



EUROPEAN
COMMISSION

Brussels, 8.7.2013
C(2013) 4398 final

COMMISSION OPINION

of 8.7.2013

**pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of
Directive 2009/72/EC – United Kingdom – Certification of Moyle Interconnector
Limited**

COMMISSION OPINION

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pursuant to Article 3(1) of Regulation (EC) No 714/2009 and Article 10(6) of Directive 2009/72/EC – United Kingdom – Certification of Moyle Interconnector Limited

I. PROCEDURE

On 7 May 2013 the Commission received a notification from the Northern Ireland Authority for Utility Regulation, in accordance with Article 10(6) of Directive 2009/72/EC¹ (hereafter, "Electricity Directive"), of a draft decision on the certification of a Transmission System Operator (TSO) for electricity.

On 24 May 2013 the Commission received a notification from the Authority for Electricity and Gas Markets (hereafter, "Ofgem") of a draft decision on the certification of the same Transmission System Operator (TSO).

Pursuant to Article 3(1) Regulation (EC) No 714/2009² (hereafter, "Electricity Regulation") the Commission is required to examine the notified draft decisions and deliver an opinion to the relevant national regulatory authorities as to their compatibility with Article 10(2) and Article 9 of Directive 2009/72/EC.

II. DESCRIPTION OF THE NOTIFIED DRAFT DECISIONS

The certification applications concern the 500 MW Direct Current subsea interconnector³ between Scotland and Northern Ireland for which Moyle Interconnector Limited (hereafter, "MIL") is licenced to carry out transmission activities and interconnector operation in Northern Ireland and in Great Britain, respectively.

MIL is wholly owned by Mutual Energy Limited (hereafter, "MEL"). MEL is a company limited by guarantee⁴ with the objective of owning and operating energy infrastructure in the island of Ireland for the long-term benefit of the energy consumers of Northern Ireland. MEL has no shareholders and financial surpluses are used for the benefit of all Northern Ireland energy consumers.

The Directors of MEL are also the Directors of MIL as well as other related companies including gas TSOs in Northern Ireland. The power to appoint Directors of MEL, MIL and other related companies resides with the Members of MEL. According to the Articles of Association, Members are not permitted to have any conflicts of interests, which the Northern

¹ 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, OJ L 211/55 of 14.8.2009.

² 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, OJ L 211/15 of 14.8.2009.

³ Within the meaning of Article 2(13) of Directive 2009/72/EC.

⁴ This form of undertaking is described at the MEL website: <http://www.mutual-energy.com/Mutualisation/Concept.php> and in the Articles of Association submitted with the respective applications for certification.

Ireland Authority for Utility Regulation states would cover any connection with an electricity or gas producer or supplier.

MIL has applied for certification as TSO under the full ownership unbundling model. As MIL was not part of a vertically integrated undertaking on 3 September 2009 this is the only unbundling model which they may implement in accordance with the Electricity Directive.

In Northern Ireland the application was considered by a special joint subcommittee (hereafter, "the SEM Committee") of the Utility Regulator and the Commission for Energy Regulation (hereafter, "CER") which acts as the decision making body for both authorities in matters relating to the operation of the Single Electricity Market (hereafter, "SEM") in place in Ireland and Northern Ireland.

System operation

The Northern Ireland Authority for Utility Regulation assessment is based on the system of legislation and licence obligations applying in the SEM according to which the transmission systems in Ireland and Northern Ireland are jointly operated in accordance to common rules. In Northern Ireland SONI is the TSO and is owned by Eirgrid plc (hereafter, "Eirgrid"). Eirgrid is the TSO in Ireland.

The Commission has already assessed the independence of both SONI and Eirgrid in its Decisions on the applications to retain the unbundling arrangements in place on 3 September 2009 in Northern Ireland and Ireland.⁵

Ofgem's decision is based on the role of MIL as an interconnector licence holder within the context of the Great Britain regulatory arrangements. National Grid is responsible for operation of the Great Britain transmission system. The Commission has already assessed the compliance of National Grid with the unbundling provisions of the Electricity Directive.⁶

Ofgem considers that the role of Moyle in Great Britain as a licenced interconnector operator differs from that of the national transmission system operator, as its obligations regards overall system operation are restricted. However, MIL is fully responsible for the financing, maintenance and development of the interconnector between Northern Ireland and Great Britain. In Northern Ireland, MIL is required by licence condition to "... make arrangements for the transmission system operator [i.e. SONI] to operate the Moyle interconnector in conjunction with its transmission system ...". It is also obliged by licence to appoint SONI as "interconnector administrator and adhere to the SEM trading and settlement code". This means that the role of MIL as TSO is restricted with many TSO activities being carried out by SONI, including the coordination of operations with National Grid.

MIL retains responsibility for financing of the interconnector, the planning of expansion of the interconnector⁷ and ensuring the reliability of the interconnector and for actual maintenance of the interconnector (with timing of maintenance decided by SONI). It has contracted Siemens Transmission and Distribution Limited to carry out the physical maintenance of the interconnector.

Both, the Northern Ireland Authority for Utility Regulation and Ofgem, notified decisions propose to improve certain non-discrimination obligations in the MIL licences as they relate to contracted activities.

⁵ See Commission Decision C(2013) 2170 final and Commission Decision C(2013) 2169 final.

⁶ See Commission Opinion C(2012) 2735 final.

⁷ Most importantly this relates to the planning for the eventual replacement of the interconnector. Incremental expansion of the capacity of the existing interconnector is technically difficult.

European Renewable Energy Fund

The Northern Ireland Authority for Utility Regulation considers MEL's investments valued at over GBP 10 million in the European Renewable Energy Fund Limited Partnership, but assesses these not to be in conflict with the requirements of Article 9(1) of the Electricity Directive as the fund is managed on an arm's length basis by a third party, MEL's share of the fund amounts to just 7% and MEL does not exercise control directly or indirectly in any of the fund's investments.

III. COMMENTS

On the basis of the present notifications the Commission has the following comments on the draft decisions.

1. Carrying out of TSO tasks

Under Article 9(1)(a) of the Electricity Directive, each undertaking which owns a transmission system is required to act as a TSO, including carrying out all the tasks of a TSO under Article 12 of the Electricity Directive. Compliance with ownership unbundling means that the undertaking which is the owner of the transmission system also acts as the TSO, and is as a consequence responsible, among other things, for granting and managing third-party access on a non-discriminatory basis to system users, and for collecting access charges. As regards investments, the owner of the transmission system is responsible for ensuring the long-term ability of the system to meet reasonable demand through investment planning. Decisions related to the operation, maintenance and development of the network must be made by the TSO and the network company must have enough resources at its disposal to carry out its tasks under Article 12 of the Electricity Directive independently.

In its opinion on Voralberger Übertragungsnetze GmbH⁸, the Commission set out that the sub-contracting of core tasks of a TSO to a vertically integrated undertaking was not compatible with the full ownership unbundling model. In that case, the Commission also expressed concerns about the availability of resources to the nominated TSO to enable it to carry out its functions and stated that it should carry out the administration of the transmission system and the control room services itself.

With the number of employees, MIL is unlikely to be able to carry out the full range of TSO activities notwithstanding the small size of the Moyle interconnector, in particular those relating to the day to day operation of the interconnector. The Commission considers that the transfer of TSO functions can be acceptable if the transmission system is operated as part of a wider transmission system. Only other TSOs which meet the unbundling requirements for electricity transmission system operation can provide this joint operation.

The operation of the cross border SEM on the island of Ireland is an important step in the integration of both Northern Ireland and Ireland into the wider internal market in electricity. Such cross border system operation, including the operation of Moyle by SONI, has the potential to provide real benefits to consumers. It is beneficial that the operation of the interconnector is fully integrated into the wider system operation on the island of Ireland, in particular in light of the planned implementation of market coupling between Great Britain and Ireland as part of the forthcoming capacity allocation and congestion management network code.

However, it remains important that each of the transmission operators continues to have the necessary powers and resources both to develop their own system and satisfy themselves that

⁸ See Commission Opinion C(2012)2244 final.

the operation of their system is being carried out in a non-discriminatory way. The Commission welcomes the intention to enhance the non-discrimination provisions of MIL's licence. However, the Commission also invites the Northern Ireland Authority for Utility Regulation to verify that MIL has sufficient resources to oversee the actions of SONI (and Eirgrid) in operating its transmission system as part of the wider system on the island of Ireland in addition to having the resources available to manage the financing, maintenance and development of interconnection between Northern Ireland and Great Britain.

2. European Renewable Energy Fund Limited Partnership

The Commission accepts the view of the Northern Ireland Authority for Utility Regulation and of Ofgem that the investments by MEL in the European Renewable Energy Fund Limited Partnership are essentially confined to a financial interest in an investment fund and MEL does not exercise, directly or indirectly, either rights or control in any of the renewable energy undertakings. Given the small size of the holding, and the role of SONI in the day to day operation of the Moyle interconnector this interest does not constitute a barrier to certification of MIL. However, the Commission invites the Northern Ireland Authority for Utility Regulation and Ofgem to keep under review whether a financial incentive could exist that could influence MEL's decision-making powers in MIL and, if that is the case, to ensure that remedies are put in place that effectively remove this conflict of interest.

IV. CONCLUSION

Pursuant to Article 3(2) Electricity Regulation, the Northern Ireland Authority for Utility Regulation and Ofgem shall take utmost account of the above comments of the Commission when taking their final decisions regarding the certification of MIL, and when they do so, shall communicate the 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 as regards 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 herein to be confidential. The Northern Ireland Authority for Utility Regulation and Ofgem are invited to inform the Commission within five working days following receipt whether they consider 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. Reasons for such a request should be given.

Done at Brussels, 8.7.2013

For the Commission
Joaquín ALMUNIA
Vice-President

