

Explanatory note to the Domestic Bulk Liquefied Petroleum Gas Market Investigation (Metered Estates) Order

This note is not part of the Order

Introduction

1. The Competition Commission (CC) published its final report on the supply of bulk liquefied petroleum gas (LPG) for domestic use on 29 June 2006 (the report). The report set out the CC's finding that there are features of the market which adversely affect competition in the UK. In light of its findings the CC has decided on a package of remedies to address the adverse effect on competition and the consequential detrimental effects on customers.
2. On 13 October 2008 the CC published an Order providing for remedies for certain customers (the Domestic Order). That Order came into effect on 13 April 2009. The Domestic LPG Order did not apply to customers who received their supply of LPG as part of a metered estate. That is, where a customer of LPG is supplied using a tank(s) and pipework which supply more than one customer and individual consumption is measured by a meter.
3. Following earlier consultation, the CC decided that two Orders were necessary to allow for the particular features of the two different supply arrangements. This explanatory note relates only to the second, metered estate Order made on 5 May 2009.

Structure of the Order

4. The Order is divided into eight parts:
 - PART A contains definition and interpretation provisions including the commencement date for the Order and to whom the Order applies;
 - PART B general obligations on suppliers;
 - PART C general provisions on how LPG infrastructure is to be transferred;
 - PART D general limitations on contractual terms and information that must be provided with contracts;
 - PART E obligations on suppliers to provide information to customers;
 - PART F information that must be provided to the Office of Fair Trading (OFT) by suppliers;
 - PART G CC powers to make directions relating to compliance with the Order.
5. The Order has two schedules. The first sets out the provisions that will apply where any matter is referred for arbitration under the Order. The second sets out information that LPG suppliers are required to provide to the OFT annually.

Status of this explanatory note

6. Nothing in this explanatory note is legally binding. In the event of a conflict between this explanatory note and any provision of the Order, the Order shall prevail.
7. The rest of this explanatory note deals in detail with each of the articles in the draft Order.

Part A: Title, commencement, application and interpretation

8. **Article 1** sets out to whom the Order applies, when it comes into force and how terms within the Order should be interpreted. Most provisions in the Order come into force on *[six months from date of Order]*. Some provisions (for example, in relation to informing some customers about the Order) come into force immediately the Order is made. It is not intended that there should be any further transitional period in relation to any of the provisions contained within the Order.
9. The Order does not apply to a supply of bulk LPG to which the Domestic Order would apply, nor does it apply to customers who might be defined as being supplied as part of a 'leisure park', nor to contracts between intermediaries and domestic users of LPG ('leisure parks' and the on-sale of LPG were not issues that were considered during the market investigation).

Part B: Obligations on suppliers

10. **Article 2** requires suppliers to use all reasonable endeavours to facilitate customers who want to switch their supplier in accordance with the detailed provisions of the Order. This is an overriding obligation which is intended to condition the way in which suppliers deal with each other, as well as with existing and new customers, to give effect to the intention of the Order.
11. This article also imposes an obligation on both the existing and new supplier to negotiate in good faith. It is recognized that because of the operational complexities of many metered estates, it is possible that the intention of the Order could be frustrated in unanticipated ways if either supplier did not positively engage with each other. The CC is aware that 'good faith' obligations impose a relatively high burden upon the parties to those negotiations but considers that this is justified as an overriding and general obligation in these circumstances.
12. It is clarified here that arrangements between metered estate managers and customers are not subject to the provisions of the Order. Although a metered estate manager may rely on the provisions of the Order if it decides to switch supplier, the Order cannot be used by customers to require their metered estate manager to switch supplier (or to switch metered estate manager). The ability of customers to influence (or replace) their metered estate manager is dependent upon the agreement they have with their metered estate manager.
13. **Article 3** imposes a general obligation on suppliers to allow customers to disconnect their residence from the LPG infrastructure of a metered estate. If it is impractical to disconnect a customer then a supplier may refuse the request from a customer. For example, the disconnection may somehow prevent the continued operation of the metered estate and thereby prevent other customers who are part of the same metered estate from obtaining LPG. The cost of the disconnection to be borne by the existing supplier is not relevant to whether a disconnection is impracticable and should not be charged to the customer.

14. An existing supplier is not obliged to disconnect a customer who is part of a metered estate where that customer has agreed to a period of exclusive supply which is still valid. Article 9 provides further detail on the limitations on the term of an exclusivity period.
15. By disconnecting a customer who is part of a metered estate, in accordance with the provisions of Article 3, a supplier does not waive any rights of ownership, inspection, maintenance or access to any LPG infrastructure up to the emergency control or meter if that comes after the emergency control (ie the point in the connection between a customer's residence and the LPG infrastructure which serves the rest of the metered estate).
16. Where a customer's residence is disconnected from a metered estate and the customer subsequently arranges for LPG to be supplied by another means (for example a mini-bulk tank) the provisions of this Order will no longer apply. In the scenario of LPG being supplied to a mini-bulk tank, the provisions of the domestic Order would usually be expected to apply. In general, where this Order does not apply, the domestic Order will apply (unless either supply is not a supply of domestic bulk LPG).
17. **Article 4** describes different contractual scenarios between suppliers and customers. It is first recognized that where the contract is between a metered estate manager and the supplier, the obligations imposed by this Order on the supplier are owed to the metered estate manager. In this scenario it is the metered estate manager's decision to decide whether or not to switch. Consequently, individuals on a metered estate will need to review the terms of their agreements with the metered estate manager to determine if they can oblige their metered estate manager to switch supplier. The Order places no obligation on a metered estate manager to consider a request by individual customers to switch LPG supplier (although it is possible that the general arrangements between customers and a metered estate manager do set out how a metered estate manager should address this type of request).
18. Where the supply of LPG is made under the terms of a number of individual contracts, no obligation is placed on an existing supplier to enable switching unless all customers on the metered estate agree to switch and are not prevented from doing so by an exclusivity period in their contract. If one customer on a metered estate does not wish to switch supplier, it will not be possible for the metered estate to switch supplier. Either the existing or new supplier may request proof that unanimity has been achieved. Unanimity is required at the date the existing supplier is given an LPG infrastructure transfer request. If an existing supplier requires proof that the customers are unanimous then no obligations arise under the Order until the proof is provided. The Order does not prescribe what is required to prove unanimity to switch so long as it complies with the requirements of Article 6.1 (ie that it is in writing and signed).
19. It is recognized that some metered estates may have a very large number of customers. To facilitate the process of switching suppliers, these customers may appoint an agent to negotiate with suppliers on their behalf (and undertake any other actions required by the customers, for example executing contracts). In these circumstances, either the existing or new supplier may request proof of the agency appointment, its scope and its terms. No obligations will arise under the Order until the proof is provided. An agency arrangement does not need any particular form so long as the agent has authorization to undertake all relevant actions on behalf of the customers, when relying on the Order to switch supplier. The scope of the agent's actions should be agreed between the customers and the agent. In most instances it is expected that an agent (for example, a residents association) will represent all the

customers on a metered estate. It is also possible that an agent only represents some customers on a metered estate. Where this occurs the agent will not represent the entire estate and for the purpose of switching will need to coordinate with the other customers (and or other agent(s) representing those customers) to prove to the suppliers that all the customers on the metered estate agree unanimously to switch supplier.

Part C: Transfer of LPG infrastructure

20. **Article 5** requires that a supplier transfers LPG infrastructure in accordance with the terms of the Order, expeditiously and in compliance with relevant safety standards. The existing and new suppliers are also required to use all reasonable endeavours to ensure that there is a continuity of supply to all customers during the transfer process. What is reasonable endeavour will depend upon all the circumstances of the particular case and might have regard to the number of customers affected.
21. Once the LPG infrastructure transfer process has been initiated, it may be terminated by the customer or metered estate manager at any time up to the date of agreement to purchase, ie the point at which the new supplier agrees to purchase the LPG infrastructure from the existing supplier.
22. Requesting to switch is not the equivalent of giving notice to terminate a contract. It is expected that a customer or metered estate manager will initiate the process of LPG infrastructure transfer well ahead of any required date to give notice to terminate the contract with the existing supplier. The request to switch is the beginning of the switching process and negotiation between suppliers. At some point in the transfer process, notice to terminate the contract will need to be given by the customer or metered estate manager. However, it is expected that notice to terminate a contract will normally be after the existing and new suppliers have reached agreement on the terms of the transfer. Otherwise, there is a danger that the existing supply arrangements might be terminated before new arrangements have been put in place.
23. For the avoidance of doubt, it is acknowledged that the arrangements for giving notice to switch are different as between this Order and the domestic Order. Each Order is designed to cover very different issues that arise in relation to switching supplier.
24. Article 5 confirms that when a request to switch is made it does not replace any requirement in the customer's existing contract to give notice in the form and at the time required by that contract. This article requires that both the existing and new supplier use reasonable endeavours to keep the person who has made the request to switch informed of its progress.
25. **Article 6** sets out the transfer process between suppliers. The transfer process will start when the existing supplier receives a request to switch. A request to switch may only be made to the existing supplier (unlike the domestic Order, which provides for it to be made in the alternative to the new supplier).
26. The existing supplier is required to set out any impediment which might prevent switching and if there is no impediment, also confirm the ownership of the LPG infrastructure within one week of receiving the request to switch (including the existence of any customers with exclusivity periods in their contracts). Given that the Order provides for the valuation and terms of transfer to be agreed, it is unlikely that any other impediment to switching will exist. However, given the complexity of some metered estates, this provision allows matters that might genuinely prevent switching to be raised by the existing supplier.

27. Assuming that the existing supplier is the owner of the LPG infrastructure and there is no impediment which might prevent switching, then the existing supplier is required to provide a number of specified pieces of information, including certain technical and safety documentation and information relating to the history and condition of the LPG infrastructure. If the existing supplier does not have any of the information that is specified it must tell the new supplier at this time.
28. The existing supplier is required to provide details of any interest in or over land held by the existing supplier that would either need to be transferred or a right of access granted to the new supplier at the same time as the LPG infrastructure is transferred. Relevant interests on or over land may vary widely. In some cases a new supplier may need to acquire ownership of a parcel of land and in others it may only be necessary to obtain an easement for access. In all cases, the existing supplier is required to identify all interests or rights over land that would be necessary for the new supplier to supply LPG to the metered estate.
29. It is possible that customers on the metered estate may believe they are unanimous in their decision to switch supplier but the existing supplier can establish that not all customers on the metered estate have agreed. This situation could arise where it is not obvious from casual observation of the extent of a metered estate (for example, a metered estate may have been developed over many years in distinct stages and yet be connected to the same LPG infrastructure). In these circumstances, the existing supplier is required to inform the customers and the new supplier that the customers of the metered estate are not unanimous. However, there is no obligation upon the existing supplier to inform customers of the identity of those customers whose consent is also required, where this would be precluded by law (for example, if applicable, the Data Protection Act 1998). It is expected that, consistent with the overriding obligation to facilitate switching, the existing supplier will inform customers how unanimous agreement could be reached, to the extent that is legally possible.
30. **Article 7** sets out how the suppliers should negotiate the value of the LPG infrastructure. Once the new supplier has received the information listed in Article 6, it has 28 calendar days in which to decide whether or not to acquire the LPG infrastructure and any associated interest in or over land. The price to be paid for the LPG infrastructure includes the value of any LPG that is stored within the system.
31. The existing supplier and the new supplier are required to use reasonable endeavours when negotiating over the price to be paid for the LPG infrastructure and any associated interest in or over land. However, given the extent and complexity of some metered estates, it may not be straightforward to secure agreement. In any event, the Order provides for an initial two-month period after the date upon which the new supplier receives the specified information from the existing supplier during which negotiations may take place. After that date, if agreement has not been reached, the new supplier may refer the matter to arbitration in accordance with detailed provisions laid down in Schedule 1.
32. Only the new supplier has a right to refer a dispute over valuation to arbitration (whether of the LPG infrastructure or any interest in or over land). The existing supplier is required to submit to arbitration but cannot refer a dispute to arbitration (the existing supplier is not prevented from requesting the new supplier to initiate arbitration).
33. In relation to any interest in or over land, the extent of any transfer or grant is restricted to that which is necessary to give effect to the Order. An existing supplier might wish to retain land from a metered estate and it is not prevented from doing so where this does not affect the ability of the new supplier to supply LPG to the

metered estate. A new supplier cannot require that the existing supplier transfers land or grant an interest in or over it where this is not needed to supply LPG to the metered estate. In addition, it is not possible for a new supplier to seek to limit the extent of any transfer or grant of an interest in or over land through arbitration.

34. In some cases, the existing supplier may have an interest in or over land that is needed for the supply of LPG to the metered estate, but which has been granted by a third party (for example, the freeholder of the land may have provided an existing supplier with a lease to access the land). In these circumstances the existing supplier is required to use all reasonable endeavours to procure the consent of the third party to assign the existing interest or grant an appropriate land interest to the new supplier. Provided that the existing supplier has used all reasonable endeavours, if the third party refuses to assign or grant a suitable interest, the switching process will be unable to continue.
35. The right of the new supplier to refer a dispute to arbitration lapses four months after the new supplier received the information set out in Article 6. Therefore the timeline for transfer of LPG infrastructure could be described as:
 - (a) The transfer process begins when an existing supplier receives a request to switch.
 - (b) The existing supplier has one week to confirm ownership and notify the new supplier of any impediment that would prevent switching. Assuming that the existing supplier owns the LPG infrastructure and there is no impediment then it has the remainder of the month to provide the technical and safety documentation relating to the history and condition of the LPG infrastructure, as well as associated interests in or over land.
 - (c) Once the new supplier has received all the information from the existing supplier the new supplier has 28 days to decide and notify the existing supplier if it does not want to proceed. Assuming that the new supplier does wish to proceed, it must indicate the price it is prepared to pay for the LPG infrastructure, any LPG it contains, and any associated interest in or over land. There is then four months from the receipt of all the information for the new supplier and the existing supplier to negotiate and settle a price for the LPG infrastructure and any LPG it contains.
 - (d) At any time between two and four months after the information has been received, the new supplier may elect to enter arbitration with the existing supplier, unless the failure to agree terms relates solely to an inability to secure consent from a third party to transfer or grant an interest in or over land (provided that the existing supplier has used all reasonable endeavours to secure consent) or relates to the new supplier seeking a more limited interest in land from that offered by the existing supplier. Once this election for arbitration has been made, the arbitration process supersedes the negotiation process or timeline set out in the Order. However, there is nothing in the Order to stop the existing supplier and the new supplier continuing to negotiate during the period leading up to the formal arbitration. As Article 7.2 makes clear, ongoing negotiations are not precluded once the period during which the new supplier may initiate arbitration has expired.
36. Where the new supplier submits a dispute for arbitration, the costs of that process shall be for the arbitrator to determine in accordance with the applicable rules of the arbitration. Under no circumstances may the costs of the arbitration be placed upon either the customer or the metered estate manager.

37. Once the terms of the purchase of the LPG infrastructure have been agreed, the new supplier must inform the customer or metered estate manager as soon as is reasonably practicable, but in any event within 14 calendar days, that it has purchased the LPG infrastructure. The new supplier must also ensure that the signage of the existing supplier is rendered illegible and its own signage is displayed prominently and permanently near the tank, with its details by the meter and emergency control. These requirements are important to assist the customer to know whom to contact in the case of an emergency.
38. Once agreement has been reached, the existing supplier is required to carry out a final meter reading for each customer on a metered estate at or immediately prior to the date of the agreement to purchase. The existing supplier is then required to supply that meter reading to the new supplier.
39. The new supplier is able to withdraw from the switching process at any point, provided that the existing supplier is informed of that withdrawal before the date of agreement to purchase. The withdrawal is dated from when the notification is received by the existing supplier. Where the new supplier withdraws it must inform the customer or the metered estate manager of its reason for withdrawal. This is important so that the customer or metered estate manager is able to determine whether it is likely that an alternative new supplier would be interested in supplying LPG to them. For example, it may become clear only during negotiation that an interest in land is necessary for the new supplier to provide LPG to the metered estate. The negotiation might attempt to address the value of the interest or the possibility of supplying LPG without acquiring the interest, but ultimately the new supplier may have insufficient resources to acquire the LPG infrastructure and the land interest.
40. **Article 8** makes provision for emergency cover to be provided in relation to the supply of LPG to the metered estate. This article has been drafted to conform to the relevant provisions of the GSIUR and ensures emergency cover even if the person making the request addresses that request to the wrong supplier (for example, to the existing supplier when the new supplier is already providing the supply of LPG to the customer).

Part D: Limitations on contractual terms and information to be provided

41. **Article 9** provides that the notice period in any contract for supply of domestic bulk LPG to a metered estate shall not exceed 42 days and the maximum length of any exclusivity period shall not exceed 24 months. This means that, where a contract contains the maximum exclusivity period of 24 months, a customer or metered estate manager may provide notice to terminate the contract to the existing supplier 42 days before the exclusivity period expires (in this way the notice will have effect once the 24-month exclusivity period has expired).
42. These limitations on the notice period and maximum period for an exclusivity period also apply to any contract entered into before the Order has application. For example, where an existing contract contains an exclusive period of supply for three years and six months and the Order comes into force one year and three months after the contract began, the remaining exclusivity period of two years and three months shall be curtailed to nine months from the application date of the Order. Where an existing contract is modified as a result of this limitation, the existing supplier shall notify the customer or metered estate manager of this change in terms.
43. The exclusivity period shall, for a metered estate manager, commence on the date of first supply. The first supply does not include any de minimis amount(s) of LPG

delivered to check and commission the system: it is only the first substantive supply that triggers the beginning of the exclusivity period in these circumstances. In the case of a customer, the exclusivity period will be measured from the date that the meter for that customer was read for the first time.

44. Where LPG is provided to a newly-developed metered estate, the first supply is likely to vary from property to property with a potentially significant interval between the date on which the first and last properties are supplied.
45. Provided that any exclusivity period has expired, the existing supplier may not charge the customer or metered estate manager for switching to another supplier.
46. All contracts for the supply of LPG must contain certain specified terms, namely the date when an exclusive period of supply will end, the applicable notice period, and the circumstances under which a charge would be levied for terminating a contract, and the amount of that charge. Article 9.6 gives further detail on what is required to effect the more general provisions of Articles 9.1 and 9.2.
47. All contracts for the supply of LPG which are entered into, modified or extended after the Order comes into force must be accompanied by a document containing information about the procedure the customer or metered estate manager should follow to switch supplier, the address where a request to switch is to be served, details of the supplier's own website and telephone enquiry points and those of industry trade associations and a statement on when any exclusivity period for supply will end.
48. A supplier is required to provide information to customers and metered estate managers about the procedure to follow when requesting to switch supplier. It is expected that a supplier will set out a description of the processes that it has developed to ensure compliance with its obligations under the Order with reference, where appropriate, to the relevant articles of this Order, this explanatory note, and any further guidance (such as 'Frequently Asked Questions') that the CC may publish.
49. Where LPG is supplied to a metered estate under the terms of two or more individual contracts (ie where the contract is not with a metered estate manager) a customer is to be made aware that switching may only take place when all customers agree and that an agent may be appointed to facilitate the switching process.

Part E: Suppliers' obligations to provide information

50. **Article 10** places obligations on a supplier to ensure that any industry trade association of which it is a member makes available, free of charge, certain information that may assist a customer or metered estate manager to determine the options available to switch supplier. There is also an obligation on suppliers to ensure, as far as is reasonably practicable, that any industry trade association of which it is a member works with any other industry trade association to ensure that there is a single unified source to provide this information. Where there is no industry trade association, a supplier shall nonetheless use its best endeavours to ensure, as far as is reasonably practicable, that a single unified source of information exists for this purpose. The Order requires that customers or metered estate managers shall have access to adequate information to facilitate the process of switching regardless of how the industry changes in the future.
51. **Article 11** sets out the information that a supplier is required to provide on any invoice sent to a customer or to a metered estate manager. This information is

intended to inform the customer or metered estate manager of how to switch and provide transparency on how LPG is priced by the supplier.

52. **Article 12** sets out that the existing supplier is required to inform a customer or metered estate manager of the option to switch no sooner than one month before and no later than one month after the end of an exclusivity period. This requirement provides notice to a customer at a proximate time in advance of the exclusivity period ending and provides an element of flexibility for the existing supplier in meeting this requirement.
53. In some cases the customer will not be able to switch, either because they are not the counterparty to the contract with the supplier (that is, where the contract is between the supplier and a metered estate manager) or because the supply is made under the terms of more than one individual contract (requiring all customers not to be subject to an exclusivity period and unanimous agreement of the customers on the metered estate). In those cases the existing supplier is obliged to explain how the customer might seek to switch supplier, drawing attention in particular to the provisions of Article 4.
54. The Order confirms that a customer or metered estate manager shall be eligible to switch from the latter of either the date upon which the Order comes into force or the end of any exclusivity period. For these purposes, the end of any exclusivity period is calculated as explained in paragraph 42, regardless of whether it pre-dates the Order coming into force.
55. **Article 13** requires a supplier to make available to a customer or metered estate manager certain information about the switching process, including the procedure to be followed, an estimate of the likely charges for switching and how long the process will take. The supplier must also make available quotes for the supply of domestic bulk LPG, provided in terms of pence per litre of LPG supplied. All this information is to be made available from a telephone enquiry point, but may also be made available from the supplier's website. Where it is not possible to provide a quote immediately over the telephone, the supplier may respond in a reasonable period of time.
56. Given the complexity of metered estates, a new supplier may find it difficult to provide robust estimates of charges and timescales without having undertaken a physical inspection of the site or undertaken some relatively detailed calculations. Accordingly, this information may be subject to an inspection of the LPG infrastructure and any other checks as may reasonably be required. If necessary, a new supplier may decline to provide any information to a customer or metered estate manager until it has undertaken some inspection of the metered estate.
57. The timescale for transfer of LPG infrastructure is likely to vary depending upon its layout, the number of customers supplied and the ease with which the existing supplier and the new supplier agree over the value of the assets to be transferred. There is no maximum time period specified during which the transfer must be completed, although the supplier must provide an estimate to a customer or metered estate manager. This estimate may be subject to an inspection of the metered estate.

Part F: Provision of specified information to the OFT

58. A supplier is required to provide certain information to the OFT on an annual basis as set out in Schedule 2.

Part G: Directions by the CC as to compliance

59. The CC has a wide power of direction to ensure that steps are taken by a specified person for the purpose of carrying out or securing compliance with the Order, or requiring that person to do or refrain from doing anything specified. These provisions apply from the time the Order is made.

Schedule 1

60. This Schedule sets out the arbitration provisions that will apply when a new supplier requests arbitration. It provides that in the absence of contrary agreement, the Rules of the Chartered Institute of Arbitrators will apply. The costs of the arbitration will be determined by the arbitrator and may be imposed on either the existing or new supplier or shared as the arbitrator sees fit. This wide discretion concerning cost is intended to encourage both the existing and new supplier to negotiate in good faith and secure agreement in a timely manner. This approach is intended to encourage only worthy disputes proceeding to arbitration. The decision of the arbitrator is binding and final and rights of appeal are restricted to the specified provisions of the Arbitration Act 1996.

Schedule 2

61. This Schedule sets out the information that is to be provided to the OFT by suppliers on an annual basis.