

This Explanatory Memorandum refers to the Gas and Electricity (Internal Markets) (Amendment) Regulations (Northern Ireland) 2013

EXPLANATORY MEMORANDUM TO

The Gas and Electricity (Internal Markets) (Amendment) Regulations (Northern Ireland) 2013

SR No. 173

1. INTRODUCTION

This Explanatory Memorandum has been prepared by the Department of Enterprise, Trade and Investment ('the Department') to accompany the above Statutory Rule which is to be laid before the Northern Ireland Assembly. The Explanatory Memorandum is designed to assist the reader in understanding the Regulations. It does not form part of the Regulations.

2. PURPOSE

The purpose of the Regulations is to insert a new Regulation 10A into the Gas and Electricity (Internal Markets) Regulations 2011 to impose a legal obligation on SONI Limited ("SONI") to be certified as transmission system operator (TSO) in Northern Ireland, pursuant to a legally binding Commission Decision.

3. BACKGROUND

The Commission Decision approves the NI arrangements in relation to NIE's transmission system as meeting the requirements of Article 9(9) of the Directive. The Decision goes on to say that "SONI shall be certified as the transmission system operator for Northern Ireland". The Commission Decision is legally binding under European law and must be complied with. Given that the transmission unbundling arrangements have been transposed into Northern Ireland law by imposing an obligation on the system owner to be certified, the legislation needs to be amended to enable SONI to be certified in line with the Commission Decision and also to address the position of NIE as system owner.

4. CONSULTATION

There was extensive consultation on the wider implementation of the Electricity and Gas Directives, further details of which are available on the Department's website. In relation to this proposed legislation, the Department consulted the Utility Regulator, NIE and SONI in developing and refining the legislative proposals.

5. EQUALITY IMPACT

The Regulations have been screened for compliance with Section 75 of the Northern Ireland Act 1998. The Department has concluded that the Regulations do not have any

impact on equality of opportunity or good relations for people within any of the equality and good relations categories. A full EQIA was therefore not considered necessary.

6. REGULATORY IMPACT

A Regulatory Impact Assessment (RIA) has been prepared in respect of this legislation. The Department has developed its legislative proposals to allow for certification of SONI as TSO in Northern Ireland in close consultation with the Utility Regulator and the two affected companies. The legislation will not have any wider impacts.

Taking consideration of the points made by consultation respondents, the Department considers that the proposed new arrangement represents the minimum required to ensure compliance in Northern Ireland with the EU Commission's Decision.

On the basis of the assessment of the benefits that have been identified, the Department is of the opinion that there will be no significant negative impact brought about by the introduction of the proposed legislation.

7. FINANCIAL IMPLICATIONS

The Regulations will not result in additional direct costs for the Department.

8. SECTION 24 OF THE NORTHERN IRELAND ACT 1998

The Department has considered section 24 of the Northern Ireland Act 1998 and is satisfied the proposed Rule does not contravene the Act.

9. EU IMPLICATIONS

The proposed legislation does the minimum necessary to implement the Commission's Decision. The proposed Rule has no negative implications for the EU or its Member States. Instead the legislation will have a positive effect by enabling the Utility Regulator to comply with the Commission Decision.

10. PARITY OR REPLICATORY MEASURE

The Department of Energy and Climate Change (DECC) has transposed the Electricity Directive via the Gas and Electricity (Internal Markets) Regulations 2011 and these can be accessed at <http://www.legislation.gov.uk/ukxi/2011/2704/contents/made>. There is and will be no direct GB equivalent to the proposed legislation, as it will affect only those companies directly affected by the Commission Decision, ie. NIE and SONI and the Utility Regulator which is responsible for the certification arrangements.

11. ADDITIONAL INFORMATION

The Regulations shall come into operation on 18 July 2013.

ENERGY DIVISION

DEPARTMENT OF ENTERPRISE, TRADE AND INVESTMENT

26 June 2013

Regulatory Impact Assessment

1. Title of Proposal

Legislation to amend the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011 “the 2011 Regulations” to allow the certification of SONI as required by the European Commission Decision of 12 April 2013 on NIE’s application for certification on the grounds of compliance with Article 9(9) of Directive 2009/72/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (“the Electricity Directive”).

2. Introduction

This Regulatory Impact Assessment is on proposals to make legislation to amend the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011 (“the 2011 Regulations”). The amendment will be to add a new Regulation 10A to the 2011 Regulations to enable the certification of SONI Limited as transmission system operator in line with Commission Decision of 12 April 2013 on NIE’s application for certification on the grounds of compliance with Article 9(9) of the Electricity Directive.

The amendment will be effected by way of a set of Regulations made by the Department under section 2(2) of the European Communities Act 1972, through the Northern Ireland Assembly legislative procedures.

3. Background and objective

The EU Third Package of energy legislation (also known as IME 3) is a package of two EU Directives and three EU Regulations concerning the creation of an internal market in gas and electricity. One of the key requirements in the Directives is unbundling of electricity and gas transmission systems from generation and supply, which includes designation and certification of transmission system operators. The electricity unbundling requirements were transposed into Northern Ireland law via changes to the Electricity (Northern Ireland) Order 1992 made by Regulation 10 of the 2011 Regulations. The Northern Ireland Authority for Utility Regulation (“the Authority”) is responsible for ensuring compliance with the certification obligations.

The amended Electricity Order implements the unbundling requirements by imposing a duty to be certified on ‘relevant’ licensees (in practice the system owner); the system owner is the entity which makes the application and is certified. In circumstances where there is a ‘related transmission licensee’, such as SONI in relation to the transmission system owned by NIE, the legislation makes specific provision for that licensee to have a role in the process and also allows flexibility in determining by way of licence conditions which of the parties is to act as transmission system operator (TSO) for the purposes of the EU Electricity Regulation.

On 30 January 2012, NIE submitted to the SEM Committee its application for certification on the grounds of Article 9(9) of the Electricity Directive. SONI, as a related transmission licensee, was given a statutory role in the process and submitted its representations on 17 February 2012. The SEM Committee (SEMC) made a preliminary decision approving the NIE application subject to the implementation of certain proposed improvements and to the decision of the European Commission. The content of the SEMC preliminary decision notes that

licence modifications would clarify and protect the NIE and SONI positions as certified and licensed TSO respectively.

Regulation (EC) No 714/2009 of the European Parliament and of the Council on conditions for access to the network for cross border exchanges in electricity and repealing Regulation No 1228/2003 ('the Electricity Regulation') also forms part of the EU Third Package. EU Regulations have direct effect and do not need to be transposed into domestic law in the way that EU Directives do. Article 3(6) of the Electricity Regulation requires the Commission, where it receives notification of the certification of a transmission system operator under Article 9(10) of the Electricity Directive (ie. Compliance with the Article 9(9) arrangements), to take a decision relating to certification. The regulatory authority must comply with that decision.

Following NIE's application for certification on the grounds of Article 9(9) of the Directive, the European Commission issued a decision on 12 April 2013 approving the NI arrangements in relation to NIE's transmission system as meeting the requirements of Article 9(9) of the Directive. The decision went on to say that "SONI shall be certified as the transmission system operator for Northern Ireland".

Given that the transmission unbundling arrangements have been transposed in Northern Ireland by imposing a duty on the system owner to be certified, provision needs to be made to enable SONI to be certified in line with the Commission Decision.

The proposed legislation is required to ensure that the Authority can comply with the Commission Decision and certify SONI. It also makes provision to address the NIE position following the Commission Decision.

The purpose of this Impact Assessment intends to identify the options available to the Department and provides information with regard to the cost of the proposals.

4. Purpose and Intended effect

The proposed Regulations will insert a new Regulation 10A into the 2011 Regulations to specifically address the SONI and NIE arrangements following the Commission Decision. It makes provision for the obligation to be certified to be imposed on SONI (as well as NIE as system owner). It also provides for a deemed application to have been made by SONI and a deemed preliminary decision by the Utility Regulator.

Where the Authority makes a final decision to certify SONI on the second certification ground (Article 9(9)), the legislation will provide for NIE to be deemed to be certified for the purposes of certain provisions of the Electricity Order. This is necessary both to ensure that NIE can meet its legal obligation to be certified, and also to ensure that the ongoing monitoring and enforcement arrangements apply to NIE as well as to SONI.

The proposed legislation will enable the Authority to comply with the Commission Decision in relation to the NIE/SONI arrangements. It is not intended to have any wider impact on any other company and the existing unbundling arrangements under the Electricity Order remain intact.

5. Risk Assessment

European Community Law must be complied with and the Department must ensure that the Northern Ireland legislative framework allows the Commission Decision to be complied with. Failure to do so would be breach of the Department's legal obligations and would expose the UK, as a Member State, to infraction proceedings from the European Commission.

6. Analysis of the options and the costs and benefits

Option 1 – do nothing.

If the Commission's Decision is not complied with, the United Kingdom is at risk of the European Commission commencing infraction proceedings as Northern Ireland would be in breach of EU law. Infraction proceedings could result in a significant financial fine against the UK, which would be passed on, in full, to the Northern Ireland Executive. This option is therefore not being put forward.

Option 2 – make legislation to enable SONI to be certified as the transmission system operator in Northern Ireland in line with the Commission Decision.

As noted above, a new Regulation 10A could be inserted into the 2011 Regulations to address the matters raised by the Commission Decision. The Department proposes that the legislation should affect only those companies to which the Commission Decision is relevant – ie. NIE and SONI. This is a technical change in the legislation which should not incur any significant costs on either company beyond what would already have been required under the existing unbundling and certification provisions.

The Department has selected Option 2 as its preferred option.

7. Concentration of Small Business: Small Business Impact Test

The proposals will not have any impact on small business: the proposed legislation will be drafted so as to apply only to NIE and SONI.

8. Environmental Impact

The proposals will not have any adverse environmental impact.

9. Human Rights Impact

Having considered the Human Rights Act, the Department has identified Article 1 First Protocol relating to the peaceful enjoyment of property as the principal Convention Right relevant to the proposed legislation. The Regulations will impose additional legal obligations on SONI to be certified as complying with the unbundling requirements of Directive 2009/72/EC. Without unbundling there is an inherent risk of discrimination in the operation of the transmission system network. Unbundling is, therefore, not only required as a matter of EU law but also is justified in terms of Article 1 First Protocol. The certification of SONI is required pursuant to Article 3(1) of Regulation No. 714/2009 and Article 10(6) of Directive 2009/72/EC as read with Commission Decision of 12th April 2013.

10. Enforcement and Sanctions

The proposed legislation will impose an obligation on SONI to be certified. This obligation is enforceable by the Authority under the existing enforcement arrangements under the Energy (Northern Ireland) Order 2003.

11. Monitoring and Review

The Department, in liaison with the Utility Regulator, will continue to monitor all aspects of the implementation of the Third Package in Northern Ireland, including the proposed certification. There are already specific obligations in the Electricity Order regarding the ongoing monitoring and review of the certification arrangements by the Authority. When the proposed legislation is made SONI as well as NIE will be subject to these obligations.

12. Consultation

The proposals have been developed and refined in close consultation with the Authority, NIE and SONI as the parties affected by the proposed legislation.

13. Summary and Recommendation

The Department has developed the proposals following the Commission Decision in order to ensure that the Authority can comply with the Commission Decision. The proposals, which have been refined following consultation with affected parties, represent the minimum required to enable compliance with the Commission Decision and will affect only those companies to which the decision relates.

On the basis of the assessment of the benefits that have been identified, the Department is of the opinion that there will be no significant negative impact brought about by the introduction of the proposed legislation.

14. Declaration

“I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.”

[signed]

**Arlene Foster MLA
Minister of Enterprise, Trade and Investment**

3 June 2013