
STATUTORY INSTRUMENTS

2011 No. 2704

The Electricity and Gas (Internal Markets) Regulations 2011

PART 3

Transmission and the operation of interconnectors

Gas transmission and the operation of gas interconnectors: independence

4. After section 8B of the Gas Act 1986(1) insert—

“Gas transmission and the operation of gas interconnectors: independence

8C Requirement for certain gas transporters and operators of gas interconnectors to be certified as independent

(1) A person who, for any period on or after the relevant date, holds a licence under section 7 and carries out transmission of gas must ensure that the person is certified by the Authority under section 8F throughout that period.

(2) A person who, for any period on or after the relevant date, holds a licence under section 7ZA and participates in the operation of a gas interconnector must ensure that the person is certified by the Authority under section 8F throughout that period.

(3) In subsections (1) and (2) the “relevant date” in respect of a person is 3 March 2012 or any later date before 4 March 2013 which the Authority specifies under subsection (4) or (5) in respect of the 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 thinks that, for reasons beyond its and the person’s control, the Authority will not reasonably be able to make a final decision before 3 March 2012 as to whether to certify the person.

(6) In this section—

- (a) “transmission” has the meaning given by Article 2(3) of the Gas Directive; and
- (b) “vertically integrated undertaking” has the meaning given by Article 2(20) of that Directive.

8D Application for certification

- (1) Any person may apply for certification.
- (2) An application for certification—
 - (a) must be made in writing to the Authority; and
 - (b) must be made in such form and contain such information as the Authority may specify.
- (3) If the application is made on or after 3 March 2013 and the applicant is a person from a third country or a person controlled by a person from a third country, the Authority must, as soon as is reasonably practicable after receiving the application—
 - (a) notify the Secretary of State and the European Commission that an application has been made by such a person; and
 - (b) enclose with the notification to the Secretary of State any information which, at the time of the notification, the Authority has in its possession and thinks is relevant to the question of whether the security of gas supplies in the United Kingdom or any other EEA state would be put at risk by the certification of the applicant.
- (4) The Authority may ask an applicant for certification for 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
 - (b) it is information which the applicant could reasonably be expected to obtain.
- (5) The Authority may ask a relevant producer or supplier for any information the Authority thinks is relevant to an application for certification, and the relevant producer or supplier must supply that information if—
 - (a) it is in the relevant producer or supplier's possession; or
 - (b) it is information which the relevant producer or supplier could reasonably be expected to obtain.
- (6) A person required to supply information under subsection (4) or (5) must do so by any deadline specified by the Authority.

8E Report where applicant connected with a country outside the European Economic Area

- (1) This section applies if the Secretary of State is notified by the Authority under section 8D(3) that an application has been made by a person from a third country or a person controlled by a person from a third country.
- (2) The Secretary of State must prepare a report on whether the security of gas supplies in the United Kingdom or any other EEA state would be put at risk by the certification of the applicant.
- (3) The Secretary of State must prepare the report and send it to the Authority within the 6 weeks beginning with the day on which the notification under section 8D(3) is received.
- (4) If, before the Secretary of State sends the report to the Authority, the Authority receives information under section 8D(4) or (5) and thinks that the information is relevant to the preparation of the report, the Authority must supply that information to the Secretary of State as soon as is reasonably practicable.
- (5) In preparing the report, the Secretary of State 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.

8F Certification

(1) Where the Authority receives an application for certification, it must make a preliminary decision by the relevant deadline as to whether it should certify the applicant.

(2) The relevant deadline is the end of the 4 months beginning with the day on which the Authority receives the application; but this is subject to any extension under subsection (3).

(3) If, before the deadline mentioned in subsection (2) (or before that deadline as previously extended under this subsection), the Authority asks the applicant or a relevant producer or supplier for information under section 8D(4) or (5), the relevant deadline is the end of the 4 months beginning with the day on which the last of that information is received.

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

- (a) the applicant;
- (b) the Secretary of State; and
- (c) the European Commission.

(5) The Authority must enclose with the notification under subsection (4)(c) a copy of any report—

- (a) which the Secretary of State has prepared under section 8E in respect of the applicant; and
- (b) which the Authority receives before giving the notification.

(6) Subsections (7) and (8) apply in relation to the Authority's final decision under Article 3 of the Gas Regulation as to whether to certify the applicant.

(7) 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 applicant;
- (b) the Secretary of State; and
- (c) the European Commission.

(8) If the final decision is to certify the applicant the applicant is to be taken as certified by the Authority under this section.

8G Grounds for certification

(1) This section applies to—

- (a) a preliminary decision under section 8F 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) The Authority may only decide that the applicant should be certified, or decide to certify the applicant, if one of the following six grounds ("the certification grounds") applies.

(3) The first certification ground is that the applicant meets the ownership unbundling requirement in section 8H.

(4) The second certification ground is that the applicant has asked the Authority to exempt it from the ownership unbundling requirement on the grounds in paragraph (9) of Article 9 of the Gas Directive (alternative arrangements for independence), and the Authority thinks the requirements of that paragraph are met.

(5) The third certification ground is that—

- (a) the applicant has asked the Authority to exempt it from the ownership unbundling requirement on the grounds in paragraphs (1) and (2) of Article 14 of the Gas 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) thinks that the requirements of those paragraphs are met, and
 - (ii) is minded to designate the nominated independent system operator.

(6) The fourth certification ground is that—

- (a) the applicant holds a licence under section 7ZA;
- (b) the applicant has asked the Authority to exempt it from the ownership unbundling requirement on the ground that it meets the requirements of Chapter 4 of the Gas Directive (independent transmission operator), in accordance with Articles 9(8) (b) and 18(10) of that Directive; and
- (c) the Authority thinks that the applicant meets the requirements of that Chapter, in accordance with those Articles.

(7) The fifth certification ground is that—

- (a) the applicant holds a licence under section 7ZA; and
- (b) in accordance with the conditions of that licence, the applicant has been granted an exemption from the ownership unbundling requirement in accordance with Article 36 of the Gas Directive (new infrastructure) and remains entitled to the benefit of it.

(8) The sixth certification ground is that—

- (a) the applicant holds a licence under section 7ZA; and
- (b) either—
 - (i) the applicant has, in accordance with the conditions of that licence, been granted an exemption in accordance with Article 22 of Directive [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; or
 - (ii) another person benefits from such an exemption, and the applicant is in a position which is substantially similar to the position of that person.

(9) But, regardless of whether a certification ground applies, the Authority—

- (a) may, in particular, decide that the applicant should not be certified, or decide not to certify the applicant, if, on the basis of an opinion expressed by the European Commission under Article 11 of the Gas Directive (certification in relation to persons from countries outside the European Economic Area), the Authority thinks that the certification of the applicant would put at risk the security of gas supplies in any EEA state;
- (b) must not decide that the applicant should be certified, and must not decide to certify the applicant, if a report prepared by the Secretary of State under section 8E

states that the certification of the applicant would put at risk the security of gas supplies in the United Kingdom or any other EEA state;

- (c) must not decide to certify the applicant on the second certification ground if the European Commission has not verified, in accordance with paragraph (10) of Article 9 of the Gas Directive (verification of independence under alternative arrangements), that the requirement in that paragraph as to arrangements for effective independence is met.

8H The ownership unbundling requirement

(1) In section 8G(3) the ownership unbundling requirement is met by an applicant for certification if the Authority thinks that each of the following five tests is passed.

(2) 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.

(3) For the purposes of subsection (2)(c), the Authority is entitled to think that the applicant will not exercise shareholder rights if the applicant has given an undertaking not to exercise those shareholder rights.

(4) 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.

(5) 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.

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

(7) But even where the fourth test is not passed, the Authority may treat it as passed if—

- (a) the control over the applicant was gained through the exercise of a right conferred as a condition of the provision of either financial support or a guarantee (or both), in relation to the applicant'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.

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

(9) But even where the fifth test is not passed, the Authority may treat it as passed if—

- (a) the control over the applicant was gained through the exercise of a right conferred as a condition of the provision of either financial support or a guarantee (or both), in relation to the applicant'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.

(10) In subsection (2)(c) “relevant date” means the relevant date for the purposes of section 8C(1) or (2).

8I The ownership unbundling requirement: supplementary

(1) Subsections (2) and (3) apply where—

- (a) by virtue of subsection (7) or (9) of section 8H, the Authority treats the fourth or fifth test under section 8H as passed in relation to a person; and
- (b) the person is certified in reliance on that treatment.

(2) The Authority must by notice to the certified person specify a period of time at the end of which the Authority will cease to treat that test as passed by virtue of that subsection.

(3) The Authority may by notice to the certified person extend that period if the Authority thinks it necessary or expedient to do so.

(4) In deciding whether to treat a test as passed by virtue of section 8H(7) or (9), and in determining any period or extension under subsection (2) or (3), the Authority—

- (a) must take into account—
 - (i) the period of time for which the test is likely to continue not to be passed, and
 - (ii) whether the relationship (direct or indirect) between the applicant and the relevant producer or supplier has led or might lead the applicant to discriminate in favour of the relevant producer or supplier; and
- (b) may, in particular, take into account any information or undertaking given to the Authority by the applicant, the relevant producer or supplier or the person who controls the applicant and controls or has a majority shareholding in the relevant producer or supplier.

(5) The information and undertakings that may be taken into account under subsection (4)(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 applicant and the business of the relevant producer or supplier.

8J Designation for the purposes of EU gas legislation

(1) This section applies in relation to any period for which a person—

- (a) holds a licence under section 7 or 7ZA; and
- (b) is certified.

(2) If the person is certified on the first, second, fourth, fifth or sixth certification ground in section 8G, the person is designated as a gas transmission system operator for the purposes of Article 10(2) of the Gas Directive (designation of transmission system operators).

(3) If the person is certified on the third certification ground in section 8G, the independent system operator nominated in the application for certification is designated 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 section, the Authority must notify the designation to—

- (a) the person designated;
- (b) the Secretary of State; and
- (c) the European Commission.

8K Monitoring and review of certification

(1) The Authority must monitor, in respect of each certified person, whether the basis on which the Authority decided to certify the person, including the certification ground on which the person was certified, (the “certification basis”) continues to apply.

(2) If, on or after 3 March 2013, as result of information it has received or obtained, the Authority thinks that a person from a third country has taken or may take control of a certified person, the Authority must, as soon as is reasonably practicable—

- (a) notify the information to the Secretary of State and the European Commission; and
- (b) enclose with the notification to the Secretary of State any further information which, at the time of the notification, the Authority has in its possession and thinks is relevant to the question of whether the security of gas supplies in the United Kingdom or any other EEA state would be put at risk by the continued certification of the person.

(3) The Authority must review whether the certification basis in respect of a certified person continues to apply if the European Commission asks it to do so.

(4) A review under subsection (3) is to be carried out within the 4 months beginning with the day on which the Authority receives the request from the European Commission.

(5) The Authority may also review whether the certification basis in respect of a certified person continues to apply if—

- (a) the certified person notifies it of any event or circumstance which may affect that basis; or
- (b) the Authority thinks that the basis may no longer apply.

(6) A review under subsection (5) is to be carried out within the 4 months beginning with—

- (a) if paragraph (a) of subsection (5) applies, the day on which the Authority receives the notification under that paragraph;
- (b) otherwise, the first day on which the Authority thinks that the certification basis may no longer apply.

(7) Subsection (8) applies where—

- (a) by virtue of section 8H(7) or (9), the Authority has treated the fourth or fifth test under section 8H as passed;
- (b) a person is certified in reliance on that treatment; and
- (c) the period specified under section 8I as the period at the end of which that treatment will cease comes to an end.

(8) Where this subsection applies, the Authority must review whether that test is now passed.

(9) A review under subsection (8) is to be carried out within the 4 months beginning with the end of the period mentioned in subsection (7)(c).

8L Review of certification: requirement to provide information etc

(1) As soon as is reasonably practicable after beginning a review under section 8K, the Authority must notify the certified person that the review is being carried out and of the reasons for it.

(2) The Authority may ask that 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 person's possession; or
- (b) it is information which the person could reasonably be expected to obtain.

(3) The Authority may ask a relevant producer or supplier for any information the Authority thinks is relevant to a review under section 8K, and the relevant producer or supplier must supply that information if—

- (a) it is in the relevant producer or supplier's possession; or
- (b) it is information which the relevant producer or supplier could reasonably be expected to obtain.

(4) A person required to supply information under subsection (2) or (3) must do so by any deadline specified by the Authority.

8M Report as to any connection of certified person with a country outside the European Economic Area

(1) This section applies if the Authority notifies information to the Secretary of State under section 8K(2) in respect of a certified person.

(2) The Secretary of State must prepare a report on whether the security of gas supplies in the United Kingdom or any other EEA state would be put at risk by the continued certification of the person.

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

(4) If, before the Secretary of State sends the report to the Authority, the Authority receives information under section 8L(2) or (3) and thinks that the information is relevant to the preparation of the report, the Authority must supply that information to the Secretary of State as soon as is reasonably practicable.

(5) In preparing the report, the Secretary of State 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.

8N Continuation or withdrawal of certification

(1) Where the Authority reviews under section 8K(3) or (5) whether the certification basis in respect of a certified person continues to apply, it may, within the 4 months mentioned in section 8K(4) or (6) either—

- (a) make a preliminary decision that the certification should be continued on the certification ground mentioned in section 8K(1); or
- (b) make a preliminary decision that the certification should be withdrawn.

(2) If the Authority does not make a decision under subsection (1) within those 4 months, it is to be taken as having made a preliminary decision at the end of the 4 months that the certification should be continued on the certification ground mentioned in section 8K(1).

(3) Where the Authority reviews under section 8K(8) whether the fourth or fifth test under section 8H is now passed, it may, within the 4 months mentioned in section 8K(9), either—

- (a) make a preliminary decision that the certification should be continued on the basis that the test is now passed; or
 - (b) make a preliminary decision that the certification should be withdrawn.
- (4) If the Authority does not make a decision under subsection (3) within those 4 months, it is to be taken as having made a preliminary decision at the end of the 4 months that the certification should be continued on the basis that the test is now passed.
- (5) As soon as is reasonably practicable after a preliminary decision is made (or taken to be made) under this section, the Authority must—
- (a) notify the decision to the certified person and the Secretary of State; and
 - (b) notify the decision to the European Commission, enclosing the information it considers relevant to the decision.
- (6) Subsections (7) to (9) apply in relation to the Authority's final decision under Article 3 of the Gas Regulation whether to confirm the certification.
- (7) 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) the Secretary of State; and
 - (c) the European Commission.
- (8) If the final decision is to continue the certification the person is to be taken as continuing to be certified by the Authority under section 8F.
- (9) Otherwise, the person is to be taken as no longer certified.
- (10) Section 8G(9)(a) and (b) applies in relation to a decision mentioned in this section as it applies in relation to a decision mentioned in section 8G(1), but as if—
- (a) the references in section 8G(9)(a) and (b) to the certification of the applicant were references to the continued certification of the person certified; and
 - (b) the reference in section 8G(9)(b) to a report prepared under section 8E were a reference to a report prepared under section 8M.

80 Prohibition on the exercise of certain shareholder rights and rights of appointment

- (1) A person must not exercise a shareholder right or a right of appointment if—
 - (a) the right falls within subsection (2), (3), (4) or (5);
 - (b) the relevant date in respect of the certified person mentioned in that subsection has been reached;
 - (c) the exercise of the right would or might lead the certified person to discriminate in favour of the relevant producer or supplier mentioned in that subsection; and
 - (d) the relevant producer or supplier is a person to whom subsection (6) applies.
- (2) A right falls within this subsection if—
 - (a) it is a shareholder right;
 - (b) it is held by a person who controls a person certified on the certification ground in section 8G(3); and
 - (c) it is exercisable in relation to a relevant producer or supplier.
- (3) A right falls within this subsection if—
 - (a) it is a shareholder right;

- (b) it is exercisable in relation to a person certified on the certification ground in section 8G(3); and
 - (c) it is held by a person who controls a relevant producer or supplier.
- (4) A right falls within this subsection if—
- (a) it is a shareholder right;
 - (b) the person who holds it appointed a senior officer of a person certified on the certification ground in section 8G(3);
 - (c) the person appointed continues to hold that office; and
 - (d) the right is exercisable in relation to a gas undertaking which is a relevant producer or supplier.
- (5) A right falls within this subsection if—
- (a) it is a right to appoint a senior officer of a person certified on the certification ground in section 8G(3); and
 - (b) the person who holds it has, within the immediately preceding period of 3 years, exercised a shareholder right in relation to a gas undertaking which is a relevant producer or supplier.
- (6) This subsection applies to a person if, in order to carry out some or all of the activity by virtue of which the person is a relevant producer or supplier, the person—
- (a) requires a licence under section 7A of this Act, section 6 of the Electricity Act 1989 (licences authorising supply, etc), or section 3 of the Petroleum Act 1998 (licences to search and bore for and get petroleum); or
 - (b) would require such a licence if carrying out the activity in Great Britain.
- (7) In this section—
- (a) “exercise” means exercise directly or indirectly, and “exercisable” is to be interpreted accordingly; and
 - (b) “relevant date” means the relevant date for the purposes of section 8C(1) or (2).

8P Validity of acts infringing section 8O

- (1) The following are voidable on an application to the court—
 - (a) the exercise of a shareholder right in breach of section 8O;
 - (b) the appointment of a senior officer in breach of that section.
- (2) Any person may make an application under subsection (1).
- (3) Such an application may not be made after the end of the 5 years beginning with the day on which the shareholder right was exercised or the appointment made.
- (4) If, by virtue of this section, the court declares the exercise of a shareholder right or an appointment to be void, it may make an order as to the consequences of its declaration.
- (5) In this section, “the court” means—
 - (a) in relation to England and Wales, the High Court, and
 - (b) in relation to Scotland, the Court of Session.

8Q Interpretation

- (1) In sections 8C to 8P and this section—

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

“certified” means taken in accordance with section 8F(8) or 8N(8) to be certified (or as continuing to be certified) by the Authority under section 8F; and “certify” and “certification” are to be interpreted accordingly;

“certification grounds” has the meaning given by section 8G(2);

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

“shareholder right” 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, an EEA state.

(2) In this Part “gas undertaking” means a person who—

- (a) gets natural gas from its natural condition in strata otherwise than as an unintended consequence of the storage of gas, and requires a licence under section 3 of the Petroleum Act 1998 (licences to search and bore for and get petroleum) to do so or would require such a licence if getting the gas in Great Britain;
- (b) produces any other gas, including in particular biomethane, which is suitable for conveyance through pipes to premises in accordance with a licence under section 7;
- (c) supplies to any premises gas which has been conveyed to those premises through pipes;
- (d) arranges with a gas transporter for gas to be introduced into, conveyed by means of or taken out of a pipe-line system operated by that transporter; or
- (e) otherwise sells gas.

(3) In this Part “relevant producer or supplier”, in relation to an applicant for certification or a certified person, means a person who falls within each of subsections (4) and (5).

(4) A person falls within this subsection if the person—

- (a) is a gas undertaking;
- (b) generates electricity for the purpose of giving a supply to any premises or enabling a supply to be so given;
- (c) supplies electricity to any premises; or
- (d) otherwise generates or sells electricity,

and terms used in paragraphs (b) and (c) of this subsection have the same meanings in those paragraphs as in Part 1 of the Electricity Act 1989.

(5) A person falls within this subsection if the person carries out in an EEA state some or all of the activity by virtue of which the person falls within subsection (4) and—

- (a) requires a licence under section 7A of this Act⁽²⁾ or section 6 of the Electricity Act 1989 (licences authorising supply, etc)⁽³⁾ to do so;
- (b) would, in the Authority's opinion, require such a licence if carrying out the activity in Great Britain; 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 the person.”

(2) 1986 c. 44. Section 7A was inserted by section 6(1) of the Gas Act 1995 (c. 45) and subsequently amended by section 108 of, and paragraphs 1 and 2(1) of Part 1 to Schedule 6 and Schedule 8 to, the Utilities Act 2000 (c. 27); and by section 149(1) and (7) of the Energy Act 2004 (c. 20).

(3) 1989 c. 29. Section 6 was substituted by section 30 of the Utilities Act 2000 (c. 27) and subsequently amended by sections 89(3), 136(1) and (2), 143(1), 145(1) and (5) to (7), and 197(9) of, and paragraphs 3 and 5 of Schedule 19 and Part 1 of Schedule 23 to, the Energy Act 2004 (c. 20); and by section 79 of, and paragraph 2 of Schedule 8 to, the Climate Change Act 2008 (c. 27).