



16 September 2014

Dear Stakeholder,

**RE: Call for Comments regarding the proposed Amendments to the Ownership  
Unbundling Provisions of the Electricity Act 1989 and Gas Act 1986**

The Government wrote to the Authority<sup>1</sup> on [17 July 2014](#) regarding its intentions to consult on amending the current GB ownership unbundling provisions.

The Electricity and Gas (Internal Markets) Regulations 2011 amended the Electricity Act 1989 (EA89) and Gas Act 1986 (GA86) in order to transpose the requirements of the EU Third Package<sup>2</sup> into GB law (there was a separate transposition for Northern Ireland).

The transposition included the introduction of new rules for ownership unbundling for electricity and gas Transmission System Operators (TSOs). A TSO carries out the function of transmission and is responsible for operating, maintaining and developing the high voltage electricity or high pressure gas systems in a given area, or the transmission infrastructure assets which connect the national transmission systems of Member States. Those undertakings classified as TSOs include the owners or operators of:

- the main onshore gas and electricity transmission systems;
- offshore electricity transmission lines (connecting offshore wind farms to the onshore transmission network) and
- gas and electricity interconnector assets connecting GB with neighbouring markets.

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<sup>1</sup> The Gas and Electricity Markets Authority (the 'Authority'). In this document, the terms "Authority", and "Ofgem" are used interchangeably and are also taken to refer to the Northern Ireland Utility Regulator

<sup>2</sup> The term "Third Package" refers to a package of EU legislation on European electricity and gas markets. It entered into force on 3 September 2009. The purpose of the Third Package is to help the EU achieve more secure, competitive and sustainable energy. DECC was primarily responsible for its transposition in Great Britain. The Gas and Electricity Markets Authority has been designated as the National Regulatory Authority of Great Britain, with responsibility for administering the certification process in Great Britain.

We are concerned that the transposition of the ownership unbundling requirements of the Third Package might be unduly constraining investment because Ofgem may not be able to certify certain cases that, in the Authority's opinion, do not present a risk of discriminatory treatment. The Commission has published a working document<sup>3</sup> that sets out its own approach to certification. In this guidance the Commission indicates that it will certify some transmission businesses even if the test in the Directives is not met, if the Commission considers that no conflict of interest arises.

We therefore propose to amend the ownership unbundling provisions of the Electricity Act 1989 and Gas Act 1986 to introduce further flexibility to Ofgem's consideration of certification cases that do not present a risk of discrimination, in the form of a new discretionary power to certify a TSO where one or more of the five ownership unbundling tests is not passed. Ofgem will decide on a case by case basis whether, in its opinion, the relationship between the TSO or its controller and a producer or supplier may give rise to an ability and incentive for discriminatory behaviour. It will be for an applicant, or a certified party, to expressly request Ofgem to consider exercising the proposed discretion and present supporting justifications.

The overall intended effect is to encourage investment in the UK energy markets whilst retaining the overall aims of the EU Directives' ownership unbundling requirements.

### **Regulations 2(2) and 3(2) & (3) - Giving Ofgem More Discretion**

We think the best way to deliver a more proportionate approach to GB TSO certification is to allow Ofgem more discretion in reaching its certification decisions.

We are proposing to do this by:

- Maintaining the five core ownership unbundling tests<sup>4</sup> set out in the GB legislation; but
- Subject to the Authority's statutory duties, where any of the five tests is not met, the applicant must demonstrate to Ofgem's satisfaction that there is no risk of discrimination arising from the ownership arrangements. If satisfied, Ofgem will have the power to decide that the TSO should be certified as meeting the ownership unbundling requirements.

In regulation 3(3), we have proposed a situation in respect of which the proposed regulations will explicitly prohibit Ofgem from exercising its discretion to certify where one or more of the five ownership unbundling tests set out in GB legislation are not met. DECC believes that there is merit in being explicit given that we consider that there would always and necessarily be an unacceptable risk of discrimination in such a situation, i.e. if an electricity TSO were not ownership unbundled from a generator to which it is directly physically connected. However, for the avoidance of doubt, the Authority would retain the power to conclude that a risk of discrimination arises in other scenarios which are not covered by this prohibition.

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<sup>3</sup>[http://ec.europa.eu/energy/gas\\_electricity/interpretative\\_notes/doc/implementation\\_notes/swd\\_2013\\_0177\\_en.pdf](http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/swd_2013_0177_en.pdf)

<sup>4</sup> for test 1, the relevant relationship is that between the applicant TSO and a producer or supplier of gas or electricity. The relevant relationship for test 2 is that between a person who may appoint a senior officer of the applicant TSO and a producer/supplier. For test 3 the relevant relationship is that between a senior officer of the applicant TSO and a producer/supplier. The relevant relationship in test 4 and 5 is that between the controller(s) of the applicant TSO and a producer/supplier.

Ultimately the proposed discretion and decision making is with the Authority (designated as the NRA of GB), acting in accordance with the relevant legal framework, and not DECC. In broad terms, a TSO's ability to discriminate in favour of a producer or supplier may depend on the:

- Types of TSO and producer/supplier involved.
- TSO's ability to control access to networks and to influence the commercial terms of connection.
- TSO's access to commercially sensitive network information.
- TSO's responsibility for system planning and development for the network activity.
- TSO's ability to influence the regulatory framework, e.g. the relevant industry codes and modification process.
- Governance arrangements in place to separate business activities, including the flow of commercially sensitive information.
- Geographic separation between the TSO and the producer/supplier, which may be indicated by the market power of the producer/supplier in a specific region, and/or the degree of interaction between the production/supply output and the transmission route.

In respect of proposed regulations 2(2) (amending s.8H(1) of the GA86) and 3(2) (amending section 10F(1) of the EA89), when examining whether or not it is appropriate to treat unpassed tests as passed, Ofgem will be required to act in accordance with its principal objective, which is to protect existing and future energy consumers, and its general duties.

We anticipate that Ofgem will provide guidance for applicants at an appropriate time. In order to assist them we are asking for views on the criteria to be applied and on the guidance stakeholders consider helpful. Decisions on these issues are entirely for Ofgem.

### **Regulations 2(3) and 3(4) - Certification Monitoring and Review Timescales**

This amends the review timescales to provide that the 4 month deadline for the conduct of reviews of certification runs from when Ofgem receive any information that it requested regarding a case. This will allow Ofgem to have the full 4 months allowed for reviews from the time at which it has all the information that it needs to conduct the review, as is the case for new applications for certification.

### **Regulation 4 - Transitional Matters**

This provides that these regulations only apply to applications received on or after the coming into force date. Ofgem will not be required to review previous certifications, unless requested to do so by the certified person. Otherwise, all TSOs currently certified by Ofgem as ownership unbundled will not be affected by the coming into force of the amended regulations.

### **Regulation 5 - Review**

This amends the review provision in the Electricity and Gas (Internal markets) Regulations 2011 so as to provide that these regulations are reviewed at the same time as the 2011 Regulations.

## **Northern Ireland arrangements**

As noted above, the unbundling requirements of the Electricity and Gas Directives were transposed separately in Northern Ireland. Transposition was effected via changes made by the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011 to the Electricity (Northern Ireland) Order 1992 and the Gas (Northern Ireland) Order 1996. The Northern Ireland legislative framework in relation to TSO ownership unbundling mirrors closely the arrangements in GB. There may be merit in maintaining this consistency in approach across the UK by making changes to the Northern Ireland legislation to give the Utility Regulator for Northern Ireland the same flexibility in the certification process as that proposed for Ofgem. Stakeholders are invited to comment on the implications for Northern Ireland of the proposed changes and the merits of maintaining consistency by making similar changes to the Northern Ireland legislation. Decisions on the way ahead for Northern Ireland will be taken by the devolved administration.

## **Stakeholder views requested**

We welcome comments on our overall approach as well as comments on the draft regulations published alongside this call for comments and where possible it would be helpful to receive responses supported by evidence (quantitative, qualitative, worked examples etc). Any wider points stakeholders wish to make are also welcome. More detail is in the attached **Annex**.

**We would be grateful to receive your responses on or before the 14<sup>th</sup> October 2014, although early responses would be welcome. Electronic responses should be sent to: [Pauline.spetsioti@decc.gsi.gov.uk](mailto:Pauline.spetsioti@decc.gsi.gov.uk)**

## **Sharing and Publishing responses**

Information provided in response to this Call for Comment, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). DECC will be sharing the responses with Ofgem, the NI Department of Enterprise, Trade and Investment and the NI Utility Regulator.

If you wish for the information you provide to be treated confidentially, please indicate this in your written response to the Call for Comment and include your reasons for the request and state whether your request extends to sharing information with Ofgem. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.

We do not expect to publish a summary of responses to this informal consultation but may do so if it is deemed appropriate. In that event, the summary would be published on our website and would include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

However, please note that when the new regulations come into force they will be accompanied by an impact assessment and an explanatory note which will summarise the stakeholder responses to this call for comments.

Yours faithfully,

Pauline Spetsioti  
Senior Policy Advisor  
Energy Markets and Consumers Division

## **Annex - Consultation Questions**

### **a) Regulations 2(2) and 3(2) & (3)-Giving Ofgem Discretion**

Do you agree that Ofgem should be given discretion to consider whether there is a risk of discrimination in situations where the TSO does not meet one or more of the 5 ownership unbundling tests? If not, why not?

Do you agree with the explicit prohibition on the certification of an electricity TSO if that TSO is not ownership unbundled from an electricity generator to which it has a direct physical connection?

Do you agree with the above factors that Ofgem may need to consider in assessing whether or not the relationship between a TSO and a producer/supplier might lead the TSO to discriminate in favour of the producer/supplier? What additional factors and/or assessment techniques/metrics do you think should be considered as part of Ofgem's assessment and why?

What guidance do you need from Ofgem?

### **b) Regulation 4-Transitional arrangement**

Do you agree that the existing legislation should continue to be applied to applications received before the amended legislation has come into force, if not why?

### **c) Regulations Impacts**

Do you have any views on the potential impacts on investment in transmission, generation or supply assets as a result of giving Ofgem discretion to consider whether there is a risk of discrimination in situations where the TSO does not meet one or more of the 5 ownership unbundling tests?

Do you think the proposed amendments would have any impacts on the level of competition in the markets for transmission, production or supply?

Do you think the proposed amendments would result in any other costs or benefits?