
Ofgem's final decision on the review of Interconnector (UK) Limited's ('IUK') certification under Article 3 of Regulation 715/2009 (the 'Regulation') and section 8N of the Gas Act 1986 (the 'Gas Act')

1. Certification Decision

- 1.1. Having taken utmost account of the European Commission's (the 'Commission') opinion¹ of our preliminary decision on the review of certification status of IUK (the 'Certified Person'), the Authority concludes that the certification of the Certified Person should continue on the grounds set out in its 2013 Certification², namely the ownership unbundling ground set out in 8G(3) of the Gas Act, subject to IUK continuing to meet the conditions of its 2013 Certification.
- 1.2. This document provides a summary of our assessment of the information submitted by the Certified Person to the Authority for the purpose of reviewing whether the basis on which the Authority decided to certify IUK continues to apply.

2. GB Legislation – Transposition of the Gas Directive

- 2.1. In GB the unbundling requirements and the certification process set out in the Third Package³ have been transposed through the Electricity and Gas (Internal Markets Regulations) 2011 which inserted new sections 8C to 8Q relating to certification into the Gas Act.

3. The Certified Person

- 3.1. IUK owns and operates a sub-sea gas pipeline and terminal facilities which provide a bi-directional link between the UK and continental European energy markets. This interconnector system comprises compression/reception terminals both at Bacton in the UK and Zeebrugge in Belgium, connected by a 235 kilometre pipeline which passes through British, Belgian and international waters.
- 3.2. IUK was established in 1994 as a joint venture between nine energy companies: British Gas, Conoco, Gazprom, BP, Elf UK, Amerada, Distrigaz, National Power and Ruhrgas UK, for the purpose of building an undersea gas pipeline.

¹ The Commission's opinion can be viewed online on

https://ec.europa.eu/energy/sites/ener/files/documents/2015_114_116_en.pdf

² IUK's 2013 Certification can be found on Ofgem's website: <https://www.ofgem.gov.uk/ofgem-publications/59214/certification-decision-interconnector-uk-limited-iuk.pdf>

³The 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; 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; 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.

- 3.3. The IUK interconnector became operational on 1 October 1998 and IUK was granted an interconnector licence on 14 August 2006. On 21 May 2013, IUK was certified and designated as a Transmission System Operator (TSO)⁴.
- 3.4. This 2013 Certification Decision provided that IUK would first be certified under the sixth certification ground set out in section 8G(8)(b)(ii) of the Gas Act until 3 March 2015 (the substantially similar ground)⁵; secondly, from 3 March 2015, IUK would be certified under the first certification ground set out in 8G(3) of the Gas Act, namely, that the applicant meets the ownership unbundling requirements set out in section 8H of the Gas Act, the ownership unbundling ground.
- 3.5. On 5 March 2015, having received confirmation from IUK itself that it had not met all the conditions of the 2013 Certification Decision by 3 March 2015, Ofgem opened a review into IUK's certification, in accordance with section 8K(5) of the Gas Act⁶.
- 3.6. On 29 May 2015, IUK submitted to Ofgem and CREG in confidence a detailed analysis showing that, although it had not achieved compliance on the 3 March 2015, it had subsequently put in place remedies which it considered had allowed IUK to achieve compliance with the conditions of the 2013 Certification Decision as at 29 May 2015⁷.
- 3.7. On 23 July 2015, in accordance with section 8N(5) of the Gas Act, Ofgem notified the Commission of its Preliminary Decision that the certification of IUK should continue on the grounds set out in its 2013 Certification, namely the ownership unbundling ground set out in 8G(3) of the Gas Act. We discuss our analysis and the Commission's Opinion, in section 4 and section 5 respectively.

4. Summary of our analysis

- 4.1. As noted above, on 29 May 2015, IUK submitted to Ofgem and CREG in confidence a detailed analysis showing how it had put in place remedies which it considered allowed IUK to achieve compliance with the conditions of the 2013 Certification Decision as at 29 May 2015.
- 4.2. Having considered the evidence provided by IUK in confidence, we are now satisfied that we can conclude our certification review, on the basis that IUK has put in place sufficient remedies which make it compliant with all the conditions of the 2013 Certification Decision. This means that the basis for IUK's certification continues: IUK continues to be certified under the first certification ground set out in 8G(3) of the Gas Act, namely, that the applicant meets the ownership unbundling requirements set out in section 8H of the Gas Act.
- 4.3. Below we assess IUK's compliance with all the conditions of the 2013 Certification Decision.

Condition 1

The material provided by the certified person to the Authority in respect of its application is true and complete.

⁴ Defined terms in this document, unless expressly defined herein, have the same meaning as set out in the 2013 Certification Decision.

⁵ The sixth certification ground (the "substantially similar ground"), which relates to gas interconnectors, provides that the Authority may decide to certify such an applicant on the basis of the applicant being in a substantially similar position to a person who has been granted a Second Package Exemption and remains entitled to the benefit of that exemption (the "substantially similar ground").

⁶ Notice of the opening of our review was published on our website here: <https://www.ofgem.gov.uk/publications-and-updates/interconnector-uk-limited-notice-opening-review-certification-under-section-8k-gas-act-1986>

⁷ On 16 June IUK also sent Ofgem an updated set of information which clarified some points after a meeting held by IUK, Ofgem and CREG on 2 June. We have based our analysis on the updated set of information.

- 4.4. We have received written confirmation that, to the best of its knowledge, all information supplied by IUK to Ofgem is true and complete. We have no reason to believe this not to be the case and therefore we are satisfied that IUK continues to meet this condition 1.

Condition 2

Prior to 3 March 2015, the certified person shall demonstrate to the Authority's reasonable satisfaction that from 3 March 2015 the certified person passes the five tests set out in section 8H of the Act, as demonstrated by the report referred to in paragraph C3. The steps referred to in this paragraph shall include, but not be limited to, taking all necessary steps to ensure that:

a. any director(s), or other senior officer(s), appointed by any conflicted shareholder(s) shall be removed from the certified person's board of directors and any board committee(s) or any other administrative body of the certified person; and,

b. any director(s), or other senior officer(s), of the certified person who participates in the appointment of directors, or other senior officers, of the certified person shall not be a senior officer of a relevant producer or supplier.

- 4.5. The Authority needs to be satisfied that IUK passes the five tests contained in section 8H of the Gas Act. Although IUK did not fully comply with all the five tests by 3 March 2015, the date set in the 2013 Certification Decision, it has worked towards compliance since the 3 March 2015 and we now consider it has put in place sufficient remedies so that it now passes the five tests.

- 4.6. In respect of the specific points set out under Condition 2 (a) and (b) of the 2013 Certification Decision, IUK has confirmed that the director appointed by the only conflicted shareholder was removed from the Board of Directors of IUK on 22 March 2015; that no other director or senior officer has been appointed by a conflicted shareholder; and that no director, other senior officer of IUK or other person who participates in the appointment of directors, or other senior officers of IUK is a senior officer of a relevant producer or supplier.

The first test is that the applicant:

- (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, exercise shareholder rights in relation to a relevant producer or supplier

- 4.7. IUK has provided written confirmation, alongside supporting information, that IUK complies with this condition as it does not hold any such interests or rights. We are therefore satisfied that IUK meets the requirements of this first test.

The second test is that, where the applicant 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 gas undertaking which is a relevant producer or supplier; or***
(b) Has a majority shareholding in a gas undertaking which is a relevant producer or supplier

- 4.8. IUK has provided supporting information to confirm that none of its senior officers has been or may be appointed by a person who (a) controls a gas undertaking which is a relevant producer or supplier; or (b) has a majority shareholding in a gas undertaking

which is a relevant producer or supplier. We are therefore satisfied that IUK meets the requirements of this second test.

The third test is that, where the applicant is a company, partnership or other business, none of its senior officers is also a senior officer of a gas undertaking which is a relevant producer or supplier.

4.9. IUK has confirmed in writing that none of its senior officers, including Directors, is also a senior officer of a gas undertaking which is a relevant producer or supplier or could be considered to be so. We have no reason to believe this is not the case and therefore we are satisfied that IUK meets the requirements of this third test.

The fourth test is that the applicant is not controlled by a person who controls a relevant producer or supplier.

4.10. IUK has provided written confirmation, alongside supporting information, that IUK is not controlled by any such person. We are therefore satisfied that IUK meets the requirements of this fourth test.

The fifth test is that the applicant is not controlled by a person who has a majority shareholding in a relevant producer or supplier.

4.11. IUK has provided written confirmation, alongside supporting information, that IUK is not controlled by any such person. Therefore, IUK continues to meet the requirements of this fifth test.

4.12. Given all of the above, we are satisfied that IUK complies with condition 2 of the 2013 Certification Decision and with all the five ownership unbundling tests prescribed by section 8H of the Gas Act.

Condition 3

The certified person shall provide a written report to the Authority every three months setting out the steps it has taken and is taking under Condition 2 and the date by which each step has been or will be completed

4.13. IUK has duly submitted quarterly written reports to Ofgem, beginning in July 2013, explaining the steps undertaken and those to be taken in order to achieve unbundling status. During the last three months of 2014 (Q4 2014), we also discussed with IUK and CREG, at various meetings, IUK's concerns around achieving compliance by 3 March 2015. We have also had email exchanges and updates with IUK concerning its compliance during Q4 2014 and Q1 2015.

4.14. On the basis of this information we are satisfied that IUK complies with this condition 3 of the 2013 Certification Decision.

Condition 4

Prior to 3 March 2015, the certified person shall take all steps to ensure that from 3 March 2015 any conflicted shareholder(s) and any proxy(s) of any conflicted shareholder(s) shall not:

i. be entitled to appoint, or participate in the appointment process of, any directors, or other senior officers of, or members of a board committee of the certified person;

4.15. IUK has provided information in confidence to show that it has put in place sufficient remedies to meet the requirements of this part of condition 4.

ii. attend any meeting of the certified person's shareholders, or any part of the shareholders' meeting, unless the meeting, or any part of such meeting, will receive information on, or discuss, any matter(s) which the certified person's board of directors has determined (at the previous board meeting) would lead to a material adverse impact on the certified person's dividends;

4.16. IUK has provided information in confidence to show that it has put in place sufficient remedies to meet the requirements of this part of condition 4.

iii. vote at any meeting of the certified person's shareholders unless, without prejudice to sections 80 and 8P of the Gas Act, the matter being voted upon has been determined by the certified person's board of directors (at the previous board meeting) would lead to a material adverse impact on the certified person's dividends;

4.17. IUK has provided information in confidence to show that it has put in place sufficient remedies to meet the requirements of this part of condition 4.

iv. without prejudice to sections 80 and 8P of the Gas act, be provided with information and/or documentation, or access to information and/or documentation, in any format by any shareholder, director or employee of the certified person, or any representative of the certified person unless the information and/or the documentation relates to:

- 1. decisions taken by the certified person's board of directors and/or shareholders; financial reports; forecasts and accounts; and, audit reports; or***
- 2. a matter which the certified person's board of directors has determined would lead to a material adverse impact on the certified person's dividends.***

4.18. IUK has provided information in confidence to show that it has put in place sufficient remedies to meet the requirements of this part of condition 4.

4.19. Ofgem will continue to monitor, through the Compliance Report, what information is provided to any conflicted shareholder and for the time being remains satisfied that IUK is compliant with this part of certification condition 4.

4.20. Given all the considerations above, we are satisfied that IUK complies with certification condition 4 of the 2013 Certification Decision.

Condition 5

At the first meeting of the certified person's board of directors after the date of this certification, and subsequently after any change in shareholdings of the certified person, it shall be determined whether there are any conflicted shareholder(s) and the registered identity of that conflicted shareholder. This decision together with reasons shall be recorded in writing and a copy sent to the Authority within 7 working days of the meeting.

4.21. IUK has sent separate reports to Ofgem, containing relevant information on shareholdings, on 19 June 2013 (within 7 days of the first Board meeting after the 2013 certification decision), and on 26 January 2015 (within 7 days of the first Board

meeting after the transfer of shares from CDP Investissement Inc ("CDPI") to CDP Group Infrastructures Inc ("CDPGI").

4.22. Given the above, we are satisfied that IUK complies with this condition 5 of the 2013 Certification Decision.

Conditions 6 and 7

The certified person shall establish and maintain a compliance programme to monitor, review and report quarterly (commencing three calendar months from the date of this certification) to the Authority on its adherence to the conditions C2 to C5.

The compliance programme required by C6 shall include but not be limited to:

a. maintaining copies of the information and/or documentation:

i. withheld from any conflicted shareholder(s); and

ii. provided (pursuant to paragraph C4(d)) to any conflicted shareholder(s) (including any proxy, employee and/or representative thereof);

b. a register recording:

i. details of the meeting(s) and/or part(s) of such meetings (including date(s)) and decision(s) from which the conflicted shareholder(s) have been excluded;

ii. each occasion where paragraph C4(d)(1) or (2) has been applied. The register shall include but not be limited to the following information in respect of each instance when paragraph C4(d)(1) or (2) has been applied:

1. the name(s) of the conflicted shareholder(s) in respect of which paragraph C4(d)(1) or (2) has been applied;

2. the date on which the certified person's board of directors determined that a matter would lead to a material adverse impact on the certified person's dividends and the reasons for the decision;

3. the date on which the conflicted shareholder(s) attended and/or participated in the relevant meeting(s) and/or received or was given access to information and/or documentation;

4. details of the relevant meeting(s) and/or information and/or documentation received or given.

4.23. IUK has confirmed that it has established a compliance programme since Q4 2014.

4.24. On 30 April 2015 we received a detailed compliance report covering the six month period from 1 October 2014 to the 31 March 2015. This register contains a list of all meetings from which the conflicted shareholder had been excluded, or where information had not been disclosed to the conflicted shareholder. The reasons of why this has been the case have also been included in the report.

4.25. Given the above, we are satisfied that IUK is in compliance with conditions 6 and 7 of the 2013 Certification Decision.

4.26. IUK has confirmed in writing that it will continue to submit these quarterly compliance reports to Ofgem, for as long as IUK has any conflicted shareholders.

Condition 8

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,

noify 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.

4.27. On 3 November 2014, IUK notified Ofgem of an event that might have affected the basis of its certification. In the same written communication, IUK has advised Ofgem that it was unlikely that it would achieve compliance with all conditions of the 2013 Certification Decision by 3 March 2015.

4.28. Following this written notification, IUK, CREG and Ofgem have held numerous meetings to discuss these concerns and contingency plans by IUK. IUK has also duly responded to all the Authority's subsequent requests for information in a satisfactory manner.

4.29. Given the above considerations, we are satisfied that IUK remains compliant with this condition 8 of the 2013 Certification Decision.

Condition 9

The certified person shall notify the Authority in writing within 7 working days of any change in the shareholdings of the certified person. Such notification shall include but not be limited to the registered name(s) and company numbers of any new shareholder(s); the number and type of share(s) allotted or transferred; the percentage of the total shareholding in the certified person that each new shareholder(s) holds; and any reduction or increase in shareholding by any current shareholder(s).

4.30. On the 19 December 2014, IUK provided a notification to Ofgem regarding the transfer of shares by CDPI to CDPGI. There has been no further change in shareholdings. IUK will continue to notify Ofgem if there is a change in its shareholding.

4.31. Therefore, we are satisfied that IUK continues to comply with this condition 9 of the 2013 Certification Decision.

Condition 10

If at any time the Authority provisionally considers that a condition contained in paragraphs C1 to C9 is not met (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)

4.32. On 5 March 2015, having received confirmation from IUK that it did not meet its certification conditions on 3 March, Ofgem sent notification to IUK that it was opening a review into IUK's certification. This notification was also accompanied by a request for information in relation to the reasons why these conditions had not been met and the details of any steps being taken to rectify this breach. On 25 March, IUK provided Ofgem with all the requested information. In subsequent meetings and emails, IUK has also provided additional clarifications and documentation.

4.33. Based on the above, we are satisfied that IUK complies with this condition 10 of the 2013 Certification Decision.

Condition 11

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.

4.34. IUK has confirmed in writing that it has not become aware of any such event and therefore has not issued any notification to the Authority. We have no reason to doubt this view and have not separately become aware of any such event or circumstance. We are therefore satisfied that IUK meets the requirements of this condition 11 of the 2013 Certification Decision.

Condition 12

If at any time from the relevant date the certified person exercises or is likely to exercise any shareholder right or right of appointment in the circumstances described in section 80 of the Gas Act, the certified person shall as soon as is reasonably practicable notify the Authority in writing of the right that has been or is likely to be exercised and the effect of exercising that right.

4.35. IUK has confirmed that it has not exercised any such right. We have no reason to doubt this view and have not separately become aware of any such event or circumstance. We are therefore satisfied that IUK meets the requirements of this condition 12 of the 2013 Certification Decision.

Condition 13

By 31 July of each year the certified person shall provide the Authority with a written declaration, approved by a resolution of the board of directors of the certified person and signed by a director 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.

4.36. We can confirm that IUK has provided annual declarations to Ofgem on 30 July 2013, 21 July 2014 and 20 July 2015. On this basis we are satisfied that IUK meets the requirements of this condition 13 of the 2013 Certification Decision.

Condition 14

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 paragraph C7);

(c) considering the information and reports provided under paragraphs C3 and C7; or

(d) 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.

4.37. We can confirm that IUK meets this certification condition 14 as it has provided any relevant information we have requested in a prompt and timely manner. For example, as previously mentioned, on 25 March 2015, IUK sent information to us in response to our request for information in relation to the opening of a review into its certification.

5. The Commission's Opinion

- 5.1. Pursuant to Article 3(2) of the Gas Regulation, the Authority is required to take "utmost account" of the Commission's opinion as to the compatibility of the preliminary decision with Articles 9 and 10 of the Gas Directive in reaching its final certification decisions.
- 5.2. We summarise below how we have taken utmost account of the Commission's opinion of Ofgem's preliminary decision in relation to the review of IUK's unbundling certification.
- 5.3. The Commission agreed with the Authority's view that "*the measures taken by IUK, if maintained, result in a situation that is compliant with Article 9 of the Gas Directive*".
- 5.4. However, the Commission is also of the opinion that both CREG and Ofgem should assess the potential risk of legal challenge to IUK's actions to comply with the conditions of the 2013 Certification Decision.
- 5.5. Ofgem's view is that, although a risk of successful legal challenge exists, this is small. In the unlikely event that a legal challenge was brought forward and was successful, we think that this can be adequately addressed through opening another review into IUK certification.
- 5.6. We would expect IUK to respond appropriately to any challenge by for example defending it legally and making alternative plans during the time they have between the challenge starting and the final judgment.
- 5.7. We also note that the conditions of their certification, in particular condition 8, pose a duty on IUK to inform the Authority as soon as reasonably practicable of any event or circumstances which may affect its eligibility for certification. We believe that, should

a legal challenge be brought forward, IUK would have a duty to inform us of this as soon as possible, and in writing.

6. Conclusion: continuation of Certification

- 6.1. Having conducted our review and having taken utmost account of the Commission's opinion on our preliminary certification decision, the Authority concludes that, at the date of this decision, IUK meets the conditions of its certification and passes the five ownership unbundling tests set out in section 8H of the Gas Act.
- 6.2. For the above reasons our final decision is that IUK's certification should be continued on the certification grounds set out in our 2013 Certification Decision; namely, that the applicant meets the ownership unbundling requirements set out in section 8H of the Gas Act.
- 6.3. In accordance with section 8K of the Gas Act, the Authority will also continue to monitor whether the basis on which it decided to certify IUK continues to apply, and if appropriate will review its certification decision.