

ENERGY MARKET INVESTIGATION

DRAFT UNDERTAKINGS – CONSULTATION

The Energy Market Investigation (Gas Tariff Codes) Undertakings 2016

Background

1. On 26 June 2014, the Gas and Electricity Markets Authority (GEMA), in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (the Act) (as provided for by section 36A of the Gas Act 1986 (GA86) and section 43 of the Electricity Act 1989 (EA89)), made an ordinary reference to the Chair of the Competition and Markets Authority (CMA) for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 for an investigation into the supply and acquisition of energy in Great Britain.¹
2. The CMA investigated the matters referred to it pursuant to sections 131 and 133 of the Act and concluded (a) in accordance with section 134(1) of the Act that there are features of the markets for the supply and acquisition of energy in Great Britain which, either alone or in combination, prevent, restrict or distort competition; and (b) in accordance with section 134(2) of the Act, that there are adverse effects on competition (AECs). The CMA published its findings in a report under section 136 of the Act entitled *Energy market investigation: Final report* published on 24 June 2016 (the Report).
3. One of the AECs identified by the CMA was the Prepayment AEC.
4. The features identified by the CMA as giving rise to the Prepayment AEC were the following:
 - (a) Technical constraints that limit the ability of all suppliers, and in particular new entrants, to compete to acquire prepayment customers, and to innovate by offering tariff structures that meet demand from prepayment customers who do not have a smart meter; and

¹ [Energy market investigation terms of reference.](#)

- (b) Softened incentives on all suppliers, and in particular new entrants, to compete to acquire prepayment customers due to: (i) actual and perceived higher costs to engage with, and acquire, prepayment customers compared with other customers; and (ii) a low prospect of successfully completing the switch of indebted customers, who represent about 7 to 10% of prepayment customers.
5. The CMA considered, in accordance with section 134(4) of the Act, (a) whether action should be taken by it for the purpose of remedying, mitigating or preventing the AECs or any detrimental effect on consumers; (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the AECs or any detrimental effect on consumers; and (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented.
6. In the Report, the CMA decided on a package of remedies to remedy, mitigate or prevent the AECs and/or associated detriment that it found. Among other things, the CMA decided to seek undertakings from active relevant gas suppliers including the following three components: (a) a cap on the number of gas tariff pages that each relevant gas supplier can hold at no more than 12; (b) an obligation on the relevant gas suppliers to provide relevant information for GEMA to monitor the allocation of the gas tariff codes; and (c) an undertaking from the relevant gas suppliers to follow a direction from GEMA to transfer of one or more gas tariff pages to another supplier.
7. The CMA also recommended that, absent such undertakings, GEMA should introduce a new licence condition in suppliers' standard licence conditions, to implement this remedy.

On behalf of [insert name of the gas supplier] and any Affiliate Licensees, [insert name of the gas supplier] now gives to the CMA the following undertakings (the Undertakings), which the CMA proposes to accept pursuant to sections 138 and 159(1) and (3) of the Act. These Undertakings may be varied, superseded or released by the CMA in accordance with section 159(4) or (5) of the Act.

Part 1

General and Interpretation

1. Commencement

- 1.1 In accordance with section 159(3) of the Act, these Undertakings shall come into force when they are accepted by the CMA, except Articles 3 and 4 which shall come into force on 1 April 2017.

2. Interpretation

- 2.1 The following provisions shall apply in the interpretation of these Undertakings.
- 2.2 These Undertakings give effect to the conclusions of the CMA stated in paragraph 20.25(b) of the Report and shall be construed consistently with, and to give effect to, those conclusions.
- 2.3 Words and expressions defined in the recitals to these Undertakings shall have the same meaning in the Undertakings.
- 2.4 The word 'including' shall mean including without limitation or prejudice to the generality of any description, definition, term or phrase preceding that word, and the word 'include' and its derivatives shall be construed accordingly.
- 2.5 The headings used in these Undertakings are for convenience and shall have no legal effect.
- 2.6 Unless the context otherwise requires, expressions in the singular include the plural (and vice versa) and references to persons include references to bodies of persons, whether corporate or incorporate.
- 2.7 References to any statute or statutory provision shall be construed as references to that statute or statutory provision as amended, re-enacted or modified whether by statute or otherwise.
- 2.8 References to paragraphs or subparagraphs are references to paragraphs or subparagraphs of these Undertakings.
- 2.9 The Interpretation Act 1978 applies to these Undertakings except where words and expressions are expressly defined.

2.10 In these Undertakings:

Act means the Enterprise Act 2002.

Affiliate Licensee has the meaning given to it in the Gas Supply Licence.

CMA means the Competition and Markets Authority.

Development Fee means any payment made to the Prepayment Meter Infrastructure Provider by a Retail Gas Supplier upon gaining access to a Tariff Page which, under contractual agreements with the Prepayment Meter Infrastructure Provider in force at the time of these Undertakings, the

	Retail Gas Supplier is entitled to recover when relinquishing a Tariff Page.
Domestic Customer	has the meaning given to it in the Gas Supply Licence.
Gas Supply Licence	means a gas supply licence granted or treated as granted under section 7A(1) of the Gas Act 1986.
GEMA	means the Gas and Electricity Markets Authority established under section 1 of the Utilities Act 2000.
New Entrant	means a Retail Gas Supplier who does not hold any Tariff Pages and has notified the Prepayment Meter Infrastructure Provider that it needs to acquire one Tariff Page in order to supply gas to one or more Domestic Customers via a Prepayment Gas Meter.
Prepayment Gas Meter	means any gas meter operating in a mode which requires a customer to pay charges in advance.
Prepayment Meter Infrastructure	has the meaning given to it in the SPAA.
Prepayment Meter Infrastructure Provider	has the meaning given to it in the SPAA.
Prepayment Gas Tariff	means a Tariff in respect of any domestic supply contract or deemed contract with a Domestic Customer that is supplied gas via a Prepayment Gas Meter, and which includes a requirement to pay charges through a Prepayment Gas Meter, regardless of whether such contract continues to be capable of being entered into by Domestic Customers.
Retail Gas Supplier	means any person authorised to supply by virtue of a Gas Supply Licence.
SPAA	means the Supply Point Administration Agreement, as defined in the Gas Supply Licence.
Tariff	has the meaning given to it in the Gas Supply Licence.
Tariff Code	has the meaning given to it in the SPAA.

Tariff Page	means 11 Tariff Codes grouped together for the purpose of allocation to a single Retail Gas Supplier.
Unallocated Tariff Page	means a Tariff Page that has not been allocated by the Prepayment Meter Infrastructure Provider to any Retail Gas Supplier.
Unused Tariff Code	means a Tariff Code that has not been used over the previous 30 days by a Retail Gas Supplier for the purpose of any Prepayment Gas Tariff.
Unused Tariff Page	means a Tariff Page that is allocated to a Retail Gas Supplier but which has not been used over the previous 30 days by the Retail Gas Supplier for the purpose of any Prepayment Gas Tariff, including in the circumstances set out in Article 5.

2.11 In these Undertakings any reference to:

- (a) '**day**' means calendar days;
- (b) a '**person**' includes any individual, firm, partnership, body corporate or association;
- (c) '**written**' or '**in writing**' includes the transmission of information or the conclusion of a process made on, by, or through the internet or by a postal service; and
- (d) a government department or non-departmental public body or organisation or person or place or thing includes a reference to its successor in title.

Part 2

Undertakings to relinquish Tariff Pages

3. Restriction on the number of Tariff Pages held at any one time

3.1 Subject to Article 3.2, [insert name of the gas supplier] undertakes to ensure that no more than 12 Tariff Pages are allocated to it at any one time.

3.2 [insert name of the gas supplier] will however be permitted to use up to 14 Tariff Pages, provided that:

- (a) none of the Tariff Pages allocated to it are Unused Tariff Pages; and

- (b) the Prepayment Infrastructure Provider has confirmed in writing that the total number of Unallocated Tariff Pages is equal to ten or more.
- 3.3 Subject to Article 5, [insert name of the gas supplier] undertakes to relinquish, pursuant to Article 5.2, any Tariff Page that it holds in excess of 12:
 - (a) no later than 30 days after such Tariff Page becomes an Unused Tariff Page; or
 - (b) no later than 150 days following receipt of a notification from the Prepayment Meter Infrastructure Provider that the total number of Unallocated Tariff Pages is fewer than ten.
- 3.4 For the purpose of ensuring compliance with Articles 3.2 and 3.3, [insert name of the gas supplier] shall request the Prepayment Meter Infrastructure Provider to notify it as soon as the total number of Unallocated Tariff Pages becomes fewer than ten.

4. Obligation to comply with directions to relinquish Tariff Pages

- 4.1 [insert name of the gas supplier] undertakes to comply with any direction to relinquish a Tariff Page that is given by GEMA in the following circumstances:
 - (a) when the total number of Unallocated Tariff Pages is fewer than five and [insert name of the gas supplier] holds one or more Unused Tariff Pages; and
 - (b) when there are no Unallocated Tariff Pages and a New Entrant has informed the Prepayment Meter Infrastructure Provider that it needs to acquire one Tariff Page in order to supply gas to one or more Domestic Customers via a Prepayment Gas Meter.
- 4.2 Subject to Article 5, [insert name of the gas supplier] undertakes to relinquish a Tariff Page, pursuant to Article 6:
 - (a) no later than 30 days after receiving a direction from GEMA in the circumstances set out in Article 4.1(a);
 - (b) no later than 150 days after receiving a direction from GEMA in the circumstances set out in 4.1(b).

5. Allocation of Tariff Codes across Tariff Pages

- 5.1 For the purposes of Articles 3.2 and 4.1 [insert name of the gas supplier] will be deemed to hold one Unused Tariff Page for each combination of 11 Unused Tariff Codes it holds across different Tariff Pages.

5.2 If an obligation to relinquish a Tariff Page arises as a result of the application of Article 5.1, a further 90 days will be added to the relevant time period for compliance set out in Articles 3.3(a) or 4.2(a), as applicable.

6. Process for relinquishing Tariff Pages

6.1 For the purpose of relinquishing a Tariff Page pursuant to Articles 3 or 4, [insert name of the gas supplier] shall notify the Prepayment Meter Infrastructure Provider as soon as practicable of its intention to relinquish a Tariff Page within a timeframe that is compliant with Articles 3 or 4, as applicable.

6.2 In the circumstances set out in Article 5.1, [insert name of the gas supplier] shall give appropriate instructions to the Prepayment Meter Infrastructure Provider so as to ensure that the Tariff Page to be relinquished only contains Unused Tariff Codes.

6.3 [insert name of the gas supplier] is entitled to the refund of the Development Fee associated with any Tariff Page it relinquishes pursuant to these Undertakings.

Part 3

Monitoring, compliance, termination and miscellaneous

7. Monitoring and compliance

7.1 [insert name of the gas supplier] undertakes to provide as soon as practicable any information and documents that the CMA or GEMA may from time to time require for the purposes of monitoring the allocation of Tariff Pages and compliance with the Undertakings.

7.2 [insert name of the gas supplier] undertakes to comply with such reasonable written directions as the CMA or GEMA may from time to time give to take such steps within their reasonable competence as may be required for the purpose of carrying out or securing compliance with these Undertakings.

8. Termination

8.1 Subject to Articles 8.2 and 8.3, [insert name of the gas supplier] recognises and acknowledges that these Undertakings shall be in force until such time as they are varied, superseded or released under section 159(4) or (5) of the Act.

- 8.2 [insert name of the gas supplier] shall be released from the undertakings given in Article 4.1 if 50 or more new Tariff Pages become available on the Prepayment Meter Infrastructure following the entry into force of these Undertakings 2016.
- 8.3 [insert name of the gas supplier] shall be released from these Undertakings if the CMA, after consultation with GEMA, confirms by way of a direction that:
- (a) an implemented modification proposal achieves the aim of the provisions set out in these Undertakings; or
 - (b) the requirement set out in Condition 33.1 of the Gas Supply Licence has been satisfied.
- 8.4 [insert name of the gas supplier] recognises and acknowledges that the variation, supersession or release of these Undertakings shall not affect the validity and enforceability of any rights or obligations that arose prior to such variation, supersession or release.

9. Effect of invalidity

- 9.1 [insert name of the gas supplier] undertakes that, should any provision of these Undertakings be contrary to law or invalid for any reason, it shall continue to observe the remaining provisions.

10. Governing Law

- 10.1 [insert name of the gas supplier] recognises and acknowledges that these Undertakings shall be governed and construed in all respects in accordance with English law.
- 10.2 In the event that a dispute arises concerning these Undertakings, [insert name of the gas supplier] undertakes to submit that dispute to the courts of England and Wales.

FOR AND ON BEHALF OF [insert name of the gas supplier]

(to be signed by two authorised signatories)