



*Promoting choice and value for
all gas and electricity customers*

To:
Current and future electricity
transmission; gas transportation;
Electricity interconnector; and
gas interconnector licensees and
all other interested stakeholders

Our Ref: Certification of Unbundling

Email: unbundlingc@ofgem.gov.uk

Cc:
European Commission; DECC

Date: 24 April 2013

Dear Colleague,

**Certification of transmission system operators ('TSOs') under the ownership unbundling requirements of the Third Package¹
Decision of the Gas and Electricity Markets Authority ('the Authority')**

The Electricity and Gas (Internal Markets) Regulations 2011 ('the GB Regulations') require TSOs to be certified as complying with the ownership unbundling requirements of the Third Package.

Current and future transmission and interconnector licensees² are required to apply for certification under the ownership unbundling requirements of the Third Package pursuant to the GB Regulations. The certification procedures are set out in the Electricity Act 1989 ('the Electricity Act') and in the Gas Act 1986 ('the Gas Act') as amended by the GB Regulations.

On 11 November 2011 Ofgem³ published an open letter setting out information on our intended procedure for processing applications for certification under the ownership unbundling requirements of the Third Package.

¹ The term 'Third Package' refers to 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 ('Electricity Directive'); 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 ('Electricity Regulation'); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC ('Gas Directive'); 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 Regulation'); and Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

² Electricity transmission, gas transportation, electricity interconnector and gas interconnector licensees.

³ Ofgem is the Office of the Gas and Electricity Markets Authority, which supports the Gas and Electricity Markets Authority, the regulator of the gas and electricity industries in Great Britain. The terms 'Ofgem', 'our' and 'the Authority' are used interchangeably in this document.

On 20 December 2011 BBL Company VOF⁴ ('BBL' or 'the Applicant') submitted an application under section 8D(2) of the Gas Act requesting to be certified pursuant to the sixth certification ground set out in section 8G(8) of the Gas Act.

This letter sets out Ofgem's final decision on the Applicant's application for certification under section 8F of the Gas Act.

Background

The Third Package is a suite of legally binding European Union legislation. The Third Package imposes new obligations on certain industry participants.

The GB Regulations have amended relevant domestic legislation, including the Gas Act, the Electricity Act and the Utilities Act 2000.

The GB Regulations have designated the Authority as the National Regulatory Authority for GB and have given it the responsibility for administering the certification process for current and future GB electricity transmission, gas transportation and electricity and gas interconnector licensees.

Application for certification

The Applicant holds a gas interconnector licence granted under section 7ZA of the Gas Act and is a person required to be certified as independent under section 8C(1) of the Gas Act.

The Authority received an application for certification under section 8D(2) of the Gas Act on 20 December 2011. The application requested that the Applicant be certified on the sixth certification ground, which is set out in section 8G(8) of the Gas Act. The sixth certification ground has two limbs:

First, the applicant must hold a licence (gas interconnector licence) to participate in the operation of a gas interconnector granted under section 7ZA of the Gas Act (section 8G(8)(a) of the Gas Act).

Second, the applicant must meet one of the two alternative conditions for the second limb of the test as set out in section 8G(8)(b) of the Gas Act. BBL's application refers to the first of these conditions: that the applicant, must have *"in accordance with the conditions of ... [its] licence, been granted an exemption in accordance with Article 22 of Directive*

⁴ a partnership registered in the Netherlands under company number 02085020.

2003/55/EC of the European Parliament and of the Council of 26 June 2003 on common rules for the internal market in natural gas (new infrastructure) and remains entitled to the benefit of it" (the "Second Gas Directive") (section 8G(b)(i) of the Gas Act). In other words, the Applicant must have been granted an exemption in accordance with its licence and the Second Gas Directive (from certain requirements relating to third party access and approval of charging methodologies) and must remain entitled to benefit of it⁵.

On the basis of the information contained in the application and the further information provided by the Applicant, the Authority considered that the two limbed test set out in section 8G(8) of the Gas Act was met by the Applicant.

The Authority made its preliminary decision under section 8F(1) of the Gas Act on 14 January 2013 and decided that the Applicant should be certified as independent, subject to conditions relating to the non-exempted portion of its capacity. These conditions are set out in section C of the Schedule to the Authority's final decision, a copy of which is attached to this letter. Further information on the non-exempt capacity and its treatment can be found in section 4 of the Authority's final decision analysis, which accompanies this letter. In its preliminary decision, the Authority also noted that BBL must act in compliance with the relevant European network codes as they enter into force (to the extent that they do not undermine BBL's partial exemption). The Authority's preliminary decision was notified to the European Commission ('the Commission') in accordance with section 8F(4) of the Gas Act.

The Authority received the Commission's opinion on 18 March 2013. The Authority understands from the Commission that its opinion is published on the Commission website and can be viewed at:

http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/certifications_decisions.pdf. In accordance with Article 3(2) of the Gas Regulation, the Authority has taken utmost account of that opinion in reaching its final decision which is set out below.

The Authority's final decision is that as of and from the date of this decision, the Applicant should be certified as independent on the sixth certification ground set out in section 8G(8) of the Gas Act, subject to conditions relating to the non-exempted portion of its capacity.

In accordance with section 8J(2) of the Gas Act, the Applicant, being a person who holds a licence specified in section 8J(1) of the Gas Act and who is certified on the sixth

⁵ The second, alternative condition, as set out in section 8G(8)(b)(ii) is "another person benefits from such an exemption [a Second Gas Directive exemption], and the applicant is in a position which is substantially similar to the position of that person."

certification ground, is designated as a gas TSO for the purposes of Article 10(2) of the Gas Directive⁶.

In accordance with sections 8F(7) and 8J(4) of the Gas Act, the Authority hereby notifies the certification and designation of the Applicant to the Applicant, to the Commission and the Secretary of State.

In accordance with section 8K of the Gas Act, the Authority will monitor whether the basis on which it decided to certify the Applicant continues to apply following the Authority's final decision and if appropriate will review its certification decision.

Attached to this letter is a copy of the certification decision granted by the Authority.

Yours sincerely,

Pamela Taylor
Associate Partner, European Wholesale

⁶ Having been designated as a TSO, the Applicant must comply with the obligations imposed on TSOs by the Gas Regulation, the Gas Directive (for example under Article 13) and the relevant European network codes adopted pursuant to the Gas Regulation as they enter into force (to the extent that they do not undermine the partial exemption (or any remaining part of the partial exemption) held by the Applicant).

GAS ACT 1986
SECTION 8F
CERTIFICATION

Pursuant to section 8F of the Gas Act 1986 ('the Act') the Gas and Electricity Markets Authority hereby gives to BBL Company VOF (a partnership registered in the Netherlands under company number 02085020) as a person who is required to be certified as independent, certification as independent under the ground set out in section 8G(8) of the Act (on the basis that it complies with section 8G(8)(b)(i) of the Act), subject to the attached Schedule.

Pamela Taylor

Authorised in that behalf by the Gas and Electricity Markets Authority

24 April 2013

SCHEDULE

PERIOD, CONDITIONS AND WITHDRAWAL OF CERTIFICATION

A. Interpretation and Definitions

In this certification

'the Authority'	means the Gas and Electricity Markets Authority established by section 1(1) of the Utilities Act 2000, as amended from time to time
'the Act'	means the Gas Act 1986, as amended from time to time
'the Agency'	has the same meaning as in section 48 of the Act
'the amended exemption'	means the exemption suspending from operation standard licence conditions 10 and 11 of the gas interconnector licence and granted by the Authority to the certified person under standard licence condition 12 of the gas interconnector licence pursuant to Article 22 of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC: <ul style="list-style-type: none">• Until 2 December 2016 with respect to approximately 1.15 mcm/hour of capacity for the physical forward flow of gas from the Netherlands to the United Kingdom; and• Until 2 December 2022 with respect to approximately 0.6 mcm/hour of capacity for the physical forward flow of gas from the Netherlands to the United Kingdom
'the certified person'	BBL Company VOF in its capacity as a person certified as independent under section 8F of the Act
'the Commission'	means the European Commission
'conflicted partner(s)'	means any partner(s) of the certified person which: (a) is a relevant producer or supplier; and/or (b) directly or indirectly controls or has a majority shareholding in a

	relevant producer or supplier; and/or (c) is directly or indirectly controlled by a person who: (i) is a relevant producer or supplier; and/or (ii) directly or indirectly controls a person who is a relevant producer or supplier; and/or (iii) is directly or indirectly controlled by a person who is a relevant producer or supplier
'control'	has the same meaning as in section 8Q of the Act
'E.On'	means E.On Ruhrgas BBL BV (a company registered in the Netherlands under company number 27268463)
'ENTSOG'	means the European Network of Transmission System Operators for Gas
'the Gas Directive'	has the same meaning as in section 48 of the Act
'the Gas Regulation'	has the same meaning as in section 48 of the Act
'the interconnector'	means the gas pipeline known as the Balgzand Bacton Line between Juliandrop near Balgzand in the Netherlands and Bacton in the United Kingdom
'non-exempt capacity'	means any capacity of the interconnector which is not subject to the amended exemption and/or in respect of which the amended exemption has expired or been revoked
'person from a third country'	has the same meaning as in section 8Q of the Act
'relevant producer or supplier'	has the same meaning as in section 8Q of the Act

B. Period

Subject to section D below, and pursuant to section 8F of the Act, this certification shall come into effect on the date that it is issued and will continue until midnight on 2 December 2022 or until it is withdrawn in accordance with section D, whichever is earlier.

C. Conditions

This certification is made subject to the following conditions:

1. The material provided by the certified person to the Authority in respect of its application for certification is true and complete.
2. If at any time the certified person knows or reasonably should know of any event or circumstance that has occurred or is likely to occur that may affect its eligibility for certification, the certified person shall as soon as reasonably practicable notify the Authority in writing of the event or circumstance and the reasons it considers that the event or circumstance may affect its eligibility for certification.
3. Subject to paragraph C4, E.On and any proxy(s) of E.On shall not :
 - a. attend or participate (including, but not limited to, voting) in those parts of the meetings of the certified person's operations committee and general meetings of partners (or any meeting with equivalent authority) where any of the following matters are discussed and/or voted upon and/or information relating to any of the following matters is provided:
 - i. marketing of or relating to the non-exempt capacity;
 - ii. commercial arrangements relating to the operation of the non-exempt capacity, including but not limited to, individual contracts, product design and the general terms and conditions; and
 - iii. the implementation of any or all of the following: annex(es) to the Gas Regulation; ENTSOG Network Code(s); and, any relevant legally binding decision of the Commission and/or the Agency;
 - b. be provided with information and/or documentation, or access to information and/or documentation, in any format relating to any of the matters set out in paragraph C3 by any other partner, any employee, or any representative (including, but not limited to legal advisers and accountants) of the certified person.
4. Paragraph C3 does not apply to the extent that the operations committee and/or general meeting of partners of the certified person agrees that the matters set out in paragraph C3(a)(i) to (iii) would lead to a material adverse impact on the certified person's revenues, dividends and excess cash arising from its contracts that cover an exempted part of the certified person's capacity.
5. The conditions set out in paragraphs C3 and C4 shall be included in a side agreement to the certified person's partnership agreement.

6. The certified person shall establish and maintain a compliance programme to monitor, review and report quarterly (commencing on 1 July 2013) to the Authority on its adherence to the conditions set out in paragraphs C3 to C5.
7. The compliance programme required by paragraph C6 shall include but not be limited to:
 - a. a register recording:
 - i. details of the meeting(s) and/or part(s) thereof (including date(s)) and decision(s) from which E.On has been excluded;
 - ii. each occasion where paragraph C3 has been dis-applied in accordance with paragraph C4.
 - iii. The register shall include but not be limited to the following information in respect of each instance when paragraph C4 has been applied:
 1. whether the operations committee or general meeting of partners agreed that material adverse impact would occur in accordance with paragraph C4, the date on which this decision was taken and the reasons for the decision;
 2. the date on which E.On attended and/or participated in the relevant meeting(s) and/or received or was given access to information and/or documentation;
 - b. details of the relevant meeting(s) and/or information and/or documentation received or given and whether E.On exercised a voting right;
 - c. maintaining copies of the information and/or documentation:
 - i. withheld from; and
 - ii. provided to (pursuant to paragraphs C3 and C4),
E.On (including any proxy, employee and/or representative thereof).
8. The certified person shall notify the Authority in writing within 7 working days of any change in the partners of the certified person. Such notification to include but not be limited to the registered name(s) and company number(s) of any new partner(s); the percentage of the partnership in BBL held by the new partner(s); any reduction or increase in the percentage of the partnership held by any current partner(s); and, whether any new partner(s) are, in BBL's reasonable opinion a conflicted partner together with BBL's reasons.
9. If at any time the Authority provisionally considers that a condition contained in paragraphs C1 to C12 is not met or has not been complied with (the "provisional breach"), the certified person shall furnish the Authority in such manner and at such times as the Authority may reasonably require the reasons for the provisional breach and the details of any steps being

taken to rectify the provisional breach (including the timescales for any such steps) together with any supporting documentation in order to assist the Authority in any review of this certification under section 8K of the Act.

10. If at any time from 3 March 2013 the certified person knows or reasonably should know that any event or circumstance has occurred, or is likely to occur, that may cause the Authority to think that the certified person is or may become a person from a third country, or that a person from a third country has or may take control of the certified person, the certified person shall as soon as reasonably practicable notify the Authority in writing.
11. By 31 July of each year the certified person shall provide the Authority with a written declaration, approved by a resolution of the general meeting of partners of the certified person and signed by a director or officer with equivalent standing of the certified person pursuant to that resolution, setting out:
 - a. Whether any event or circumstance has occurred in the previous 12 month period, or such part of that 12 month period since the certified person was certified, that may affect the certified person's eligibility for certification, and if so, the reasons it considers that the event or circumstance may affect its eligibility for certification; and
 - b. Whether any event or circumstance has occurred, or is likely to occur, that may cause the Authority to think that the certified person has become a person from a third country, or that a person from a third country has taken control of the certified person, in the previous 12 month period or such part of that 12 month period since the certified person was certified, providing that the certified person is only required to provide a written declaration under this paragraph (b) in relation to a period that occurs after 3 March 2013.
12. The certified person shall furnish the Authority in such manner and at such times as the Authority may reasonably require, with such information as the Authority may reasonably require, or as may be necessary, for the purpose of:
 - (a) performing the functions assigned to it by or under the Act, the Electricity Act 1989, the Utilities Act 2000, the Energy Act 2004, the Energy Act 2008, or the Energy Act 2011, each as may be amended from time to time; or
 - (b) monitoring and review of the certification under section 8K of the Act (which, for the avoidance of doubt, shall include but not be limited to any information and/or documentation required to be maintained pursuant to paragraphs C6 and C7); or
 - (c) reporting by the Authority as to any connection of the licensee with a country outside the European Economic Area under section 8M of the Act.

13. Should any of the grounds for withdrawal arise under section D of this certification, the Authority may amend this certification rather than withdraw the certification.

D. Withdrawal

Pursuant to section 8N of the Act, this certification may be withdrawn in the following circumstances:

1. This certification may be withdrawn by the Authority by giving a notice of withdrawal to the certified person not less than four months before the coming into force of the withdrawal in any of the following circumstances:

(a) where:

- (i) the amended exemption has been revoked;
- (ii) the Authority considers that a condition contained in paragraphs C1 to C12 above is not met;
- (iii) the Authority considers that the basis on which the Authority decided to certify the certified person does not continue to apply and has made a final decision that the certification should be withdrawn;
- (iv) the certified person has a receiver (which expression shall include an administrative receiver within the meaning of section 251 of the Insolvency Act 1986, as amended from time to time) of the whole or any material part of its assets or undertaking appointed;
- (v) the certified person has entered into administration under section 8 of Schedule B1 to the Insolvency Act 1986;
- (vi) the certified person is found to be in breach of any national or European competition laws, such breach relating to the licensed activity of the certified person;
- (vii) the certified person has failed to provide a declaration to the Authority pursuant to paragraph C11 above and the Authority has written to certified person stating that the declaration has not been provided and giving the certified person notice that if the declaration remains outstanding past the period specified in the notice the certification may be withdrawn;
- (viii) the certified person has failed to comply with a request for information issued by the Authority under paragraph C12 above and the Authority has written to certified person stating that the request has not been complied with and giving

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the certified person notice that if the request for information remains outstanding past the period specified in the notice the certification may be withdrawn; or

- (ix) to ensure compliance with any legally binding decision of the Agency or of the Commission.

2. This certification may be withdrawn if the certified person notifies the Authority that it does not require to be certified and the Authority considers that the certified person is not a person who is required to be certified.