

**MEMORANDUM ON EUROPEAN CONVENTION ON HUMAN RIGHTS
COMPATIBILITY FOR THE ENERGY BILL 2012
(SUPPLEMENT ON NEW CLAUSES ADDED IN COMMONS COMMITTEE)**

1. This memorandum analyses the issues arising under the European Convention on Human Rights (“ECHR”) in relation to those clauses of the Energy Bill 2012 which were added in the Public Bill Committee in the House of Commons. This note is supplementary to the Memorandum on European Convention on Human Rights Compatibility for the Energy Bill 2012 (“the substantive ECHR memorandum”) and relies on argument set out in that Memorandum. It should be noted that the clauses of the Bill referred to here are those as amended in that Committee. This memorandum has been produced by the Department of Energy and Climate Change and the Department takes the view that these clauses are compatible with Convention rights.

PART 1: DECARBONISATION

2. Part 1 of the Bill (Decarbonisation) does not give rise to any human rights issues. Clause 1 imposes a target duty on the Secretary of State, which comes into effect once a decarbonisation target range is set by the Secretary of State. A decarbonisation target range sets, in relation to a year, a range for the carbon intensity of electricity generation in Great Britain, measured in grams of carbon dioxide emitted per kilowatt hour of electricity generated. The calculation of carbon intensity will use existing figures used to determine emissions under international carbon reporting practice. There is no requirement for individual generating stations to be inspected under the provisions, and there will be no interference with the human rights of any owner or operator of a generating station. However, in accordance with section 6 of the Human Rights Act 1998, the Secretary of State will consider whether a decarbonisation target range, or any statutory instrument refining the definition of “carbon intensity of electricity generation in Great Britain” raises any human rights issues when making a statutory instrument.

PART VI, CHAPTER 1: CONSUMER PROTECTION

Introduction

3. These clauses allow the Secretary of State to require gas and electricity suppliers to change the tariffs or other terms upon which gas and electricity are supplied to domestic customers. This includes the power to require that suppliers limit the number of tariffs available (clause 121(3)(b)); switch certain customers to certain tariffs (or that they invite the customer to switch) (clause 121(3)(e)); and to require that they provide customers with certain information about their tariffs (clause 121(3)(d)). They may not be used to set a monetary charge or rate (such a power would be too specific for the sorts of amendments envisaged by these clauses and is in any event specifically prohibited by clause 121(8)(b)).
4. This is achieved by giving the Secretary of State the power to modify licences and conditions granted under the Gas Act 1986 and the Electricity Act 1989. These powers may only be exercised for the purposes of promoting competition or requiring amendments to domestic tariffs offered by the licence holder to reduce the costs for domestic customers.

Power to modify licences and conditions

Application of Article 6

5. Article 6 and the right to a fair trial may be engaged by the exercise of the power by the Secretary of State to make licence modifications. Detailed consideration of the Article 6 implications of a power to modify licence conditions is set out in paragraphs 10-15 of the substantive ECHR memorandum and we do not think there is anything to be added to those arguments here.
6. Article 6(1) is likely to be engaged in relation to the enforcement of any new licence conditions. Once any licence modifications have been made, Ofgem will enforce them under the existing regime in the Electricity and Gas Acts, which includes power to impose orders to secure compliance and financial penalties¹. In terms of Article 6, the Electricity and Gas Acts give licensees the opportunity to apply to court to challenge any order made or penalty imposed by Ofgem². Moreover as a public authority, Ofgem is bound by section 6 of the Human Rights Act to act compatibly with the ECHR.

Application of Article 1 of the First Protocol

7. So far as relevant to the present discussion Article 1 of the First Protocol provides, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest...”. It goes on to say, “...the preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions...”.
8. We do not consider that a supplier’s licence constitutes a possession such that modification of it engages Article 1 of the First Protocol. However, even if it does constitute such a possession we still consider that these provisions are compliant with Article 1 of the First Protocol. The modification of licence conditions under these powers will be a control on use rather than a deprivation of property since it will not prevent the licensee from continuing and profiting from the activity authorised by the licence.
9. In our view, the UK has good reasons for controlling the use of property in accordance with a general interest and that any modifications strike a fair balance between the rights of those affected and achieving the general interest. The reasons we have for controlling the use of a licence and therefore the economic activity of supplying electricity or gas are to:
 - a) encourage greater market participation by energy consumers in order to help produce some of the missing competitive pressures in the market;
 - b) simplify the structure of the market by simplifying the number of complex tariffs available to consumers;
 - c) save consumers money.
10. In our opinion these reasons, individually and collectively, serve to demonstrate that the policy being pursued serves a legitimate public policy which is in the general interest.

¹ Sections 28 and 30A Gas Act, sections 25 and 27A Electricity Act.

² Sections 30 and 30E Gas Act, sections 27 and 27E Electricity Act.

11. The proportionality of any interference can be demonstrated by reference to the fact that the power will only be exercised in relation to those tariffs, such as poor value dead tariffs, which are likely to represent poor value for money or tariffs which are shown to hinder active consumer participation in the energy market. Put another way, the proportionality of the power can be demonstrated by reference to the fact that the power will not be exercised so that all existing tariffs are interfered with.³
12. Another aspect of the power's proportionality can be demonstrated by reference to it being available for only a limited period of time. The power we are seeking is intended to sunset at the end of 2018.
13. The policy intention is to make such changes as are believed to be necessary to licences so that consumer engagement levels begins to rise to levels which are beneficial to the market. The intention is to do this by modifying the current tariff structure so that suppliers are in the future prevented from hindering consumer participation through complicated tariff structures. Once this objective has been achieved it is hoped that the market will have a sufficient level of competitive pressures within it to maintain itself on that competitive basis. In principle therefore, the power to interfere with a supplier's property lasts for a relatively short period of time. Once the objective is achieved the power falls away. In this way, we believe we can show that the time-limited nature of the power demonstrates another aspect of its proportionality.

The power to provide consumers with information on cheaper tariffs

Application of Article 8

14. The power to require the holders of supply licences to provide information to their customers is capable of engaging the right to respect for private life in Article 8. This power is intended to allow the Secretary of State to require suppliers to provide consumers with information about the tariffs they offer so that customers can make informed choices about what tariff they are on. This should allow them to make their own decisions about what tariff is best for them and manage their expenditure and energy usage accordingly. We therefore consider that this power is necessary in the interests of the economic well-being of the country (in keeping competition in the energy markets and therefore keeping prices low) and the protection of health (allowing, in particular, the elderly and vulnerable to heat their homes at the lowest cost).
15. We also consider that the power is a proportionate one. The information to be provided by the supplier will only be information about the tariffs it offers. The information is likely to be required to be sent infrequently and should not represent a particular burden for suppliers.

Application of Article 1 of the First Protocol

16. As set out above, we do not consider that changes to licence conditions engage Article 1 of the First Protocol in so far as they may interfere with energy companies' licences. However, in the event that they do we still take the view that these powers are compliant with the requirements of that Article. The right to property is a qualified one and by virtue of the second paragraph of Article 1 it does not prevent a State enforcing such

³ Since we are seeking a power it will be exercised compatibly with the Human Rights Act 1998 and the requirements of A1P1.

laws as it deems necessary to control the use of property in the general interest. A fair balance must be struck between the general interest and the rights of the individual.

17. We consider that the power to require suppliers to provide customers with information about cheaper tariffs on offer strikes a fair balance between the general interest and the rights of the individual licensees. The exercise of this power will ensure that customers receive information on the lowest tariffs and how to switch to them, promoting switching, price competition and a better deal for consumers.