



Brussels, 29.1.2016
C(2016) 655 final

COMMISSION OPINION

of 29.1.2016

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

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I. PROCEDURE

On 30 November 2015, the Commission received a notification from the Irish national regulatory authority, Commission for Energy Regulation (hereafter "CER"), of a draft decision on the certification of Gas Networks Ireland (hereafter "GNI") as transmission system operator for gas.

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.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISION

GNI is the gas transmission system operator in Ireland, and owns, operates, builds and maintains the natural gas network.

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.

Prior to incorporation, GNI (then named Bord Gáis 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.

Given BGÉ's interest in supply and production, Bord Gáis Energy, was sold in June 2014.

GNI wholly owns and controls a subsidiary, GNI (UK) which owns and operates certain gas interconnectors assets between Scotland and Ireland, other gas transmission assets in Northern Ireland and the South North Pipeline in Ireland. GNI (UK) is also seeking certification as an ownership unbundled TSO, for which a decision will be taken by the Utility Regulator in Northern Ireland and Ofgem in Great Britain.

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.

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

The CER has analysed whether and to what extent GNI complies with the unbundling rules of the OU model. CER has come to the preliminary conclusion that GNI complies with these requirements. The draft certification decision issued by CER is subject to the following conditions:

- GNI provides copies of signed declarations from GNI's current board members to CER (prior to the end of December 2015) stating that they are in compliance with Article 9 of the Directive;
- GNI provides copies of signed declarations from all new members that are appointed to the GNI and GNI(UK)'s board to CER, which confirms that the relevant board member is compliant with Article 9 of the Directive;
- GNI immediately notifies CER regarding the potential and actual appointment of members to the Ervia board, and advise whether members of Ervia board have interests in an undertaking that is involved in energy production/supply;
- GNI immediately notifies CER regarding the potential and actual establishment of any new companies within the Ervia Group;
- GNI immediately notifies CER regarding the potential and/or actual activation of any dormant/non-trading company within the Ervia Group;
- GNI notifies CER if Irish Water substantially escalates its energy production/supply, such that it could be reasonably deemed to be an undertaking that actively participates in energy production/supply.

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'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 CER's assessment that in view of the very low levels of Irish Water's electricity production, as against Ireland's overall electricity demand, and the fact that the electricity is produced almost exclusively for self-consumption, there is a no identifiable risk of an ability or incentive for Ervia or GNI 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.³

The Commission welcomes the fact that in its draft decision, CER has included a condition that GNI notifies CER if Irish Water substantially escalates its energy production/supply, such that it could be reasonably deemed to be an undertaking that actively participates in energy production/supply. The Commission considers that in that case a re-examination of the compliance with the unbundling requirements would need to take place. However, the Commission takes that view that CER should extend the scope of this notification obligation in its final decision by requiring GNI to also notify CER if additional generation units of Irish Water start exporting electricity to the grid.

In its preliminary decision, CER also states that Ervia holds participations in a number of non-trading companies which had been set up with the purpose of engaging in generation or supply activities and which would thus be considered as being involved in the energy production or supply if they were to start trading. However CER points out that these companies are in the process of being wound up or sold.

Based on the information provided in the draft decision, it appears that none of the companies in question are currently engaged in activities of generation or supply of gas or electricity. The Commission invites CER to specify this in its final decision. The Commission also considers that should these companies assume activities of generation or supply of gas or electricity, GNI 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 CER that GNI must immediately notify them of any potential or actual activation of any dormant or non-trading companies in the Ervia Group. The Commission considers that this condition is sufficient to ensure GNI'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. Separation within the State

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 ownership unbundling, 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

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

must be truly separate. In these cases, it must be demonstrated that the requirements of ownership unbundling of Article 9 Electricity and Gas Directives are enshrined in national law and are duly complied with.

Ervia and GNI were formerly under the control of the 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 Minister for Environment, Community and Local Government (MECLG). CER states in its preliminary decision 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, the CER is of the view that GNI is compliant with the respective unbundling requirements.

However, the Commission is of the view that CER has not sufficiently assessed in its preliminary decision 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 and GNI, 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 CER to assess in its final decision the degree of independence which the MECLG enjoys in the exercise of their function in relation to Ervia and GNI. The Commission considers that CER should only certify GNI if further to such assessment full compliance with the unbundling requirements pursuant to Article 9(1) *juncto* Article 9(6) can be established.

IV. CONCLUSION

Pursuant to Article 3 Gas Regulation, CER shall take utmost account of the above comments of the Commission when taking its final decision regarding the certification of GNI, and when it does so, shall communicate this decision 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. CER is invited to inform the Commission within five working days following receipt whether and why it considers that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which it wishes to have deleted prior to such publication.

Done at Brussels, 29.1.2016

For the Commission
Margrethe VESTAGER
Member of the Commission

