

ENERGY MARKET INVESTIGATION

DRAFT EXPLANATORY NOTE – CONSULTATION

The Energy Market Investigation (Gas Settlement) Order 2016

This note is not a part of the Order

Introduction

1. The Competition and Markets Authority (CMA) published its findings in a report under section 136 of the Enterprise Act 2002 (the Act) entitled *Energy market investigation: Final Report* on 24 June 2016 (the Report).
2. The Report set out that the current system of gas settlement is a feature of the markets for domestic and SME retail gas supply in Great Britain that gives rise to an adverse effect on competition (the Gas Settlement AEC).
3. The CMA decided on a package of remedies to be implemented in order to remedy, mitigate or prevent the Gas Settlement AEC, set out in paragraph 20.27 of the Report.
4. The Energy Market Investigation (Gas Settlement) Order 2016 dated [XX] December 2016 (the Order) gives effect to these remedies. Section 27 of the Gas Act 1986 provides that where the CMA makes an order under section 161 of the Act, such order may also provide for the modification¹ of the conditions of a particular licence, or the standard conditions of licences of any type (including supply, shipper and transporter licences for gas) to such extent as may appear to the CMA to be requisite or expedient for the purpose of giving effect to, or taking account of, any provision made by the order.
5. The Order introduces amendments to Standard Condition 21 of the Gas Supply Licence, Standard Condition 11 of the Gas Shipper Licence, Standard Condition 5 and Standard Special Condition A50 of the Gas Transporter Licence (the Licence Conditions). This Explanatory Note applies to the Order and the Licence Conditions.

¹ The term 'modification' includes additions, alterations and omissions.

6. Nothing in this Explanatory Note is legally binding.
7. Terms defined in the Order have the same meaning in the Explanatory Note. In the event of a conflict between this Explanatory Note and any provision of the Order or Gas Supply Licence, the Order and the Gas Supply Licence shall prevail.

Possible consequences of not complying with the Order

8. Section 167 of the Act places a duty on any person to whom the Order applies to comply with it. Any person who suffers loss or damage due to a breach of this duty may bring an action.
9. The CMA has power under the Order to give directions, including directions to a person in their capacity as an office holder, for the purpose of carrying out, or ensuring compliance with, the Order.
10. Section 167 of the Act also provides that the CMA can seek to enforce the Order by civil proceedings for an injunction or for any other appropriate relief or remedy.
11. The obligations set out in Articles 3 and 4 of the Order will be introduced, pursuant to Article 5 and Schedule 1, into the Gas Supply Licence. To the extent that the obligations set out in the Order have been introduced into licences, GEMA has a duty to monitor compliance and, where appropriate, to use its powers under sections 28 to 30F of the Gas Act 1986, including where appropriate by imposing on the licensee a penalty of such amount as is reasonable in all the circumstances of the case. The CMA intends to collaborate with GEMA so as to put in place processes to monitor and ensure compliance with the obligations set out in the Order and associated conditions of the Gas Supply Licence, where appropriate, through enforcement measures.
12. In addition, new provisions will be introduced by Article 5 and Schedules 2 and 3 into the Gas Shipper Licence and Gas Transporter Licence to take account of the obligations set out in the Order, and facilitate the effective implementation of the aims of the Order.

Review of the Order

13. The CMA has a duty under section 162 of the Act to monitor the operation of the Order. This includes a duty to consider, from time to time, whether the Order should be varied or revoked in the light of a change of circumstances.

14. GEMA has a general duty, under section 34 of the Gas Act 1986, to monitor activities connected with regulated energy activities (including gas supply) in a manner which it considers will best further its principal objective to protect the interests of existing and future consumers. It similarly has a duty to provide advice, information and assistance to the CMA (on GEMA's own initiative or where expressly requested).
15. In view of these duties, the CMA expects GEMA to consider, from time to time, the need for the Order (and associated obligations set out in the Licence Conditions), and to inform the CMA of any change of circumstance which in its view might require the termination or variation of the Order (and any consequential change to the Licence Conditions).

Structure of the Order

16. The Order is divided into 4 Parts and has 3 Schedules:
 - (a) Part 1 contains general provisions, which include specifying when the Order comes into force, the scope of the Order and definitions that are used throughout the Order (and which are also used in this Explanatory Note).
 - (b) Part 2 contains obligations on gas suppliers to submit Valid Meter Readings.
 - (c) Part 3 contains certain amendments to relevant licence conditions for the purpose of giving effect to, or taking account of, the provisions set out in the Order.
 - (d) Part 4 contains provisions for monitoring compliance, including provisions allowing the CMA to give directions as to compliance with the Order and to require the supply of information for the purposes of monitoring compliance with the Order and reviewing its operation.
 - (e) Schedules 1 to 3 contain the modification to Standard Condition 21 of the Gas Supply Licence, Standard Condition 11 of the Gas Shipper Licence, Standard Condition 5 and Standard Special Condition A50 of the Gas Transporter Licence.

Part 1 – General and Interpretation

17. Article 1 provides that the Order applies to the supply of gas in Great Britain. This includes the supply of gas to domestic customers, SMEs and Industrial and Commercial customers, except to those customers' premises which are equipped with a Daily Read Supply Meter.

18. It provides that the Order shall come into force on [day after the Order] December 2016, except Article 3 (which applies to Supply Meters that are able to remotely transmit Valid Meter Readings) which will enter into force on the Project Nexus Implementation Date. Article 3.4 will become effective six months after the Project Nexus Implementation Date (see below paragraph 20).
19. Article 2 includes definitions of various terms used in the Order. To the extent possible, the terms used in the Order have been defined to have the same meaning as in the Gas Supply Licence and in the UNC. For the avoidance of doubt, when a word or expression has been expressly defined in the Order, the definition set out in the Order shall prevail over other definitions.

Part 2 – Submission of Valid Meter Readings

20. This Order will be implemented in three phases.
 - (a) As from the day after the publication of the Order, gas suppliers must take all reasonable steps to obtain and provide to the Relevant Gas Transporter a Valid Meter Reading at least once every year. This obligation will apply in respect of all Non-Daily Read Supply Meters. As a result, gas suppliers will have to submit at least one Valid Meter Reading within one year of the date of the Order.
 - (b) As from the Project Nexus Implementation Date – currently expected to be 1 June 2017 – the frequency of submissions will increase in respect of Supply Meters able to remotely transmit Valid Meter Readings. Suppliers will have an obligation to take all reasonable steps to submit at least one Valid Meter Reading per month.
 - (c) Six months after the Project Nexus Implementation Date², or any other date directed by the CMA³, the granularity of the data submitted will increase in respect of Supply Meters able to remotely transmit Valid Meter Readings. As a result, suppliers will have an obligation to take all reasonable steps to ensure that Valid Meter Readings are recorded for every day. The supplier may choose how frequently these Valid Meter Readings are collected and submitted, subject to the obligation outlined in paragraph (b). These Valid Meter Readings do not therefore need to be collected on a daily basis, but may, for instance, be collected (and

² In view of the currently expected Project Nexus Implementation Date, this provision should be effective as from 1 December 2017.

³ Prior to giving any such direction, the CMA must seek and have regard to representations from gas suppliers and other relevant stakeholders.

submitted) once a month as a batch of daily Valid Meter Readings for the previous month.

21. The definition of Supply Meters that are able to remotely transmit Valid Meter Readings includes any meter which forms part of a Smart Metering System (eg SMETS 1 or SMETS 2, or any other version).
22. For the avoidance of doubt, the obligation outlined in Article 4 (concerning Supply Meters that are not able to remotely transmit Valid Meter Readings) will continue to apply after the Project Nexus Implementation Date.
23. As regards prepayment meters, which Article applies will depend on whether the meter can remotely transmit Valid Meter Readings. The obligation outlined in Article 4 will apply to prepayment meters which are not able to remotely transmit Valid Meter Readings. The obligations outlined in Articles 3.3 and 3.4 will apply to prepayment meters which are able to remotely transmit Valid Meter Readings (e.g. smart meters in prepayment mode).⁴
24. The requirement of 'taking all reasonable steps' implies that, in certain circumstances, a gas supplier will not be in breach of the Order where it has not been able, despite having taken all reasonable steps, to provide Valid Meter Readings with the frequency and granularity set out in Articles 3 and 4.
25. With respect to smart or advanced meters (which in principle are capable of remotely transmitting meter readings), the obligations set out in Articles 3.3 and 3.4 (see paragraphs 20(b) and 20(c) above) will not apply in respect of Supply Meters which, due to a technical malfunction, are temporarily unable to remotely transmit Valid Meter Readings. However, as set out in Article 3.2, the supplier must take all reasonable steps to resolve such technical malfunction in order to comply with the Order.
26. We also note that, under SLC 41, a gas supplier may only obtain gas consumption data in respect of domestic premises (or 'micro business premises') that relates to a period of less than a month where the requirements of either SLC 41(5) or 41(6) (or SLC 41(17A) or 41(17B)) are satisfied.⁵
27. We therefore expect gas suppliers, with a view to complying with this Order, to give notice pursuant to SLC 41(5)(a) to domestic customers (or SLC 41(17A) to microbusinesses) that are equipped with a smart or advanced

⁴ We have noted the previous exemption in SLC 21B(4) for prepayment meters, which applied to the procurement of meter reads for customer billing purposes. We note, however, that the aim of the Order is to increase the accuracy of the gas settlement process – to which prepayment customers' actual consumption data are relevant – and we do not consider it to be appropriate to exclude prepayment meters within this context.

⁵ We do not expect SLC 41(6) or 41(17B) to be relevant for the purposes of this Order.

meter. The Notice should inform these customers of the gas supplier's intention to obtain gas consumption data for daily periods (but not for periods of less than a day) for the purpose of complying with the Order and increasing the accuracy of the gas settlement process, subject to the right of the domestic customer to object at any time. Where the customer gives explicit consent, or does not object after at least seven days have elapsed from the date on which the Notice was given to it, the gas supplier shall comply with Article 3.4 of the Order.

28. The obligation to obtain and submit Valid Meter Readings for every day will not however apply in relation to domestic customers or microbusinesses where, despite the reasonable steps taken by the gas supplier (as per paragraph 27 above) neither of the requirements set out in paragraphs 5 or 6 (paragraphs 17A or 17B in relation to microbusiness) of Condition 41 of the Gas Supply Licence are met. In such circumstances, the supplier will comply with the Order by submitting every month a Valid Meter Reading relating to a period of one month (ie the gas consumed in a month since the previous Valid Meter Reading).
29. For the avoidance of doubt, Valid Meter Readings are to be submitted to gas transporters following the rules set out in the UNC.

Part 3 (and Schedules 1 to 3) – Amendments to certain licence conditions

30. Pursuant to section 26 of the Gas Act 1986, where the CMA makes an order, the order may also provide for the modification of the conditions of any of the standard licence conditions mentioned in sections 7 and 7A of the Gas Act 1986, to such extent as may appear to the CMA to be requisite or expedient for the purpose of giving effect to, or taking account of, any provision made by the order.
31. Article 5.1 provides for the modification of Standard Condition 21B of the Gas Supply Licence, pursuant to the terms set out in Schedule 1. These terms substantially reflect the obligations imposed on gas suppliers by Articles 3 and 4 of the Order. Implementation of these provisions will occur in parallel with the correspondent provisions of the Order, as per paragraph 20 above.
32. In addition, Articles 5.2 and 5.3 provide for certain amendments to Standard Condition 11 of the Gas Shipper Licence, Standard Condition 5 and Standard Special Condition A50 of the Gas Transporter Licence. This is to ensure that, when a gas supplier has submitted to a gas transporter (or gas shipper⁶) Valid

⁶ This is because certain suppliers, in practice, rely on a gas shipper for submitting Valid Meter Readings to gas transporters.

Meter Readings in compliance with the Order and Gas Supply Licence, this information is effectively passed on to the Gas Transporters Agent, Xoserve, for settlement purposes.

33. As a result of the inclusion of these obligations in the Licence Conditions, we expect GEMA to monitor and ensure compliance with these obligations. In particular, we expect the UNC to be modified in line with the requirements set out in the Order and associated Licence Conditions, and subsequently to be monitored and enforced through the Performance Assurance Framework developed by the UNC Parties in collaboration with GEMA. Where appropriate, GEMA may also decide to use its powers set out in sections 28 to 30F GA86.

Part 4 – Monitoring, compliance, and termination

34. As noted above in paragraphs 13 to 15, the CMA has a general duty under section 162 of the Act to keep under review the carrying out of any order. We also noted GEMA's monitoring role in paragraph 33 above.
35. In order to assist the CMA in carrying out its monitoring duty, Article 6 provides that the CMA may give directions as to compliance with the Order.
36. Article 7 provides for any person to whom this Order applies to provide information required by the CMA to allow it to monitor and review compliance with and operation of the Order. GEMA has a general power, under each licence, to obtain from licensees information that it considers may be necessary to enable it to perform any functions given or transferred to it by or under any legislation.
37. For the purpose of facilitating the exercise of its duty under section 162 of the Act, and the exercise by GEMA of an equivalent general duty in relation to Gas Supply Licence, Gas Transporter Licence and Gas Shipper Licence (respectively), and subject to Part 9 of the Act, the CMA will generally disclose to GEMA information obtained by it under Article 6 (subject to the restriction on further disclosure set out in section 241(2) of the Act). Subject similarly to Part 9 of the Act, relevant sector-specific legislative provisions and any other provisions relating to the disclosure, handling and use of information, the CMA expects GEMA to provide any information it obtains under its general powers to bring any instances of non-compliance to the CMA's attention.
38. This Order shall cease to have effect if the CMA confirms by way of a direction that an implemented modification proposal to the UNC satisfies the aim of the remedy identified in paragraph 20.27(c) of its Final report. Such modification proposal should therefore reflect the requirements set out in the Order.