
To: Mary Simmons

Copies: Sarah Cooper
Andrew Blair

From: Hugo Lidbetter

Date: 11 November 2021

Our Ref: HL6/HL6/UK01-025418-00119/99941554 v2

Advice relating to use of an interconnector as a storage facility

1. Request for advice

- 1.1 Interconnector is the operator of the Bacton/Zeebrugge interconnector and is currently consulting on the proposed implementation of a short term, fast cycle storage service as a secondary service to its transportation business (the "**Intended Use**").
- 1.2 You have asked us for advice in relation to an interconnector operator's ability to provide a storage service under the current regulatory regime. You have conducted a review of, amongst other things, the Gas Act¹ and Gas Regulation², and, in particular, consider the following issues to be relevant to your consultation:
- (a) whether the definition of "storage facility" in the Gas Act is inconsistent with the Intended Use ("**Issue 1**");
 - (b) whether an interconnector operator would require an exemption from the requirement to hold a gas transporter licence pursuant to section 5.2 of the Gas Act (and in any event whether that is material to the primary issue of whether an interconnector can provide a storage service) ("**Issue 2**"); and
 - (c) whether the definition of "storage facility" in the Gas Regulation is consistent with the Intended Use and, if it is, whether that definition takes precedence over that set out in the Gas Act ("**Issue 3**").
- 1.3 We have set out our advice in relation to Issues 1 to 3, but have not otherwise conducted a wider review of the Gas Act or Gas Regulation for the purposes of advising on the compatibility of that regime with the Intended Use.

2. Issue 1: Gas Act definition

¹ Gas Act 1986

² Regulation (EC) 715/2009

2.1 Under Section 48(1) Gas Act 1986, storage facility is defined as³:

[F783“storage facility” means a facility in Great Britain (including the territorial sea adjacent to Great Britain and the sea in any area designated under section 1(7) of the Continental Shelf Act 1964) for either or both of the following—

- (a) the storage in porous strata, or in cavities in strata, of gas which has been, or will be, conveyed in a pipeline system operated by the holder of a licence under section 7 or 7ZA;
- (b) the storage of liquid gas which, if regasified, would be suitable for conveyance through pipes to premises in accordance with a licence under section 7,

but the reference in paragraph (b) to the storage of liquid gas does not include such temporary storage as is mentioned in the definition of “LNG import or export facility”;;]

2.2 The Intended Use does not appear entirely consistent with the Gas Act definition. However, our view is that the definition is more likely intended to be descriptive (in referring to the means by which gas is stored) rather than determinative (i.e. intentionally exclusionary of other forms of storage). This is supported by the observation that, at the time of implementation of the definition, storage of gas would involve salt caverns or depleted gas fields, rather than other forms including linepack.

3. Issue 2: Licensing

3.1 We note that you have addressed Issue 2 in your Consultation Letter (dated 28 October 2021), where you conclude that the class and named exemptions in Section 5.2 of the Gas Act are not relevant because conveyance of gas into the NTS from an interconnector does not require a license under Section 5.1(a).

3.2 We agree with this analysis, particularly as the alternative is presumably that Interconnector would hold two licences. We note, in any event, that Standard Licence Condition 6 of the Gas Interconnector Licence anticipates a licensee exercising a range of activities, including storage, which suggests a licensee, under that licence, should not be limited only to the activity of interconnection.

4. Issue 3: Gas Regulation definition

4.1 The Gas Regulation (in its original form) does not define storage facility, although it incorporates the definitions contained in Article 2 of the Gas Directive⁴:

(9) ‘storage facility’ means a facility used for the stocking of natural gas and owned and/or operated by a natural gas undertaking, including the part of LNG facilities used for storage but excluding the portion used for production operations, and excluding facilities reserved exclusively for transmission system operators in carrying out their functions;

4.2 We believe that this definition is consistent with the Intended Use, as it is focussed on the activity of storing gas, rather than the structure and physical characteristics of the facility in which that gas

3 This definition was inserted on 10.11.2011 through an amendment made by s.47(2)(b) of The Electricity and Gas (Internal Markets) Regulations 2011 (S.I. 2011/2704).

4 Directive 2009/73/EC, Article 2(9)

is stored. We note the intent behind the "excluding" part (relating to facilities reserved exclusively for transmission system operators) is addressed in your Consultation Letter.

- 4.3 The question then is to what extent the Gas Regulation applies to the Intended Use and whether it could be said to have primacy over the Gas Act definition (given both concern storage facilities).
- 4.4 Taking, first, storage facilities generally, the applicability of the Gas Regulation to storage facilities is clear from paragraph 7 of Schedule 4B of the Gas Act, which confirms that Articles 15, 17, 19, 20, 22 of the Gas Regulation apply to the owners of storage facilities. Those provisions are shown below (from paragraph (f)):

Owners of storage facilities

7. The following are relevant provisions in relation to an owner of a storage facility—

- (a) section 8R(2), (3), (4), (6) and (7);
- (b) section 11A(2);
- (c) section 11C;
- (d) section 19B(1), (3), (3A), (3B), (7) and (11);
- (e) section 19E(2) and (3);
- (f) in the Gas Regulation—
 - (i) Article 15 (duties relating to third-party access services),
 - (ii) Article 17 (duties relating to capacity allocation and congestion management),
 - (iii) Article 19 (transparency requirements concerning storage facilities),
 - (iv) Article 20 (duty to keep records),
 - (v) Article 22 (duties relating to trading of capacity rights).

Having determined the relevance of the Gas Regulation to storage facilities generally, the issue then is to what extent the definition of storage facilities encompasses the Intended Use (and so whether the Gas Regulation applies to the Intended Use). As we have set out above, we consider that the definition of storage facility in the Gas Regulation is compatible with the Intended Use.

- 4.5 The Gas Regulation, being an EU regulation, was directly applicable in domestic law.⁵ In other words, it had effect in UK law without the need for specific domestic implementing legislation.⁶ EU law ceased to apply to the UK at 11pm on 31st December 2020 – known as IP completion day ("IPCD").⁷ On IPCD the Gas Regulation was incorporated into domestic law by virtue of Section 3 of the European Union (Withdrawal) Act 2018 (the "EUWA") as direct EU legislation. Direct EU legislation forms part of retained EU law.⁸

⁵See Article 288 of the Treaty on the Functioning of the European Union, which states: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

⁶ It was implemented through the operation of section 2(1) of the European Communities Act 1972. Section 2(1) allowed EU law to "flow" directly into UK law without the need for further, specific implementing legislation.

⁷ The UK left the EU on 31st January 2020. However, Part 4 of the EU-UK Withdrawal Agreement provided for an implementation or transition period. During this period, EU law continued to apply to the UK (subject to limited exceptions) as if it was still a Member State.

⁸ See the definition in section 6(7) of the EUWA.

3 Incorporation of direct EU legislation

- (1) Direct EU legislation, so far as operative immediately before [F¹ IP completion day], forms part of domestic law on and after [F¹ IP completion day].
- (2) In this Act "direct EU legislation" means—
 - (a) any EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before [F² IP completion day] and so far as—

4.6 Before IPCD, if there was a conflict between directly applicable EU law (in this case, the Gas Regulation) and any domestic legislation (here, the Gas Act), the EU legislation took precedence due to the principle of the supremacy of EU law. The starting point after IPCD is that this principle still applies where there is a conflict between direct EU legislation and domestic law which dates from before IPCD (see section 5(1) and (2) of the EUWA).⁹ Where retained EU law has been modified (for example, where it has been amended using the power in section 8¹⁰ of the EUWA) the principle of the supremacy of EU law can continue to apply, where that is consistent with the intention of the modification. In other words, the Gas Regulation can continue to have supremacy over the Gas Act, even where the Gas Regulation has been amended (see section 5(3) of the EUWA).

5 Exceptions to savings and incorporation

- (1) The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after [F¹ IP completion day].
- (2) Accordingly, the principle of the supremacy of EU law continues to apply on or after [F¹ IP completion day] so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before [F¹ IP completion day].
- (3) Subsection (1) does not prevent the principle of the supremacy of EU law from applying to a modification made on or after [F¹ IP completion day] of any enactment or rule of law passed or made before [F¹ IP completion day] if the application of the principle is consistent with the intention of the modification.

4.7 The Gas Regulation was amended by Reg 151 of the Electricity and Gas etc. (Amendment etc.) (EU Exit) Regulations 2019 (the "Brexit Regs"),¹¹ to add the following definition of "storage facility" to Article 2 of the Gas Regulation (to come into effect after IPCD):

"storage facility" means a facility used for the stocking of natural gas and owned or operated by a natural gas undertaking, including the part of LNG facilities used for storage but excluding the portion used for production operations, and excluding facilities reserved exclusively for transmission system operators in carrying out their functions;

4.8 There is nothing to suggest that the addition of the definition of "storage facility" should displace the principle of the supremacy of EU law. Therefore our view is that the definition in the Gas Regulation should have primacy when considering the Intended Use:

- (a) the Gas Regulation has primacy over the Gas Act where there is a conflict between them, as a result of section 5(1) and (2) of the EUWA; and
- (b) there is nothing in the insertion of the definition of "storage facility" which suggests that the principle of the supremacy of EU law no longer applies. Rather, the introduction of this new definition into the Gas Regulation should be taken as a clear indication that this

⁹ Section 5(1) and (2) should be read together. They are intended to make a relatively simple proposition: after IPCD, the normal rules of implied repeal apply. New Acts of Parliament take precedence over all earlier legislation. However, domestic legislation which pre-dates IPCD should still be read as it would have been prior to IPCD, as being subject to the principle of the supremacy of EU law. See Duhs, E. and Rao, I. (2021). *Retained EU law: a practical guide*. London: The Law Society, Chapter 14.

¹⁰ The power can be used to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency in relation EU law arising from the UK's withdrawal from the EU. See section 8(1) of the EUWA and Duhs, E. and Rao, I. (2021). *Retained EU law: a practical guide*. London: The Law Society, Chapter 17.

¹¹ These regulations were made using the power in section 8(1) of the EUWA.

definition of storage facility was intended to prevail and, in any event, if there had been an intention to preserve the original Gas Act definition, that could have been substituted into the Gas Regulation in place of the one that originally appeared in the Gas Directive. Instead, the definition has been restated by virtue of the amendments made under the Brexit Regs.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Hugo Lidbetter', with a long, sweeping horizontal stroke extending to the right.

Hugo Lidbetter
Partner