

Ofgem's¹ final decision and analysis on BBL Company VOF's (BBL's) application for certification

This document sets out Ofgem's final decision on BBL's compliance with the requirements of the Third Package² for transmission system operators (TSOs) to be certified in accordance with implementing legislation in Great Britain (GB).

1. Certification Decision

1.1. Having taken utmost account of the European Commission's (the "Commission's") opinion on our preliminary certification decision on BBL³, the Authority concludes that the sixth ground for certification set out in section 8G(8) of the Gas Act 1986 (the "Gas Act") has been complied with and that BBL should therefore be certified (on the basis of having been granted an exemption under Article 22 of Directive 2003/55/EC (a "Second Package Exemption") in respect of part of its capacity and remaining entitled to the benefit of it), subject to conditions relating to the non-exempted portion of its capacity and should be designated as a TSO⁴.

2. GB Legislation – Transposition of Directive 2009/73

2.1. In GB the grounds for certification set out in Gas Directive have been transposed through the Electricity and Gas (Internal Markets) Regulations 2011 (the "Regulations") which insert new sections 8C to 8Q into the Gas Act. Section 8G of the Gas Act sets out the grounds on which the Authority may decide to certify an applicant. The sixth of these grounds relates to gas interconnector licensees and provides that the Authority may decide to certify such an applicant on the basis of the applicant having been granted a Second Package Exemption and remaining entitled to the benefit of that exemption⁵.

3. The Applicant

3.1. BBL (the "Applicant") operates the Balgzand Bacton Line, a gas interconnector between Juliandrop near Balgzand in the Netherlands and Bacton in GB. The interconnector provides services for physical gas flow from the Netherlands to GB and non-physical interruptible reverse flow services from GB to the Netherlands. BBL was established in July 2004 to design, construct and operate the interconnector. The interconnector had

¹ In this document, the terms "Ofgem", "Authority", "we", "us" and "our" are used interchangeably. The "Authority" means the Gas and Electricity Markets Authority. "Ofgem" is the Office of the Authority.

² 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.

³ In accordance with Article 3(2) of the Gas Regulation.

⁴ Pursuant to section 8J(2) of the Gas Act, implementing Article 10(2) of the Gas Directive.

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."

an initial capacity of 1.75 million cubic meters per hour (mcm/hour). BBL holds a gas interconnector licence granted under Section 7ZA of the Gas Act.

3.2. This document provides a summary of the analysis of the information submitted by BBL to the Authority and the Commission for the purpose of assessing the Applicant's compliance with the sixth ground set out in section 8G of the Gas Act and its certification on the basis of a Second Package Exemption covering part of its capacity under the GB legislation implementing the unbundling provisions of the Gas Directive.

4. Summary of Ofgem analysis

First limb: The applicant holds a licence under section 7ZA of the Gas Act

4.1. On 8 April 2005, the Authority granted BBL a gas interconnector licence under section 7ZA of the Gas Act. As at the date of this decision, BBL continues to hold that licence under section 7ZA of the Gas Act.

Second limb: Remaining entitled to the benefit of an exemption granted in accordance with the conditions of its licence under Article 22 of the Second Gas Directive

Existence of an exemption

4.2. When it granted BBL a gas interconnector licence, the Authority issued an exemption order suspending standard licence conditions 10 and 11 of BBL's licence from operation until 2 December 2022 (the "initial exemption").

4.3. On 9 August 2005, the Authority amended the initial exemption consistent with a request from the Commission⁶ (the "partial exemption"). Pursuant to the powers under standard licence condition 12 of the gas interconnector licence, standard licence conditions 10 (relating to regulated third party access ("rTPA")) and standard licence condition 11 (relating to approval of BBL's charging methodology for access to BBL's interconnector by the Authority) were suspended from operation in BBL's licence⁷.

4.4. The partial exemption was therefore granted for the following capacity and duration:

4.4.1. Until 2nd December 2016 with respect to approximately 1.15 mcm/hour of capacity for the physical forward flow of gas from the Netherlands to the UK; and,

4.4.2. Until 2nd December 2022 with respect to approximately 0.6mcm/hour of capacity for the physical forward flow of gas from the Netherlands to the UK.

Entitlement to continue to benefit from the partial exemption

4.5. Recital 35 of the Gas Directive provides that "[e]xemptions granted under Directive 2003/55/EC continue to apply until the scheduled expiry date as decided in the granted exemption". This is noted on page 6 of the Commission Staff Working Paper on The Unbundling Regime dated 22 January 2010⁸, where it states that "[e]xemptions for new infrastructure that have already been granted pursuant to Article 22 of Directive 2003/55/EC ... continue to apply until the expiry date stipulated in the exemption decision, also after entry into force of the Gas Directive ... (recital 35 Gas Directive ...).

⁶ Under Article 22(4) of Directive 2003/55/EC.

⁷ <http://www.ofgem.gov.uk/Markets/WhiMkts/CompandEff/TPAccess/Documents1/Amendment%20to%20the%20exemption%20order%20issued%20to%20BBL%20Company.pdf>

⁸ Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in Electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas: http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_unbundling_regime.pdf.

Unless provided otherwise in the exemption decisions themselves, such exemptions must not be altered by application of the provisions on new infrastructure set out in Article 36 Gas Directive ...".

- 4.6. The Authority confirms that at the date of this decision it is not taking steps to revoke the partial exemption. Accordingly, as the partial exemption has not expired, has not been revoked and is not subject to revocation action, BBL remains entitled to the benefit of the partial exemption.
- 4.7. Accordingly, for the capacity and on the terms specified in the partial exemption, BBL satisfies the test set out in respect of the sixth certification ground.
- 4.8. However, exemptions only apply to specific capacity and BBL has a portion of capacity which is not specified as being exempted from rTPA and approval of charging methodologies by the Authority in the partial exemption. Such capacity which is not subject to an exemption is referred to in this document as "non-exempt capacity".

Treatment of the non-exempt capacity

- 4.9. The partial exemption does not apply to the non-exempt capacity and BBL must, in relation to such non-exempt capacity (which will increase in 2016 when part of the partial exemption expires), act in accordance with the Third Package ownership unbundling requirements (as transposed into Gas Act); in compliance with 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); in compliance with standard licence conditions 10 and 11 of its interconnector licence; and, in compliance with other relevant provisions of the Gas Directive and of the Gas Regulation. For the avoidance of doubt, we note that to the extent not excluded by the partial exemption, BBL must act in compliance with the relevant European Network Codes as they enter into force to the extent that they do not undermine the partial exemption (or any remaining part of the partial exemption); the standard licence conditions of its interconnector licence; and other relevant provisions of the Gas Directive and of the Gas Regulation.
- 4.10. As the partial exemption does not exempt BBL's non-exempt capacity from the Third Package ownership unbundling requirements as transposed into the Gas Act, BBL must act in accordance with the main principles of ownership unbundling when marketing this capacity. The ownership unbundling requirements have been transposed in the Gas Act as five tests and are set out in section 8H. The fourth and fifth of these tests are that the certification applicant is not controlled by a person who controls a relevant producer or supplier or who has a majority shareholding in a relevant producer or supplier⁹.
- 4.11. Given that BBL had stated that one of its partners is a person who is a relevant producer or supplier¹⁰ or who has a majority shareholding in a relevant producer or supplier (or is itself controlled by a person who is or controls such a person), it was not immediately clear how BBL would comply with the fourth and fifth test of the ownership unbundling requirement as set out in section 8H of the Gas Act¹¹. BBL has and is therefore taking steps, to amend its partnership agreement and internal procedures restricting the rights of one of its partners who is part of a corporate group including gas production and supply interests (the "conflicted partner"). These rights will be restricted with regards to the non-exempt capacity. This decision is made on the basis that there is only one partner who is part of a group of companies which includes gas

⁹ Sections 8H(6) and (8) of the Gas Act.

¹⁰ As defined in section 8Q of the Gas Act.

¹¹ Or the provisions of Article 9 of the Gas Directive, including as transposed into the law of the Netherlands.

production and supply interests. The Authority reserves the right to review this final certification decision¹² in respect of BBL in the event that other partner(s) become a relevant producer or supplier, or have a majority shareholding in, or control of, a relevant producer or supplier (or are themselves controlled by a person who is or controls such a person). The precise terms of these restrictions are set out in the Schedule to our final decision which accompanies this summary analysis.

4.12. In summary, these restrictions are:

4.12.1. Subject to the exception in paragraph 4.12.2, the conflicted partner will not attend or participate (including voting) in those parts of BBL's Operations Committee and General Meetings of Partners¹³ where the following are discussed, nor be provided with information on the following:

4.12.1.1. decisions relating to the marketing of non-exempt capacity;

4.12.1.2. commercial arrangements related to the operation of non-exempt capacity, including individual contracts, product design and the General Terms and Conditions; and

4.12.1.3. discussions regarding implementation of any ENTSOG Network Code and any annexes to the Gas Regulation relating to the marketing of non-exempt capacity.

4.12.2. The provisions of 4.12.1 will not apply if the marketing of non-exempt capacity would lead to a material adverse impact on BBL's revenues, dividends and excess cash arising from its contracts that cover an exempted part of the capacity. In such a case, the conflicted partner would not be excluded from attending, participating or receiving information (as detailed in 4.12.1), but as far as possible commercially sensitive information will be excluded from the information shared with the conflicted partner.

4.13. Our decision to certify BBL on the sixth ground is subject to BBL complying with such conditions relating to the non-exempt capacity. The Authority considers that such conditions are appropriate to ensure the continued application of the partial exemption over the capacity which is subject to it whilst, at the same time, ensuring that marketing the non-exempt capacity occurs in accordance with the provisions and principles referred to above.

5. European Commission Opinion

5.1. Pursuant to Article 3(2) of the Gas Regulation, Ofgem is required to take "utmost account" of the Commission's opinion in reaching its final certification decisions. We summarise below how we have taken "utmost account" of the Commission's opinion of Ofgem's preliminary certification decision in relation to BBL. The Commission's opinion is published on the Commission's website and can be viewed at:
http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/certification/certifications_decisions.pdf.

5.2. The Commission agreed with the Authority's view that BBL is entitled to continue to benefit from the partial exemption and with the view that non-exempt capacity is "to the extent the exemption is not undermined and taking into account the specific nature

¹² Pursuant to section 8K(5) of the Gas Act.

¹³ We understand that these are, respectively, the equivalent of the meetings of a board of directors and the meetings of the shareholders of a company established in England and Wales.

of interconnectors, subject to the rules set by the Third energy package, including European network codes established on its basis...".

- 5.3. The Commission supports the Authority's approach to the marketing of non-exempt capacity and notes that, as acknowledged in our preliminary decision, once the partial exemption has totally expired, BBL *"will have to comply with the regular unbundling requirements as laid down in the Third energy package..."*. The Commission agrees with the Authority that the conditions relating to the restriction of the rights of the conflicted partner *"ensures a situation in which the non-discriminatory marketing of the non-exempt capacity is sufficiently safeguarded ..."*. The Commission however, encouraged the Authority to ensure that the conditions set out in our decision are complied with and the restrictions required by them are implemented and functional before making a final decision.
- 5.4. The Authority has two months from the date of receiving the Commission's opinion to make a final certification decision¹⁴. We received the Commission's opinion on 18 March 2013 and therefore consider that our final decision must be made by 18 May 2013. We understand from BBL that implementation of the restrictions in compliance with the conditions set out in our decision will be completed in June 2013. We note that non-compliance with the conditions set out in our decision is a ground for withdrawal of certification. Notwithstanding the Commission's comments, we therefore consider it appropriate to issue our final decision now and require BBL to commence reporting to us on its compliance with the conditions set out in our decision on 1 July 2013, enabling us to take prompt action in the event of any non-compliance.
- 5.5. The Commission's opinion notes that: (i) Gasunie BBL BV holds 60% of the shares in BBL; (ii) Gasunie BBL BV is a wholly owned subsidiary of NV Nederlandse Gasunie; (iii) NV Nederlandse Gasunie is wholly owned by the Dutch state; and, (iv) the Dutch state also owns GasTerra BV, a network user with contracted capacity in BBL. The Commission therefore encouraged the Dutch regulator, Nederlandse Mededingingsautoriteit ("NMa") to carry out an assessment of the appropriate separation within the Dutch state and for both the Authority and NMa to include a means of reassessing BBL's certification in the event that the separation appears not to be in line with the unbundling requirements. The Authority considers that this reassessment is possible under section 8K of the Gas Act and in light of conditions C2 and C11 of our final decision. If Ofgem deems that the basis has changed and an applicant is no longer compliant with the ground on which it has been certified, the appropriate action can be taken.

¹⁴ Article 3(2) of the Gas Regulation.