Mod 0761 Final Modification Report - discussion at Modification Panel (16th December 2021)

National Grid Response to Questions Raised

The BEIS view was flagged as being in conflict with the legal advice Interconnector Ltd provided in its representation that stated that the wider definition of Storage Facility incorporated into the EU derived Gas Regulation superceded the narrower Gas Act definition if it was in conflict. As a consequence, a number of parties understood that BEIS had made a statement that the Gas Act definition of Storage Facility prevailed over the equivalent definition incorporated into the EU derived Gas Regulation.

Response:

We note that this issue was discussed in the initial phase of the Workgroup. Accordingly, the following was recorded in the Final Modification Report (FMR):

> Interconnector asserted that as retained EU law, the Gas Regulation is directly applicable meaning that the definition of 'Interconnector' in the Gas Regulation applies as a matter of English Law and therefore prevails over domestic legislation. This is addressed in Schedule 8, para 1 of the EU Withdrawal Act.
>
> Some Workgroup participants disagreed with this interpretation and expressed concern that the legal basis on which the storage service is to be offered is unclear. A Workgroup participant had received different advice in correspondence with BEIS:
>
> "*The UK transposed Directive (EU) 2019/692 by making the Gas (Internal Markets) Regulations 2020 (SI 2020/625). The Regulations operated by amending other legislation, including the Gas Act 1986, and modifying the standard conditions of a gas interconnector licence. The Regulations included a provision to sunset some of its changes at the end of the transition period.*
>
> *Section 5(8) of the Gas Act 1986 defines "gas interconnector" for the purposes of Part 1 of the Act as:*
> *…so much of any pipeline system as—*
> *(a) is situated at a place within the jurisdiction of Great Britain; and*
> *(b) subsists wholly or primarily for the purposes of the conveyance of gas (whether in both directions or in only one) between Great Britain and another country or territory.*
>
> *This definition was inserted by the Energy Act 2004 and has not been amended (whether as part of transposing Directive (EU) 2019/692 or in relation to EU exit). Our assessment at the time was that the definition of interconnector that we had in UK domestic law was already broad enough to include third countries, so no amendments were necessary to transpose the Directive*".
>
> Some Workgroup participants remained concerned that there appeared to be conflicting views on which legislation applies whilst recognised that the definition (in both the Gas Act and Gas Regulation) indicates that an Interconnector may provide services other than Transmission.

Our view is that:

- the BEIS correspondence replicated in the Final Modification Report does not implicitly or explicitly provide a definitive conclusion on the supremacy of one type of UK legislation over

another if they are in conflict. It merely states as a matter of historic record that no revision to the definition of "Interconnector" in the Gas Act was deemed as necessary by BEIS as a consequence of the transposition into UK law of EU Directive 2019/692 in order to align the Interconnector definitions. This was on the basis that both definitions were consistent; and

- in the correspondence replicated in the FMR, BEIS did not provide a view in respect of, nor refer to, the definition of 'Storage Facility'.

On the basis of the above two points:

- drawing a conclusion as to the applicability of the definition of "Interconnector" as per the Gas Act over and above the definition of the same term in the EU directive (or vice -versa) **is not necessary** as BEIS concluded that both Interconnector definitions are aligned; and

- it would be **erroneous to conclude** that BEIS have stated in its response (replicated in the FMR) that the Gas Act definition of "Storage Facility" prevails over an equivalent definition in EU Gas Regulation as this was neither explicit, nor implied, in its response. In retrospect, and upon review, the line in the FMR "*A Workgroup participant had received different advice in correspondence with BEIS*" (as shown above in context) is arguably inaccurate in light of our conclusions on the scope of the statement from BEIS.

What *is* explicit is that sections 5 in the European Union (Withdrawal) Act 2018 states:

> ***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 exit day.*
>
> *(2) Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.*

On the basis that the definition of "Storage Facility" in the Gas Act 1986 is narrower in scope (in terms of the physical means of storage) and therefore arguably in conflict with the definition of "Storage Facility" incorporated into EU Regulation 715/2009 (now UK law post-Brexit), which merely refers to the stocking of natural gas, the clear and unambiguous statement in section 5(2) above directs that the EU derived law prevails over any domestic legislation that pre-dates exit day (from the EU) in terms of any question regarding interpretation.

As recorded in the FMR, other Workgroup participants maintain a different view. Therefore, we remain unclear as to the expectations of the referral back to the Workgroup as we do not expect to reach a unanimous viewpoint on this issue.

As was discussed and recognised by all parties in the Workgroup, it is arguably for the decision maker in this context (Ofgem) to conclude, on the basis of the explanations and rationale set out in the FMR and representations, whether it concurs with one view or the other.

Where parties have deemed it appropriate, legal advice or summaries of such have been provided in the Workgroup (and reflected in the FMR) or in their representations. In respect of the latter we note that the consultation period was specifically extended to "…allow all parties to acquire and consider legal opinion…" (as set out in the October 2021 Modification Panel minutes).

WWU expressed the view that the UNC solution should include some form of constraint to ensure that the levels of storage activity remain sub-ordinate to the traditional transportation service to remain aligned to the Interconnector definition (i.e which set out that interconnection should be the 'primary' purpose).

Response:

Our view is that it is for individual Interconnector operators to assure themselves that they remain within the constraints of the various legislative definitions that impact their operation. In other words, it is not for the UNC to police the wider compliance of Interconnector operators (or indeed other industry players) with the rules and constraints on their (respective) operations.

If this was the desired, or accepted, approach Interconnector Operators are subject to many rules set out in a number of different authorities (licences, legislation etc). Therefore, how is it determined which of these requirements is, or needs to be, assured via UNC rules? We are of the opinion that any consideration of this as a broader principle to be adopted in respect of one or more market participant types is beyond the narrow scope of this Proposal which specifically concerns operation of storage within Interconnectors.