⁴ Set out in section 8G(3) of the Gas Act.

⁵ The Regulations were amended in 2014: The Electricity and Gas (Ownership Unbundling) Regulations 2014: http://www.legislation.gov.uk/ukxi/2014/3333/pdfs/ukxi_20143333_en.pdf

- Great Britain: Ofgem for interconnector assets operated by GNI(UK) in GB. In GB, GNI(UK) holds a gas interconnector licence authorising it to participate in the operation of two interconnectors from Moffat in Scotland to the end of UK Territorial Waters.

3.2. In GB, BGE(UK) was granted a gas interconnector licence under section 7ZA of the Gas Act on 26 February 2008. On 1 April 2015, BGE(UK) notified Companies House of its name change to GNI(UK). The Applicant is a person required to be certified as independent under section 8C(2) of the Gas Act.

3.3. We have assessed the information sent by GNI(UK) to the Authority against the five tests in section 8H of the Gas Act. We consider that GNI(UK) complies with the five tests and 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. *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.*

4.2. GNI(UK) have confirmed that they have no shareholdings or control over any other entity. GNI(UK) has provided an undertaking confirming that it will not exercise control or shareholder rights in relation to an RPOS including any future shareholder rights it may hold in relation to an RPOS.

4.3. We therefore consider that GNI(UK) meets the requirements of the first test.

4.4. *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.*

4.5. GNI is responsible for the appointment of the GNI(UK) directors. Ervia is the parent company and in practice therefore, the board of Ervia approves the appointment of external directors and indirectly controls the appointment of GNI(UK)'s directors. The Majority Shareholding Minister (MSM's) consent is not required for the appointment of a director of GNI(UK).

4.6. We consider that none of the companies controlled by GNI and Ervia are a gas undertaking which is an RPOS. We also note none of the directors of GNI and Ervia control or exercise decisive influence over a gas undertaking which is an RPOS.

4.7. GNI(UK) 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.

4.8. We therefore consider that GNI(UK) meets the requirements of the second test.

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

4.10. GNI(UK)'s application lists all the applicant's directors and confirms they hold no other directorships at present. GNI(UK) have also 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.

- 4.11. Under the gas interconnector licence, GNI(UK) is required to notify us of any changes that may affect their eligibility for certification. Therefore, any relevant interests of directors will be notified so that they can be considered by Ofgem. We therefore consider that GNI(UK) meets the requirements of the third test.
- 4.12. *The fourth and fifth test: The fourth test is that the applicant is not controlled by a person who controls an RPOS. The fifth test is that the applicant is not controlled by a person who has a majority shareholding in an RPOS.*
- 4.13. GNI(UK) is part of the Ervia group and a subsidiary of Gas Networks Ireland. Ervia is a company in Ireland owned by the Irish state, which has a sponsor Minister who acts as shareholder. In GNI(UK)'s application, this Minister is referred to as the Majority Shareholding Minister (MSM). It is the MSM who ultimately controls the applicant through the appointment of the board of Ervia. For Ervia, the MSM is the Minister for Environment, Community and Local Government (MECLG) and it does not have control or a majority shareholding in an RPOS.
- 4.14. GNI(UK) has provided a list of Ervia's and GNI's shareholdings and subsidiary companies. We do not consider any of these companies to be an RPOS or a barrier to certification.
- 4.15. We were invited by the Commission to assess the role of the State in the operation of TSOs. The Commission requested we demonstrate that public bodies are separate and are not under the common influence of another public entity. This matter is considered in Section 5.
- 4.16. We are satisfied that GNI, Ervia and the MSM do not have control or a majority shareholding in an RPOS and that separation exists between public entities within the Irish State. We therefore consider that GNI(UK) meets the requirements of the fourth and fifth tests.
- 4.17. We consider that GNI(UK) 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.
- 4.18. Ofgem also considers that GNI(UK) fulfils the requirements under Article 9 of the Gas Directive.

5. European Commission Opinion

- 5.1. Pursuant to Article 3(2) of the Gas 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 GNI(UK). The Commission's opinion is published on the Commission's website and can be viewed at: https://ec.europa.eu/energy/sites/ener/files/documents/2015_124_125_gni_uk_ni_en.pdf
- 5.2. The Commission returned their opinion on Ofgem's preliminary decision of 4 February 2016. The Commission were content with our assessment of GNI(UK)'s application for certification but commented that further analysis was needed on "*the degree of independence which the MECLG enjoys in the exercise of their function in relation to Ervia, GNI and GNI(UK), i.e. whether it can be demonstrated that MCENR⁶ 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*".

⁶ Minister for Communication Energy and Natural Resources (MCNER)

5.3. Separation within the state

- 5.3.1. Ervia is a company in Ireland owned by the Irish state, a public body, which has a sponsor Minister who acts as shareholder. In GNI(UK)'s application, this Minister is referred to as the Majority Shareholding Minister (MSM). It is the MSM who ultimately controls the applicant through the appointment of the board of Ervia. For Ervia, the MSM is the Minister for Environment, Community and Local Government (MECLG).
- 5.3.2. When GNI(UK) submitted its application, Ireland's Minister for Communication Energy & Natural Resources (MCENR) still exercised control over the Ervia Group (e.g. appointment of Ervia's directors) and indirect control over GNI(UK). It held similar roles over other companies engaged in supply activities.
- 5.3.3. Legislation was subsequently passed in Ireland that provided for the appointment of an MSM. In November 2015, the Minister for the Environment, Community & Local Government (MECLG) was appointed as MSM for Ervia and assumed the controlling role from the MCENR.
- 5.3.4. GNI(UK) has confirmed in its application that the new MSM has no control or rights of companies involved in energy generation, production and supply which could result in a conflict of interest.
- 5.3.5. CER⁷ with the Department for Communications Energy and Natural Resources (DCENR) have assessed the extent to which separation within the state exists between Irish Ministries, and have set out that these principles are enshrined in legislation:
- Ministers & Secretaries Act, 1924, Section 2(1)⁸: each Minister shall be a corporation sole with complete legal responsibility for the affairs of his/her Department and associated branches or offices.
 - Ministers and Secretaries (Amendment) Act 1939, Section 6(3)⁹: provides that whenever any power is vested by statute in a Minister, the administration entailed in the exercise of that power is deemed to be allocated to the Department of that Minister.
 - Public Service Management Act, 1997¹⁰: Ministers of the Government having charge of a Department shall be responsible for the performance of functions that are assigned to the Department. Ministers have a duty to inform and explain actions to the Oireachtas (lower house), through such means as parliamentary questions. As such, they retain the prime democratic accountability for actions in areas under their jurisdiction.
- 5.3.6. We note that while the MSM is the controlling authority, the Gas Regulation Act 2013¹¹ sets out a consultative role for ministers for example input from the Minister for Public Expenditure and/or Minister for Finance on certain financial activities. We also note that board member appointments require Governmental approval. We consider that although approval is required from ministers, such arrangements are common for state owned entities. We would expect there to be proper scrutiny of the financial elements of a public appointment and this serves as a ministerial safeguard of a decision made by Ervia and the MSM. This therefore does not constitute decisive control by a common entity.

⁷ The Irish regulator, the Commission for Energy Regulation

⁸ <http://www.irishstatutebook.ie/eli/1924/act/16/enacted/en/html>

⁹ <http://www.irishstatutebook.ie/eli/1939/act/36/enacted/en/html>

¹⁰ <http://www.irishstatutebook.ie/eli/1997/act/27/enacted/en/html>

¹¹ <http://www.irishstatutebook.ie/eli/2013/act/39/enacted/en/pdf>

5.3.7. CER have also confirmed that the independence of individual Ministers in the areas under their jurisdiction precludes the Taoiseach (Prime Minister) from giving orders or instructions to the relevant Ministries.

5.3.8. Based on the analysis undertaken by CER we consider that government departments in Ireland are distinct persons and that the Majority Shareholding Minister (MSM) MECLG is independent in the exercise of its functions in relation to Ervia, GNI and GNI(UK).

5.3.9. We consider that the MECLG 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. We can conclude that separation within the state exists in this regard.

5.4. Ofgem Monitoring

5.4.1. The Commission considered that any changes to GNI(UK) for example, as a result of non-trading companies resuming generation or supply activities or changes to contractual obligations, which would lead to GNI(UK) no longer being considered compliant must be immediately notified to Ofgem.

5.4.2. GNI(UK) is required to advise us if and when circumstances change that may affect its eligibility for certification, in accordance with SLC 22 of the GB gas interconnector licence and condition 9 of this certification decision.

5.4.3. In accordance with standard licence condition (SLC) 22 of the GB gas interconnector licence, GNI(UK) is required to inform Ofgem each year whether anything has happened which may affect its eligibility for certification¹².

6. Conclusion

6.1. Our decision is that GNI(UK) should be certified and designated as a TSO. We consider that GNI(UK) 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(UK) fulfils the ownership unbundling requirements under Article 9 of the Gas Directive.

¹² The SLCs: epr.ofgem.gov.uk//Content/Documents/Gas_Interconnector_SLCs_Consolidated%20-%20Current%20Version.pdf

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

Article 13, Gas Directive		Compliance under Gas Interconnector Licence
13(1)	Each transmission system operator shall:	
13(1) (a)	operate, maintain and develop under economic conditions secure, reliable and efficient transmission ... 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 and 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)(a) and (b): <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: 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 from time to time for the purpose of this licence condition."</i></p>
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 Co-operation of Energy Regulators (ACER).</p>
13(1) (c)	providing any other transmission 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 operation of the interconnected system	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.
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)	<p>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 account security of supply.</p>	<p>SLC 19(2): <i>"The licensee shall operate, maintain and develop and 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>
13(3)	<p>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 established pursuant to a methodology compatible with Article 41(6) in a non-discriminatory and cost reflective way and shall be published.</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 <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> <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(4)	<p>The regulatory authorities where Member States have so provided ... may require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.</p>	<p>SLC 19(2): <i>"The licensee shall operate, maintain and develop and economic, efficient, secure and reliable interconnector"</i>.</p>

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> "
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