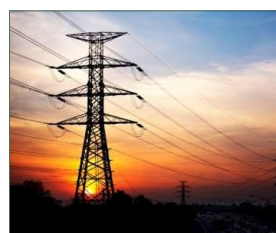


Final decision on certification of GNI (UK)
as required under Article 10 of Directive
2009/73/EC and Article 3 of Regulation
(EC) No. 715/2009

31 March 2016



About the Utility Regulator

The Utility Regulator is the independent non-ministerial government department responsible for regulating Northern Ireland's electricity, gas, water and sewerage industries, to promote the short and long-term interests of consumers.

We are not a policy-making department of government, but we make sure that the energy and water utility industries in Northern Ireland are regulated and developed within ministerial policy as set out in our statutory duties.

We are governed by a board of directors and are accountable to the Northern Ireland Assembly through financial and annual reporting obligations.

We are based at Queens House in the centre of Belfast. The Chief Executive leads a management team of directors representing each of the key functional areas in the organisation: Corporate Affairs; Electricity; Gas; Retail and Social; and Water. The staff team includes economists, engineers, accountants, utility specialists, legal advisors and administration professionals.

Our Mission

Value and sustainability in energy and water.

Our Vision

We will make a difference for consumers by listening, innovating and leading.

Our Values

Be a best practice regulator: transparent, consistent, proportional, accountable, and targeted.

Be a united team.

Be collaborative and co-operative.

Be professional.

Listen and explain.

Make a difference.

Act with integrity.

Abstract

This paper provides the rationale behind the Utility Regulator's final decision to certify GNI (UK), in accordance with the *European Directive 2009/73/EC* and *Regulation (EC) No. 715/2009*.

Audience

GNI (UK), the European Commission and other regulated companies.

Consumer Impact

Compliance with the legislation avoids undue discrimination. This ensures that the market is operating in a fair and efficient manner.

Final decision on certification of GNI (UK) Limited as required under Article 10 of Directive 2009/73/EC

Contents

Acronyms and Definitions	2
Executive Summary	3
1.0 Introduction.....	4
1.1. Background	4
2.0 Commission Opinion	5
2.1. Background	5
2.2. Irish Water	5
2.3. Greener Ideas.....	5
2.4. Contracting of Services.....	6
2.5. Separation within the State	6
3.0 Ministerial Independence	8
3.1. Types of Control	8
3.2. Review of Independence	8
3.3. Conclusion.....	11
4.0 Final Decision	12

Acronyms and Definitions

Term	Description
ACER	Agency for the Co-operation of Energy Regulators.
AoA	Articles of Association.
BGE	Bord Gáis Eireann.
BGE (UK)	Transmission company now know as GNI (UK).
CER	Commission for Energy Regulation – regulatory authority in the Republic of Ireland.
DCENR	Department for Communications, Energy and Natural Resources.
DECLG	Department for Environment, Community and Local Government.
EC	European Commission.
Ervia	A statutory company formerly known as Bord Gáis Eireann.
FOU	Full Ownership Unbundling.
GNI	Gas Networks Ireland – TSO in the Republic of Ireland.
GNI (UK)	Gas transmission company formerly known as BGE (UK).
ISO	Independent System Operator.
ITO	Independent Transmission Operator.
MCENR	Minister for Communications, Energy and Natural Resources.
MECLG	Minister for Environment, Community and Local Government.
MSM	Majority Shareholding Minister.
NI	Northern Ireland
NIAUR	Northern Ireland Authority for Utility Regulation – also know as the Utility Regulator (UR).
NWP	North West Pipeline.
RoI	Republic of Ireland.
RPoS	Relevant Producer or Supplier.
SNP	South-North Pipeline.
TSO	Transmission System Operator.
UR	Utility Regulator – regulatory authority in Northern Ireland.

Executive Summary

The 3rd Internal Markets in Gas Directive (*Directive 2009/73/EC*) requires that Transmission System Operators (TSOs) are unbundled from production and supply interests.

The aim is to ensure TSOs make independent decisions. This provides transparency and helps avoid undue discrimination of network users.

GNI (UK) has applied for certification under the grounds of full ownership unbundling (FOU). This means that the transmission system belongs to an undertaking that is independent from any supply or production interests.

In December 2015 the Utility Regulator (UR) published the preliminary decision¹ to certify GNI (UK) as fully unbundled. The European Commission (EC) provided an opinion² on this preliminary view in early February 2016.

The EC was content with the UR's analysis of GNI (UK)'s application for certification. In light of the fact that the Irish state controls both transmission as well as generation and supply interests, the EC requested that the UR assess the degree of independence which the Majority Shareholding Minister (MSM) enjoys.

In particular, whether 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 UR is required to take "utmost account" of the Commission's opinion in reaching its final certification decision. This paper summarises how we have taken "utmost account" of the EC's opinion of the preliminary certification decision in relation to GNI (UK).

The findings from our review of ministerial independence indicate the MSM enjoys a sufficient degree of independence such that the arrangements are compliant with Article 9(1) of the Directive.

Given this conclusion, the final decision of the UR is to certify GNI (UK) as fully ownership unbundled pursuant to Article 10 of *Directive 2009/73/EC* and Article 3 of *Regulation (EC) No. 715/2009*.

This paper sets out the rationale for the final decision.

¹ http://www.uregni.gov.uk/news/preliminary_decision_on_gniuk_certification

² https://ec.europa.eu/energy/sites/ener/files/documents/2015_124_125_gni_uk_ni_en.pdf

1.0 Introduction

1.1. Background

- 1.1.1 In Northern Ireland, GNI (UK)³ is licensed and regulated by the UR. In February 2002, GNI (UK) was awarded a gas conveyance licence. The company is also subject to a network code as approved by the UR.
- 1.1.2 The Gas Directive (*Directive 2009/73/EC*) requires that TSOs are certified under one of the models of unbundling.
- 1.1.3 On the 4 December 2015 the UR notified the EC of its [preliminary decision](#) to certify GNI (UK). That document provides a wide range of data on the application, detailed issues and assessment against the five tests in *The Gas (Northern Ireland) Order 1996*.
- 1.1.4 The EC published its [opinion](#) on the decision, dated 2 February 2016. Under Article 3(2) of Regulation (EC) No. 715/2009, the UR is obliged to adopt a final position within two months. The UR is required to take “utmost account” of the Commission’s opinion in reaching its final certification decision.
- 1.1.5 This paper covers a number of areas including:
- A summary of the EC findings (Chapter 2);
 - A review of ministerial independence (Chapter 3); and
 - The final certification decision (Chapter 4).
- 1.1.6 More detail on the issues can be found in the preliminary decision paper and EC opinion.

³ Formerly known as BGE (UK).

2.0 Commission Opinion

2.1. Background

2.1.1 This chapter summarises the EC opinion.

2.2. Irish Water

2.2.1 Ervia are the ultimate controlling company of both GNI (UK) and Irish Water. Irish Water own and operate water and sewage assets in RoI. A company like this would typically not be considered a relevant undertaking.

2.2.2 However, Irish Water generates electricity at 23 wastewater treatment works (WwTW). As such, it must be considered under the Article 9 obligations.

2.2.3 The UR made a number of representations as to why Irish Water should not be considered a relevant producer. The EC agreed with these arguments and stated the following:

“....there is a no identifiable risk of an ability or incentive for GNI (UK) 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 (UK).”

2.3. Greener Ideas

2.3.1 Greener Ideas is a joint venture (50/50) between Ervia and Mountside Partners Limited. The company owns three sites, each with planning approval for 98 MW gas-fired power plants.

2.3.2 The UR is content that Greener Ideas is not a relevant producer at present. Ervia have provided assurances that the company will not act as a producer so long as they retain ownership.

2.3.3 The fact that it would take 3 years before the plant is operational is a key factor. Furthermore, a licence condition has been implemented which requires GNI (UK) to inform the UR if anything should change which would impact certification.

2.3.4 The Commission agreed with the licence provision and concluded the following:

“The Commission considers that this condition is sufficient to ensure GNI (UK)'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.”

2.4. Contracting of Services

- 2.4.1 Article 9(1)(a) of *Directive 2009/73/EC* requires that each system owner acts as a TSO. The tasks of a transmission operator are detailed in Article 13.
- 2.4.2 Gas Networks Ireland provides a wide range of TSO services to GNI (UK). This activity is conducted pursuant to an agreement from 2008.
- 2.4.3 The UR believes that acting as the operator of the system does not prevent GNI (UK) from exercising its right to sub-contract the tasks to a third party.
- 2.4.4 The EC agreed with this conclusion stating:

“The Commission considers that in the present case the envisaged sub-contracting of certain services does not constitute an obstacle to GNI (UK)'s certification.....In view of these specific circumstances, and provided that GNI (UK) remains ultimately responsible for the tasks in question, the Commission is of the view that GNI (UK) can be considered as compliant with the requirements for OU.” [Ownership Unbundling]

2.5. Separation within the State

- 2.5.1 Article 9(6) of the Directive allows for state ownership of both transmission and generation/supply interests. However control of each must rest with distinct public bodies. The entities concerned must be truly separate and not under the influence of another public entity, in violation of FOU rules.
- 2.5.2 Ervia was formerly under the remit of the energy Minister (MCENR), who also controls other relevant producers and suppliers. To ensure ongoing compliance, the Minister for the environment (MECLG) became the MSM of Ervia on 23 November 2015.
- 2.5.3 As the MECLG does not control any relevant producers or suppliers, the UR considered this compliant with the Directive. However, the EC was of the view that sufficient assessment had not been provided to determine that departments are not under a common influence. They state;

“the Commission is of the view that NIAUR and Ofgem have not sufficiently assessed in their preliminary decisions whether the separation within the state is ensured.....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 NIAUR and Ofgem to assess in their respective final decisions the degree of independence which the MECLG enjoys in the exercise of their function in relation to Ervia, GNI and GNI (UK). The Commission considers that NIAUR and Ofgem should only certify GNI (UK) if further to such assessment full compliance with the unbundling requirements pursuant to Article 9(1) juncto Article 9(6) Gas Directive can be established.”

2.5.4 The UR has undertaken the assessment requested by the EC. The results are provided in the next chapter.

3.0 Ministerial Independence

3.1. Types of Control

- 3.1.1 The Commission has requested the UR assess the autonomy of the MECLG. This is pursuant to the Article 9 rules which state that the same person:
- a) Cannot directly or indirectly exercise control⁴ over both a relevant producer or supplier (RPoS) and a TSO.
 - b) Cannot appoint TSO supervisory board members whilst exercising control over a RPoS.
 - c) Is not entitled to be a board member of both a TSO and an undertaking performing generation or supply activities.
- 3.1.2 The MSM has a variety of legal governance and control functions with respect to the gas network company. This includes the power to:
- Approve company articles of association.
 - Approve director appointment and terminations.
 - Instruct TSO to remove directors in the case of ill health, inefficiency etc.
 - Confer additional functions on the supervisory board.
 - Consent to borrowing or capital expenditure requests.
 - Give directives with respect to financial objectives and/or profits.
 - Approve construction of pipelines.
 - Request any such information as required.
- 3.1.3 The remit of the MECLG is wide-ranging and would certainly constitute control as per Article 9 of the Directive. The issue is whether the MSM has autonomy when exercising this control.

3.2. Review of Independence

- 3.2.1 In response to the EC request, DCENR submitted to the CER an assessment of the extent to which separation within the state exists between Irish Ministries. The UR has relied on this assessment in arriving at its final certification decision.
- 3.2.2 The DCENR highlighted certain legal provisions which demonstrate individual ministerial authority including:

⁴ The term 'control' means any rights, contracts or other means which allow for a decisive influence. This might mean the right to use assets of an undertaking, voting rights or decision making ability.

- a) Section 2 (1) of the Ministers and Secretaries Act 1924 which states,
“Each of the Ministers, heads of the respective Departments of State mentioned in Section 1 of this Act, shall be a corporation sole under his style or name.....”⁵
- b) Section 6 (3) of the Ministers and Secretaries (Amendment) Act 1939 which states,
“Whenever any particular power, duty, or function is now or shall hereafter be conferred or imposed by statute on or shall be transferred under this section to a Minister having charge of a Department of State, the administration and business in connection with the exercise, performance, or execution of such power, duty, or function shall be deemed to be allocated to the said Department of State.”⁶
- c) The Public Service Management Act 1997 which states,
“A Minister of the Government having charge of a Department shall, in accordance with the Ministers and Secretaries Acts, 1924 to 1995, be responsible for the performance of functions that are assigned to the Department pursuant to any of those Acts.”⁷

3.2.3 The references provide evidence that independence of responsibility exists within the legal framework. The Department further stated that:

- Ministers are held accountable through and by the Oireachtas (Irish legislature); and
- The Taoiseach (Prime Minister) is precluded from giving orders to the MECLG with respect to his role with gas networks.

3.2.4 DCENR note that the energy Minister may be consulted on certain gas issues. However their overall conclusion is that,

“Neither Minister is under the common influence of another public entity in relation to their functions in gas transmission activities on one hand and generation and supply on the other.”

3.2.5 Besides the views of the Department, the UR undertook to review the legal position of the MECLG. Attention was paid to the Gas Regulation Act 2013, which enshrines much of the certification rules into national law.

3.2.6 Part 4, Section 32 of this Act highlights that:

- 5% of the capital stock is issued to the MCENR;
- 5% is issued to the Minister for Public Expenditure and Reform; and

⁵ <http://www.irishstatutebook.ie/eli/1924/act/16/section/2/enacted/en/html#sec2>

⁶ <http://www.irishstatutebook.ie/eli/1939/act/36/section/6/enacted/en/html#sec6>

⁷ <http://www.irishstatutebook.ie/eli/1997/act/27/section/3/enacted/en/html#sec3>

- The remainder is issued to the MSM.

3.2.7 Whilst these other ministries retain some ownership, this is not in conflict with Article 9 provisions. The legislation specifically states that,

“The Minister [MCENR] and the Minister for Public Expenditure and Reform, in respect of the capital stock held by each of them, shall not directly or indirectly exercise control over the Board in carrying out its functions under section 8 and in particular shall not be entitled to appoint a member of the Board or to exercise voting rights in respect of the Board.”⁸

3.2.8 This specifically rules out a conflicting interest for MCENR. Although the Minister controls energy production and supply interests, he cannot exercise control over the gas TSO.

3.2.9 The MCENR and other ministries do have a consultative role with some aspects of the gas TSO governance (e.g. capital budgets). It is also the case that the Ervia Board is appointed by the MSM with the approval of the Government.

3.2.10 However, the purpose of such arrangements is to ensure proper consultation and scrutiny, particularly of paid appointments. This does not violate the independence of the MSM

Common Influence

3.2.11 The vast majority of the Gas Regulation Act cites the MSM as the approving authority. Given the legal independence conditions cited by DCENR, this would indicate that no common entity controls the separate ministry functions.

3.2.12 An exception is to be found in Part 4, Section 40 which states,

“The majority-shareholding Minister shall, with the approval of the Government, from time to time as occasion requires appoint a member of the Board to be chairman thereof.”⁹

3.2.13 The reference seems to suggest ultimate approval for board appointments lies with the Government or Cabinet. However, the UR does not consider this to be decisive common entity control for the following reasons:

- a) Government cannot appoint its own candidates, but rather take a view on the Ministerial decision.
- b) Such arrangements are common to ensure proper scrutiny of paid appointments.
- c) The MSM retains sole powers with respect to the other functions mentioned in paragraph 3.1.2 above.

⁸ <http://www.irishstatutebook.ie/eli/2013/act/39/section/32/enacted/en/html#sec32>

⁹ <http://www.irishstatutebook.ie/eli/2013/act/39/section/40/enacted/en/html#sec40>

- d) State board appointments are now subject to scrutiny from the independent Public Appointments Service (PAS) and NewERA (New Economy and Recovery Authority).

- 3.2.14 The role of NewERA in board appointments is set out in the National Treasury Management Agency (Amendment) Act 2014.¹⁰ The guidelines¹¹ provide a role for PAS and NewERA to select and advise Ministers on public appointments.
- 3.2.15 Such arrangements preclude the possibility of common Government control as the candidates are selected by independent bodies.

3.3. Conclusion

- 3.3.1 In light of the analysis, the UR is of the opinion that the MSM is independent in the exercise of its functions in relation to Ervia, GNI and GNI (UK).
- 3.3.2 The ministries 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.
- 3.3.3 The UR can conclude that separation within the state exists in this regard.

¹⁰ <http://www.irishstatutebook.ie/eli/2014/act/23/enacted/en/html>

¹¹ <http://hr.per.gov.ie/files/2014/11/Appointments-to-the-Boards-of-NewERA-companies.pdf>

4.0 Final Decision

- 4.1.1 In accordance with Article 3 of Regulation (EC) No. 715/2009 and Article 10 of the Directive, the final decision of the UR is to certify GNI (UK) as a fully ownership unbundled TSO.
- 4.1.2 This certification will take effect from the same date as the licence modifications to implement the FOU model (8 April 2016).
- 4.1.3 The UR will monitor GNI (UK)'s ongoing certification as required by the Directive and compliance with the licence conditions.