
STATUTORY RULES OF NORTHERN IRELAND

2011 No. 155

**The Gas and Electricity (Internal Markets)
Regulations (Northern Ireland) 2011**

PART III

OWNERSHIP UNBUNDLING

Participants in electricity transmission: certification as to independence

10. After Article 10A of the Electricity Order there shall be inserted the following Articles—

“Electricity transmission: requirement for participants to be certified as independent

10B.—(1) A person who participates in the transmission of electricity within the meaning of sub-paragraph (b) or both sub-paragraphs (a) and (b) of Article 8(4) and who holds a transmission licence immediately before the coming into operation of the 2011 Regulations must, on and after the relevant date, ensure that he is certified at all times when he acts under the authority of that licence.

(2) Any person who intends to participate in the transmission of electricity within the meaning of Article 8(4)(b) and who is granted a transmission licence after the coming into operation of the 2011 Regulations must ensure that he is certified at all times when he acts under the authority of the licence.

(3) In paragraph (1) the “relevant date” in respect of a person is 3rd March 2012 or any later date before 4th March 2013 which the Authority specifies under paragraph (4) or (5) in respect of that person.

(4) The Authority may specify a later date in respect of a person if—

- (a) the person has asked the Authority to specify a later date;
- (b) the person is not, and is not part of, a vertically integrated undertaking; and
- (c) no senior officer of the person is also a senior officer of a relevant producer or supplier.

(5) The Authority may also specify a later date in respect of a person if the Authority decides that, for reasons beyond its and the person’s control, the Authority will not reasonably be able to make a final decision before 3rd March 2012 as to whether or not to certify the person.

Application for certification

10C.—(1) An application for certification may not be made unless the applicant has first consulted, in such manner and within such period as the Authority may specify in writing, with any related transmission licensee in respect of the application.

- (2) An application for certification must be made—
- (a) in writing to the Authority; and
 - (b) before such date and in such form and contain such information as the Authority may specify in writing.
- (3) The applicant must, at the same time as it makes an application for certification, send a copy of it to any related transmission licensee.
- (4) If the application is made on or after 3rd March 2013 and either—
- (a) the applicant is; or
 - (b) the application is made on the basis of the third certification ground under Article 10F(5) and the applicant nominates as an independent system operator, a person from a third country or a person controlled by a person from a third country, the Authority must notify the Department and the European Commission as soon as is reasonably practicable.
- (5) A related transmission licensee may, make such representations to the Authority as it thinks fit in respect of the application for certification in question, including representations as to any qualification measures whether or not proposed by the applicant.
- (6) The Authority may specify a date by which such representations must be made.
- (7) The Authority may request from an applicant for certification any further information the Authority considers is relevant to the application, and the applicant must supply that information if—
- (a) it is in the applicant's possession or control; or
 - (b) it is information which the applicant could reasonably be expected to obtain.
- (8) The Authority may request a relevant producer or supplier, and any related transmission licensee, for any information the Authority considers relevant to an application for certification, and the person so requested must supply that information if—
- (a) it is in his possession or control; or
 - (b) it is information which he could reasonably be expected to obtain.
- (9) A person requested to supply information under paragraph (7) or (8) must do so by the date specified by the Authority in the request.
- (10) The Authority shall have regard to any representations made by a related transmission licensee in accordance with paragraphs (5) and (6) in making a decision as to whether or not the applicant should be certified and what, if any, qualification measures should be taken.

Report where applicant connected with a country outside the European Economic Area

10D.—(1) This Article applies if the Department is notified by the Authority under Article 10C(4) that an application has been made by, or nominating as an independent system operator, a person from a third country or a person controlled by a person from a third country.

(2) The Department must prepare a report on whether the security of electricity supplies in the United Kingdom and the European Economic Area would be put at risk by the certification of the applicant.

(3) In preparing the report, the Department must take into account—

- (a) any relevant international law; and

(b) any relevant agreement between the government of the United Kingdom and the government of the third country in question.

(4) The Department must send the report to the Authority within the 6 weeks beginning with the day on which the notification under Article 10C(4) is received by it.

Certification

10E.—(1) The Authority must, within the 4 months beginning with the day on which it receives an application for certification, make a preliminary decision as to whether it should certify the applicant.

(2) If—

- (a) the Authority has asked an applicant or a relevant producer or supplier or related transmission licensee for information under Article 10C(7) or (8); and
- (b) the information has not been supplied by the date specified by the Authority under Article 10C(9),

then the period of 4 months referred to in paragraph (1) shall be extended by the period of delay in supplying such information.

(3) As soon as is reasonably practicable after making the preliminary decision under paragraph (1), the Authority must notify the decision and the reasons for it to—

- (a) the applicant;
- (b) any related transmission licensee;
- (c) the Department; and
- (d) the European Commission.

(4) The Authority must enclose with the notification under paragraph (3)(a), (b) or (d) a copy of any report which the Department has prepared under Article 10D in respect of the applicant and which the Authority receives before giving the notification.

(5) Article 3 of the Electricity Regulation sets out the obligation to make a final decision, together with related processes, time limits, matters to be taken into account and conditions.

(6) As soon as is reasonably practicable after making the final decision in any case, the Authority must notify the decision and the reasons for it to—

- (a) the applicant;
- (b) any related transmission licensee;
- (c) the Department; and
- (d) the European Commission.

Grounds for certification

10F.—(1) This Article applies to—

- (a) a preliminary decision under Article 10E as to whether an applicant should be certified; and
- (b) a final decision under Article 3 of the Electricity Regulation as to whether to certify an applicant.

(2) Subject to paragraph (7), the Authority may only decide that the applicant should be certified, or decide to certify the applicant, if one of the following four grounds (“the certification grounds”) applies.

(3) The first certification ground is that the ownership unbundling requirement in Article 10G is met in relation to the applicant and to any related transmission licensee.

(4) The second certification ground is that the applicant has applied for a derogation from the ownership unbundling requirement on the grounds in paragraph (9) of Article 9 of the Directive (alternative arrangements for independence), and the Authority has determined that the requirements of that paragraph are met.

(5) The third certification ground is that—

- (a) the applicant has applied for a derogation from the ownership unbundling requirement on the grounds in paragraphs (1) and (2) of Article 13 of the Directive (independent system operator);
- (b) the applicant has nominated an independent system operator for designation in accordance with those paragraphs; and
- (c) the Authority—
 - (i) has determined that the requirements of those paragraphs and of paragraphs (1) and (2) of Article 14 of the Directive (unbundling of transmission system owners) are met; and
 - (ii) is minded to designate the nominated independent system operator.

(6) The fourth certification ground is that the applicant has been granted an exemption under Article 17 of the Electricity Regulation (new interconnectors) and remains entitled to the benefit of it.

(7) The Authority may make a preliminary decision to certify an applicant where it is satisfied that the certification ground to which his application relates applies in the case of the applicant or would apply if particular qualification measures were taken and that—

- (a) those qualification measures are within the powers of the Authority to impose under regulations 11 and 94 of the 2011 Regulations or any other powers of the Authority under this Order or the Energy (Northern Ireland) Order 2003 and the Authority is minded so to exercise those powers; or
- (b) the Authority is otherwise satisfied that such qualification measures will be taken.

(8) But, regardless of whether a certification ground applies under paragraph (2), the Authority must not certify the applicant—

- (a) if, on the basis of an opinion expressed by the European Commission under Article 11 of the Directive (certification in relation to persons from countries outside the European Economic Area), the Authority considers that the certification of the applicant would put at risk the security of electricity supplies in the European Economic Area;
- (b) if a report prepared by the Department under Article 10D states that the certification of the applicant would put at risk the security of electricity supplies in the United Kingdom or the European Economic Area;
- (c) on the second certification ground if the European Commission has not verified, in accordance with paragraph (10) of Article 9 of the Directive (verification of independence under alternative arrangements), that the requirement in that paragraph as to arrangements for effective independence is met.

The ownership unbundling requirement

10G.—(1) For the purposes of Article 10F(3), the ownership unbundling requirement is met by an applicant for certification or (as the case may be) a related transmission licensee (“a relevant person”) if the Authority considers that each of the following five tests is passed.

- (2) The first test is that the relevant person—
 - (a) does not control a relevant producer or supplier;
 - (b) does not have a majority shareholding in a relevant producer or supplier; and
 - (c) will not, on or after the relevant date (within the meaning of Article 10B(3)), exercise any shareholder rights it holds, or becomes the holder of, in relation to a relevant producer or supplier.
- (3) For the purposes of paragraph (2)(c), the Authority is entitled to think that the relevant person will not exercise any shareholder rights it holds, or becomes the holder of, if the relevant person has given an undertaking that it will not exercise those shareholder rights.
- (4) The second test is that the relevant person is not controlled by a person who controls a relevant producer or supplier.
- (5) But even where the second test is not passed, the Authority is entitled to treat it as passed if—
 - (a) the control over the relevant person was gained through the exercise of a right conferred as a condition of the provision of financial support or a guarantee in relation to the relevant person's business; or
 - (b) the control over the relevant producer or supplier was gained through the exercise of such a right conferred in relation to the business of the relevant producer or supplier.
- (6) The third test is that the relevant person is not controlled by a person who has a majority shareholding in a relevant producer or supplier.
- (7) But even where the third test is not passed, the Authority is entitled to treat it as passed if—
 - (a) the control over the relevant person was gained through the exercise of a right conferred as a condition of the provision of financial support or a guarantee in relation to the relevant person's business; or
 - (b) the majority shareholding in the relevant producer or supplier was gained through the exercise of such a right conferred in relation to the business of the relevant producer or supplier.
- (8) Where the Authority treats the second or third test as having been passed only by virtue of paragraph (5) or (7), it must specify a time limit after which it will cease to treat that test as having been passed; and it may extend the time limit if it thinks it necessary or expedient to do so.
- (9) Paragraphs (10) and (11) apply where the Authority is entitled to treat the second or third test as having been passed only by virtue of paragraph (5) or (7).
- (10) In deciding whether to treat the test as having been passed, the Authority—
 - (a) must take into account—
 - (i) whether the relationship (direct or indirect) between the relevant person and the relevant producer or supplier has led or might lead the relevant person to discriminate in favour of the relevant producer or supplier; and
 - (ii) the length of time for which that is likely to continue to be so; and
 - (b) may, in particular, take into account any information or undertakings given to the Authority by the relevant person, the relevant producer or supplier or the person who controls the relevant person and controls or has a majority shareholding in the relevant producer or supplier.

(11) The information and undertakings that may be taken into account under paragraph (10)(b) include information and undertakings regarding any measures that have been or will be put in place to ensure the effective separation of the business of the relevant person and the business of the relevant producer or supplier.

(12) The fourth test is that, where the relevant person is a company, partnership or other business, none of its senior officers has been, or may be, appointed by a person who—

- (a) controls a relevant producer or supplier other than a gas producer or gas supply undertaking; or
- (b) has a majority shareholding in a relevant producer or supplier other than a gas producer or gas supply undertaking.

(13) The fifth test is that, where the relevant person is a company, partnership or other business, none of its senior officers is also a senior officer of a relevant producer or supplier other than a gas producer or gas supply undertaking.

Designation for the purposes of EU electricity legislation

10H.—(1) This Article applies for any period during which a person—

- (a) holds a transmission licence in relation to which the duty under Article 10B(1) or (2) applies; and
- (b) is certified.

(2) If the person is certified on the first or second certification ground in Article 10F, the Department shall designate that person as an electricity transmission system operator for the purposes of Article 10(2) of the Directive (designation of transmission system operators).

(3) If the person is certified on the third certification ground in Article 10F, the Department shall designate the independent system operator nominated in the application for certification as an electricity transmission system operator for the purposes of that Article.

(4) As soon as is reasonably practicable after a person is designated by virtue of this Article, the Department must give notice of the designation to—

- (a) the person so designated;
- (b) the applicant (if different);
- (c) the Authority; and
- (d) the European Commission.

(5) Where, in the case of a person certified on the first or second certification ground, there is a related transmission licensee, conditions included pursuant to Article 11A(1) in the transmission licences of the certified person and the related transmission licensee may make provision for determining which of them is to act as transmission system operator for the purposes of any provision of the Electricity Regulation and any designation under this Article is without prejudice to any such provision.

Monitoring and review of certification

10I.—(1) The Authority must monitor, in respect of each certified person, whether the grounds on which the person was certified continue to apply.

(2) Where for the purposes of certifying any person, the Authority has treated the second or third test in Article 10G as having been passed only by virtue of paragraph (5) or (7) of that Article, then where after the expiry of the time limit provided under paragraph (8) of that Article it has ceased to treat that test as having been passed by such virtue, the certification

shall be withdrawn unless the Authority reviews the certification and is satisfied that the test in question is otherwise passed.

(3) If, on or after 3rd March 2013, as a result of information it has received or obtained, the Authority considers that a person from a third country has taken or may take control of a certified person or a person designated as independent system operator, the Authority must, as soon as is reasonably practicable, notify the information to the Department and the European Commission.

(4) The Authority may review the final certification for any person if—

- (a) the certified person or any related transmission licensee notifies it of any event or circumstance which may affect the grounds on which that person was certified; or
- (b) for any other reason the Authority considers that the grounds for the certification of that person may no longer apply.

(5) A review under paragraph (2) or (4) is to be carried out within the 4 months beginning with—

- (a) if paragraph (4)(a) applies, the day on which the Authority receives the notification under that paragraph;
- (b) if the review is in pursuance of paragraph (2), the expiry of the time limit referred to in that paragraph; or
- (c) otherwise, the first day on which the Authority considers that the grounds for certification may no longer apply.

(6) The Authority must also review a final certification if the European Commission asks it to do so.

(7) A review under paragraph (6) is to be carried out within the 4 months beginning with the day on which the Authority receives the request from the European Commission.

(8) But where the Authority considers that the circumstances giving rise to the review of the certification of any person under paragraph (4) or (6) represent or result from the contravention of a relevant condition or requirement for the purposes of Article 41 of the Energy (Northern Ireland) Order 2003, by a related transmission licensee, the Authority may suspend the carrying out of the review while the Authority is taking steps in relation to such contravention pursuant to Part VI of that Order and during any period allowed to the related transmission licensee for complying with any enforcement order.

(9) As soon as is reasonably practicable after beginning a review under this Article, the Authority must notify the certified person to whom the review relates and any related transmission licensee that the review is being carried out and the reasons for it.

(10) The Authority may ask the certified person for any information the Authority thinks is relevant to the review, and the person must supply the information if—

- (a) it is in the certified person's possession or control; or
- (b) it is information which the certified person could reasonably be expected to obtain.

(11) The Authority may ask a relevant producer or supplier or related transmission licensee for any information the Authority thinks is relevant to a review under this Article, and the relevant producer or supplier or related transmission licensee must supply that information if—

- (a) it is in the possession or control of the relevant producer or supplier or related transmission licensee; or
- (b) it is information which the relevant producer or supplier or related transmission licensee could reasonably be expected to obtain.

(12) A person required to supply information under paragraph (10) or (11) must do so by any deadline specified by the Authority in the request.

Report as to any connection of a certified person with a country outside the European Economic Area

10J.—(1) This Article applies if the Department is notified by the Authority under Article 10I(3) that a person from a third country has taken or may take control of a certified person or (in relation to a certified person) a person designated as an independent system operator.

(2) The Department must prepare a report on whether the security of electricity supplies in the United Kingdom and the European Economic Area would be put at risk by the continued certification of the person.

(3) In preparing the report, the Department must take into account—

- (a) any relevant international law; and
- (b) any relevant agreement between the government of the United Kingdom and the government of the third country in question.

(4) The Department must prepare the report and send it to the Authority within the 6 weeks beginning with the day on which the notification is received.

Continuation or withdrawal of certification

10K.—(1) Where the Authority reviews under Article 10I whether the grounds for the certification of a person apply or continue to apply, it may, within the review period, make a preliminary decision that either—

- (a) the certification should be continued on the certification ground in question; or
- (b) the certification should be withdrawn.

(2) If the Authority does not make a decision under paragraph (1) within the review period, it is to be taken as having decided at the end of the review period that the certification should be continued on the certification ground in question.

(3) As soon as is reasonably practicable after a preliminary decision is made (or taken to be made) under this Article, the Authority must—

- (a) notify the European Commission of the decision; and
- (b) enclose the information it considers relevant to the decision.

(4) Article 3 of the Electricity Regulation sets out an obligation to make a final review decision, together with related processes, time limits, matters to be taken into account and conditions.

(5) Paragraphs (6) to (8) apply in relation to the Authority's final decision under Article 3 of the Electricity Regulation whether or not to confirm the certification.

(6) As soon as is reasonably practicable after making the final decision, the Authority must notify the decision and the reasons for it to—

- (a) the person in relation to whom the review was carried out;
- (b) any related transmission licensee;
- (c) the Department; and
- (d) the European Commission

(7) If the final decision is to continue the certification, the person in question is to be taken as continuing to be certified by the Authority.

(8) Otherwise, the person is to be taken as no longer certified.

(9) Article 10F(8)(a) and (b) applies in relation to a decision mentioned in this Article as it applies in relation to a decision mentioned in Article 10F(1), but as if the reference in Article 10F(8)(b) to a report under Article 10D were a reference to a report under Article 10J.

Interpretation

10L.—(1) In Articles 10B to 10K and this Article—

“certification ground” shall be construed in accordance with Article 10F(2);

“certified” means, in relation to any person, certified in accordance with Article 10E or continued to be certified in accordance with Article 10K;

“control”, in relation to one person having control over another, has the meaning given in Article 2(34) of the Directive, but in determining whether one person (“person A”) controls another person (“person B”) no account is to be taken of any power to exercise a contractual or other right which would give person A decisive influence over person B where the right was conferred as a condition of the provision of any financial support or guarantee by person A in relation to the business of person B; and references to one person controlling another are to be interpreted accordingly;

“electricity generation undertaking” means a person who generates electricity for the purpose of giving a supply to any premises or enabling a supply to be so given;

“electricity supply undertaking” means a person who supplies electricity to any premises;

“Electricity Regulation” means 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;

“gas producer” means a gas undertaking carrying out the function of production mentioned in Article 2(1) of European Parliament and Council Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC;

“gas supply undertaking” means a person who sells gas to one or more customers, including by the supply to any premises of gas which has been conveyed to those premises through pipes;

“licence” means—

- (a) in relation to an electricity generation undertaking or an electricity supply undertaking, a licence under Article 10(1)(a) or (c); and
- (b) in relation to a gas supply undertaking, a licence under Article 8(1)(c) of the Gas (Northern Ireland) Order 1996;

“majority shareholding” means a simple majority of shares;

“person from a third country” means any person the Authority thinks is a person from a third country;

“qualification measures”, in relation to an applicant for certification, means measures taken or arrangements made to ensure that the certification ground to which his application relates applies in his case;

“related transmission licensee” means, in relation to an applicant for certification or a certified person, any other person (including a person nominated or designated as independent system operator for the purposes of the third certification ground) who—

- (a) holds; or
- (b) in the case of an applicant for certification would, pursuant to any qualification measures proposed in the application, hold, a transmission licence under which that person participates or would participate in the transmission of electricity (within the meaning of Article 8(4)(a)) by means of the transmission system of the applicant or certified person;

“review period”, in relation to a review under Article 10I, means the period specified in paragraph (5) or (7) of that Article as extended by any period of suspension under paragraph (8) of that Article;

“senior officer” means—

- (a) in relation to a company, a director;
- (b) in relation to a partnership, a partner;
- (c) in relation to any other business, a person holding a position equivalent to that of a director or partner;

“shareholder right”, in relation to a company, means a right conferred by the holding of a share in the company’s share capital—

- (a) to vote at general meetings of the company; or
- (b) to appoint or remove a member of the company’s board of directors;

“third country” means a country that is not, and is not part of, a European Economic Area state.

(2) In Article 10B to 10K and this Article, “relevant producer or supplier”, in relation to an applicant for certification or a certified person, means—

- (a) an electricity generation undertaking, an electricity supply undertaking or a gas supply undertaking which meets the requirements of paragraph (3); or
- (b) a gas producer which meets the requirements of paragraph (4).

(3) An undertaking mentioned in paragraph (2)(a) meets the requirements of this paragraph if it carries out its generation or supply activity in a European Economic Area state and it—

- (a) requires a licence or similar authority to do so;
- (b) would, in the Authority’s opinion, require a licence to do so if it carried out the activity in Northern Ireland; or
- (c) has a relationship with the applicant or certified person which the Authority thinks might lead the applicant or certified person to discriminate in favour of it.

(4) A gas producer meets the requirements of this paragraph if it—

- (a) carries out its production activity in a European Economic Area state; and
- (b) has a relationship with the applicant or certified person which the Authority thinks might lead the applicant or certified person to discriminate in favour of it.”.

Electricity transmission unbundling: modification of licences, etc.

11.—(1) Where the Authority is minded to make a final decision to certify a person under Article 10E of the Electricity Order, modifications to the conditions of an electricity licence made pursuant to regulation 91 may include such modifications as the Department or the Authority considers requisite or expedient to enable the satisfaction of any condition required for the relevant certification ground to apply.

(2) Conditions included in a licence pursuant to paragraph (1)—

- (a) may require the licence holder to enter into such new agreements or arrangements, or new agreements or arrangements for such purposes or of such description, as may be specified in, or determined by or under the conditions;
 - (b) may include provision for determining the terms on which such new agreements or arrangements are to be entered into; and
 - (c) may require the licence holder to amend or terminate, or agree to the amendment or termination of, such existing agreements or arrangements, or existing agreements or arrangements of such description, as may be specified in, or determined by or under the conditions.
- (3) In this regulation “certification ground” has the meaning given to it in Article 10L of the Electricity Order.

Gas conveyors: certification as to independence

12. After Article 8 of the Gas Order there shall be inserted the following Articles—

“The conveyance of gas: requirement to be certified as independent

8B.—(1) A person who conveys gas through a gas transmission pipe-line and holds a licence under Article 8(1)(a) immediately before the coming into operation of the 2011 Regulations must, on and after the relevant date, ensure that he is certified at all times when he acts under the authority of that licence.

(2) Any person who intends to convey gas through a gas transmission pipe-line and who is granted a licence under Article 8(1)(a) after the coming into operation of the 2011 Regulations must ensure that he is certified at all times when he acts under the authority of the licence.

(3) In paragraph (1) the “relevant date” in respect of a person is 3rd March 2012 or any later date before 4th March 2013 which the Authority specifies under paragraph (4) or (5) in respect of that person.

(4) The Authority may specify a later date in respect of a person if—

- (a) the person has asked the Authority to specify a later date;
- (b) the person is not, and is not part of, a vertically integrated undertaking; and
- (c) no senior officer of the person is also a senior officer of a relevant producer or supplier.

(5) The Authority may also specify a later date in respect of a person if the Authority decides that, for reasons beyond its and the person’s control, the Authority will not reasonably be able to make a final decision before 3rd March 2012 as to whether or not to certify the person.

(6) For the purposes of this Article, a person conveys gas through a gas transmission pipe-line where he—

- (a) makes a gas transmission pipe-line available for use for the purposes of the conveyance of gas; or
- (b) makes such a pipe-line available and coordinates and directs the flow of gas into and through such pipe-line.

Application for certification

8C.—(1) An application for certification must be made—

- (a) in writing to the Authority; and

- (b) before such date and in such form and contain such information as the Authority may specify in writing.
- (2) If the application is made on or after 3rd March 2013 and either—
 - (a) the applicant is; or
 - (b) the application is made on the basis of the third certification ground under Article 8F(5) and the applicant nominates as an independent system operator, a person from a third country or a person controlled by a person from a third country, the Authority must notify the Department and the European Commission as soon as is reasonably practicable.
- (3) The Authority may request from an applicant for certification any further information the Authority thinks is relevant to the application, and the applicant must supply that information if—
 - (a) it is in the applicant’s possession or control; or
 - (b) it is information which the applicant could reasonably be expected to obtain.
- (4) The Authority may request a relevant producer or supplier, and any related conveyance licensee, for any information the Authority considers relevant to an application for certification, and the person so requested must supply that information if—
 - (a) it is in his possession or control; or
 - (b) it is information which he could reasonably be expected to obtain.
- (5) A person requested to supply information under paragraph (3) or (4) must do so by the date specified by the Authority in the request.

Report where applicant connected with a country outside the European Economic Area

- 8D.**—(1) This Article applies if the Department is notified by the Authority under Article 8C(2) that an application has been made by, or nominating as an independent system operator, a person from a third country or a person controlled by a person from a third country.
- (2) The Department must prepare a report on whether the security of gas supplies in the United Kingdom and the European Economic Area would be put at risk by the certification of the applicant.
 - (3) In preparing the report, the Department must take into account—
 - (a) any relevant international law; and
 - (b) any relevant agreement between the government of the United Kingdom and the government of the third country in question.
 - (4) The Department must send the report to the Authority within the 6 weeks beginning with the day on which the notification under Article 8C(2) is received by it.

Certification

- 8E.**—(1) The Authority must, within the 4 months beginning with the day on which it receives an application for certification, make a preliminary decision as to whether it should certify the applicant.
- (2) If—
 - (a) the Authority has asked an applicant or a relevant producer or supplier or related conveyance licensee for information under Article 8C(3) or (4); and

- (b) the information has not been supplied by the date specified by the Authority under Article 8C(5),

then the period of 4 months referred to in paragraph (1) shall be extended by the period of delay in supplying such information.

(3) As soon as is reasonably practicable after making the preliminary decision under paragraph (1), the Authority must notify the decision and the reasons for it to—

- (a) the applicant;
- (b) any related conveyance licensee;
- (c) the Department; and
- (d) the European Commission.

(4) The Authority must enclose with the notification under paragraph (3)(a), (b) or (d) a copy of any report which the Department has prepared under Article 8D in respect of the applicant and which the Authority receives before giving the notification.

(5) Article 3 of the Gas Regulation sets out the obligation to make a final decision, together with related processes, time limits, matters to be taken into account and conditions.

(6) As soon as is reasonably practicable after making the final decision in any case the Authority must notify the decision and the reasons for it to—

- (a) the applicant;
- (b) any related conveyance licensee;
- (c) the Department; and
- (d) the European Commission.

Grounds for certification

8F.—(1) This Article applies to—

- (a) a preliminary decision under Article 8E as to whether an applicant should be certified;
- (b) a final decision under Article 3 of the Gas Regulation as to whether to certify an applicant.

(2) Subject to paragraph (7), the Authority may only decide that the applicant should be certified, or decide to certify the applicant, if one of the following four grounds (“the certification grounds”) applies.

(3) The first certification ground is that the ownership unbundling requirement in Article 8G is met in relation to the applicant and to any related conveyance licensee.

(4) The second certification ground is that—

- (a) the applicant has applied for a derogation from the ownership unbundling requirement on the grounds in paragraphs (1) and (2) of Article 14 of the Directive (independent system operator);
- (b) the applicant has nominated an independent system operator for designation in accordance with those paragraphs; and
- (c) the Authority—

- (i) has determined that the requirements of those paragraphs and of paragraphs (1) and (2) of Article 15 of the Directive (unbundling of transmission system owners and storage system operators) are met; and
- (ii) is minded to designate the nominated independent system operator.

- (5) The third certification ground is that—
- (a) the applicant holds a licence under Article 8(1)(a);
 - (b) the applicant has applied for a derogation from the ownership unbundling requirement on the grounds in Chapter IV of the Directive (independent transmission operator); and
 - (c) the Authority has determined that the requirements of that Chapter are met.
- (6) The fourth certification ground is that the applicant has been granted an exemption (effective by virtue of the conditions which apply in his licence, or by way of exemption under Article 7(1)) in accordance with Article 36 of the Directive (new infrastructure) and remains entitled to the benefit of it.
- (7) The Authority may make a preliminary decision to certify an applicant where it is satisfied that the certification ground to which his application relates applies in the case of the applicant or would apply if particular qualification measures were taken and that—
- (a) those qualification measures are within the powers of the Authority to impose under regulations 13 and 94 of the 2011 Regulations or any other powers of the Authority under this Order or the Energy (Northern Ireland) Order 2003, and the Authority is minded so to exercise those powers; or
 - (b) the Authority is otherwise satisfied that such qualification measures will be taken.
- (8) But, regardless of whether a certification ground applies under paragraph (2), the Authority must not certify the applicant—
- (a) if, on the basis of an opinion expressed by the European Commission under Article 11 of the Directive (certification in relation to persons from countries outside the European Economic Area), the Authority considers that the certification of the applicant would put at risk the security of gas supplies in the European Economic Area;
 - (b) if a report prepared by the Department under Article 8D states that the certification of the applicant would put at risk the security of gas supplies in the United Kingdom or the European Economic Area.

The ownership unbundling requirement

8G.—(1) For the purposes of Article 8F(3), the ownership unbundling requirement is met by an applicant for certification or (as the case may be) a related conveyance licensee (“a relevant person”) if the Authority considers that each of the following five tests is passed.

- (2) The first test is that the relevant person—
- (a) does not control a relevant producer or supplier;
 - (b) does not have a majority shareholding in a relevant producer or supplier; and
 - (c) will not, on or after the relevant date (within the meaning of Article 8B(3)) exercise any shareholder rights it holds, or becomes the holder of, in relation to a relevant producer or supplier.
- (3) For the purposes of paragraph (2)(c), the Authority is entitled to think that the relevant person will not exercise any shareholder rights it holds, or becomes the holder of, if the relevant person has given an undertaking that it will not exercise those shareholder rights.
- (4) The second test is that the relevant person is not controlled by a person who controls a relevant producer or supplier.
- (5) But even where the second test is not passed, the Authority is entitled to treat it as passed if—

- (a) the control over the relevant person was gained through the exercise of a right conferred as a condition of the provision of financial support or a guarantee in relation to the relevant person's business; or
 - (b) the control over the relevant producer or supplier was gained through the exercise of such a right conferred in relation to the business of the relevant producer or supplier.
- (6) The third test is that the relevant person is not controlled by a person who has a majority shareholding in a relevant producer or supplier.
- (7) But even where the third test is not passed, the Authority is entitled to treat it as passed if—
- (a) the control over the relevant person was gained through the exercise of a right conferred as a condition of the provision of financial support or a guarantee in relation to the relevant person's business; or
 - (b) the majority shareholding in the relevant producer or supplier was gained through the exercise of such a right conferred in relation to the business of the relevant producer or supplier.
- (8) Where the Authority treats the second or third test as having been passed only by virtue of paragraph (5) or (7), it must specify a time limit after which it will cease to treat that test as having been passed; and it may extend the time limit if it thinks it necessary or expedient to do so.
- (9) Paragraphs (10) and (11) apply where the Authority is entitled to treat the second or third test as having been passed only by virtue of paragraph (5) or (7).
- (10) In deciding whether to treat the test as having been passed, the Authority—
- (a) must take into account—
 - (i) whether the relationship (direct or indirect) between the relevant person and the relevant producer or supplier has led or might lead the relevant person to discriminate in favour of the relevant producer or supplier; and
 - (ii) the length of time for which that is likely to continue to be so; and
 - (b) may, in particular take into account any information or undertakings given to the Authority by the relevant person, the relevant producer or supplier or the person who controls the relevant person and controls or has a majority shareholding in the relevant producer or supplier.
- (11) The information and undertakings that may be taken into account under paragraph (10)(b) include information and undertakings regarding any measures that have been or will be put in place to ensure the effective separation of the business of the relevant person and the business of the relevant producer or supplier.
- (12) The fourth test is that, where the relevant person is a company, partnership or other business, none of its senior officers has been, or may be, appointed by a person who—
- (a) controls a relevant producer or supplier other than an electricity generation undertaking or electricity supply undertaking; or
 - (b) has a majority shareholding in a relevant producer or supplier other than an electricity generation undertaking or electricity supply undertaking.
- (13) The fifth test is that, where the relevant person is a company, partnership or other business, none of its senior officers is also a senior officer of a relevant producer or supplier other than an electricity generation undertaking or electricity supply undertaking.

Designation for the purposes of EU gas legislation

8H.—(1) This Article applies for any period during which a person—

- (a) holds a licence under Article 8(1)(a); and
- (b) is certified.

(2) If the person is certified on the first or third certification ground in Article 8F, the Department shall designate that person as a gas transmission system operator for the purposes of Article 10(2) of the Directive (designation of transmission system operators).

(3) If the person is certified on the second certification ground in Article 8F, the Department shall designate the independent system operator nominated in the application for certification as a gas transmission system operator for the purposes of that Article.

(4) As soon as is reasonably practicable after a person is designated by virtue of this Article, the Department must give notice of the designation to—

- (a) the person so designated;
- (b) the applicant (if different);
- (c) the Authority; and
- (d) the European Commission.

(5) Where, in the case of a person certified on the first certification ground, there is a related conveyance licensee, conditions included pursuant to Article 10A(1) in the licences under Article 8(1)(a) of the certified person and the related conveyance licensee may make provision for determining which of them is to act as transmission system operator for the purposes of any provision of the Gas Regulation and any designation under this Article is without prejudice to any such provision.

Monitoring and review of certification

8I.—(1) The Authority must monitor, in respect of each certified person, whether the grounds on which the person was certified continue to apply.

(2) Where, for the purposes of certifying any person, the Authority has treated the second or third test in Article 8G as having been passed only by virtue of paragraph (5) or (7) of that Article, then where after the expiry of the time limit provided under paragraph (8) of that Article it has ceased to treat that test as having been passed by such virtue, the certification shall be withdrawn unless the Authority reviews the certification and is satisfied that the test in question is otherwise passed.

(3) If, on or after 3rd March 2013, as a result of information it has received or obtained, the Authority considers that a person from a third country has taken or may take control of a certified person or a person designated as independent system operator, the Authority must, as soon as is reasonably practicable, notify the information to the Department and the European Commission.

(4) The Authority may review the final certification for any person if—

- (a) the certified person or any related conveyance licensee notifies it of any event or circumstance which may affect the grounds on which that person was certified; or
- (b) for any other reason the Authority considers that the grounds for the certification of that person may no longer apply.

(5) A review under paragraph (2) or (4) is to be carried out within the 4 months beginning with—

- (a) if paragraph (4)(a) applies, the day on which the Authority receives the notification under that paragraph;

- (b) if the review is in pursuance of paragraph (2), the expiry of the time limit referred to in that paragraph; or
 - (c) otherwise, the first day on which the Authority considers that the grounds for certification may no longer apply.
- (6) The Authority must also review a final certification if the European Commission asks it to do so.
- (7) A review under paragraph (6) is to be carried out within the 4 months beginning with the day on which the Authority receives the request from the European Commission.
- (8) But where the Authority considers that the circumstances giving rise to the review of the certification of any person under paragraph (4) or (6) represent or result from the contravention of a relevant condition or requirement for the purposes of Article 41 of the Energy (Northern Ireland) Order 2003, by a related conveyance licensee, the Authority may suspend the carrying out of the review while the Authority is taking steps in relation to such contravention pursuant to Part VI of that Order and during any period allowed to the related conveyance licensee for complying with any enforcement order.
- (9) As soon as is reasonably practicable after beginning a review under this Article, the Authority must notify the certified person to whom the review relates and any related conveyance licensee that the review is being carried out and the reasons for it.
- (10) The Authority may ask the certified person for any information the Authority thinks is relevant to the review, and the person must supply the information if—
- (a) it is in the certified person's possession or control; or
 - (b) it is information which the certified person could reasonably be expected to obtain.
- (11) The Authority may ask a relevant producer or supplier or related conveyance licensee for any information the Authority thinks is relevant to a review under this Article, and the relevant producer or supplier or related conveyance licensee must supply that information if—
- (a) it is in the possession or control of the relevant producer or supplier or related conveyance licensee; or
 - (b) it is information which the relevant producer or supplier or related conveyance licensee could reasonably be expected to obtain.
- (12) A person required to supply information under paragraph (10) or (11) must do so by any deadline specified by the Authority in the request.

Report as to any connection of a certified person with a country outside the European Economic Area

- 8J.**—(1) This Article applies if the Department is notified by the Authority under Article 8I(3) that a person from a third country has taken or may take control of a certified person or (in relation to a certified person) a person designated as an independent system operator.
- (2) The Department must prepare a report on whether the security of gas supplies in the United Kingdom and the European Economic Area would be put at risk by the continued certification of the person.
- (3) In preparing the report, the Department must take into account—
- (a) any relevant international law; and
 - (b) any relevant agreement between the government of the United Kingdom and the government of the third country in question.

(4) The Department must prepare the report and send it to the Authority within the 6 weeks beginning with the day on which the notification is received.

Continuation or withdrawal of certification

8K.—(1) Where the Authority reviews under Article 8I whether the grounds for the certification of a person apply or continue to apply, it may, within the review period, make a preliminary decision that either—

- (a) the certification should be continued on the certification ground in question; or
- (b) the certification should be withdrawn.

(2) If the Authority does not make a decision under paragraph (1) within the review period, it is to be taken as having decided at the end of the review period that the certification should be continued on the certification ground in question.

(3) As soon as is reasonably practicable after a preliminary decision is made (or taken to be made) under this Article, the Authority must—

- (a) notify the European Commission of the decision; and
- (b) enclose the information it considers relevant to the decision.

(4) Article 3 of the Gas Regulation sets out an obligation to make a final review decision, together with related processes, time limits, matters to be taken into account and conditions.

(5) Paragraphs (6) to (8) apply in relation to the Authority’s final decision under Article 3 of the Gas Regulation whether or not to confirm the certification.

(6) As soon as is reasonably practicable after making the final decision, the Authority must notify the decision and the reasons for it to—

- (a) the person in relation to whom the review was carried out;
- (b) any related conveyance licensee;
- (c) the Department; and
- (d) the European Commission.

(7) If the final decision is to continue the certification the person in question is to be taken as continuing to be certified by the Authority.

(8) Otherwise, the person is to be taken as no longer certified.

(9) Article 8F(8)(a) and (b) applies in relation to a decision mentioned in this Article as it applies in relation to a decision mentioned in Article 8F(1), but as if the reference in Article 8F(8)(b) to a report under Article 8D were a reference to a report under Article 8J.

Interpretation

8L.—(1) In Articles 8B to 8K and this Article—

“certification ground” shall be construed in accordance with Article 8F(2);

“certified” means, in relation to any person, certified in accordance with Article 8E or continued to be certified in accordance with Article 8K;

“control”, in relation to one person having control over another, has the meaning given in Article 2(36) of the Directive, but in determining whether one person (“person A”) controls another person (“person B”) no account is to be taken of any power to exercise a contractual or other right which would give person A decisive influence over person B where the right was conferred as a condition of the provision of any financial support or guarantee by person A in relation to the business of person B; and references to one person controlling another are to be interpreted accordingly;

“electricity generation undertaking” means a person who generates electricity for the purpose of giving a supply to any premises or enabling a supply to be so given;

“electricity supply undertaking” means a person who supplies electricity to any premises;

“gas producer” means a gas undertaking carrying out the function of production mentioned in Article 2(1) of the Directive;

“gas supply undertaking” means a person who sells gas to one or more customers, including by the supply to any premises of gas which has been conveyed to those premises through pipes;

“the Gas Regulation” means 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;

“gas transmission pipe-line” means a gas pipe-line used for the purposes of transmission within the meaning of the Directive;

“licence” means—

(a) in relation to an electricity generation undertaking or an electricity supply undertaking, a licence under Article 10(1)(a) or (c) of the Electricity (Northern Ireland) Order 1992; and

(b) in relation to a gas supply undertaking, a licence under Article 8(1)(c);

“majority shareholding” means a simple majority of shares;

“person from a third country” means any person the Authority thinks is a person from a third country;

“qualification measures” in relation to an applicant for certification, means measures taken or arrangements made to ensure that the certification ground to which his application relates applies in his case;

“related conveyance licensee” means, in relation to an applicant for certification or a certified person, any other person (including a person nominated or designated as independent system operator for the purposes of the second certification ground) who—

(a) holds; or

(b) in the case of an applicant for certification would, pursuant to any qualification measures proposed in the application, hold, a licence under Article 8(1)(a) under which that person co-ordinates, and directs, the flow of gas into and through a gas transmission pipe-line of the applicant or certified person;

“review period” in relation to a review under Article 8I, means the period specified in paragraph (5) or (7) of that Article as extended by any period of suspension under paragraph (8) of that Article;

“senior officer” means—

(a) in relation to a company, a director;

(b) in relation to a partnership, a partner;

(c) in relation to any other business, a person holding a position equivalent to that of a director or partner;

“shareholder right”, in relation to a company, means a right conferred by the holding of a share in the company’s share capital—

(a) to vote at general meetings of the company; or

- (b) to appoint or remove a member of the company’s board of directors;
“third country” means a country that is not, and is not part of, a European Economic Area state.

(2) In Articles 8B to 8K and this Article, “relevant producer or supplier”, in relation to an applicant for certification or a certified person, means—

- (a) an electricity generation undertaking, an electricity supply undertaking or a gas supply undertaking which meets the requirements of paragraph (3); or
- (b) a gas producer which meets the requirements of paragraph (4).

(3) An undertaking mentioned in paragraph (2)(a) meets the requirements of this paragraph if it carries out its generation or supply activity in a European Economic Area state and it—

- (a) requires a licence or similar authority to do so;
- (b) would, in the Authority’s opinion, require a licence to do so if it carried out the activity in Northern Ireland; or
- (c) has a relationship with the applicant or certified person which the Authority thinks might lead the applicant or certified person to discriminate in favour of it.

(4) A gas producer meets the requirements of this paragraph if it—

- (a) carries out its production activity in a European Economic Area state; and
- (b) has a relationship with the applicant or certified person which the Authority thinks might lead the applicant or certified person to discriminate in favour of it.”.

Gas transmission unbundling: modification of licences, etc.

13.—(1) Where the Authority is minded to make a final decision to certify a person under Article 8E of the Gas Order, modifications to the conditions of a gas licence made pursuant to regulation 92 may include such modifications as the Department or the Authority considers requisite or expedient to enable the satisfaction of any condition required for the relevant certification ground to apply.

(2) Conditions included in a licence pursuant to paragraph (1)—

- (a) may require the licence holder to enter into such new agreements or arrangements, or new agreements or arrangements for such purposes or of such description, as may be specified in or determined by or under the conditions;
- (b) may include provision for determining the terms on which such new agreements or arrangements are to be entered into; and
- (c) may require the licence holder to amend or terminate, or agree to the amendment or termination of, such existing agreements or arrangements, or existing agreements or arrangements of such description, as may be specified in or determined by or under the conditions.

(3) In this regulation “certification ground” has the meaning given to it in Article 8L of the Gas Order.