DEPARTMENT OF ENERGY & CLIMATE CHANGE

DECC – Department of Energy and Climate Change

Implementation of the EU Third Internal Energy Package

Government Response

The Electricity Directive: 2009/72/EC
The Gas Directive: 2009/73/EC
The Electricity Regulation: (EC) No 714/2009
The Gas Regulation: (EC) No 715/2009
The ACER Regulation: (EC) No 713/2009

URN: 10D/953

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Executive summary

Following a Call for Evidence published last April, the Government issued its main consultation on the implementation of the Third Package in July, where it sought consultees' views on proposals to implement the key new requirements of the EU legislation. The Government subsequently issued two further detailed consultations, providing analysis and seeking views on policy proposals covering:

- a new process for Ofgem to make changes to licences and a new appeals process; and
- proposals for requiring private licence exempt distribution networks to provide third party access to allow customers to switch suppliers.

The main consultation closed on 19 October. The Government received 44 responses from a range of stakeholders including energy suppliers, consumer groups, trade bodies and other organisations with an interest in the energy market (see breakdown in Annex). In addition there were 18 responses to the proposals for a new decision making and appeals process for Ofgem's decisions and 28 responses to the proposals relating to private distribution networks.

Respondents raised a wide range of issues in the three consultations, in particular:

- the capability of the current IT systems to switch energy customers within 3 weeks from the time they express a wish to switch to a new supplier.
- the regulatory uncertainty that Ofgem's new decision-making process and subsequent appeals process would cause to the industry.
- the burdens on small distribution networks granting access to a third party.

There were also a number of views setting out which unbundling models offered in the Third Package were appropriate to the UK market and on the most appropriate way to regulate the gas storage and LNG sectors.

This Government Response sets out the Government's conclusions on the proposals included in the consultation documents, focusing in particular on areas where the Government received the most responses.

Introduction

1. The Third Package comprises two Directives and three Regulations:

   - Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (the “Electricity Directive”);

   - Directive 2009/73/EC concerning common rules for the internal market in gas and repealing Directive 2003/55/EC (the “Gas Directive”);

   - Regulation (EC) No 714/2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (the “Electricity Regulation”);

   - Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 (the “Gas Regulation”); and

   - Regulation (EC) No 713/2009 establishing an Agency for the Co-operation of Energy Regulators (the “ACER Regulation”) (see list of Appendices).

2. The Third Package was published in the Official Journal of the European Union on 14 August 2009 and came into force on 3 September 2009. The requirements of the Directives must be transposed into domestic legislation by 3 March 2011. Undertakings affected by the transmission network unbundling requirements of the Third Package (see Chapter 3) will have an extra year after the requirements have been transposed into law, to comply, and therefore will have until 3 March 2012. The three Regulations are directly applicable and therefore do not need to be transposed in the same way. We will, however, need to ensure that our national market framework is consistent with their application and transpose any specific requirements of the Regulations as necessary.

3. The consultation document and Call for Evidence have highlighted areas where the Government needs to take further action to comply with the new requirements. We are planning to implement the new obligations primarily through regulations under section 2(2) of the European Communities Act 1972 and changes to licences.

4. The responses to all the consultations have been analysed and have been taken into account in the Government Response. Some of the comments and observations made have been quoted in this document as representative of the thoughts and views expressed in responses to the consultation. This paper seeks to reflect the views expressed, although it is not possible to describe all the responses in detail.

5. You may make copies of this document without seeking permission. Further printed copies of the consultation document can be requested by e-mailing third.package@decc.gsi.gov.uk. Other versions of the document in Braille, other languages or audiocassette are available on request.

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SUMMARY AND EVALUATION OF RESPONSES

1. Consumer Protection

1.1 **We asked the following questions in relation to consumer protection:**

- In respect of the requirement to switch customers within three weeks, subject to contractual terms, we propose to put in place a new Licence Condition requiring the new supplier to give new customers a 14 calendar day period after the contract has been entered into, to consider whether they wish to proceed with this. Unless the customer notifies the supplier they do not wish to proceed, the Licence Condition will require the new supplier to give customers the right to change their mind within 14 calendar days and then be switched within three weeks, subject to outstanding debt (and, in the case of non-domestic customers, contractual conditions). Do consultees agree with this proposal?

- General comments on Government proposals to implement the consumer protection measures of the Third Package.

- Do consultees consider that the requirement on supply undertakings which are not registered in Great Britain, to provide a GB address for the service of the documents, poses any difficulty for these suppliers? Evidence of costs to these suppliers would be particularly welcome.

Switching energy suppliers

1.2 This question elicited a number of strong representations from the industry in relation to the industry's ability to meet the required timescales for switching.

1.3 Companies who provide IT support to the energy suppliers confirmed that the arrangements in the Balancing and Settlement Code (BSC) allowed electricity suppliers to effect the necessary changes within three weeks. A number of suppliers and system administrators noted however that the current arrangements in relation to gas were more complicated and could not accommodate the required timescales especially if Bank Holidays were not recognised as non-working days. A number of respondents asked Government to clarify the starting point for the three weeks and whether Bank Holidays were excluded.

1.4 The Government recognises that the current systems cannot accommodate the new timescales in all cases. Consequently suppliers will need to make adjustments to their systems to ensure that as many customers as possible are able to switch within three weeks (after the end of any cooling-off period for domestic consumers). In doing so, we would expect the suppliers to work proactively with other suppliers and market participants and their customers to prevent data discrepancies which, apart from

outstanding payments, are the main cause of delays when a customer tries to switch suppliers.

1.5 Ofgem will be leading work with the suppliers in the next few months to put together a programme of proportionate changes with a view to increasing the number of customers who are switched within three weeks. Customers who have an outstanding debt will be switched within three weeks after their debt has been resolved. In addition, the Government recognises that if there is some failure on the customer's part, it may not be possible to switch the customer within three weeks (see more detail in Final Decisions section below).

Domestic consumers

1.6 The Government is not proposing to introduce new cooling-off rights. Our proposals are designed to recognise existing cooling-off rights and we will impose the three week switching requirement from the point any such rights expire (at this point customers are committed to switching supplier). The duration of the cooling-off periods currently offered to domestic customers varies between different suppliers and as a result of different sales processes. The Government considers that cooling-off periods should not be able to be used to delay switching, and that a period of 14 calendar days is sufficient to allow for these cooling-off periods. The obligation on suppliers to switch customers within 3 weeks will therefore start the day after the end of any cooling-off period that applies to the contract, provided that this cooling-off period does not exceed 14 calendar days.

Non-domestic consumers

1.7 In relation to business contracts, a number of stakeholders who have business customers commented that cooling-off periods did not fit with the structure and nature of these contracts. The Government agrees with these arguments and appreciates that business contracts are structured and operate differently to domestic contracts. Some suppliers do currently offer a cooling-off period to certain business customers on the same basis offered to domestic customers. The Government's proposals do not prevent this. Where a cooling-off period is agreed as part of these contracts, customers should be switched within 3 weeks of the end of any cooling-off period, provided that this cooling-off period does not exceed 14 calendar days.

Consumer enforcement right

1.8 Energy suppliers raised concerns over the Government's proposal to enable customers to take legal action against their supplier if switching takes beyond three weeks.

1.9 The Government understands the concerns raised by the stakeholders but remains of the view that the Directives require that customers have a new specific right which can be enforceable directly by the customers. Although the Consumers, Estate Agents and Redress Act 2007 (CEAR) is an appropriate enforcement route for other consumer rights, we consider that this is such an important right that customers should be able to enforce the right in the Courts - the process described in the CEAR is not a formal legal process. The Government understands, however, that on a

number of occasions a transfer may not be possible because of some failure on the customer's part. The Government considers that the Terms and Conditions of the contract should recognise that the supplier is not obliged to switch the customer while certain issues are being resolved (see section on Final Decisions).

1.10 **The Government's final proposal in relation to the obligation on suppliers to switch customers is:**

- **a licence requirement to include a 3 week switching right in the contract with the customer. The right will stipulate that customers should be switched within 3 weeks unless there is a failure on their part, for example the customer failed to provide the supplier with the necessary data to complete the transfer or the customer has an outstanding debt.**

- **a licence requirement on all suppliers to take reasonable steps to improve their systems and processes so as to increase the speed at which customers switch.**

- **an obligation on the incumbent supplier and gas transporter to co-operate with the new supplier to enable the transfer.**

- **the "3 weeks" is to be treated as 21 days, inclusive of bank holidays.**

When does the obligation to switch customers within 3 weeks start?

1.11 As discussed above, for both domestic and non-domestic customers, the obligation to switch customers within 3 weeks starts when the customer has entered into the contract, unless a cooling-off period applies. We consider that a customer has entered into a contract for these purposes when they inform the supplier that they wish to switch to that supplier by agreeing to the main terms of the contract including by telephone, through a switching website, or by signing a contract during a visit by a representative of the supplier.

1.12 Ofgem will lead a programme of work to provide the industry with guidance on the steps needed to improve their systems and processes so that more customers are able to switch within the new timescales. The Government will provide Ofgem with the relevant information gathering powers to ensure that it is able to collect the relevant information from suppliers on improvements and overall performance through amendments to supply and distribution licences.

Consumption data (domestic customer only)

1.13 The energy suppliers made a number of comments on how to implement the requirement in paragraph (h) in Annex I[1], to give customers a right to contact their supplier to request them to pass on their consumption[2] data to another supplier. Suppliers suggested that this requirement could be met by suppliers passing on a

[2] By "consumption data" we mean any information reasonably required by a new supplier in order to make an offer of supply.

customer's annual statement to another supplier or that it should be the customer who should pass on that data to a new supplier.

1.14 The Government has noted the suppliers' concerns especially in relation to data protection and it considers that it is for the suppliers to find the most appropriate arrangement to meet this requirement. For example, this could be through sharing details of the annual statement, or through other means such as a third party transferring the relevant data between suppliers, although the supplier could not require customers to give the new supplier this information themselves. Customers must not be charged for this service. This requirement will also be set in a new licence condition.

Energy Consumer Checklist (domestic customers only)

1.15 Some suppliers raised concerns about the consumer checklist and whether it is proportionate to require it to be sent alongside existing consumer information requirements. The Government recognises that it would be impractical for suppliers to send the full checklist to their customers.

1.16 **The Government therefore believes that a more proportionate way of meeting this requirement is to require suppliers to only send a concise version of the fuller checklist on an annual basis. Consumer Focus[3] will be taking the role of compiling the concise and the full checklists. Suppliers will be required to have available on their websites updated copies of both lists. Exempt suppliers (small suppliers without a licence), will be required to signpost their customers to the Consumer Focus website and make available a hard copy of the concise list on request.**

Other consumer protection related issues

1.17 In relation to other measures in the Third Package, the Government would like to clarify that:

- the measures described in Annex 1 apply to domestic customers only.
- there are two separate requirements to inform customers of the dispute settlement rights. One which applies only to domestic customers and is set out in Annex 1 and one which applies to both domestic and business customers and is set out in article 3(9) (c) in the Electricity Directive (but not the Gas Directive).
- the Government was asked how "promotional materials" is to be defined. The Government continues to use the definition in Condition 21 of the Supply Licence, where "promotional materials" is defined as "documents, other than newspapers and magazines, that are handed out or sent directly to consumers and are intended to promote the sale of electricity".

[3] The Government intends to consult on the future of consumer bodies. Should this consultation result in any changes to the role or status of Consumer Focus, we would expect this work to be carried out by any successor body.

1.18 The Government will also be introducing new obligations on suppliers to:

- **provide updated bills or statements when customers give them their own meter readings (domestic and non-domestic customers)[4];**
- **retain for at least five years and make available to Ofgem (in fulfilment of its tasks) data on all transactions in gas or electricity supply contracts and gas derivatives with wholesale customers, transmission system operators and LNG and Gas Storage Operators or any person who sells electricity/gas to the licensee;**
- **provide customers with a final bill 6 weeks after they have switched suppliers (domestic customers only); and**
- **ensure all relevant information is included in contracts with customers (domestic only).**

1.19 For information about obligations on unlicensed energy suppliers, please see Chapter 5 about "Exempt undertakings".

Vulnerable customers

1.20 The Energy Action Scotland (EAS) and the National Energy Action (NEA), queried whether the different initiatives GB has in place to increase energy efficiency and support vulnerable customers meet the requirement to formulate national energy plans. The Government's view is that the Directives do not require Member States to adopt a single plan but rather "plans" and "initiatives". The initiatives across GB to support energy efficiency and support vulnerable customers who are fuel poor are consistent with the requirements for plans at national level and respect the devolution settlements. The Government does, and will continue to, maintain contact across the devolved nations in respect of the support that is available for vulnerable customers.

Requirement on non-UK based suppliers to have a UK address

1.21 In response to our question regarding the requirement on suppliers who are not registered in GB to provide a GB address for the service of documents, the few respondents who expressed a view, considered that this was not a burden and did not pose any barrier on these companies.

[4] This paragraph implements the requirement on the availability of consumption data described in article 3(5) (b) of the Electricity Directive and 3(6) (b) of the Gas Directive.

2. The role of the National Regulatory Authority (NRA)

2.1 In our consultation document we set out that Ofgem's current arrangements were in many places compliant with the requirements of the Directives (especially in relation to independence, impartiality, transparency and budgetary autonomy) but that there were a few areas where more action was needed to become fully compliant.

2.2 We therefore proposed to place formal requirements on Ofgem's staff and Board Members to be impartial; amend the formal arrangements for appointments to the Board, including the length of tenure and renewal of terms; place a formal duty on Ofgem to co-operate with other NRAs on cross-border issues; and ensure that Ofgem is able to implement decisions in a timely manner (on this particular issue please see section on "Licence Modification Appeals" below).

2.3 We did not receive any detailed comments on Ofgem's current arrangements, although a number of consultees stressed the importance of Ofgem working with other NRAs on cross-border issues.

Designation of regulatory authorities

2.4 In line with our proposals, **Ofgem will be designated as the National Regulatory Authority for GB and NIAUR for Northern Ireland (although NIAUR will be designated separately by NI). Ofgem will be required to work closely with the NIAUR for the purposes of representing the UK at ACER.**

Independence off NRA staff

2.5 Although Ofgem's staff are subject to the Civil Service Code and Nolan Principles of Public Life there is no explicit rule to require that staff are impartial. **We therefore intend to impose a new duty on Ofgem to ensure that Ofgem's staff and members of the Board cannot carry out any activity nor have any financial or other interests that might compromise their independence. Financial interests could include shares held in energy companies. Other activities or interests could include sitting on the boards of, or providing other services in relation to, energy companies.**

Appointments to the Board

2.6 Members of GEMA's[5] Board will be able to hold office for a term of 5 to 7 years which can be renewed once. The only exception to the 5 year minimum term is when Executive Board members cease to be a member of Ofgem staff before the 5 years are up. In this case, appointees could be required to step down from the Board. The Secretary of State will also be required to ensure a rotation of Board members, so the terms of appointment cannot all start and end at the same time. In addition:

[5] Ofgem is the Office of the Gas and Electricity Markets which supports the Gas and Electricity Markets Authority.

- New members appointed post March 2011 will have appointments initially for 5-7 years (at the Secretary of State's discretion) renewable once by a term of 5-7 years.

- Non-executive members may only be required to stand down if they fail to meet the new independence requirement, they misbehave or the Secretary of State thinks they are incapable.

Duties and powers of the regulatory authority

2.7 Ofgem carries out many of the duties described in Articles 37 of the Electricity Directive and Article 41 of the Gas Directive. However, Ofgem does not currently have explicit duties and information gathering powers in respect of all of the monitoring duties in the Directives. **We therefore intend to place new formal monitoring duties on Ofgem. Ofgem will be given new information gathering powers in respect of these duties.**

2.8 **The new explicit duties placed on Ofgem will be to monitor:**

- the investment plans of the Transmission System Operators and report on them;
- contractual arrangements between suppliers and large non-household customers to ensure they do not restrict competition;
- the speed at which transmission and distribution system operators make connections and repairs;
- the roles and responsibilities of Transmission and Distribution System Operators in the market;
- the levels of generation capacity;
- the technical co-operation between the Community and third country transmission operators;
- the implementation of safeguard measures in the event of a critical incident in the energy market; and
- where an Independent System Operator (ISO) or (in respect of gas interconnectors), an Independent Transmission Operator[6] (ITO) has been appointed, monitor the relevant arrangements.

Other legislative changes

2.9 In line with our proposals, we will also be:

- **amending the dispute resolution procedures in order to extend the scope of complaints that can be made against Transmission and Distribution System Operators, LNG import and gas storage facility owners, ISOs and - where the ITO model is in place - vertically integrated undertakings;**

[6] In relation to the ITO model, we are proposing to make this available for gas interconnectors only. Please see section on unbundling in Chapter 3 "Transmission and Distribution Networks".

- **requiring Ofgem to report annually to the Commission and ACER in respect of its NRA functions;**

- **placing an obligation on Ofgem to consult and co-operate with relevant national authorities and other NRAs to integrate the national markets, manage the networks, promote cross-border trade and cross-border capacity, including interconnection capacity;**

- **placing an obligation on Ofgem to comply with and implement binding decisions of the Commission and ACER. In this context, Ofgem will be able to initiate code modifications that are essential for the implementation of ACER or Commission decisions.**

- **placing obligations on Ofgem to ensure that when acting as the NRA, Ofgem takes into account the objectives set out in article 36 of the Electricity Directive and 40 of the Gas Directive.**

Licence Modification Appeals

2.10 The Government's consultation in July 2010 set out initial proposals to change the arrangements for making changes to energy industry licences. This was followed by a more detailed consultation in October 2010.

2.11 **We asked the following questions in relation to a new licence modification appeals process**:

- Do you agree there should be a full investigative hearing for price controls?
- Does the fundamental nature of price controls require any other adaptations? Please explain what, why and how that is compatible with the Third Package.
- Do you agree that a rehearing approach to appeals for modifications other than price controls strikes the right balance between appropriate economic scrutiny of the regulator's decisions and a timely appeals process that controls potential costs for participants?
- Do you agree with our proposal for an appeal on the merits?
- Would similar grounds to those under the code modification process allow for consideration of legitimate legal, factual and economic issues, without undermining regulator independence?
- Do you see any case for extending the right of appeal of an Ofgem decision to any licensees or other materially affected parties beyond directly affected licensees? Please explain which and why.
- Do you agree the CC is the most appropriate appeal body?
- The Government would welcome views on whether the appeal body should be able to vary Ofgem's decisions, or whether such cases would be better handled by remitting decisions to Ofgem with recommendations. Do you think the Government's suggested timescales of 4 weeks to lodge an appeal, and a period of 4 months for the resolution most appeals will ensure appropriate scrutiny and efficient decision making?
- Do you see any case for ensuring certain appeals are subject to a faster timeline, if so can you provide example
- Do you agree the appeal body should be given the discretion to suspend Ofgem's decisions on application if they could lead to significant and potentially unnecessary expense and/or disclosure of confidential information?

- What will be the costs and benefits of these changes on your organisation?
- How do you recommend potential costs could be reduced? How could we maximise the potential benefits to the regulatory regime as a whole?

2.12 Respondents representing consumers welcomed the proposals, which they argue will have significant benefits for consumers. Most industry respondents stated a preference for the current licence modification process and argued the proposed changes are unnecessary.

2.13 A significant number of respondents commented on the Government's interpretation of the Third Package and suggested that the current licence modification process is compliant with its requirements. Others took the view that the current process is largely compliant and that the proposed appeal process should apply only to the implementation by Ofgem of the Agency for the Cooperation of European Regulators (ACER) and the European Commission's binding decisions through licence modifications.

2.14 The Government does not agree with either of these views. The EU Third Package requires, among other things, that the National Regulatory Authority (NRA) takes autonomous decisions, implements binding decisions of the European Commission and ACER and is able to undertake its regulatory tasks independently and in an efficient and expeditious manner. It also requires that Member States ensure that suitable mechanisms are in place under which a party affected by the decision has a right of appeal.

2.15 **The Government considers that these requirements do mean that the current process for licence modifications needs amendment to enable the regulator to carry out its duties and effectively implement the requirements of the Third Package. The Government remains of the view that the best way to implement these requirements, ensure a coherent and consistent regulatory regime, ensure robust regulation in the consumer interest and appropriate scrutiny of Ofgem's decisions, is to replace the current licence modification process with an ex-post right of appeal.**

2.16 Some respondents proposed that licence modification proposals that do not fall within the scope of the Third Package should remain subject to the current licence modification process, and only those arising from Ofgem's EU obligations should be subject to the proposed appeals process. This would require the creation of a second regime, meaning that two substantially different regimes are in force in tandem – one ex-ante and one ex-post - and assumes that it would be feasible to determine whether the action being taken can be separated into those which arise from EU law and those that arise as a matter of purely domestic arrangements. **The Government has concluded that it would be extremely difficult, if not impossible, in many instances to determine with any certainty which process should be used. This is because the source of the requirement (ie whether the requirement arises**

from EU or domestic obligations) leading to the licence modification depends upon the context in which it is proposed. This risks disputes over which process should be followed in a particular case, inefficient decision-making and regulatory uncertainty.

2.17 Further difficulties would arise in relation to packages of measures which make up a licence modification, where some elements could be considered to arise from EU obligations and others may not. Developing different elements of a single package of measures using two different processes would give rise to a confused, inconsistent and incoherent regulatory process and seems likely to increase cost and effort for licensees, Ofgem and other interested parties. **The Government has therefore decided a single regime would better ensure regulatory certainty and clarity.**

2.18 Several respondents asked why the Government was not implementing a merits-based appeal for other Ofgem decisions such as decisions to fine licensees for licence breaches. **The Government has considered the processes for other Ofgem decisions and concluded they are consistent with the requirements of the Third Package. The Government is introducing a merits-based appeal process for licence modification decisions, as their broader economic impacts merit factual and economic scrutiny.**

The appeal body

2.19 As outlined in the consultation document, **the Government considers that the Competition Commission is best placed to act as the appeal body**. Almost all respondents supported this view and the Competition Commission will hear appeals.

Structure of the appeal

2.20 We received a number of detailed and helpful comments on the design of the appeal process. Respondents generally agreed that given the complexity of the price control decisions and the impact they have on companies' financial position they should be capable of being subject to a longer and more in-depth investigation than decisions relating to other licence modifications. Respondents agreed that for other licence modifications an adjudicative process is more appropriate.

2.21 It is worth noting that in practice both types of appeal will follow a similar process in so far as the appeal body would consider evidence submitted by the appellant, Ofgem, and other relevant parties, and weigh up the arguments and evidence to reach a decision. The appeal body would have the power to require the submission of additional information and clarification of evidence and to hold hearings. The Competition Commission may also commission expert advice to help it interrogate evidence submitted by the appellant and by Ofgem.

2.22 Some respondents asked whether new evidence that was not available at the time the decision was taken, would be admissible. Parties will be permitted to introduce new evidence in so far as the appeal body considers it is relevant to the issue before it.

2.23 A number of respondents asked whether licence holders would be able to appeal individual elements of a price control. The Government acknowledges that where this is feasible it may reduce the cost of appealing. However, as price control decisions are essentially a package of balancing measures, there is the potential that upholding an appeal on a single element could have a knock-on effect on other elements of the package and upset the balance of the price control mechanism as a whole. The appeal body would therefore have discretion to consider additional elements or the whole package of the price control decision if the evidence submitted shows that reviewing individual elements is likely to upset the balance of the whole package.

The grounds for appeal

2.24 Respondents were generally in favour of an appeal on the merits, but some commented that the grounds proposed in the consultation documents were too narrow. Some respondents commented that the proposed grounds are effectively the same as those available in the industry code appeals regime and were the subject of some debate when the appeal process was first used. One respondent pointed out that in the case of E.ON UK Ltd v GEMA on Energy Code Modification UNC116 (CC 02/07), the Competition Commission took the view that the grounds for appeal enabled it to go beyond a narrower judicial review approach and to consider the merits of the case. **It is the Government's intention that the proposed grounds for appeal for licence modification decisions also enable the appeal body to take account of the merits of the case in a similar manner. The Government considers the Competition Commission's approach in relation to code modifications to be helpful in this regard.**

2.25 Some respondents were concerned that the proposed appeals process does not place sufficient incentive on the regulator to consult effectively with licence holders prior to making a decision to modify a licence. Some argued that licensees should also have the right to appeal where the licence modification decision fails to achieve its intended effect as is the case in the code appeals process.

2.26 The Government has therefore decided to include in the regulations a requirement that Ofgem set out in the consultation on the proposed modification its intended effect. Upon publication of its decision Ofgem will be required to set out how it has taken account of representations made during consultation and where it has changed the decision from the original proposals an explanation of the reason for these changes. In addition, not having the effect specified in the consultation will be added to the grounds to appeal.

2.27 The majority of respondents supported the proposed grounds for appeal, though a few commented that the Public Interest Test should be retained. **The Government's view is that the Public Interest Test is incompatible in relation to appeals against licence decisions implementing binding decisions arising from EU obligations and intends to replace it with a requirement to apply the same criteria as the regulator.**

Who should have the right to appeal?

2.28 The Government has considered carefully the arguments submitted in relation to the right to appeal. The majority of respondents that commented on this issue supported extending the right to appeal beyond those directly affected. Generators and supply companies argued that decisions in relation to network licences can have a significant impact on them and supported the proposal that licence holders that are materially affected by a decision should also have a right of appeal. The Government agrees, and in addition considers that as licence decisions can have a material impact on consumers, that a designated consumer body should also have the right of appeal. **The Government proposes that Consumer Focus should have a right of appeal in relation to licence decisions that materially affect consumers.**

2.29 Some respondents expressed concern that the greater the number of classes of people that can mount an appeal, the greater the regulatory uncertainty. **The Government believes that allowing other licence holders and a designated consumer body the right to appeal should encourage more rigorous analysis of the potential impacts of licence modification decisions on all parties and therefore lead to better decision making.**

Outcomes of an appeal

2.30 On the outcomes of an appeal, some respondents thought that if the Competition Commission remitted a matter back to Ofgem for reconsideration and determination or issued directions, then there should be a requirement on Ofgem to report back to the Competition Commission on the steps it plans to take to address the issue under appeal in line with the current licence modification reference process. **The Government understands respondents' concerns, but does not agree that it is appropriate that Ofgem reports back to the Competition Commission before implementing its decision, as this has the potential to lengthen the timescale for implementing the decision and increase regulatory uncertainty. Instead the Government proposes to give the Competition Commission the power to issue binding directions. The Government intends to give the appeal body the power to confirm, quash, remit the matter back to the regulator, and give binding directions for ordinary licence modification decision appeals. However, for price control decision appeals, the Government intends to give the appeal body an additional power to substitute the decision in relation to the matter appealed against.**

2.31 A number of respondents asked about the effect of an appeal that is upheld and which relates to a standard condition in a licence, pointing out that licence holders other than the appellant will be affected by the decision. If an appeal on a standard licence condition is upheld, that decision will have effect in relation to all standard licence conditions to which the decision relates. Ofgem will therefore need to take this into account when complying with the Competition Commission's decision.

2.32 It should be noted that all directly affected licence holders and those that are materially impacted by a decision will be able to make submissions to the appeal body and give evidence in support of either Ofgem or the appellant.

Time limits for the appeals process

2.33 A number of respondents suggested that the proposed timescale of four weeks for parties to appeal a decision may not be long enough and could lead to the need for preparatory work during the consultation period before a decision is announced. The Government has reflected on these concerns. **However, given that parties will be appropriately engaged in the consultation process, that further relevant evidence may be considered on appeal and that the proposed time limit is longer than that for submitting appeals in relation to code modifications, the Government believes that four weeks is an adequate timeframe in which to prepare and submit an appeal.**

2.34 The Government proposes that there should be a time limit for both lodging an appeal and for the maximum time within which an appeal must be heard. We consider four weeks an appropriate time scale for lodging an appeal and a period of four months for the determination of an appeal on an ordinary licence modification decision. We believe this provides an adequate balance between cost and scrutiny of decisions.

2.35 Respondents agreed with the Government that price control decision appeals may warrant greater scrutiny and may need longer to resolve. **The Government therefore intends to introduce a six month time limit for determining price control decision appeals.** The Competition Commission will have the discretion to extend the timescales for determining all appeals by one month.

2.36 **The Government is also giving the Competition Commission powers to dismiss trivial and vexatious appeals and those that stand no reasonable chance of success.**

Suspending decisions on appeal

2.37 A number of respondents proposed that all licence modification decisions should be automatically suspended pending appeal. **The Government agrees that where a decision that is being appealed is likely to result in significant harm, such as significant expenditure that would be unnecessary if the appeal succeeded, the decision should be suspended. However, the Government does not agree that suspension should be automatic in every case, since this could lead to parties seeking to appeal simply to delay the effects of the decision inappropriately. The Government has decided that the appeal body will be given discretion to suspend decisions on application, where those decisions would result in significant harm.** Significant harm we consider would include significant expense and/or the need to disclose confidential information that would be wholly unnecessary if the appeal succeeded.

2.38 A number of respondents expressed concerns that, if Ofgem's decisions were implemented before appeals could be lodged, they could incur significant expense complying, potentially unnecessarily, and may be deterred from appealing. The Government intends that each licence modification decision should be accompanied by a coming into force date. This will avoid the identified risk.

Costs of an appeal

2.39 Respondents were concerned that the cost of the appeal may restrict access to the process, particularly for smaller companies. The Competition Commission would have to make an order to recover its costs. If the company is successful in its appeal, the Competition Commission would order Ofgem to pay its costs. **In relation to the costs of other parties, we are intending that the Competition Commission should have discretion to award these costs and that in doing so it should be able to take into account the reasonableness of the costs incurred in all the circumstances.** This means that even if a party loses the appeal it may not necessarily be liable for all the costs if the Competition Commission decides that the other party's costs are unreasonable. Where appropriate, the Competition Commission will also be able to amalgamate separate appeals, so they can be heard together with a view to reducing costs

3. Transmission and Distribution Networks

3.1 **The Government asked the following questions:**

- Do you have any comments relevant to our consideration of which unbundling models should be available in the GB market?
- Do you have any views or concerns with how we intend to apply these new Third Package requirements on TSOs and DSOs?

Unbundling

3.2 One consultee proposed that the requirements for ownership unbundling should be set out in legislation with some obligations being reflected in licences. Interconnector licensees argued that it was important that they were regulated under a single regime. Stakeholders also raised concerns about the relevance of some of the tasks of a TSO in relation to interconnectors and argued that interconnectors would not be able to comply because of the existing BETTA arrangements.

3.3 One organisation argued that companies with governance structures which allowed impartiality should be able to continue to operate without having to unbundle. Stakeholders also stated that the certification process would need to be carried out in a timely manner to reduce uncertainty.

3.4 Some stakeholders asked for the ITO model to be implemented. Others expressed the view that all models should be made available, including the ITO model. Some concerns were expressed that whereas the unbundling requirements applied to both vertically integrated and non-vertically integrated undertakings, the derogations from full ownership unbundling were only available to vertically integrated undertakings.

3.5 There were a number of views expressed about the treatment of OFTOs (Offshore Transmission Network Owners) under the unbundling requirements. Some organisations expressed concerns that if the UK took a prescriptive approach to the unbundling requirements, there would be a risk to current and future investment decisions which ultimately would be against the public interest, and urged Government to implement the new requirements in a proportionate way. Some respondents asked for clarification as to whether all TSOs (in particular OFTOs) were carrying out all the tasks set out at Article 12 of the Directives and if not, whether they could be considered compliant with the Third Package. Some questions were also raised about the compatibility of the generator-build model for offshore transmission with the Third Package

3.6 **Having considered the points raised in the consultation, the Government's final proposals are:**

- **Ofgem will be the certification authority (and NIAUR in Northern Ireland).**

- **Full ownership unbundling, the ISO model and the Article 9(9) derogation will be made available in both the electricity and gas sectors.**

- **Legislation will allow Ofgem to certify exempt undertakings and those in circumstances equivalent to an exempt undertaking.**

- **The ITO model will be also made available for gas interconnectors. The Government's view is that this will provide important flexibility and will enable Ofgem and the regulatory authorities in other Member States to arrive at consistent regulatory arrangements.**

- **Certification will be made a requirement of transmission and interconnector licences. Licensees will also be required to remain certified and to notify any relevant change in circumstance to Ofgem.**

3.7 **The Government will allow the following limited exceptions from the prohibition on people having interests both in transmission and in generation or supply:**

- **A de-minimis provision to allow transmission operators to carry out small-scale generation and supply to e.g. supply to tenants, provided that those arrangements do not present a risk of discrimination.**

- **Generation, production and supply which takes place outside the European Economic Area will not be taken into account.**

- **Arrangements that will allow testing and limited operation of transmission assets pending transfer to a TSO such as an OFTO.**

- **Recognition of the interests of debt investors, who may simultaneously hold rights (e.g. arising from financial covenants) in a number of energy undertakings, and may take control through the exercise of such rights.**

3.8 **Legislation will prohibit those who control a TSO from exercising rights in licensed generation, supply and production undertakings (and vice versa). Such rights will not prevent certification, but if exercised, any decisions taken may be voided by the court where discrimination has or is likely to arise.**

3.9 **The Government is not proposing to require all TSOs to carry out all of the TSO tasks set out at Article 12. The Government's view is that licences already set out the functions relevant to each type of TSO and that it is not necessary to require TSOs to carry out functions that are not relevant to their role. The functions of a TSO supporting offshore transmission or providing interconnection are different from those of a national transmission system operator. Arrangements that allow or require certain activities to be carried out by an ownership unbundled System Operator are consistent with the purposes of the Directive.**

Distribution

3.10 Turning to Distribution System Operators (DSOs), it was argued that DSOs complied with the requirements for a compliance officer through Standard Condition 43 of the Distribution Licence and for branding, through Standard Condition 42.5 of the Distribution Licence. Others thought that where a Distributed System Operator was part of a vertically integrated organisation with a supply arm, their communication and branding could and, on occasion, did, create confusion for customers of the supply arm in that there is no clear distinction between the separate identities of the companies.

3.11 Standard Condition 42 and 43 of current licences addresses the requirements of Article 26 of the Gas and Electricity Directives. These conditions will apply to all vertically integrated licensees. Distribution licences will require that distribution undertakings are legally separated from licensed generation activities. The Government has noted the points that were raised, in particular that where a DSO is part of a vertically integrated organisation with a supply arm, there could be scope for their communication and branding to create confusion for customers of the supply arm, if there is no clear distinction between the separate identities of the companies. **The Government agrees that this is addressed by Standard Condition 42.5. It is for Ofgem to consider whether the requirements of individual companies' Compliance Statements have been met.**

3.12 **Licensed gas transporters will be prohibited from carrying out gas production activities (i.e. producing gas for the purpose of its conveyance through pipes to premises, or through a pipeline system operated by a gas transporter or a transmission system operator, including any person who is the holder of a licence under section 3 of the Petroleum Act 1998 for that purpose).**

4. Gas Infrastructure

4.1 **We asked the following question:**

- Should the Gas Directive requirements for storage and LNG operators be introduced through a new licence regime or by amending existing legislation? Please provide evidence of costs and benefits wherever possible.

4.2 The Gas Storage Operators Group (GSOG), representing 17 gas storage operators, supported amending legislation to implement the new requirements on gas storage and LNG operators. This was the view expressed by the majority of consultees that responded to this question. The key reasons cited against the licensing approach were the uncertainty that licensing could create and the consequent risk to investment; the duplication of provisions extant in other licensing schemes; and an increase in the administrative burden. In addition, GSOG felt that the current regulatory framework, based on legislation, had proven to be stable and competitive and should thus be maintained.

4.3 A small number of respondents considered that the Third Package requirements should be implemented via a licensing regime which they felt would not be onerous for industry and would not discourage new investment. Some respondents in the LNG sector felt that a light-touch licensing regime would be a more appropriate way of implementing the provisions relevant to LNG operators than regulation.

4.4 The majority of respondents expressed a clear preference for express provisions to be made in legislation rather than in a licence regime. **The Government is therefore proposing to amend existing legislation in the Gas Act 1986 to give effect to the requirements in the Gas Directive for gas storage and LNG facility operators. The amendments to the Gas Act will:**

- **introduce the new obligations required by the Gas Directive; and**
- **enable Ofgem to enforce compliance with the new obligations on storage and LNG operators in the Gas Regulation (including obligations relating to transparency and the daily publication of information about gas flows and capacity).**

The key new legislative requirements include:

For gas storage operators

- **rules requiring legal and functional separation of gas storage operators from any parent and affiliate undertakings involved in production and storage (unless they have a minor facility exemption);**

- **Ofgem to publish criteria regarding exemptions from negotiated third party access (nTPA) for minor facilities and to make public what facilities are available under the nTPA regime; and**

- **gas storage operators (and owners of gas processing facilities under section 12 of the Gas Act 1995) to consult system users when developing the commercial conditions for the provision of ancillary services).**

For gas storage and LNG facility operators

- **changes to the process required for applications for TPA exemptions for new or expanded infrastructure, including requirements to comply with capacity allocation rules and an increased role for the Commission and the Agency; and**

- **confidentiality requirements for all storage and LNG facility operators to restrict the use and disclosure of information.**

4.5 **The Government will make minor amendments to existing legislation to improve clarity and ease of use by:**

- **bringing the TPA provisions together by moving the TPA provisions relating to offshore gas storage fields from the Petroleum Act 1998 to the Gas Act 1986; and**

- **extending the regulation of gas storage and LNG facilities to cover the whole of the UK Continental Shelf so that onshore and offshore facilities are treated alike and to provide certainty about the scope of the provisions.**

4.6 **The Government will bring the enforcement provisions into line with the obligations on licence holders by making storage and LNG obligations in the Gas Act 1986 "relevant requirements" (using the same approach as for licence holders under section 28 of the Gas Act 1986). The obligations on owners of gas processing facilities (under section 12 of the Gas Act 1995) that relate to operations necessary for accessing or operating a gas transporter's pipeline, an interconnector, a gas storage facility or an LNG import facility will also be enforceable by Ofgem in this way.**

4.7 **Ofgem will then, within the legislative framework, be provided with the relevant powers to gather information and make enforcement orders and impose penalties as required.**

Obligations on gas storage operators

The minor facilities exemption from TPA and unbundling

4.8 In their responses to the consultation stakeholders welcomed the proposal to retain negotiated nTPA. The explicit obligation on Ofgem to publish the criteria it uses to

determine whether a gas storage facility is technically and/or economically necessary, and therefore whether it can be exempt from TPA, was also welcomed, although respondents said that it should be published as soon as practicable. Some respondents suggested that the Government should oversee the criteria used to determine access to storage facilities, to ensure Government decisions on infrastructure investment were not undermined.

4.9 Although Ofgem will not be required to publish these criteria until after March 2011, it published an open letter in June 2009 giving guidance on the matters it considers relevant when assessing whether a facility is technically or economically necessary.[7]

4.10 **The Government will maintain in legislation a provision for a minor facility exemption to be given when the facility is not economically necessary for the operation of an efficient gas market. The legislation will also require that a facility is not technically necessary in order to qualify for a minor facility exemption. A new legislative provision will require Ofgem to set out how it will determine whether the use of a gas storage facility by other persons is economically or technically necessary. Before publishing this guidance, Ofgem will be required to consult the Secretary of State and such other persons it considers appropriate.**

Unbundling

4.11 A number of gas storage operators made the point that some activities required to be unbundled under the Third Package, are essential to the operation of gas storage facilities and should therefore be categorised as ancillary services to the facility. Examples include production activities where gas is stored in a depleted hydrocarbon field and shipper activities where gas is bought and sold at the NBP.

4.12 **It is the Government's view that any activities which are necessary in order for the operation of a gas storage facility will be permitted.**

Obligations on gas storage and LNG facility operators

Confidentiality obligations

4.13 The Third Package places confidentiality requirements explicitly on gas storage and LNG facility operators (even where TPA obligations do not apply). The Third Package restricts the use of commercially sensitive information in the context of a vertically integrated undertaking (VIU). Some stakeholders raised concerns that compliance with these obligations would be difficult to achieve without some form of unbundling of the SSO from the rest of the VIU. Some respondents sought controls, enforceable against all SSOs, to be put in place.

4.14 **The Government acknowledges that this new provision needs to be introduced in an even-handed and light-touch way. There will be obligations on operators**

[7] Gas storage minor facility exemptions open letter from Ofgem: http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=154&refer=Markets/WhlMkts/CompandEff/TPAccess.

to prevent the disclosure of commercially sensitive information in a discriminatory manner, including particular obligations where disclosure is made to associated undertakings as well as restrictions regarding the use of information once received.

Obligations for LNG facility operators

4.15 In some particular circumstances relating to take-or-pay contracts, operators of LNG facilities will be able to request a temporary derogation from regulated TPA. This derogation will also be available for transmission and distribution system operators and interconnector licence holders.

4.16 We will clarify in legislation the circumstances in which the owner of an LNG facility may refuse access to a facility (for such reasons as insufficient capacity).

Gas Regulation

4.17 With the exception of article 19.4 (covered below) the Gas Regulation applies to gas storage and LNG facility operators **that are not exempt from TPA, including new and infrastructure exemptions**. Gas storage and LNG operators are obliged to comply with all relevant obligations in the Regulation and Ofgem will be given the powers to enforce these in the same way as it enforces duties for licence holders.

4.18 Ofgem has published consultative guidance in relation to gas storage facilities which aims to give greater clarity around the operation of the nTPA regime with particular regard to the impact of the Gas Regulation.[8] Ofgem intends to publish its guidance in the New Year before the new legislation takes effect. Ofgem may also consult on the appropriate arrangements for rTPA at LNG facilities in the New Year. This consultation may include Ofgem's views on the application of the relevant provisions of the Gas Regulation to LNG facilities.

4.19 Article 19.4 of the Gas Regulation requires **all LNG and gas storage operators,** to make public the amount of gas in each storage or LNG facility as well as inflows, outflows and available capacity. The information should be made available to the TSO and updated at least once daily. Respondents asked for clarification about what should be included.

4.20 **The Government is following-up the suggestion that information should be made available in one place for ease of use and comparison.**

Interconnectors

Existing exemptions

4.21 Interconnectors who were exempt from third party access obligations for the purposes of the Second Package will continue to operate in accordance with the terms of the

8 Ofgem consultation on Third Party Access guidance: http://www.ofgem.gov.uk/Markets/WhlMkts/CompandEff/Documents1/Third%20Party%20Access%20regime%20for%20gas%20storage%20facilities%20Consultation%20Document.pdf.

exemption order. In addition, interconnectors who benefit from these exemptions will not be obliged to comply with the ownership unbundling requirements.

New exemptions

4.22 The Government will amend the interconnector licence conditions to reflect the new requirements for new infrastructure exemptions from third party access. The changes will apply to any new applications for an exemption in relation to a new interconnector, or modifications to an existing interconnector.

4.23 These exemptions will continue to be granted by Ofgem but ACER and the European Commission will have a greater role in the final decision. Ofgem will also need to approve the capacity allocation mechanism that will be used when allocating and managing capacity in the interconnector before granting the exemption.

5. Requirements on Exempt undertakings

5.1 Following a Call for Evidence in July 2010 we set out high-level proposals to extend the right of Third Party Access to private licence exempt distribution networks. A further consultation[9] in October 2010 set out the Government's detailed proposals.

5.2 **We asked the following questions in the consultation:**

- Do you have any views or concerns on how Government intends to apply third party access requirements to licence exempt distribution networks?
- Do you have any views or concerns on how Government intends to apply these Third Package requirements to licence exempt undertakings?

5.3 This section considers how the Government intends to apply third party access and other Third Package requirements on licence exempt gas and electricity undertakings.

5.4 We received responses from a diverse range of stakeholders that were representatives of affected sectors owning licence exempt networks, licensed networks owners and suppliers, and code owners with an interest in how third party access could work.

5.5 All responses were supportive of the Government's overall proposal to take a light-touch approach imposing the lowest possible regulatory burden to apply third party access and other Third Package requirements on licence exempt undertakings. There was also general support for the Government's proposal to keep the Class Exemption regime in place for the small players and reflect any new obligations in primary legislation, with Ofgem being responsible for enforcement through a proportional approach to potential penalties.

5.6 In taking this approach the Government recognised that these network owners have generally limited resources and face particular technical barriers. However, the consultation brought forward a considerable level of concern about the practical details and cost implications of ensuring third party access on licence exempt distribution networks.

5.7 The Government also recognises that it is neither possible nor desirable to legislate in a way that covers all possible scenarios.

5.8 Responses to both the consultation and the earlier Call for Evidence suggested that it was unlikely that demand for third party access to licence exempt networks would be

[9] This is the consultation on the provision of Third Party Access to licence exempt electricity and gas undertakings, published by DECC in October 2010.

significant. Most licence exempt distribution and supply arrangements (particularly those that include embedded generation and heat) will already be offering a competitive price suggesting that the costs associated with providing physical access to third party suppliers may mean that in practice few consumers look to switch suppliers.

Third Party Access

5.9 The Government's approach to third party access has been to start from the principle that all consumers, be they domestic or industrial and commercial, should have the right to choose their electricity or gas supplier. Many stakeholders welcomed the extension of these consumer rights to those connected to exempt networks. The Government recognises, however, that there are technical barriers and many of the affected stakeholders raised detailed examples in their responses.

5.10 The responses received to the consultation brought out the diverse nature of the stakeholders affected by the third party access requirements. The responses gave examples of many technical and economic issues that all sectors will face in offering third party access. There were also other technical issues that were specific to particular sectors. Many of these detailed issues concerned either connection arrangements or use of system charges.

5.11 **The Government recognises that these technical issues will inevitably impact on the way the three week switching right applies to licence exempt networks. The switch will need to take place three weeks from the date that the customer actually enters into the contract with the new supplier. However that three week period will be preceded by the network owner preparing unbundled accounts, providing the new supplier with relevant information and sending the charging methodology to Ofgem for approval. It is not the intention that all these necessary steps should be compressed into a three week period.**

Connection Arrangements

5.12 Several responses raised the issue of significant costs of providing the necessary connections to allow for third party access – these costs would include network reinforcement as well as metering and basic connection infrastructure. It is worth being clear that, as set out in the consultation document, **the Government expects the same arrangements to apply as in the licensed sector and that these costs will fall on either the consumer seeking a third party supplier or the third party supplier themselves.** We will set out in the guidance examples of the sorts of costs that we would expect to be covered, but the underlying principle will be that responsibility for the cost of providing third party access will not ultimately fall on the network owners. It will also be important that the customer seeking a third party supplier, the existing operator and the new supplier work closely together in any new connection work to ensure that important safety and security considerations are aligned. Ofgem has confirmed that licence exempt distribution networks will not be obliged to upgrade their networks or become licensed distributors in order to allow third party access.

5.13 A specific issue was raised in several responses concerning “reefers and cold ironing” in the case of ports whereby ships in dock or refrigerated containers on land in ports take electricity from a port’s own distribution network for limited periods of time. In these instances a number of responses were seeking clarity on whether they would count as a distribution system for the purposes of the Directive and hence whether there is a requirement to provide third party access if asked. Generic guidance will be made available to address as many of these issues as possible, but the applicability in specific situations will depend on the detailed arrangements in place.

Use of system charges

5.14 Responses to the consultation were generally supportive of the proposed approach to the charging of consumers/third party suppliers for use of the licence exempt distribution network. Several responses stressed the need for a simple and flexible generic charging methodology. There were also a number of responses that highlighted the need for Ofgem to be properly resourced to approve charging methodologies developed by licence exempt network owners. There was also a lot of emphasis on the need to ensure that charging methodologies take full account of all the costs that will fall on the licence exempt distribution network.

5.15 Some specific questions were raised. For example there are numerous examples of a distribution owner having a forward supply purchase contract with a supplier on a take or pay, or on a minimum level of consumption basis. Several respondents sought clarity on who would be liable for any costs associated with not meeting that contract, should a significant number of consumers on the network switch to third party suppliers. Taking this one step further a number of stakeholders also suggested that by re-tendering this central contract on an annual basis, the consumers on the network were benefiting from the competitive energy market and therefore were already acting in a way that met the objectives of the Electricity and Gas Directives.

5.16 **The Government therefore intends to pursue the approach set out in the consultation document and set out the requirement to allow third party access to licence exempt networks in legislation that will be enforceable by Ofgem as the national regulatory authority. The third party access requirement will be backed up by guidance that will enable exempt undertakings to assess what steps they may need to take in order to ensure compliance. Ofgem will also publish guidance on the use of system charging methodology – this guidance is the subject of a consultation launched by Ofgem on 20 December 2010[10].**

5.17 This legislation will result in the owners of exempt distribution networks being obliged, but only when asked, to provide third party energy suppliers with network access in order to supply energy customers. The supporting guidance will address:

- The circumstances in which the infrastructure owner conveying gas or electricity is not likely to be classed as a distribution network.

[10] The consultation document is available at http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=316&refer=Networks/Policy

- The way in which the customer and network operator may voluntarily agree to vary the right to switch supplier.
- The detailed arrangements that may be used to provide third party access.
- The administrative arrangements including the setting of network tariffs.

5.18 Where it is appropriate, the supporting guidance will also address some of the technical issues raised by stakeholders in the consultation. **In instances where it is not appropriate to address these technical issues in the guidance, for example where only a limited number of stakeholders in a particular sector are affected, the Government will look to work with representatives of those sectors to consider how they can comply with the third party access requirements in the least burdensome way.**

Treatment of other requirements on Licence Exempt Undertakings

5.19 The focus of the responses to the consultation was on the issue of third party access. Only a limited number of responses referred to the approach to the treatment of other Third Energy Package requirements on licence exempt undertakings set out in Annex B of the consultation document[11]. These responses were all supportive of the Government's approach of imposing the least burdensome solution in a way that will ensure the applicable tasks bite on licence exempt companies and that Ofgem has a proportional way of enforcing them.

5.20 **The Government therefore intends to pursue the approach set out in the consultation document and make the new requirements "relevant requirements" under the Electricity Act 1989 and Gas Act 1986. Those Acts will be amended so that Ofgem's enforcement powers will apply in respect of anyone operating under an exemption from a requirement to hold a gas or electricity licence as well as in respect of licensees, and those carrying out other activities regulated by the Gas Acts.**

Obligations on exempt suppliers to provide consumer protection measures

5.21 As we set out in our main Third Package consultation document, the obligations in the Directives to offer consumer protection measures also apply to unlicensed energy suppliers. **The Government will therefore be making changes to legislation to ensure that unlicensed suppliers also comply with these obligations.**

5.22 **These obligations will be to:**

Customer Switching

- supply customers within 3 weeks after they have entered into a contract with them. As we set out in Chapter 1 (Consumer Protection"), the obligation to switch customers within 3 weeks will start the day after the contract is entered into, unless a cooling-off period applies, in which case it starts after the cooling-off period expires (provided this does not exceed 14 calendar days).

[11] This is the consultation on the provision of Third Party Access to licence exempt electricity and gas undertakings, by DECC in October 2010.

We consider that a customer has entered into a contract for these purposes when they inform the supplier that they wish to switch to that supplier by agreeing to the main terms of the contract.

- to enable a new supplier to comply with the obligation to switch the customer within 3 weeks, operators of exempt distribution networks will be expected to take all reasonable steps to ensure that the new supplier is able to start supplying the customer within the relevant period.

- customers should not be charged for changing suppliers (this does not affect any termination fees customers have to pay as part of the terms of their contract with their supplier).

Consumption data

- customers will need to be provided with information about their consumption, free of charge. This will be information about the energy they consumed in the last 12 months, the total charges and their meter number. Where the customer has no meter, the supplier will have to set out how the charges for that customer were determined.

- If the customer wishes to receive offers from a prospective new supplier, provided that they make a written request to the existing supplier, their incumbent supplier will be obliged to send the consumption data of that customer to the prospective supplier.

Contractual information

- contracts with customers will need to include transparent information on tariffs, prices and terms and conditions (which also have to be non-discriminatory) and include all other relevant information.

Other information to be provided annually

- electricity customers will have to be provided with information about the fuels used to generate the electricity supplied, known as the “Fuel Mix”;

- they will also need to be sent the concise Consumer Energy Checklist compiled by Consumer Focus on request (see paragraphs 1.16 and 1.17 for relevant information).

Resolving customer complaints

- in addition to normal litigation through the courts, customers will be able to refer their complaints to Ofgem who will provide the independent dispute resolution mechanism for customers of unlicensed suppliers.

Record Keeping

- unlicensed suppliers will be required to keep records of supply transactions and derivatives for 5 years and make them available to Ofgem.

Annex 1: List of respondents to the main Third Package Consultation

Centrica
ICOSS
BGE
EDF
National Grid
Utility Regulator
Commission for Energy Regulation
ENA
Drax power
BG Group
Scottish Government
GSOG
RWE Npower
Scottish Renewables
Cornwall Energy
EON
GDF Suez Energy
IUK
Energy Action Scotland
Xoserve
Gazprom
Centrica Storage
ENI
Electricity North West
Elexon
Balfour Beatty
Mutual Energy
Statoil (UK)
Shell Energy Europe
SONI
MRA
NEA
South Hook LNG
First Utility
Haven Power Limited
Exxon Mobile
SSE
BBL
ERA
Consumer Focus
AEP
WWU
Ecotricity
Total