

2011 No. 155

GAS

ELECTRICITY

**The Gas and Electricity (Internal Markets) Regulations
(Northern Ireland) 2011**

Made - - - - *23rd March 2011*

Coming into operation - *15th April 2011*

The Department of Enterprise, Trade and Investment, being a Department designated for the purposes of section 2(2) of the European Communities Act 1972^(a) in relation to energy and energy sources^(b), in exercise of the powers conferred on it by the said section 2(2), and of every other power enabling it in that behalf, hereby makes the following Regulations:

PART I

INTRODUCTORY

Citation and commencement

1. These Regulations may be cited as the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011 and shall come into operation on 15th April 2011.

Interpretation

2.—(1) The Interpretation Act (Northern Ireland) 1954^(c) shall apply to these Regulations as it applies to an Act of the Assembly.

(2) In these Regulations—

“the Authority” means the Northern Ireland Authority for Utility Regulation;

“the Department” means the Department of Enterprise, Trade and Investment;

“the Electricity Directive” means European Parliament and Council Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;

“the Electricity Order” means the Electricity (Northern Ireland) Order 1992^(d);

“the Energy Order” means the Energy (Northern Ireland) Order 2003^(e);

(a) 1972 c.68

(b) The European Communities (Designation) Order 2010 S.I. 2010/761

(c) 1954 c.33 (N.I.)

(d) S.I. 1992/231 (N.I. 1)

(e) S.I. 2003/419 (N.I.6)

“the Gas Directive” means European Parliament and Council Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; and

“the Gas Order” means the Gas (Northern Ireland) Order 1996(a).

PART II CONSUMER PROTECTION

Amendments to objectives in the Energy Order

3. In Article 12(3) of the Energy Order, after “the Authority shall have regard to” there shall be inserted “the need to protect”.

4. In Article 14(3) of the Energy Order, after “the Authority shall have regard to” there shall be inserted “the need to protect”.

Amendment of provisions dealing with determination of disputes

5.—(1) Article 26 of the Electricity Order, shall be amended as provided in this regulation.

(2) In paragraph (1)—

(a) for sub-paragraph (a) there shall be substituted the following sub-paragraph—

“(a) may be referred to the Authority by either party, and such a reference shall be accompanied by such information as is necessary or expedient to allow a determination to be made in relation to the dispute; and”;

(b) for “and the practice and procedure” there shall be substituted “and, subject to paragraph (1A), the practice and procedure”.

(3) After paragraph (1) there shall be inserted the following paragraphs—

“(1A) The procedures established under paragraph (1) shall provide for the determination of the dispute to be notified to the party making the reference within the requisite period or such longer period as the Authority may agree with that person.

(1B) For the purposes of paragraph (1A), the requisite period in any case means—

(a) the period of 2 months from the date when the dispute was referred to the Authority; or

(b) where the information sent to the Authority under paragraph (1)(a) was in its opinion insufficient to enable it to make a determination, the period of 4 months from the date when the dispute was referred to the Authority.”

6.—(1) Article 42A of the Electricity Order, shall be amended as provided in this regulation.

(2) In paragraph (1) for sub-paragraph (a) there shall be substituted the following sub-paragraph—

“(a) may be referred to the Authority by either party or, with the agreement of either party, by the General Consumer Council, and such a reference shall be accompanied by such information as is necessary or expedient to allow a determination to be made in relation to the dispute; and”.

(3) In paragraph (3) for “The practice and procedure” there shall be substituted “Subject to paragraph (3A), the practice and procedure”.

(a) S.I. 1996/275 (N.I.2)

(4) After paragraph (3) there shall be inserted the following paragraphs—

“(3A) The procedures established under paragraph (3) shall provide for the determination of the dispute to be notified to the person making the reference within the requisite period or such longer period as the Authority may agree with that person.

(3B) For the purposes of paragraph (3A), the requisite period in any case means—

- (a) the period of 2 months from the date when the dispute was referred to the Authority; or
- (b) where the information sent to the Authority under paragraph (1)(a) was in its opinion insufficient to enable it to make a determination, the period of 4 months from the date when the dispute was referred to the Authority.”.

Billing disputes: electricity

7. For Article 47A of the Electricity Order there shall be substituted the following Article—

“Billing disputes

47A.—(1) A billing dispute—

- (a) may be referred by the customer who is party to the dispute to the Authority for determination in accordance with this Article; and
- (b) on such a reference, shall be determined by order made by the Authority or, if the Authority thinks fit, an arbitrator appointed by the Authority.

(2) In this Article “billing dispute” means a dispute between an electricity supplier and a customer concerning the amount of the charge which the supplier is entitled to recover from the customer in connection with the provision of electricity supply services.

(3) The practice and procedure to be followed in connection with the determination of billing disputes shall be such as the Authority thinks appropriate and shall be published by the Authority.

(4) Except with the consent of the Authority, no billing dispute may be referred for determination under this Article—

- (a) unless the matter in dispute has first been referred to the General Consumer Council pursuant to Article 22 of the Energy (Northern Ireland) Order 2003 and the matter has not been resolved to the satisfaction of the customer within 3 months of the matter being referred to the General Consumer Council;
- (b) after the end of the period of 12 months after the end of the period in respect of which the charge which is the subject of the dispute applies.

(5) Where a billing dispute is referred to the Authority, an order under this Article shall be made and notified to the parties to the dispute within the requisite period or such longer period as the Authority may agree with the person referring the dispute.

(6) For the purposes of paragraph (5), the requisite period in any case means—

- (a) the period of 2 months from the date when the dispute was referred to the Authority; or
- (b) where information given to the Authority in relation to the dispute was in its opinion insufficient to enable it to make a determination, the period of 4 months from the date the dispute was referred to the Authority.

(7) A person making an order under this Article shall include in the order his reasons for reaching his decision with respect to the dispute.

(8) An order under this Article—

- (a) may include provision requiring either party to the dispute to pay a sum in respect of the costs and expenses of the person making the order; and
- (b) shall be final and enforceable as if it were a judgment of the county court.

(9) In including in an order under this Article any such provision as to costs or expenses as is mentioned in paragraph (8)(a), the person making the order shall have regard to the conduct and means of the parties and any other relevant circumstances.

(10) The Authority or an arbitrator appointed by him shall not determine any billing dispute which is the subject of proceedings before, or with respect to which judgment has been given by, any court.

(11) Neither party to any billing dispute which has been referred to the Authority for determination in accordance with this Article shall commence proceedings before any court in respect of that dispute pending the determination of the dispute in accordance with this Article.

(12) An electricity supplier may not commence proceedings before any court in respect of any charge in connection with the provision by him of electricity supply services unless, not less than 28 days before doing so, the customer concerned was informed by him, in such form and manner (if any) as may be required by any conditions of the electricity supplier's licence, of—

- (a) his intention to commence proceedings;
- (b) the customer's rights by virtue of this Article; and
- (c) such other matters (if any) as may be prescribed.

(13) The powers of the Authority under Article 31 shall also be exercisable for any purpose connected with the determination of any billing dispute referred to him in accordance with this Article as they are exercisable for a purpose mentioned in paragraph (1) of that Article.”

Billing disputes

8. After Article 24 of the Gas Order there shall be inserted the following Article—

“Billing disputes: gas

24A.—(1) A billing dispute—

- (a) may be referred by the customer who is party to the dispute to the Authority for determination in accordance with this Article; and
- (b) on such a reference, shall be determined by order made by the Authority or, if the Authority thinks fit, an arbitrator appointed by the Authority.

(2) In this Article “billing dispute” means a dispute between a gas supplier and a customer concerning the amount of the charge which the supplier is entitled to recover from the customer in connection with the provision of gas supply services.

(3) The practice and procedure to be followed in connection with the determination of billing disputes shall be such as the Authority thinks appropriate and shall be published by the Authority.

(4) Except with the consent of the Authority, no billing dispute may be referred for determination under this Article—

- (a) unless the matter in dispute has first been referred to the General Consumer Council pursuant to Article 22 of the Energy (Northern Ireland) Order 2003 and the matter has not been resolved to the satisfaction of the customer within 3 months of the matter being referred to the General Consumer Council;
- (b) after the end of the period of 12 months after the end of the period in respect of which the charge which is the subject of the dispute applies.

(5) Where a billing dispute is referred to the Authority, an order under this Article shall be made and notified to the parties to the dispute within the requisite period or such longer period as the Authority may agree with the person referring the dispute.

- (6) For the purposes of paragraph (5), the requisite period in any case means—
- (a) the period of 2 months from the date when the dispute was referred to the Authority; or
 - (b) where information given to the Authority in relation to the dispute was in its opinion insufficient to enable it to make a determination, the period of 4 months from the date the dispute was referred to the Authority.
- (7) A person making an order under this Article shall include in the order his reasons for reaching his decision with respect to the dispute.
- (8) An order under this Article—
- (a) may include provision requiring either party to the dispute to pay a sum in respect of the costs and expenses of the person making the order; and
 - (b) shall be final and enforceable as if it were a judgment of the county court.
- (9) In including in an order under this Article any such provision as to costs or expenses as is mentioned in paragraph (8)(a), the person making the order shall have regard to the conduct and means of the parties and any other relevant circumstances.
- (10) The Authority or an arbitrator appointed by him shall not determine any billing dispute which is the subject of proceedings before, or with respect to which judgment has been given by, any court.
- (11) Neither party to any billing dispute which has been referred to the Authority for determination in accordance with this Article shall commence proceedings before any court in respect of that dispute pending the determination of the dispute in accordance with this Article.
- (12) A gas supplier may not commence proceedings before any court in respect of any charge in connection with the provision by him of gas supply services unless, not less than 28 days before doing so, the customer concerned was informed by him, in such form and manner (if any) as may be required by any conditions of the gas supplier's licence, of—
- (a) his intention to commence proceedings; and
 - (b) the customer's rights by virtue of this Article.
- (13) The powers of the Authority under Article 30 shall also be exercisable for any purpose connected with the determination of any billing dispute referred to him in accordance with this Article as they are exercisable for a purpose mentioned in paragraph (1) of that Article.”.

Amendments to Energy Act (Northern Ireland) 2011 relating to disputes

9.—(1) Section 2 of the Energy Act (Northern Ireland) 2011 shall be amended as provided in this regulation.

(2) For subsection (1)(a), there shall be substituted the following subsection—

“(a) may be referred to the Authority by either party or, with the agreement of either party, by the General Consumer Council, and such a reference shall be accompanied by such information as is necessary or expedient to allow a determination to be made in relation to the dispute; and”.

(3) In subsection (3) for “The practice and procedure” there shall be substituted “Subject to subsection (3A), the practice and procedure”.

(4) After subsection (3) there shall be inserted the following subsections—

“(3A) The procedures established under subsection (3) shall provide for the determination of the dispute to be notified to the party making the reference within the requisite period or such longer period as the Authority may agree with that person.

- (3B) For the purposes of subsection (3A) the requisite period in any case means—
- (a) the period of 2 months from the date when the dispute was referred to the Authority; or
 - (b) where the information sent to the Authority under subsection (1)(a) was in its opinion insufficient to enable it to make a determination, the period of 4 months from the date the dispute was referred to the Authority.”.

PART III

OWNERSHIP UNBUNDLING

Participants in electricity transmission: certification as to independence

10. After Article 10A of the Electricity Order there shall be inserted the following Articles—

“Electricity transmission: requirement for participants to be certified as independent

10B.—(1) A person who participates in the transmission of electricity within the meaning of sub-paragraph (b) or both sub-paragraphs (a) and (b) of Article 8(4) and who holds a transmission licence immediately before the coming into operation of the 2011 Regulations must, on and after the relevant date, ensure that he is certified at all times when he acts under the authority of that licence.

(2) Any person who intends to participate in the transmission of electricity within the meaning of Article 8(4)(b) and who is granted a transmission licence after the coming into operation of the 2011 Regulations must ensure that he is certified at all times when he acts under the authority of the licence.

(3) In paragraph (1) the “relevant date” in respect of a person is 3rd March 2012 or any later date before 4th March 2013 which the Authority specifies under paragraph (4) or (5) in respect of that person.

(4) The Authority may specify a later date in respect of a person if—

- (a) the person has asked the Authority to specify a later date;
- (b) the person is not, and is not part of, a vertically integrated undertaking; and
- (c) no senior officer of the person is also a senior officer of a relevant producer or supplier.

(5) The Authority may also specify a later date in respect of a person if the Authority decides that, for reasons beyond its and the person’s control, the Authority will not reasonably be able to make a final decision before 3rd March 2012 as to whether or not to certify the person.

Application for certification

10C.—(1) An application for certification may not be made unless the applicant has first consulted, in such manner and within such period as the Authority may specify in writing, with any related transmission licensee in respect of the application.

(2) An application for certification must be made—

- (a) in writing to the Authority; and
- (b) before such date and in such form and contain such information as the Authority may specify in writing.

(3) The applicant must, at the same time as it makes an application for certification, send a copy of it to any related transmission licensee.

(4) If the application is made on or after 3rd March 2013 and either—

- (a) the applicant is; or
- (b) the application is made on the basis of the third certification ground under Article 10F(5) and the applicant nominates as an independent system operator,

a person from a third country or a person controlled by a person from a third country, the Authority must notify the Department and the European Commission as soon as is reasonably practicable.

(5) A related transmission licensee may, make such representations to the Authority as it thinks fit in respect of the application for certification in question, including representations as to any qualification measures whether or not proposed by the applicant.

(6) The Authority may specify a date by which such representations must be made.

(7) The Authority may request from an applicant for certification any further information the Authority considers is relevant to the application, and the applicant must supply that information if—

- (a) it is in the applicant's possession or control; or
- (b) it is information which the applicant could reasonably be expected to obtain.

(8) The Authority may request a relevant producer or supplier, and any related transmission licensee, for any information the Authority considers relevant to an application for certification, and the person so requested must supply that information if—

- (a) it is in his possession or control; or
- (b) it is information which he could reasonably be expected to obtain.

(9) A person requested to supply information under paragraph (7) or (8) must do so by the date specified by the Authority in the request.

(10) The Authority shall have regard to any representations made by a related transmission licensee in accordance with paragraphs (5) and (6) in making a decision as to whether or not the applicant should be certified and what, if any, qualification measures should be taken.

Report where applicant connected with a country outside the European Economic Area

10D.—(1) This Article applies if the Department is notified by the Authority under Article 10C(4) that an application has been made by, or nominating as an independent system operator, a person from a third country or a person controlled by a person from a third country.

(2) The Department must prepare a report on whether the security of electricity supplies in the United Kingdom and the European Economic Area would be put at risk by the certification of the applicant.

(3) In preparing the report, the Department must take into account—

- (a) any relevant international law; and
- (b) any relevant agreement between the government of the United Kingdom and the government of the third country in question.

(4) The Department must send the report to the Authority within the 6 weeks beginning with the day on which the notification under Article 10C(4) is received by it.

Certification

10E.—(1) The Authority must, within the 4 months beginning with the day on which it receives an application for certification, make a preliminary decision as to whether it should certify the applicant.

(2) If—

- (a) the Authority has asked an applicant or a relevant producer or supplier or related transmission licensee for information under Article 10C(7) or (8); and
- (b) the information has not been supplied by the date specified by the Authority under Article 10C(9),

then the period of 4 months referred to in paragraph (1) shall be extended by the period of delay in supplying such information.

(3) As soon as is reasonably practicable after making the preliminary decision under paragraph (1), the Authority must notify the decision and the reasons for it to—

- (a) the applicant;
- (b) any related transmission licensee;
- (c) the Department; and
- (d) the European Commission.

(4) The Authority must enclose with the notification under paragraph (3)(a), (b) or (d) a copy of any report which the Department has prepared under Article 10D in respect of the applicant and which the Authority receives before giving the notification.

(5) Article 3 of the Electricity Regulation sets out the obligation to make a final decision, together with related processes, time limits, matters to be taken into account and conditions.

(6) As soon as is reasonably practicable after making the final decision in any case, the Authority must notify the decision and the reasons for it to—

- (a) the applicant;
- (b) any related transmission licensee;
- (c) the Department; and
- (d) the European Commission.

Grounds for certification

10F.—(1) This Article applies to—

- (a) a preliminary decision under Article 10E as to whether an applicant should be certified; and
- (b) a final decision under Article 3 of the Electricity Regulation as to whether to certify an applicant.

(2) Subject to paragraph (7), the Authority may only decide that the applicant should be certified, or decide to certify the applicant, if one of the following four grounds (“the certification grounds”) applies.

(3) The first certification ground is that the ownership unbundling requirement in Article 10G is met in relation to the applicant and to any related transmission licensee.

(4) The second certification ground is that the applicant has applied for a derogation from the ownership unbundling requirement on the grounds in paragraph (9) of Article 9 of the Directive (alternative arrangements for independence), and the Authority has determined that the requirements of that paragraph are met.

(5) The third certification ground is that—

- (a) the applicant has applied for a derogation from the ownership unbundling requirement on the grounds in paragraphs (1) and (2) of Article 13 of the Directive (independent system operator);
- (b) the applicant has nominated an independent system operator for designation in accordance with those paragraphs; and

- (c) the Authority—
 - (i) has determined that the requirements of those paragraphs and of paragraphs (1) and (2) of Article 14 of the Directive (unbundling of transmission system owners) are met; and
 - (ii) is minded to designate the nominated independent system operator.

(6) The fourth certification ground is that the applicant has been granted an exemption under Article 17 of the Electricity Regulation (new interconnectors) and remains entitled to the benefit of it.

(7) The Authority may make a preliminary decision to certify an applicant where it is satisfied that the certification ground to which his application relates applies in the case of the applicant or would apply if particular qualification measures were taken and that—

- (a) those qualification measures are within the powers of the Authority to impose under regulations 11 and 94 of the 2011 Regulations or any other powers of the Authority under this Order or the Energy (Northern Ireland) Order 2003 and the Authority is minded so to exercise those powers; or
- (b) the Authority is otherwise satisfied that such qualification measures will be taken.

(8) But, regardless of whether a certification ground applies under paragraph (2), the Authority must not certify the applicant—

- (a) if, on the basis of an opinion expressed by the European Commission under Article 11 of the Directive (certification in relation to persons from countries outside the European Economic Area), the Authority considers that the certification of the applicant would put at risk the security of electricity supplies in the European Economic Area;
- (b) if a report prepared by the Department under Article 10D states that the certification of the applicant would put at risk the security of electricity supplies in the United Kingdom or the European Economic Area;
- (c) on the second certification ground if the European Commission has not verified, in accordance with paragraph (10) of Article 9 of the Directive (verification of independence under alternative arrangements), that the requirement in that paragraph as to arrangements for effective independence is met.

The ownership unbundling requirement

10G.—(1) For the purposes of Article 10F(3), the ownership unbundling requirement is met by an applicant for certification or (as the case may be) a related transmission licensee (“a relevant person”) if the Authority considers that each of the following five tests is passed.

- (2) The first test is that the relevant person—
 - (a) does not control a relevant producer or supplier;
 - (b) does not have a majority shareholding in a relevant producer or supplier; and
 - (c) will not, on or after the relevant date (within the meaning of Article 10B(3)), exercise any shareholder rights it holds, or becomes the holder of, in relation to a relevant producer or supplier.

(3) For the purposes of paragraph (2)(c), the Authority is entitled to think that the relevant person will not exercise any shareholder rights it holds, or becomes the holder of, if the relevant person has given an undertaking that it will not exercise those shareholder rights.

(4) The second test is that the relevant person is not controlled by a person who controls a relevant producer or supplier.

(5) But even where the second test is not passed, the Authority is entitled to treat it as passed if—

- (a) the control over the relevant person was gained through the exercise of a right conferred as a condition of the provision of financial support or a guarantee in relation to the relevant person's business; or
- (b) the control over the relevant producer or supplier was gained through the exercise of such a right conferred in relation to the business of the relevant producer or supplier.

(6) The third test is that the relevant person is not controlled by a person who has a majority shareholding in a relevant producer or supplier.

(7) But even where the third test is not passed, the Authority is entitled to treat it as passed if—

- (a) the control over the relevant person was gained through the exercise of a right conferred as a condition of the provision of financial support or a guarantee in relation to the relevant person's business; or
- (b) the majority shareholding in the relevant producer or supplier was gained through the exercise of such a right conferred in relation to the business of the relevant producer or supplier.

(8) Where the Authority treats the second or third test as having been passed only by virtue of paragraph (5) or (7), it must specify a time limit after which it will cease to treat that test as having been passed; and it may extend the time limit if it thinks it necessary or expedient to do so.

(9) Paragraphs (10) and (11) apply where the Authority is entitled to treat the second or third test as having been passed only by virtue of paragraph (5) or (7).

(10) In deciding whether to treat the test as having been passed, the Authority—

- (a) must take into account—
 - (i) whether the relationship (direct or indirect) between the relevant person and the relevant producer or supplier has led or might lead the relevant person to discriminate in favour of the relevant producer or supplier; and
 - (ii) the length of time for which that is likely to continue to be so; and
- (b) may, in particular, take into account any information or undertakings given to the Authority by the relevant person, the relevant producer or supplier or the person who controls the relevant person and controls or has a majority shareholding in the relevant producer or supplier.

(11) The information and undertakings that may be taken into account under paragraph (10)(b) include information and undertakings regarding any measures that have been or will be put in place to ensure the effective separation of the business of the relevant person and the business of the relevant producer or supplier.

(12) The fourth test is that, where the relevant person is a company, partnership or other business, none of its senior officers has been, or may be, appointed by a person who—

- (a) controls a relevant producer or supplier other than a gas producer or gas supply undertaking; or
- (b) has a majority shareholding in a relevant producer or supplier other than a gas producer or gas supply undertaking.

(13) The fifth test is that, where the relevant person is a company, partnership or other business, none of its senior officers is also a senior officer of a relevant producer or supplier other than a gas producer or gas supply undertaking.

Designation for the purposes of EU electricity legislation

10H.—(1) This Article applies for any period during which a person—

- (a) holds a transmission licence in relation to which the duty under Article 10B(1) or (2) applies; and
- (b) is certified.

(2) If the person is certified on the first or second certification ground in Article 10F, the Department shall designate that person as an electricity transmission system operator for the purposes of Article 10(2) of the Directive (designation of transmission system operators).

(3) If the person is certified on the third certification ground in Article 10F, the Department shall designate the independent system operator nominated in the application for certification as an electricity transmission system operator for the purposes of that Article.

(4) As soon as is reasonably practicable after a person is designated by virtue of this Article, the Department must give notice of the designation to—

- (a) the person so designated;
- (b) the applicant (if different);
- (c) the Authority; and
- (d) the European Commission.

(5) Where, in the case of a person certified on the first or second certification ground, there is a related transmission licensee, conditions included pursuant to Article 11A(1) in the transmission licences of the certified person and the related transmission licensee may make provision for determining which of them is to act as transmission system operator for the purposes of any provision of the Electricity Regulation and any designation under this Article is without prejudice to any such provision.

Monitoring and review of certification

10I.—(1) The Authority must monitor, in respect of each certified person, whether the grounds on which the person was certified continue to apply.

(2) Where for the purposes of certifying any person, the Authority has treated the second or third test in Article 10G as having been passed only by virtue of paragraph (5) or (7) of that Article, then where after the expiry of the time limit provided under paragraph (8) of that Article it has ceased to treat that test as having been passed by such virtue, the certification shall be withdrawn unless the Authority reviews the certification and is satisfied that the test in question is otherwise passed.

(3) If, on or after 3rd March 2013, as a result of information it has received or obtained, the Authority considers that a person from a third country has taken or may take control of a certified person or a person designated as independent system operator, the Authority must, as soon as is reasonably practicable, notify the information to the Department and the European Commission.

(4) The Authority may review the final certification for any person if—

- (a) the certified person or any related transmission licensee notifies it of any event or circumstance which may affect the grounds on which that person was certified; or
- (b) for any other reason the Authority considers that the grounds for the certification of that person may no longer apply.

(5) A review under paragraph (2) or (4) is to be carried out within the 4 months beginning with—

- (a) if paragraph (4)(a) applies, the day on which the Authority receives the notification under that paragraph;

- (b) if the review is in pursuance of paragraph (2), the expiry of the time limit referred to in that paragraph; or
 - (c) otherwise, the first day on which the Authority considers that the grounds for certification may no longer apply.
- (6) The Authority must also review a final certification if the European Commission asks it to do so.
- (7) A review under paragraph (6) is to be carried out within the 4 months beginning with the day on which the Authority receives the request from the European Commission.
- (8) But where the Authority considers that the circumstances giving rise to the review of the certification of any person under paragraph (4) or (6) represent or result from the contravention of a relevant condition or requirement for the purposes of Article 41 of the Energy (Northern Ireland) Order 2003, by a related transmission licensee, the Authority may suspend the carrying out of the review while the Authority is taking steps in relation to such contravention pursuant to Part VI of that Order and during any period allowed to the related transmission licensee for complying with any enforcement order.
- (9) As soon as is reasonably practicable after beginning a review under this Article, the Authority must notify the certified person to whom the review relates and any related transmission licensee that the review is being carried out and the reasons for it.
- (10) The Authority may ask the certified person for any information the Authority thinks is relevant to the review, and the person must supply the information if—
- (a) it is in the certified person’s possession or control; or
 - (b) it is information which the certified person could reasonably be expected to obtain.
- (11) The Authority may ask a relevant producer or supplier or related transmission licensee for any information the Authority thinks is relevant to a review under this Article, and the relevant producer or supplier or related transmission licensee must supply that information if—
- (a) it is in the possession or control of the relevant producer or supplier or related transmission licensee; or
 - (b) it is information which the relevant producer or supplier or related transmission licensee could reasonably be expected to obtain.
- (12) A person required to supply information under paragraph (10) or (11) must do so by any deadline specified by the Authority in the request.

Report as to any connection of a certified person with a country outside the European Economic Area

- 10J.**—(1) This Article applies if the Department is notified by the Authority under Article 10I(3) that a person from a third country has taken or may take control of a certified person or (in relation to a certified person) a person designated as an independent system operator.
- (2) The Department must prepare a report on whether the security of electricity supplies in the United Kingdom and the European Economic Area would be put at risk by the continued certification of the person.
- (3) In preparing the report, the Department must take into account—
- (a) any relevant international law; and
 - (b) any relevant agreement between the government of the United Kingdom and the government of the third country in question.
- (4) The Department must prepare the report and send it to the Authority within the 6 weeks beginning with the day on which the notification is received.

Continuation or withdrawal of certification

10K.—(1) Where the Authority reviews under Article 10I whether the grounds for the certification of a person apply or continue to apply, it may, within the review period, make a preliminary decision that either—

- (a) the certification should be continued on the certification ground in question; or
- (b) the certification should be withdrawn.

(2) If the Authority does not make a decision under paragraph (1) within the review period, it is to be taken as having decided at the end of the review period that the certification should be continued on the certification ground in question.

(3) As soon as is reasonably practicable after a preliminary decision is made (or taken to be made) under this Article, the Authority must—

- (a) notify the European Commission of the decision; and
- (b) enclose the information it considers relevant to the decision.

(4) Article 3 of the Electricity Regulation sets out an obligation to make a final review decision, together with related processes, time limits, matters to be taken into account and conditions.

(5) Paragraphs (6) to (8) apply in relation to the Authority’s final decision under Article 3 of the Electricity Regulation whether or not to confirm the certification.

(6) As soon as is reasonably practicable after making the final decision, the Authority must notify the decision and the reasons for it to—

- (a) the person in relation to whom the review was carried out;
- (b) any related transmission licensee;
- (c) the Department; and
- (d) the European Commission

(7) If the final decision is to continue the certification, the person in question is to be taken as continuing to be certified by the Authority.

(8) Otherwise, the person is to be taken as no longer certified.

(9) Article 10F(8)(a) and (b) applies in relation to a decision mentioned in this Article as it applies in relation to a decision mentioned in Article 10F(1), but as if the reference in Article 10F(8)(b) to a report under Article 10D were a reference to a report under Article 10J.

Interpretation

10L.—(1) In Articles 10B to 10K and this Article—

“certification ground” shall be construed in accordance with Article 10F(2);

“certified” means, in relation to any person, certified in accordance with Article 10E or continued to be certified in accordance with Article 10K;

“control”, in relation to one person having control over another, has the meaning given in Article 2(34) of the Directive, but in determining whether one person (“person A”) controls another person (“person B”) no account is to be taken of any power to exercise a contractual or other right which would give person A decisive influence over person B where the right was conferred as a condition of the provision of any financial support or guarantee by person A in relation to the business of person B; and references to one person controlling another are to be interpreted accordingly;

“electricity generation undertaking” means a person who generates electricity for the purpose of giving a supply to any premises or enabling a supply to be so given;

“electricity supply undertaking” means a person who supplies electricity to any premises;

“Electricity Regulation” means Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No. 1228/2003;

“gas producer” means a gas undertaking carrying out the function of production mentioned in Article 2(1) of European Parliament and Council Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC;

“gas supply undertaking” means a person who sells gas to one or more customers, including by the supply to any premises of gas which has been conveyed to those premises through pipes;

“licence” means—

- (a) in relation to an electricity generation undertaking or an electricity supply undertaking, a licence under Article 10(1)(a) or (c); and
- (b) in relation to a gas supply undertaking, a licence under Article 8(1)(c) of the Gas (Northern Ireland) Order 1996;

“majority shareholding” means a simple majority of shares;

“person from a third country” means any person the Authority thinks is a person from a third country;

“qualification measures”, in relation to an applicant for certification, means measures taken or arrangements made to ensure that the certification ground to which his application relates applies in his case;

“related transmission licensee” means, in relation to an applicant for certification or a certified person, any other person (including a person nominated or designated as independent system operator for the purposes of the third certification ground) who—

- (a) holds; or
- (b) in the case of an applicant for certification would, pursuant to any qualification measures proposed in the application, hold, a transmission licence under which that person participates or would participate in the transmission of electricity (within the meaning of Article 8(4)(a)) by means of the transmission system of the applicant or certified person;

“review period”, in relation to a review under Article 10I, means the period specified in paragraph (5) or (7) of that Article as extended by any period of suspension under paragraph (8) of that Article;

“senior officer” means—

- (a) in relation to a company, a director;
- (b) in relation to a partnership, a partner;
- (c) in relation to any other business, a person holding a position equivalent to that of a director or partner;

“shareholder right”, in relation to a company, means a right conferred by the holding of a share in the company’s share capital—

- (a) to vote at general meetings of the company; or
- (b) to appoint or remove a member of the company’s board of directors;

“third country” means a country that is not, and is not part of, a European Economic Area state.

(2) In Article 10B to 10K and this Article, “relevant producer or supplier”, in relation to an applicant for certification or a certified person, means—

- (a) an electricity generation undertaking, an electricity supply undertaking or a gas supply undertaking which meets the requirements of paragraph (3); or
- (b) a gas producer which meets the requirements of paragraph (4).

(3) An undertaking mentioned in paragraph (2)(a) meets the requirements of this paragraph if it carries out its generation or supply activity in a European Economic Area state and it—

- (a) requires a licence or similar authority to do so;
- (b) would, in the Authority’s opinion, require a licence to do so if it carried out the activity in Northern Ireland; or
- (c) has a relationship with the applicant or certified person which the Authority thinks might lead the applicant or certified person to discriminate in favour of it.

(4) A gas producer meets the requirements of this paragraph if it—

- (a) carries out its production activity in a European Economic Area state; and
- (b) has a relationship with the applicant or certified person which the Authority thinks might lead the applicant or certified person to discriminate in favour of it.”.

Electricity transmission unbundling: modification of licences, etc.

11.—(1) Where the Authority is minded to make a final decision to certify a person under Article 10E of the Electricity Order, modifications to the conditions of an electricity licence made pursuant to regulation 91 may include such modifications as the Department or the Authority considers requisite or expedient to enable the satisfaction of any condition required for the relevant certification ground to apply.

(2) Conditions included in a licence pursuant to paragraph (1)—

- (a) may require the licence holder to enter into such new agreements or arrangements, or new agreements or arrangements for such purposes or of such description, as may be specified in, or determined by or under the conditions;
- (b) may include provision for determining the terms on which such new agreements or arrangements are to be entered into; and
- (c) may require the licence holder to amend or terminate, or agree to the amendment or termination of, such existing agreements or arrangements, or existing agreements or arrangements of such description, as may be specified in, or determined by or under the conditions.

(3) In this regulation “certification ground” has the meaning given to it in Article 10L of the Electricity Order.

Gas conveyors: certification as to independence

12. After Article 8 of the Gas Order there shall be inserted the following Articles—

“The conveyance of gas: requirement to be certified as independent

8B.—(1) A person who conveys gas through a gas transmission pipe-line and holds a licence under Article 8(1)(a) immediately before the coming into operation of the 2011 Regulations must, on and after the relevant date, ensure that he is certified at all times when he acts under the authority of that licence.

(2) Any person who intends to convey gas through a gas transmission pipe-line and who is granted a licence under Article 8(1)(a) after the coming into operation of the 2011 Regulations must ensure that he is certified at all times when he acts under the authority of the licence.

(3) In paragraph (1) the “relevant date” in respect of a person is 3rd March 2012 or any later date before 4th March 2013 which the Authority specifies under paragraph (4) or (5) in respect of that person.

- (4) The Authority may specify a later date in respect of a person if—
- (a) the person has asked the Authority to specify a later date;
 - (b) the person is not, and is not part of, a vertically integrated undertaking; and
 - (c) no senior officer of the person is also a senior officer of a relevant producer or supplier.

(5) The Authority may also specify a later date in respect of a person if the Authority decides that, for reasons beyond its and the person's control, the Authority will not reasonably be able to make a final decision before 3rd March 2012 as to whether or not to certify the person.

(6) For the purposes of this Article, a person conveys gas through a gas transmission pipe-line where he—

- (a) makes a gas transmission pipe-line available for use for the purposes of the conveyance of gas; or
- (b) makes such a pipe-line available and coordinates and directs the flow of gas into and through such pipe-line.

Application for certification

8C.—(1) An application for certification must be made—

- (a) in writing to the Authority; and
- (b) before such date and in such form and contain such information as the Authority may specify in writing.

(2) If the application is made on or after 3rd March 2013 and either—

- (a) the applicant is; or
- (b) the application is made on the basis of the third certification ground under Article 8F(5) and the applicant nominates as an independent system operator,

a person from a third country or a person controlled by a person from a third country, the Authority must notify the Department and the European Commission as soon as is reasonably practicable.

(3) The Authority may request from an applicant for certification any further information the Authority thinks is relevant to the application, and the applicant must supply that information if—

- (a) it is in the applicant's possession or control; or
- (b) it is information which the applicant could reasonably be expected to obtain.

(4) The Authority may request a relevant producer or supplier, and any related conveyance licensee, for any information the Authority considers relevant to an application for certification, and the person so requested must supply that information if—

- (a) it is in his possession or control; or
- (b) it is information which he could reasonably be expected to obtain.

(5) A person requested to supply information under paragraph (3) or (4) must do so by the date specified by the Authority in the request.

Report where applicant connected with a country outside the European Economic Area

8D.—(1) This Article applies if the Department is notified by the Authority under Article 8C(2) that an application has been made by, or nominating as an independent system operator, a person from a third country or a person controlled by a person from a third country.

(2) The Department must prepare a report on whether the security of gas supplies in the United Kingdom and the European Economic Area would be put at risk by the certification of the applicant.

(3) In preparing the report, the Department must take into account—

- (a) any relevant international law; and
- (b) any relevant agreement between the government of the United Kingdom and the government of the third country in question.

(4) The Department must send the report to the Authority within the 6 weeks beginning with the day on which the notification under Article 8C(2) is received by it.

Certification

8E.—(1) The Authority must, within the 4 months beginning with the day on which it receives an application for certification, make a preliminary decision as to whether it should certify the applicant.

(2) If—

- (a) the Authority has asked an applicant or a relevant producer or supplier or related conveyance licensee for information under Article 8C(3) or (4); and
- (b) the information has not been supplied by the date specified by the Authority under Article 8C(5),

then the period of 4 months referred to in paragraph (1) shall be extended by the period of delay in supplying such information.

(3) As soon as is reasonably practicable after making the preliminary decision under paragraph (1), the Authority must notify the decision and the reasons for it to—

- (a) the applicant;
- (b) any related conveyance licensee;
- (c) the Department; and
- (d) the European Commission.

(4) The Authority must enclose with the notification under paragraph (3)(a), (b) or (d) a copy of any report which the Department has prepared under Article 8D in respect of the applicant and which the Authority receives before giving the notification.

(5) Article 3 of the Gas Regulation sets out the obligation to make a final decision, together with related processes, time limits, matters to be taken into account and conditions.

(6) As soon as is reasonably practicable after making the final decision in any case the Authority must notify the decision and the reasons for it to—

- (a) the applicant;
- (b) any related conveyance licensee;
- (c) the Department; and
- (d) the European Commission.

Grounds for certification

8F.—(1) This Article applies to—

- (a) a preliminary decision under Article 8E as to whether an applicant should be certified;
- (b) a final decision under Article 3 of the Gas Regulation as to whether to certify an applicant.

(2) Subject to paragraph (7), the Authority may only decide that the applicant should be certified, or decide to certify the applicant, if one of the following four grounds (“the certification grounds”) applies.

(3) The first certification ground is that the ownership unbundling requirement in Article 8G is met in relation to the applicant and to any related conveyance licensee.

(4) The second certification ground is that—

- (a) the applicant has applied for a derogation from the ownership unbundling requirement on the grounds in paragraphs (1) and (2) of Article 14 of the Directive (independent system operator);
- (b) the applicant has nominated an independent system operator for designation in accordance with those paragraphs; and
- (c) the Authority—
 - (i) has determined that the requirements of those paragraphs and of paragraphs (1) and (2) of Article 15 of the Directive (unbundling of transmission system owners and storage system operators) are met; and
 - (ii) is minded to designate the nominated independent system operator.

(5) The third certification ground is that—

- (a) the applicant holds a licence under Article 8(1)(a);
- (b) the applicant has applied for a derogation from the ownership unbundling requirement on the grounds in Chapter IV of the Directive (independent transmission operator); and
- (c) the Authority has determined that the requirements of that Chapter are met.

(6) The fourth certification ground is that the applicant has been granted an exemption (effective by virtue of the conditions which apply in his licence, or by way of exemption under Article 7(1)) in accordance with Article 36 of the Directive (new infrastructure) and remains entitled to the benefit of it.

(7) The Authority may make a preliminary decision to certify an applicant where it is satisfied that the certification ground to which his application relates applies in the case of the applicant or would apply if particular qualification measures were taken and that—

- (a) those qualification measures are within the powers of the Authority to impose under regulations 13 and 94 of the 2011 Regulations or any other powers of the Authority under this Order or the Energy (Northern Ireland) Order 2003, and the Authority is minded so to exercise those powers; or
- (b) the Authority is otherwise satisfied that such qualification measures will be taken.

(8) But, regardless of whether a certification ground applies under paragraph (2), the Authority must not certify the applicant—

- (a) if, on the basis of an opinion expressed by the European Commission under Article 11 of the Directive (certification in relation to persons from countries outside the European Economic Area), the Authority considers that the certification of the applicant would put at risk the security of gas supplies in the European Economic Area;
- (b) if a report prepared by the Department under Article 8D states that the certification of the applicant would put at risk the security of gas supplies in the United Kingdom or the European Economic Area.

The ownership unbundling requirement

8G.—(1) For the purposes of Article 8F(3), the ownership unbundling requirement is met by an applicant for certification or (as the case may be) a related conveyance licensee (“a relevant person”) if the Authority considers that each of the following five tests is passed.

(2) The first test is that the relevant person—

- (a) does not control a relevant producer or supplier;
- (b) does not have a majority shareholding in a relevant producer or supplier; and

- (c) will not, on or after the relevant date (within the meaning of Article 8B(3)) exercise any shareholder rights it holds, or becomes the holder of, in relation to a relevant producer or supplier.

(3) For the purposes of paragraph (2)(c), the Authority is entitled to think that the relevant person will not exercise any shareholder rights it holds, or becomes the holder of, if the relevant person has given an undertaking that it will not exercise those shareholder rights.

(4) The second test is that the relevant person is not controlled by a person who controls a relevant producer or supplier.

(5) But even where the second test is not passed, the Authority is entitled to treat it as passed if—

- (a) the control over the relevant person was gained through the exercise of a right conferred as a condition of the provision of financial support or a guarantee in relation to the relevant person's business; or
- (b) the control over the relevant producer or supplier was gained through the exercise of such a right conferred in relation to the business of the relevant producer or supplier.

(6) The third test is that the relevant person is not controlled by a person who has a majority shareholding in a relevant producer or supplier.

(7) But even where the third test is not passed, the Authority is entitled to treat it as passed if—

- (a) the control over the relevant person was gained through the exercise of a right conferred as a condition of the provision of financial support or a guarantee in relation to the relevant person's business; or
- (b) the majority shareholding in the relevant producer or supplier was gained through the exercise of such a right conferred in relation to the business of the relevant producer or supplier.

(8) Where the Authority treats the second or third test as having been passed only by virtue of paragraph (5) or (7), it must specify a time limit after which it will cease to treat that test as having been passed; and it may extend the time limit if it thinks it necessary or expedient to do so.

(9) Paragraphs (10) and (11) apply where the Authority is entitled to treat the second or third test as having been passed only by virtue of paragraph (5) or (7).

(10) In deciding whether to treat the test as having been passed, the Authority—

- (a) must take into account—
 - (i) whether the relationship (direct or indirect) between the relevant person and the relevant producer or supplier has led or might lead the relevant person to discriminate in favour of the relevant producer or supplier; and
 - (ii) the length of time for which that is likely to continue to be so; and
- (b) may, in particular take into account any information or undertakings given to the Authority by the relevant person, the relevant producer or supplier or the person who controls the relevant person and controls or has a majority shareholding in the relevant producer or supplier.

(11) The information and undertakings that may be taken into account under paragraph (10)(b) include information and undertakings regarding any measures that have been or will be put in place to ensure the effective separation of the business of the relevant person and the business of the relevant producer or supplier.

(12) The fourth test is that, where the relevant person is a company, partnership or other business, none of its senior officers has been, or may be, appointed by a person who—

- (a) controls a relevant producer or supplier other than an electricity generation undertaking or electricity supply undertaking; or

- (b) has a majority shareholding in a relevant producer or supplier other than an electricity generation undertaking or electricity supply undertaking.

(13) The fifth test is that, where the relevant person is a company, partnership or other business, none of its senior officers is also a senior officer of a relevant producer or supplier other than an electricity generation undertaking or electricity supply undertaking.

Designation for the purposes of EU gas legislation

8H.—(1) This Article applies for any period during which a person—

- (a) holds a licence under Article 8(1)(a); and
- (b) is certified.

(2) If the person is certified on the first or third certification ground in Article 8F, the Department shall designate that person as a gas transmission system operator for the purposes of Article 10(2) of the Directive (designation of transmission system operators).

(3) If the person is certified on the second certification ground in Article 8F, the Department shall designate the independent system operator nominated in the application for certification as a gas transmission system operator for the purposes of that Article.

(4) As soon as is reasonably practicable after a person is designated by virtue of this Article, the Department must give notice of the designation to—

- (a) the person so designated;
- (b) the applicant (if different);
- (c) the Authority; and
- (d) the European Commission.

(5) Where, in the case of a person certified on the first certification ground, there is a related conveyance licensee, conditions included pursuant to Article 10A(1) in the licences under Article 8(1)(a) of the certified person and the related conveyance licensee may make provision for determining which of them is to act as transmission system operator for the purposes of any provision of the Gas Regulation and any designation under this Article is without prejudice to any such provision.

Monitoring and review of certification

8I.—(1) The Authority must monitor, in respect of each certified person, whether the grounds on which the person was certified continue to apply.

(2) Where, for the purposes of certifying any person, the Authority has treated the second or third test in Article 8G as having been passed only by virtue of paragraph (5) or (7) of that Article, then where after the expiry of the time limit provided under paragraph (8) of that Article it has ceased to treat that test as having been passed by such virtue, the certification shall be withdrawn unless the Authority reviews the certification and is satisfied that the test in question is otherwise passed.

(3) If, on or after 3rd March 2013, as a result of information it has received or obtained, the Authority considers that a person from a third country has taken or may take control of a certified person or a person designated as independent system operator, the Authority must, as soon as is reasonably practicable, notify the information to the Department and the European Commission.

(4) The Authority may review the final certification for any person if—

- (a) the certified person or any related conveyance licensee notifies it of any event or circumstance which may affect the grounds on which that person was certified; or
- (b) for any other reason the Authority considers that the grounds for the certification of that person may no longer apply.

(5) A review under paragraph (2) or (4) is to be carried out within the 4 months beginning with—

- (a) if paragraph (4)(a) applies, the day on which the Authority receives the notification under that paragraph;
 - (b) if the review is in pursuance of paragraph (2), the expiry of the time limit referred to in that paragraph; or
 - (c) otherwise, the first day on which the Authority considers that the grounds for certification may no longer apply.
- (6) The Authority must also review a final certification if the European Commission asks it to do so.
- (7) A review under paragraph (6) is to be carried out within the 4 months beginning with the day on which the Authority receives the request from the European Commission.
- (8) But where the Authority considers that the circumstances giving rise to the review of the certification of any person under paragraph (4) or (6) represent or result from the contravention of a relevant condition or requirement for the purposes of Article 41 of the Energy (Northern Ireland) Order 2003, by a related conveyance licensee, the Authority may suspend the carrying out of the review while the Authority is taking steps in relation to such contravention pursuant to Part VI of that Order and during any period allowed to the related conveyance licensee for complying with any enforcement order.
- (9) As soon as is reasonably practicable after beginning a review under this Article, the Authority must notify the certified person to whom the review relates and any related conveyance licensee that the review is being carried out and the reasons for it.
- (10) The Authority may ask the certified person for any information the Authority thinks is relevant to the review, and the person must supply the information if—
- (a) it is in the certified person’s possession or control; or
 - (b) it is information which the certified person could reasonably be expected to obtain.
- (11) The Authority may ask a relevant producer or supplier or related conveyance licensee for any information the Authority thinks is relevant to a review under this Article, and the relevant producer or supplier or related conveyance licensee must supply that information if—
- (a) it is in the possession or control of the relevant producer or supplier or related conveyance licensee; or
 - (b) it is information which the relevant producer or supplier or related conveyance licensee could reasonably be expected to obtain.
- (12) A person required to supply information under paragraph (10) or (11) must do so by any deadline specified by the Authority in the request.

Report as to any connection of a certified person with a country outside the European Economic Area

- 8J.**—(1) This Article applies if the Department is notified by the Authority under Article 8I(3) that a person from a third country has taken or may take control of a certified person or (in relation to a certified person) a person designated as an independent system operator.
- (2) The Department must prepare a report on whether the security of gas supplies in the United Kingdom and the European Economic Area would be put at risk by the continued certification of the person.
- (3) In preparing the report, the Department must take into account—
- (a) any relevant international law; and
 - (b) any relevant agreement between the government of the United Kingdom and the government of the third country in question.
- (4) The Department must prepare the report and send it to the Authority within the 6 weeks beginning with the day on which the notification is received.

Continuation or withdrawal of certification

8K.—(1) Where the Authority reviews under Article 8I whether the grounds for the certification of a person apply or continue to apply, it may, within the review period, make a preliminary decision that either—

- (a) the certification should be continued on the certification ground in question; or
- (b) the certification should be withdrawn.

(2) If the Authority does not make a decision under paragraph (1) within the review period, it is to be taken as having decided at the end of the review period that the certification should be continued on the certification ground in question.

(3) As soon as is reasonably practicable after a preliminary decision is made (or taken to be made) under this Article, the Authority must—

- (a) notify the European Commission of the decision; and
- (b) enclose the information it considers relevant to the decision.

(4) Article 3 of the Gas Regulation sets out an obligation to make a final review decision, together with related processes, time limits, matters to be taken into account and conditions.

(5) Paragraphs (6) to (8) apply in relation to the Authority’s final decision under Article 3 of the Gas Regulation whether or not to confirm the certification.

(6) As soon as is reasonably practicable after making the final decision, the Authority must notify the decision and the reasons for it to—

- (a) the person in relation to whom the review was carried out;
- (b) any related conveyance licensee;
- (c) the Department; and
- (d) the European Commission.

(7) If the final decision is to continue the certification the person in question is to be taken as continuing to be certified by the Authority.

(8) Otherwise, the person is to be taken as no longer certified.

(9) Article 8F(8)(a) and (b) applies in relation to a decision mentioned in this Article as it applies in relation to a decision mentioned in Article 8F(1), but as if the reference in Article 8F(8)(b) to a report under Article 8D were a reference to a report under Article 8J.

Interpretation

8L.—(1) In Articles 8B to 8K and this Article—

“certification ground” shall be construed in accordance with Article 8F(2);

“certified” means, in relation to any person, certified in accordance with Article 8E or continued to be certified in accordance with Article 8K;

“control”, in relation to one person having control over another, has the meaning given in Article 2(36) of the Directive, but in determining whether one person (“person A”) controls another person (“person B”) no account is to be taken of any power to exercise a contractual or other right which would give person A decisive influence over person B where the right was conferred as a condition of the provision of any financial support or guarantee by person A in relation to the business of person B; and references to one person controlling another are to be interpreted accordingly;

“electricity generation undertaking” means a person who generates electricity for the purpose of giving a supply to any premises or enabling a supply to be so given;

“electricity supply undertaking” means a person who supplies electricity to any premises;

“gas producer” means a gas undertaking carrying out the function of production mentioned in Article 2(1) of the Directive;

“gas supply undertaking” means a person who sells gas to one or more customers, including by the supply to any premises of gas which has been conveyed to those premises through pipes;

“the Gas Regulation” means Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No. 1775/2005;

“gas transmission pipe-line” means a gas pipe-line used for the purposes of transmission within the meaning of the Directive;

“licence” means—

(a) in relation to an electricity generation undertaking or an electricity supply undertaking, a licence under Article 10(1)(a) or (c) of the Electricity (Northern Ireland) Order 1992; and

(b) in relation to a gas supply undertaking, a licence under Article 8(1)(c);

“majority shareholding” means a simple majority of shares;

“person from a third country” means any person the Authority thinks is a person from a third country;

“qualification measures” in relation to an applicant for certification, means measures taken or arrangements made to ensure that the certification ground to which his application relates applies in his case;

“related conveyance licensee” means, in relation to an applicant for certification or a certified person, any other person (including a person nominated or designated as independent system operator for the purposes of the second certification ground) who—

(a) holds; or

(b) in the case of an applicant for certification would, pursuant to any qualification measures proposed in the application, hold, a licence under Article 8(1)(a) under which that person co-ordinates, and directs, the flow of gas into and through a gas transmission pipe-line of the applicant or certified person;

“review period” in relation to a review under Article 8I, means the period specified in paragraph (5) or (7) of that Article as extended by any period of suspension under paragraph (8) of that Article;

“senior officer” means—

(a) in relation to a company, a director;

(b) in relation to a partnership, a partner;

(c) in relation to any other business, a person holding a position equivalent to that of a director or partner;

“shareholder right”, in relation to a company, means a right conferred by the holding of a share in the company’s share capital—

(a) to vote at general meetings of the company; or

(b) to appoint or remove a member of the company’s board of directors;

“third country” means a country that is not, and is not part of, a European Economic Area state.

(2) In Articles 8B to 8K and this Article, “relevant producer or supplier”, in relation to an applicant for certification or a certified person, means—

(a) an electricity generation undertaking, an electricity supply undertaking or a gas supply undertaking which meets the requirements of paragraph (3); or

(b) a gas producer which meets the requirements of paragraph (4).

(3) An undertaking mentioned in paragraph (2)(a) meets the requirements of this paragraph if it carries out its generation or supply activity in a European Economic Area state and it—

- (a) requires a licence or similar authority to do so;
 - (b) would, in the Authority’s opinion, require a licence to do so if it carried out the activity in Northern Ireland; or
 - (c) has a relationship with the applicant or certified person which the Authority thinks might lead the applicant or certified person to discriminate in favour of it.
- (4) A gas producer meets the requirements of this paragraph if it—
- (a) carries out its production activity in a European Economic Area state; and
 - (b) has a relationship with the applicant or certified person which the Authority thinks might lead the applicant or certified person to discriminate in favour of it.”.

Gas transmission unbundling: modification of licences, etc.

13.—(1) Where the Authority is minded to make a final decision to certify a person under Article 8E of the Gas Order, modifications to the conditions of a gas licence made pursuant to regulation 92 may include such modifications as the Department or the Authority considers requisite or expedient to enable the satisfaction of any condition required for the relevant certification ground to apply.

(2) Conditions included in a licence pursuant to paragraph (1)—

- (a) may require the licence holder to enter into such new agreements or arrangements, or new agreements or arrangements for such purposes or of such description, as may be specified in or determined by or under the conditions;
- (b) may include provision for determining the terms on which such new agreements or arrangements are to be entered into; and
- (c) may require the licence holder to amend or terminate, or agree to the amendment or termination of, such existing agreements or arrangements, or existing agreements or arrangements of such description, as may be specified in or determined by or under the conditions.

(3) In this regulation “certification ground” has the meaning given to it in Article 8L of the Gas Order.

PART IV

ELECTRICITY AND GAS LICENSING AND COMMUNITY OBLIGATIONS

Amendments to the Electricity Order

14. For Article 11A (Compliance with Community obligations) of the Electricity Order there shall be substituted the following Article—

“11A.—(1) Without prejudice to the generality of Article 11(1), a licence shall include such conditions as appear to the grantor to be requisite or expedient to ensure any activity authorised by it is carried out in compliance with the relevant requirements and prohibitions laid down by the Directive.

(2) The conditions included in a licence in accordance with paragraph (1) shall, in particular—

- (a) require the licence holder to give to the Authority, in each year it is required by the Authority to do so, a report containing such information as the Authority may require in relation to—
 - (i) the present and likely future balance between supply of and demand for electricity in Northern Ireland and Ireland;
 - (ii) additional generating capacity under construction or being planned in Northern Ireland and Ireland;

- (iii) the quality and level of maintenance of the generating plant and equipment and of the transmission, distribution and supply systems in Northern Ireland and Ireland;
- (iv) measures taken and planned to ensure that peak demand for electricity is met and to deal with shortfalls in electricity supply in Northern Ireland and Ireland,

and to give a copy of that report to the Department;

- (b) require the licence holder to keep accounts in accordance with the requirements of Article 31 of the Directive and to have them audited in accordance with those requirements and shall confer on the Department and the Authority a right of access to his accounts for the purpose of ensuring compliance with those requirements; and
- (c) ensure that any person who is an eligible customer for the purposes of Article 33 of the Directive can exercise his freedom to purchase electricity from the supplier of his choice within the meaning of that Article.

(3) The conditions referred to in paragraph (1) shall, in particular, in the case of a transmission licence ensure that the holder does not disclose information contrary to Article 16 of the Directive and shall require the holder, as appropriate having regard to the activities authorised by the licence—

- (a) to carry out the tasks laid down for him by Article 12 or 15(1) of the Directive;
- (b) where he carries out the tasks laid down by Article 15(1) of the Directive, to do so in accordance with such criteria as may be determined and published by the Authority for the purposes of paragraph (2) of that Article;
- (c) in relation to any task referred to in Article 15(3) to (5) of the Directive, to follow such rules for priority as may be specified in the conditions for the purposes of those provisions;
- (d) to comply with the requirements of Article 15(6) of the Directive in procuring the energy used in the carrying out of his functions;
- (e) where he balances electricity inputs to and offtakes from any transmission system used under the licence, to adopt and follow rules which comply with the relevant requirements of Article 15(7) of the Directive; and
- (f) to comply with the requirements for system access laid down by Article 32 of the Directive.

(4) The conditions referred to in paragraph (1) shall, in particular, in the case of a distribution licence ensure that the holder does not disclose information contrary to Article 27 of the Directive and shall require the holder—

- (a) to carry out the tasks laid down for him by Articles 25(1) and (7) of the Directive;
- (b) to act in accordance with paragraph (2) of Article 25 of the Directive and to provide the information required by paragraph (3) of that Article;
- (c) in relation to any task referred to in Article 25(4) of the Directive, to follow such rules for priority as may be specified in the conditions for the purposes of those provisions;
- (d) to comply with the requirements of Article 25(5) of the Directive in procuring the energy used in the carrying out of his functions;
- (e) where he balances electricity inputs to and offtakes from any distribution system used under the licence, to adopt and follow rules which comply with the relevant requirements of Article 25(6) of the Directive;
- (f) to comply with the requirements for system access laid down by Article 32 of the Directive;
- (g) to facilitate (to the extent within his control) the ability of customers to change suppliers within 3 weeks, as required by Article 3(5)(a) of the Directive; and

- (h) to facilitate (to the extent within his control) the ability of customers to have access to consumption data, as required by Article 3(5)(b) of, and items (h) and (i) of paragraph 1 of Annex I to, the Directive.

(5) The conditions included in a licence in accordance with paragraph (1) shall, in particular, in the case of a transmission licence—

- (a) where the holder, or a holder of a transmission licence in relation to whom the holder is a related transmission licensee, is certified under the first certification ground in Article 10F, require that the ownership unbundling requirement in Article 10G continues to be met in relation to the holder;
- (b) where the holder, or a holder of a transmission licence in relation to whom the holder is a related transmission licensee, is certified under the second certification ground in Article 10F, require the maintenance in force of the arrangements by virtue of which the requirements of Article 9(9) of the Directive were met;
- (c) where the holder is certified under the third certification ground in Article 10F or is designated as independent system operator for the purposes of that certification ground—
 - (i) require that the requirements of Articles 13(2) and 14(1) and (2) of the Directive which are relevant to the holder continue to be met; and
 - (ii) require that the requirements of Article 13(4) or 13(5) of the Directive which are relevant to the holder continue to be met; and
- (d) require the holder to notify the Authority if any of the other conditions referred to in this paragraph ceases or is likely to cease to be met.

(6) Subject to paragraph (5), the conditions included in a licence in accordance with paragraph (1) shall, in particular, in the case of a distribution licence granted to a person forming part of a vertically integrated undertaking—

- (a) require that person to comply with the requirements for independence in terms of his legal form, organisation and decision-making laid down by Article 26(1) of the Directive;
- (b) require that person to comply with the requirements for independence in terms of his management and decision-making rights laid down by Article 26(2) of the Directive; and
- (c) require that person to comply with the requirements laid down by Article 26(3) of the Directive.

(7) The conditions included in a licence in accordance with paragraph (1) shall, in particular, in the case of a transmission licence granted to a person forming part of a vertically integrated undertaking who carries on the combination of activities to which Article 29 of the Directive applies, as appropriate having regard to the activities authorised by the licence, require that person to comply with the requirements laid down by that provision in relation to those activities.

(8) The conditions referred to in paragraph (1) shall, in particular, in the case of a transmission or distribution licence or a licence under Article 10(1)(c) require that any supply of electricity by the licence holder to a household customer, or (as the case may be) any transmission or distribution by a licence holder in connection with such a supply, meets specified quality standards.

(9) The conditions referred to in paragraph (1) shall, in particular, in the case of a licence under Article 10(1)(c)—

- (a) require that any supply of electricity by the licence holder to a household customer is given at reasonable, easily and clearly comparable, transparent and non-discriminatory prices as required by Article 3(3) of the Directive;
- (b) require the introduction and maintenance of safeguards to help any consumers referred to in Article 12(3) of the Energy (Northern Ireland) Order 2003 in particular to avoid disconnection from an electricity supply;

- (c) ensure that consumers of electricity have access to the information required by Article 3(9) of the Directive;
- (d) ensure that household customers are not charged for changing supplier, in compliance with paragraph 1(e) of Annex I to the Directive, and are able to use procedures which comply with paragraph 1(f) of Annex I to the Directive;
- (e) require that information provided to consumers of electricity (including information about the contractual terms and conditions offered to such consumers) by the holder of such a licence complies with the requirements of Article 3(7) of the Directive;
- (f) make provision for customers wishing to change suppliers to be able to do so within 3 weeks, as required by Articles 3(5)(a) and 3(7) of the Directive;
- (g) ensure that customers have consumption data at their disposal and are able to give access to that data to other suppliers, as required by Article 3(5)(b) and items (h) and (i) of paragraph 1 of Annex I to the Directive;
- (h) ensure that customers have access to information about sources of energy efficiency advice, as required by Articles 3(8) and 3(11) of the Directive;
- (i) require that the holder of the licence provides its customers with a copy of the guidance, which is to be published by the Authority pursuant to Article 7(5) of the Energy (Northern Ireland) Order 2003, as required by Article 3(16) of the Directive;
- (j) ensure that household customers are offered a wide choice of payment methods, which do not unduly discriminate between customers, as required by paragraph 1(d) of Annex I to the Directive;
- (k) ensure that the terms and conditions of supply contracts offered by the licence holder to household customers comply with items (a) and (d) of paragraph 1 of Annex I to the Directive;
- (l) make provision for customers to be protected from unfair or misleading selling methods, as required by paragraph 1(d) of Annex I to the Directive;
- (m) ensure that household customers receive a final bill following changing suppliers within the time frame required by paragraph 1(j) of Annex I to the Directive; and
- (n) ensure that the holder of the licence maintains the records required by Article 40 of the Directive.”.

Amendments to the Gas Order

15. For Article 10A (Compliance with Community obligations) of the Gas Order there shall be substituted the following Article—

“**10A.**—(1) Without prejudice to the generality of Article 10(1), a licence shall include such conditions as appear to the grantor to be necessary or expedient having regard to the requirements and prohibitions laid down in the Directive.

(2) The conditions included in a licence in accordance with paragraph (1) shall, in particular—

- (a) ensure that the licence holder and, if appropriate, any activity authorised by the licence and the construction or operation of any pipe-line, facility or associated apparatus used in connection with that activity meets the published criteria referred to in Article 8(7B);
- (b) require the licence holder to develop and publish the technical safety criteria and rules required by Article 8 of the Directive;
- (c) require the licence holder to keep accounts in accordance with the requirements of Article 31 of the Directive and to have them audited in accordance with those requirements and shall confer on the Department and the Authority a right of

access to the licence holder's accounts for the purpose of ensuring compliance with those requirements.

(3) The conditions included in a licence in accordance with paragraph (1) shall, in particular, in the case of a licence under Article 8(1)(a) ensure that the holder does not disclose or abuse information contrary to Article 16 or 27 of the Directive and shall, having regard to the activities authorised by the licence, require the holder—

- (a) where he balances gas inputs to and offtakes from any pipe-line used under the licence, to adopt and follow rules which comply with the relevant requirements of Articles 13(3) and 25(5) of the Directive;
- (b) to comply with the requirements of Article 13(5) of the Directive in procuring the energy used in the carrying out of his functions;
- (c) where appropriate to carry out the tasks laid down for him by Article 25(1) of the Directive;
- (d) to refrain from discriminating between persons using or intending to use any pipe-line, facility or associated apparatus operated for the purposes of the licence, contrary to Article 25(2) of the Directive;
- (e) to provide such persons with the information required by Article 25(4) of the Directive;
- (f) to provide any other licence holder mentioned in Article 25(3) of the Directive with the information required by that provision;
- (g) to comply with the requirements for system access laid down by Article 32 of the Directive (as read with Article 2 of the Commission Decision);
- (h) to take any measures necessary for the purpose of complying with Article 16(3) of the Directive;
- (i) to facilitate (to the extent within his control) the ability of customers to change suppliers within 3 weeks, as required by Article 3(6)(a) of the Directive; and
- (j) to facilitate (to the extent within his control) the ability of customers to have access to consumption data, as required by Article 3(6)(b) of, and items (h) and (i) of paragraph 1 of Annex I to, the Directive.

(4) The conditions included in a licence in accordance with paragraph (1) shall, in particular, in the case of a licence under Article 8(1)(a)—

- (a) provide for the Authority to approve in advance of their coming into operation any terms and conditions—
 - (i) for the connection and access to any pipe-line, facility or associated apparatus operated by the holder for the purposes of the licence including but not limited to the tariffs, or the method for determining the tariffs, for such connection or access; and
 - (ii) for the provision of any balancing services; and
- (b) provide that where the licence holder enters into a contract directly with a household customer for the provision to that customer of services under the licence, or makes arrangements in pursuance of which a household customer enters into a contract with another person for a supply of gas to that customer, then to the extent that this is within the licence holder's control—
 - (i) the terms and conditions of any such contract complies with items (a) and (d) of paragraph 1 of Annex I to the Directive; and
 - (ii) the requirements of items (b), (c), (d) and (g) of paragraph 1 of Annex I to the Directive are complied with in relation to the customer.

(5) The conditions included in a licence in accordance with paragraph (1) shall, in particular, in the case of a licence under Article 8(1)(a) granted to a person forming part of a vertically integrated undertaking—

- (a) to whom Article 26(1) of the Directive applies, require that person to continue to comply with the requirements referred to in that provision for independence in terms of his legal form, organisation and decision-making in relation to his activities under the licence and to comply with the requirements laid down by Article 26(2) of the Directive for independence in terms of its organisation and decision making, in particular the minimum criteria laid down thereby and to comply with the requirements applying to such person laid down by Article 26(3) of the Directive; and
 - (b) who carries on the combination of activities to which Article 29 of the Directive applies, require that person to comply with the requirements laid down by that provision for independence in terms of its legal form, organisation and decision-making in relation to its activities under the licence.
- (6) The conditions included in a licence in accordance with paragraph (1) shall, in particular, in the case of a licence under Article 8(1)(a)—
- (a) where the holder, or a person who holds a licence under Article 8(1)(a) in relation to whom the holder is a related conveyance licensee, is certified under the first certification ground in Article 8F, require that the ownership unbundling requirement in Article 8G continues to be met in relation to the holder;
 - (b) where the holder is certified under the second certification ground in Article 8F or is designated as independent system operator for the purposes of that certification ground—
 - (i) require that the requirements in Articles 14(1) and (2) and 15(1) and (2) of the Directive which are relevant to the holder continue to be met; and
 - (ii) require that the requirements in Article 13(4) or 13(5) of the Directive which are relevant to the holder continue to be met;
 - (c) where the holder is certified under the third certification ground in Article 8F, require that the requirements in Chapter IV of the Directive are met; and
 - (d) require the holder to notify the Authority if any of the other conditions referred to in this paragraph ceases or is likely to cease to be met.

(7) The conditions included in a licence in accordance with paragraph (1) shall, in particular, in the case of a licence under Article 8(1)(a) granted to a person to whom Article 9(1) of the Directive applies, as appropriate having regard to the activities authorised by the licence, require the holder to carry out the tasks laid down for him by Article 13(1) of the Directive.

(8) The conditions included in a licence in accordance with paragraph (1) shall, in particular, in the case of a licence under Article 8(1)(b) ensure that the holder does not disclose or abuse information contrary to Article 16 of the Directive and shall require the holder as appropriate having regard to the activities authorised by the licence—

- (a) to carry out the tasks laid down for him by Article 13(1) of the Directive;
- (b) to comply with the requirements for access to storage laid down by Article 33 of the Directive in accordance with criteria published by the Authority for the purposes of paragraph (1) of that Article; and
- (c) where the person forms part of a vertically integrated undertaking, to comply with the requirements laid down in Article 15 of the Directive for independence in terms of its legal form, organisation and decision-making in relation to its activities under the licence and, in particular, to comply with the minimum criteria laid down by Article 15(2) of the Directive.

(9) The conditions included in a licence in accordance with paragraph (1) shall, in particular, in the case of a licence under Article 8(1)(c)—

- (a) require the introduction and maintenance of safeguards to help any consumers referred to in Article 14(3) of the Energy (Northern Ireland) Order 2003 and individuals who are consumers in rural areas in particular to avoid disconnection from the gas pipe-line system;
- (b) ensure that consumers of gas have access to the information (including information about the contractual terms and conditions offered to such consumers) required by Article 3(3) of the Directive;
- (c) ensure that any person who is an eligible customer for the purposes of Article 37 of the Directive (as read with Article 2 of the Commission Decision) can exercise his freedom to purchase gas from the supplier of his choice within the meaning of that Article;
- (d) ensure that persons exercising that freedom are not charged therefor in compliance with paragraph 1(e) of Annex I to the Directive, and are able to use procedures which comply with paragraph 1(f) of Annex I to the Directive;
- (e) require that information provided to consumers of gas (including information about the contractual terms and conditions offered to such consumers) by the holder of such a licence are sufficiently transparent to enable the consumer to exercise that freedom;
- (f) make provision for customers wishing to change suppliers to be able to do so within 3 weeks, as required by Article 3(6)(a) and Article 3(3) of the Directive;
- (g) ensure that customers have consumption data at their disposal and are able to give access to that data to other suppliers, as required by Article 3(6)(b) of, and items (h) and (i) of paragraph 1 of Annex I to, the Directive;
- (h) ensure that customers have access to information about sources of energy efficiency advice, as required by Article 3(4) and 3(8) of the Directive;
- (i) require that the holder of the licence provides its customers with a copy of the guidance, which is to be published by the Authority pursuant to Article 7(5) of the Energy (Northern Ireland) Order 2003, as required by Article 3(12) of the Directive;
- (j) ensure that household customers are offered a wide choice of payment methods, which do not unduly discriminate between customers, as required by paragraph 1(d) of Annex I to the Directive;

- (k) ensure that the terms and conditions of supply contracts offered by the licence holder to household customers comply with items (a) and (d) of paragraph 1 of Annex I to the Directive;
- (l) make provision for customers to be protected from unfair or misleading selling methods, as required by paragraph 1(d) of Annex I to the Directive;
- (m) ensure that household customers receive a final bill following changing suppliers within the time frame required by paragraph 1(j) of Annex I to the Directive; and
- (n) ensure that the holder of the licence maintains the records required by Article 44 of the Directive.”.

PART V

ELECTRICITY DISTRIBUTION

Interpretation

16. In Article 3 (Interpretation of Part II) of the Electricity Order—

- (a) after the definition of “distribute” there shall be inserted the following definition—
 - ““distribution licence” means a licence under Article 10(1)(bb);”; and
- (b) in the definition of “electricity distributor” for “10(1)(b)” there shall be substituted “10(1)(bb)”.

Prohibition on unlicensed distribution

17. In Article 8(1) (Prohibition on unlicensed supply, etc) of the Electricity Order, after paragraph (b) there shall be inserted the following sub-paragraph—

“(bb) distributes electricity for that purpose;”

Exemptions from licensing

18. In Article 9 (Exemptions from Article 8) of the Electricity Order—

- (a) in paragraph (1) after “sub-paragraph (a),” there shall be inserted “(bb)”;
- (b) in paragraph (3) after sub-paragraph (a) there shall be inserted the following sub-paragraph—
 - “(aa) may be granted subject to such conditions as appear to the Department to be requisite or expedient to ensure that the activity authorised by the exemption is carried out in compliance with the relevant requirements and prohibitions laid down by the Directive; and”;
- (c) after paragraph (4) there shall be inserted the following paragraph—
 - “(5) If any condition pursuant to paragraph 3(aa) of an exemption granted to persons of a class is not complied with by any person of that class, the Department may give to that person a direction declaring that the exemption is revoked, so far as relating to that person, to such extent and as from such date as may be specified in the direction.”.

Distribution licences

19. In Article 10 (Licences authorising supply, etc.) of the Electricity Order—

(a) after paragraph (1)(b) there shall be inserted the following sub-paragraph—

“(bb) to distribute electricity for that purpose;”; and

(b) in paragraph (8), after “paragraph (1)(b)” there shall be inserted “or (1)(bb)”.

20. After Article 10A (Transmission licences) of the Electricity Order there shall be inserted the following Article—

“Distribution licences

10AA.—(1) A distribution licence may authorise the holder to distribute electricity in any area, or only in an area specified in the licence.

(2) The Authority may, with the consent of the holder of a distribution licence, modify any term included in the licence in pursuance of paragraph (1).

(3) Without prejudice to the generality of Article 11(1)(a), conditions included in a distribution licence by virtue of that sub-paragraph may restrict where the licence holder may carry on an activity which he is authorised by the licence to carry on.”.

Conditions of licences

21. In Article 11(3A) (Conditions of licences) of the Electricity Order after “Article 10(1)(b)” there shall be inserted “, (bb)”.

General duties of electricity distribution system operators

22. In Article 12(1)(a) of the Electricity Order after “distribution” there shall be inserted “which has the long-term ability to meet reasonable demands for the distribution of electricity”.

Powers, etc., of licence holders

23. In Article 13 (Powers, etc., of licence holders) of the Electricity Order—

(a) for sub-paragraphs (a) and (b) of paragraph (1) there shall be substituted—

“(a) in relation to the holder of a licence under Article 10(1)(b);

(b) in relation to the holder of a licence under Article 10(1)(bb) to the extent that his licence so provides; and”;

(b) in paragraph (4A) after “transmission licence” there shall be inserted “or a distribution licence”.

Miscellaneous

24. In Article 33 (Electrical inspectors) of the Electricity Order in paragraph (2)(a) after “supply” there shall be inserted “, distribute”.

25. In Article 38 (Provisions supplementary to Article 37) of the Electricity Order—

(a) in paragraph (1) after “transmission licence” there shall be inserted “or a distribution licence”; and

(b) in paragraph (2) after “licence to” there shall be inserted “distribute or”.

26. In Article 46 (Functions with respect to competition) of the Electricity Order in paragraphs (2A) and (3) after “transmission” in each place where the word occurs there shall be inserted “, distribution”.

27. In Article 58 (Directions for preserving security of electricity supplies, etc.) of the Electricity Order—

- (a) in paragraph (1)(a) after “transmission” there shall be inserted “, distribution”; and
- (b) in paragraph (6) after “generate” there shall be inserted “, distribute”.

28. In Article 59 (Provision of statistical information) of the Electricity Order—

- (a) in paragraph (1) after “transmission” there shall be inserted “, distribution”; and
- (b) in paragraph (1) after “generate” there shall be inserted “, distribute”.

29. In Article 60 (Promotion of new techniques in national interest) of the Electricity Order—

- (a) in paragraph (1) after “transmission” there shall be inserted “, distribution”; and
- (b) in paragraph (2) after “generate” there shall be inserted “, distribute”.

30. In Article 62(2) (Directions restricting the use of certain information) of the Electricity Order, after “supply” there shall be inserted “, distribute”.

Existing electricity distribution system operators

31. Article 8(1)(bb) of the Electricity Order shall not apply to any person, other than—

- (a) the holder of a licence under Article 10(1)(bb) of the Electricity Order; or
- (b) the former holder of such a licence which has been revoked other than with his agreement,

until 30 September 2012 or such later date as the Department may determine under regulation 31.

32. The Department may determine a later date if it thinks there are reasonable grounds for doing so and that date is not later than 12 months after the date in regulation 31.

Amendments to the Electricity (Applications for Licences and Extensions of Licences) (No. 2) Regulations (Northern Ireland) 2007

33. The Electricity (Applications for Licences and Extensions of Licences) (No. 2) Regulations (Northern Ireland) 2007(a) shall be amended as follows—

- (a) in regulation 2 (Interpretation) after the definition of “application” there shall be inserted the following definition—

“distribution licence” means a licence under Article 10(1)(bb) of the Order;

- (b) in regulation 3 (Form of applications) after paragraph (5) there shall be inserted the following paragraph—

“(6) An application for a distribution licence shall be in the form, and shall contain the particulars, specified in Part I of Schedule 6.”;

- (c) in regulation 4 (Documents to accompany applications) after paragraph (5) there shall be inserted the following paragraph—

“(6) An application for a distribution licence shall be accompanied by the documents and particulars specified in Part II of Schedule 6.”;

- (d) in regulation 6(1)(b)(i) (Manner of publishing applications), after “transmission licence” there shall be inserted—

“, a distribution licence”;

- (e) in regulation 7(1) (Fees payable with applications), after “transmission” there shall be inserted—

“, distribution”;

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- (f) in Part II of Schedule 3—
 - (i) in paragraph 2(b), after “systems” there shall be inserted “or distribution systems”;
 - (ii) in paragraph 2(g), after “underground;” omit “and”; and
- (g) after Schedule 5 there shall be inserted the Schedule set out in Schedule 2 to these Regulations.

Amendments to the Energy Order

34. The Energy Order shall be amended as follows—

- (a) in Article 8(2)(b)(i) after “supplying” there shall be inserted “, distributing”;
- (b) in Article 12—
 - (i) in paragraphs (1), (5)(b), (5)(e) and the part of paragraph (5) following paragraph (5)(e), after “transmission” in each place where the word occurs there shall be inserted “, distribution”;
 - (ii) in paragraphs (5)(a) and (5)(d) after “supply” in each place where the words occur there shall be inserted “, distribute”; and
 - (iii) in paragraph (6) after “supplying” there shall be inserted “, distributing”.
- (c) in Article 39(5) after “transmission” there shall be inserted “, distribution”.

PART VI

NATIONAL REGULATORY AUTHORITY

Designation of the Authority as the national regulatory authority for Northern Ireland

35. After Article 3 (The Northern Ireland Authority for Energy Regulation) of the Energy Order there shall be inserted the following Article—

“Designation of Authority as national regulatory authority for Northern Ireland

3A.—(1) The Authority is designated as the national regulatory authority for Northern Ireland in accordance with Article 35(3) of the Electricity Directive and Article 39(3) of the Gas Directive.

(2) The Authority shall ensure that its staff do not—

- (a) seek or take any instructions that might compromise, or might reasonably be seen to compromise, the Authority’s independence in relation to its functions as designated regulatory authority for Northern Ireland; or
- (b) carry out any other activity, or have any financial or other interest, that might compromise, or might reasonably be seen to compromise, the Authority’s independence in relation to those functions.

(3) The Authority may make representations to the regulatory authority for Great Britain designated under section 3A of the Utilities Act 2000 about matters to be discussed or decided at any meeting of the Board of Regulators of the Agency; and whenever the Authority receives from that regulatory authority any documents or other information related to any such meeting, the Authority shall consider whether or not to do so.”.

Annual reports and implementation of binding decisions

36. After Article 6 of the Energy Order there shall be inserted the following Articles—

“Report on activities as designated regulatory authority

6A.—(1) The Authority shall, each year, prepare a report (the “regulatory authority report”) on the activities it has carried out in the preceding 12 months in its capacity as designated regulatory authority for Northern Ireland.

(2) The regulatory authority report shall include, in particular, a general survey of the steps taken and results achieved by the Authority in the performance of its functions under Article 37 of the Electricity Directive and Article 41 of the Gas Directive.

(3) In preparing the regulatory authority report, the Authority shall have regard to the need for excluding, so far as that is practicable, any matter which relates to the affairs of a particular individual or body of persons (corporate or unincorporate), where publication of that matter would or might, in the opinion of the Authority, seriously and prejudicially affect the interests of that individual or body.

(4) The first regulatory authority report shall be prepared by 1st July 2012.

(5) Subsequent regulatory authority reports shall be prepared by 1st July each year.

(6) As soon as is practicable after preparing a regulatory authority report, the Authority shall—

- (a) send a copy of it to—
 - (i) the Department;
 - (ii) the European Commission; and
 - (iii) the Agency; and
- (b) publish it in such manner as the Authority considers appropriate for bringing it to the attention of others who may be interested in it.

Decisions of the Agency for the Cooperation of Energy Regulators and of the European Commission

6B. The Authority shall carry out its functions in the manner that it considers is best calculated to implement, or to ensure compliance with, any binding decision of the Agency or the European Commission made under the Electricity Directive, the Gas Directive, the Electricity Regulation, the Gas Regulation or the Agency Regulation.”.

Duty on the Authority to publish guidance for consumers

37. After Article 7(4) of the Energy Order there shall be inserted the following paragraphs—

“(5) The Authority shall—

- (a) prepare and keep under review, with a view to making any necessary changes, guidance for consumers of gas and electricity which:
 - (i) addresses all matters included in any document published by the European Commission pursuant to Article 3(16) of the Electricity Directive and Article 3(12) of the Gas Directive; and
 - (ii) may include any other information relating to the rights of the consumers which the Authority considers appropriate;
- (b) consult the Council when preparing and keeping under review the guidance referred to in paragraph (a); and

- (c) publish that guidance by making it available on its website and any other manner as the Authority considers appropriate for the purpose of bringing it to the attention of the consumers and others likely to be interested.
- (6) The first such guidance shall be published on or before 1st December 2011.”.

Duty on the Authority to consult and co-operate with other authorities

38. After Article 8 of the Energy Order there shall be inserted the following Article—

“Duty on the authority to have regard to the need for consultation and co-operation with other authorities

8A.—(1) When carrying out its functions as designated regulatory authority for Northern Ireland, the Authority shall, to the extent it considers necessary, consider whether there is a need to—

- (a) consult and co-operate with the Agency or the designated regulatory authorities of Great Britain or other Member States;
- (b) provide the Agency or the designated regulatory authorities of Great Britain or other Member States with information they may require in order to carry out their functions under the Electricity Directive, the Gas Directive, the Electricity Regulation, the Gas Regulation or the Agency Regulation; and
- (c) consult relevant national authorities.

(2) In meeting its duty under paragraph (1) the Authority shall, wherever it thinks fit, co-operate with the designated regulatory authorities of Great Britain or other Member States within a region with a view to achieving, within that region, compliance with those requirements of the Third Package which apply in relation to regions to provide for regional co-operation.

(3) In this Article.—

“region” means—

- (a) in relation to electricity, any geographical area defined in accordance with Article 12(3) of the Electricity Regulation which includes Northern Ireland; and
- (b) in relation to gas, any geographical area defined in accordance with Article 12(3) of the Gas Regulation which includes Northern Ireland;

“relevant national authority” means any of the following—

- (a) the Competition Commission;
- (b) the Office of Communications; and
- (c) the Office of Fair Trading.

(4) The provisions of this Article are without prejudice to any provision of the SEM Order.”.

Amendment of the Authority’s principal objective in relation to electricity

39. After Article 12(1) of the Energy Order, there shall be inserted the following paragraph—

“(1A) The interests of consumers include their interests in the fulfilment by the Authority, when carrying out its functions as designated regulatory authority for Northern Ireland, of the objectives set out in Article 36(a) to (h) of the Electricity Directive.”.

40. In Article 13(2)(b) of the Energy Order, after “Article 8” there shall be inserted “and Article 8A”.

Amendment of the Authority’s principal objective in relation to gas

- 41.** For Article 14(1) of the Energy Order there shall be substituted the following paragraph—
- “(1) The principal objective of the Department and the Authority in carrying out their respective gas functions is to promote the development and maintenance of an efficient, economic and co-ordinated gas industry in Northern Ireland, and to do so in a way that is consistent with the fulfilment by the Authority, pursuant to Article 40 of the Gas Directive, of the objectives set out in paragraphs (a) to (h) of that Article.”
- 42.** In Article 15(2)(b) of the Energy Order, after “Article 8” there shall be inserted “and Article 8A”.

Amendment to provision dealing with reasons for decisions

- 43.** In Article 62 of the Energy Order, after paragraph(1)(f) there shall be inserted the following sub-paragraph—
- “(g) any other decision of the Authority when carrying out its functions as designated regulatory authority for Northern Ireland.”.
- 44.** In Article 62(3) of the Energy Order, after “(f)” there shall be inserted “or (g)”.

Amendments to Schedule 1 to the Energy Order – Members of the Authority

- 45.** In Schedule 1 to the Energy Order—
- (a) after paragraph 2 there shall be inserted the following paragraph—
- “2A.** A person holding office as chairman or other member shall not—
- (a) carry out any activity or have any financial or other interest that might compromise or might reasonably be seen to compromise that person’s impartiality; or
- (b) seek or take any instructions from any person or body that might compromise or might reasonably be seen to compromise the independence of the Authority when the Authority is carrying out functions in its capacity as national regulatory authority for Northern Ireland.”; and
- (b) for paragraph 3 there shall be substituted the following paragraph—
- “3.—**(1) No person shall be appointed to hold office as chairman or other member for a term of less than 5 years or for a term of more than 7 years.
- (2) If a person who is on the Authority’s staff, is appointed as chairman or other member, the Department of Finance and Personnel may make the appointment subject to the condition that the appointment will end if that person ceases to be on the Authority’s staff.
- (3) The appointment of a person as chairman or other member may be renewed only once.
- (4) To ensure continuity of the functioning of the Authority, the Department of Finance and Personnel shall ensure that there is a rotation of the Authority’s membership. To do this, that Department shall appoint members so that their terms of office will not all expire at the same time.
- (5) A person holding office as chairman or other member may resign that office by giving notice in writing to the Department of Finance and Personnel.
- (6) A person holding office as chairman or other member may only be removed from office by the Department of Finance and Personnel, and on one of the following grounds only—
- (a) a breach of paragraph 2A;
- (b) incapacity; or

(c) misbehaviour.”.

Amendment to the Energy Order

46. In Article 6(3) of the Energy Order, for the words “general directions” there shall be substituted the word “guidance”.

Amendments to the Electricity Order – Grant of electricity licences

47. In Article 10(1) of the Electricity Order, for the words “Department after consultation with the Director, or the Director with the consent of, or in accordance with a general authority given by, the Department,” there shall be substituted the word “Authority”.

48. In Article 10(2A) of the Electricity Order, for the word “grantor” there shall be substituted the word “Authority”.

49. In Article 10(4) of the Electricity Order—

- (a) in the first line for the words “the Department or the Director” there shall be substituted the words “the Authority”; and
- (b) in paragraph (a) for the words “the Department or the Director, as the case may require,” there shall be substituted the words “the Authority”.

50. In Article 10(5) of the Electricity Order, for the words “the Department or the Director” there shall be substituted the words “the Authority”.

51. Article 10(7) of the Electricity Order shall be omitted.

52. After Article 11A of the Electricity Order there shall be inserted the following Article—

“Standard conditions of licences

11AA.—(1) Such conditions as may be determined by the Department, and published by it in such manner as it considers appropriate, in relation to licences under sub-paragraph (a), (b), (bb), (c) or (d) of Article 10(1), shall be standard conditions for the purposes of licences under that sub-paragraph.

(2) The standard conditions for the purposes of licences under sub-paragraph (a), (b), (bb), (c) or (d) of Article 10(1) may contain provision—

- (a) for any standard condition included in such a licence not to have effect until brought into operation in such manner and in such circumstances as may be specified in or determined under the standard conditions;
- (b) for the effect of any standard condition included in such a licence to be suspended in such manner, and in such circumstances, as may be so specified or determined; or
- (c) for any standard condition included in such a licence which is for the time being suspended to be brought back into operation in such manner and in such circumstances as may be so specified or determined.

(3) Subject to paragraph (5) and Article 14(1)(b), each condition which by virtue of paragraph (1) is a standard condition for the purposes of licences under sub-paragraph (a), (b), (bb), (c) or (d) of Article 10(1) shall be incorporated (that is to say, incorporated by reference, or in the case of a licence in force at the time of any determination under paragraph (1), deemed to be incorporated by reference) in each licence under that sub-paragraph.

(4) The modification under Article 14(1)(b) of a condition of a licence shall not prevent so much of the condition as is not modified being regarded as a standard condition for the purposes of this Part.

(5) In relation to a licence in force at the time of any determination under paragraph (1), except with the consent of the licence holder, paragraph (3) shall not have effect in relation to a particular standard condition or part thereof if the effect of paragraph (3) would be to modify the conditions of that licence.”.

53. Paragraph (1) of Article 14 of the Electricity Order shall be substituted with the following paragraph—

- “(1) Subject to the following provisions of this Article, the Authority may—
- (a) modify the conditions of a licence if the licence holder consents to the modifications;
 - (b) in granting a licence, modify any of the standard conditions to such extent as the Authority considers requisite to meet the circumstances of the particular case; or
 - (c) modify the standard conditions of licences under sub-paragraph (a), (b), (bb), (c) or (d) of Article 10(1).”.

54. After paragraph (4) of Article 14 of the Electricity Order there shall be inserted the following paragraphs—

“(5) The Authority shall not make any modifications of standard conditions under paragraph 1(c) unless—

- (a) no licence holder whose licence incorporates the standard conditions (a “relevant licence holder”) has objected, within the period specified under paragraph (2)(c), to the modifications, unless any such objection has been withdrawn; or
- (b) the Authority is of the opinion that—
 - (i) the effect of the standard conditions is such as to impose a burden affecting relevant licence holders in the carrying out of activities to which the modifications relate;
 - (ii) the modifications would remove or reduce the burden without removing any necessary protection; and
 - (iii) the modifications are such that no relevant licence holder would be unduly disadvantaged in competing with other relevant licence holders.

(6) Where at any time the Authority modifies standard conditions under paragraph (1)(c) for the purposes of their incorporation in licences under sub-paragraph (a), (b), (bb), (c) or (d) of Article 8(1) granted after that time, it shall publish the modifications in such manner as it considers appropriate.”.

Authority’s dispute resolution functions in relation to electricity

55. For paragraph (1) of Article 31A of the Electricity Order there shall be substituted the following paragraph—

“(1) Any person may make a complaint under this Article (hereinafter referred to as “a complaint”) if—

- (a) the subject matter of the complaint constitutes a dispute between the complainant and—
 - (i) the holder of a transmission licence;
 - (ii) the holder of a distribution licence; or
 - (iii) a distribution exemption holder;
- (b) it is wholly or mainly a complaint against that holder regarding an obligation imposed upon him pursuant to the Directive; and
- (c) the subject matter of the complaint—
 - (i) does not fall to be dealt with under Article 26 or Article 42A; and

- (ii) is not capable of being determined pursuant to any other provision of this Order.”.

Amendment to the Electricity Order

56. In Article 50(2) of the Electricity Order for the words “give general directions” there shall be substituted the words “issue guidance”.

Authority’s monitoring functions in relation to electricity

57. After Article 50(3A) of the Electricity Order there shall be inserted the following paragraph—

“(3B) the activities to which paragraph (1) applies include, in particular, the matters specified in the following provisions of the Directive as matters to be monitored—

- (a) Article 26(3);
- (b) Article 37(1)(g) to (k), (m) and (q) to (t); and
- (c) where an independent system operator has been designated under Article 10H of this Order, Article 37(3)(a), (b) and (f).”.

Amendments to the Gas Order – grant of gas licences

58. In Article 8(1) and (2) of the Gas Order, for the words “Department after consultation with the Director, or the Director with the consent of, or in accordance with a general authority given by, the Department,” there shall be substituted the word “Authority”.

59. In Article 8(4) of the Gas Order—

- (a) in the first line for the words “the Department or the Director” there shall be substituted the words “the Authority”; and
- (b) in sub-paragraph (a) for the words “the Department or the Director, as the case may require,” there shall be substituted the words “the Authority”.

60. In Article 8(6) of the Gas Order, for the words “the Department or Director” there shall be substituted with the words “the Authority”.

61. In Article 8(7) of the Gas Order for the words “the Department or the Director” there shall be substituted with the words “the Authority”.

62. In Article 8(7A) of the Gas Order, the words “the Department or” and the words “Department or” shall be omitted where and in the order they appear and the words “, as the case may be,” shall also be omitted.

63. In Article 11(2) of the Gas Order, in the first line for the words “paragraph (3)” there shall be substituted the words “Article 14(1)(aa)”.

64. Paragraph (3) of Article 11 of the Gas Order shall be omitted.

65. In Article 11(4) of the Gas Order, in the first line for the words “paragraph (3)” there shall be substituted the words “Article 14(1)(aa)”.

66. In Article 14(1) of the Gas Order, at the end of paragraph (a) there shall be omitted the word “or” and there shall be inserted the following sub-paragraph—

- “(aa) in granting a licence, modify any of the standard conditions to such extent as the Authority considers requisite to meet the circumstances of the particular case; or”.

Amendments to the Gas Order

67. In Article 27(2) of the Gas Order for the words “give general directions” there shall be substituted with the words “issue guidance”.

68. In Article 30(2) of the Gas Order the words “, with the consent of the Department,” shall be omitted.

Authority’s monitoring functions in relation to gas

69. After Article 27(3A) of the Gas Order there shall be inserted the following paragraph—

“(3B) The activities to which paragraph (1) applies include, in particular, the matters specified in the following provisions of the Directive as matters to be monitored—

- (a) Article 26(3);
- (b) Article 41(1)(g) to (k), (m), (n) and (r) to (t);
- (c) where an independent system operator has been designated under Article 8H of this Order, Article 41(3)(a) and (b); and
- (d) where a person has been certified on the basis of the third certification ground (independent transmission operator) in Article 8F and designated as a gas transmission operator under Article 8H of this Order, Article 41(5)(b) and (d); and
- (e) Article 41(9).”.

Authority’s dispute resolution functions in relation to gas

70. For Article 27A(1) of the Gas Order there shall be substituted the following paragraph—

“**27A.** —(1) Any person may make a complaint under this Article (hereinafter referred to as “a complaint”) if—

- (a) the subject matter of the complaint constitutes a dispute between the complainant and—
 - (i) a person holding a licence under Article 8(1)(a);
 - (ii) a person holding a licence under Article 8(1)(b);
 - (iii) a gas conveyance exemption holder; or
 - (iv) a gas storage exemption holder;
- (b) it is wholly or mainly a complaint against that holder regarding an obligation imposed on him pursuant to the Directive; and
- (c) the subject matter of the complaint is not capable of being determined pursuant to any other Article of this Order or any condition of the licence held by the holder.”.

PART VII

ENFORCEMENT

Amendment of the enforcement provisions of the Energy Order

71. In Articles 42 to 51 of the Energy Order, for “licence holder”, substitute “regulated person” wherever it appears, except where the words “licence holder” appears in the following places—

- (a) Article 45(2) of the Energy Order;
- (b) paragraphs (b) and (c) of Article 51(1) of the Energy Order.

72. In Article 41(1)(a) of the Energy Order, after the words “electricity licences” there shall be inserted the words “and exemptions”.

73. In Article 41(2) of the Energy Order, before the definition of “relevant conditions” there shall be inserted the following definition—

““regulated person” means any person who is—

- (a) a licence holder; or
- (b) an exemption holder;”.

74. In Article 41(2) of the Energy Order, for the definition of “relevant conditions” there shall be substituted the following definition—

““relevant conditions” means—

- (a) in relation to any licence holder, any condition of his licence;
- (b) in relation to any exemption holder, any condition of his exemption.”.

75. In Article 41(2) of the Energy Order, for the definition of “relevant requirement” there shall be substituted the following definition—

““relevant requirement” has the meaning given to it in Articles 41A and 41B.”.

76. After Article 41 of the Energy Order there shall be inserted the following new Articles—

“Meaning of relevant requirement in relation to electricity

41A.—(1) In the case of electricity, “relevant requirement” in respect of any regulated person means any duty or other requirement imposed on that person by or under a provision—

- (a) specified in this Article; or
- (b) in the Electricity Regulation and designated under this Article, in respect of that person.

(2) In respect of any licence holders, Article 27(4)(b) is specified for the purposes of paragraph (1).

(3) In respect of holders of an electricity generation licence—

- (a) Part VII (Electricity from renewable sources);
- (b) designated provisions of the Electricity Regulation;
- (c) Articles 10C(8) and (9) of the Electricity Order (Certification procedure);
- (d) Articles 10I(11) and (12) of the Electricity Order (Monitoring and review of certification);
- (e) Articles 8C(4) and (5) of the Gas Order (Certification procedure); and
- (f) Articles 8I(11) and (12) of the Gas Order (Monitoring and review of certification),

are specified for the purposes of paragraph (1).

(4) In respect of holders of an electricity supply licence—

- (a) Article 43(3) of the Electricity Order (Overall standards of performance: electricity supply);
- (b) Article 44(3) of the Electricity Order (Promotion of efficient use of electricity);
- (c) Article 45A of the Electricity Order (Information to be given to customers about overall performance);
- (d) Article 45B of the Electricity Order (Procedures for dealing with complaints);
- (e) those in Part VII (Electricity from renewable sources);
- (f) the Electricity and Gas (Billing) (No. 2) Regulations (Northern Ireland) 2010;
- (g) Articles 10C(8) and (9) of the Electricity Order (Certification procedure);
- (h) Articles 10I(10), (11) and (12) of the Electricity Order (Monitoring and review of certification) insofar as they apply to that person;

(i) Articles 8C(4) and (5) of the Gas Order (Certification procedure); and
(j) Articles 8I(11) and (12) of the Gas Order (Monitoring and review of certification),
are specified for the purposes of paragraph (1).

(5) In respect of holders of an electricity distribution licence—

- (a) Article 12(1) of the Electricity Order (General duties of electricity distributors and transmission licence holders);
- (b) Articles 19 to 26 of the Electricity Order (Duty to connect on request);
- (c) Article 43A of the Electricity Order (Overall standards of performance: electricity distributors); and
- (d) Article 45A of the Electricity Order (Information to be given to customers about overall performance),

are specified for the purposes of paragraph (1).

(6) In respect of holders of an electricity transmission licence—

- (a) Article 12(2) of the Electricity Order (General duties of electricity distributors and transmission licence holders);
- (b) Article 10B(1) or (2) and Article 10C(3) of the Electricity Order insofar as they apply to that person; and
- (c) Articles 10C(7) or (8) and (9) and 10I(10), (11) and (12) of the Electricity Order insofar as they apply to that person,

are specified for the purposes of paragraph (1).

(7) The Department shall for the purposes of paragraph (1) designate those provisions of the Electricity Regulation which impose a duty or requirement on any or on any particular regulated person in respect of such persons and shall publish any such designation in the Belfast Gazette

Meaning of relevant requirement in relation to gas

41B.—(1) In the case of gas, “relevant requirement” in respect of any regulated person means any duty or other requirement imposed on that person by or under a provision

- (a) specified in this Article; or
- (b) in the Gas Regulation and designated under this Article,

in respect of that person.

(2) In respect of any licence holders, Article 27(4)(b) is specified for the purposes of paragraph (1).

(3) In respect of holders of a gas supply licence—

- (a) Section 3(4) of the Energy Act (Northern Ireland) 2011 (Overall standards of performance);
- (b) Section 5(3) of the Energy Act (Northern Ireland) 2011 (Standards for promoting efficient use of gas);
- (c) Section 7 of the Energy Act (Northern Ireland) 2011 (Information to be given to customers about overall performance);
- (d) Section 8 of the Energy Act (Northern Ireland) 2011 (Procedures for dealing with complaints);
- (e) the Electricity and Gas (Billing) (No. 2) Regulations (Northern Ireland) 2010;
- (f) Articles 10C(8) and (9) of the Electricity Order (Certification procedure);
- (g) Articles 10I(11) and (12) of the Electricity Order (Monitoring and review of certification);
- (h) articles 8C(4) and (5) of the Gas Order (Certification procedure); and

- (i) Articles 8I(11) and (12) of the Gas Order (Monitoring and review of certification) are specified for the purposes of paragraph (1).
- (4) In respect of holders of a gas conveyance licence —
 - (a) Section 3(4) of the Energy Act (Northern Ireland) 2011 (Overall standards of performance);
 - (b) Section 7 of the Energy Act (Northern Ireland) 2011 (Information to be given to customers about overall performance),
 are specified for the purposes of paragraph (1).
- (5) In respect of holders of a gas conveyance licence involved in gas transmission—
 - (a) Article 8B(1) or (2) of the Gas Order and Article 8B(1) or (2) of the Electricity Order insofar as they apply to that person; and
 - (b) Article 8C(3), (4) and (5) and 8I(10), (11) and (12) of the Gas Order insofar as they apply to that person,
 are specified for the purposes of paragraph (1).
- (6) The Department shall for the purposes of paragraph (1) designate those provisions of the Gas Regulation which impose a duty or requirement, on any or on any particular, regulated person in respect of such persons and shall publish any such designation in the Belfast Gazette.”.

Amendment to the Energy Order – penalties

77. For paragraph (9) of Article 45 there shall be substituted the following paragraph—
- “(9) No penalty imposed by the Authority under this Article may exceed—
- (a) subject to sub-paragraph (b), 10 per cent of the turnover of the regulated person; or
 - (b) where the regulated person is or is part of a vertically integrated undertaking and the relevant condition or requirement to which the contravention relates is imposed on a vertically integrated undertaking pursuant to the Electricity Directive or the Gas Directive, 10 per cent of the turnover of the vertically integrated undertaking,
- in each case determined in accordance with provisions specified in an order made by the Department.”.

Amendments to the Energy Order – miscellaneous provisions

78. For paragraph (11) of Article 45 there shall be substituted the following paragraph—
- “(11) “Community Regulation” means the Electricity Regulation or the Gas Regulation.”.
79. After Article 51(1) of the Energy Order there shall be inserted the following paragraph—
- “(1A) The Authority may, for the purposes of its monitoring functions under Article 50 of the Electricity Order and Article 27 of the Gas Order, serve a notice under paragraph (2) on any regulated person, but only where the activities being monitored are the activities set out in paragraph (3B) of Article 50 of the Electricity Order and paragraph (3B) of Article 27 of the Gas Order, as the case may be.”.

PART VIII

MISCELLANEOUS PROVISIONS

Amendments to the Electricity Order

80. In Article 3 of the Electricity Order—
- (a) for the definition of “the Directive” there shall be substituted the following definition—

““the Directive” means European Parliament and Council Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;”;

(b) there shall be inserted at the appropriate places the following definitions—

““the 2011 Regulations” means the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011;”;

““vertically integrated undertaking” has the meaning given in Article 2(21) of the Directive;”.

81. In Article 11B of the Electricity Order—

(a) in paragraph(1)(b), for the words “Article 7” there shall be substituted the words “Article 8”; and

(b) in paragraph 5, for the words “Article 7” there shall be substituted the words “Article 8”.

82. In Article 40(6), for the words “Article 22(2)” there shall be substituted the words “Article 34(2)”.

Amendments to the Energy Order

83. In Article 2 of the Energy Order, there shall be inserted at the appropriate places the following definitions—

““the Agency” means the Agency for the Cooperation of Energy Regulators, established under the Agency Regulation;”;

““designated regulatory authority” means an authority designated in accordance with Article 35 of the Electricity Directive or Article 39 of the Gas Directive;”;

““exemption holder” means any person who is—

(a) an electricity generation exemption holder;

(b) an electricity distribution exemption holder;

(c) an electricity supply exemption holder;

(d) a gas conveyance exemption holder;

(e) a gas storage exemption holder; or

(f) a gas supply exemption holder;”;

““the Agency Regulation” means Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators;”;

““the Electricity Directive” means Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;”;

““the Electricity Regulation” means Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No. 1228/2003;”;

““electricity distribution exemption holder” means a person who carries on the activity referred to in Article 8(1)(bb) of the Electricity Order under the authority of an exemption granted pursuant to Article 9 of that Order;”;

““electricity generation exemption holder” means a person who carries on the activity referred to in Article 8(1)(a) of the Electricity Order under the authority of an exemption granted pursuant to Article 9 of that Order;”;

““electricity supply exemption holder” means a person who carries on the activity referred to in Article 8(1)(c) of the Electricity Order under the authority of an exemption granted pursuant to Article 9 of that Order;”;

““the Gas Directive” means Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC;”;

““the Gas Regulation” means Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No. 1775/2005;”;

““gas conveyance exemption holder” means a person who carries on the activity referred to in Article 6(1)(a) of the Gas Order under the authority of an exemption granted pursuant to Article 7 of that Order;”;

““gas storage exemption holder” means a person who carries on the activity referred to in Article 6(1)(b) of the Gas Order under the authority of an exemption granted pursuant to Article 7 of that Order;”;

““gas supply exemption holder” means a person who carries on the activity referred to in Article 6(1)(c) of the Gas Order under the authority of an exemption granted pursuant to Article 7 of that Order;”;

““Third Package” means—

- (a) the Electricity Directive;
- (b) the Gas Directive;
- (c) the Agency Regulation;
- (d) the Electricity Regulation; and
- (e) the Gas Regulation.”.

84. In Article 38 of the Energy Order—

- (a) In paragraph (1), for the words “European Parliament and Council Directive 2003/54/EC concerning common rules for the internal market in electricity and repealing Directive 96/92/EC” there shall be substituted the words “the Electricity Directive”; and
- (b) in paragraph (2), for the words “European Parliament and Council Directive 2003/55/EC concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC” there shall be substituted “the Gas Directive”.

Amendments to the Gas Order

85. In Article 3 of the Gas Order—

- (a) for the definition of “the Directive” there shall be substituted the following definition—

““the Directive” means European Parliament and Council Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC;”;
- (b) for the definition of “the Commission Decision” there shall be substituted the following definition—

““the Commission Decision” means Commission Decision PH (2005) 0791 granting a derogation from certain provisions of Directive 2003/55/EC of the European Parliament and of the Council in respect of Northern Ireland;”;
- (c) there shall be inserted at the appropriate places the following definitions—

““the 2011 Regulations” means The Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011;”;

““vertically integrated undertaking” has the meaning given in Article 2(20) of the Directive.”.

86. In Article 8(7B)(b), for the words “Article 24(2)” there shall be substituted the words “Article 38(2)”.

87. In Article 9A(1)(a), for the words “Article 24(1)” there shall be substituted the words “Article 38(1)”.

88. In Article 45(1A), for the words “Article 10 or 14” there shall be substituted the words “Article 16 or 27”.

Amendments to the Energy Act (Northern Ireland) 2011

89. In Section 17(5) of the Energy Act (Northern Ireland) 2011, in paragraph (a) of the definition of “relevant licence”, after the words “Article 10(1)(b)” there shall be inserted the words “or Article 10(1)(bb)”.

PART IX

TRANSITIONAL PROVISIONS

Separation of existing electricity transmission licence

90.—(1) The transmission licence held by Northern Ireland Electricity plc immediately before the date these Regulations come into operation (“the existing transmission licence”) shall have effect as if it were—

- (a) a licence under Article 10(1)(b) of the Electricity Order to participate in the transmission of electricity (“the successor transmission licence”); and
- (b) a licence under Article 10(1)(bb) of the Electricity Order to distribute electricity (“the successor distribution licence”),

authorising, in each case, the activities thereunder in the area specified in the existing transmission licence.

(2) Subject to paragraph (3) and subject to any modification made under paragraph (5), each condition (or part of a condition) of the existing transmission licence which—

- (a) relates only to electricity transmission shall be included as a condition in the successor transmission licence;
- (b) relates only to electricity distribution shall be included as a condition in the successor distribution licence;
- (c) does not relate only to electricity transmission or only to electricity distribution shall be included as a condition in both the successor transmission licence and the successor distribution licence.

(3) Condition 42 (and Annex 2 to the Conditions) of the existing transmission licence shall be included as a condition in both the successor transmission licence and the successor distribution licence and shall be taken as relating to the activities authorised by both licences taken together.

(4) Where any question arises as to the effect of paragraph (2) in relation to a particular licence condition, the Authority, after consultation with Northern Ireland Electricity plc, shall determine such question and may modify the successor transmission or distribution licence accordingly.

(5) The Authority, after consultation with the Department, may by notice in writing make such incidental, consequential or transitional modifications to the terms and conditions of the successor transmission licence or the successor distribution licence as the Authority may consider necessary or expedient in connection with paragraph (1).

(6) Before making modifications under this regulation, the Authority shall consult Northern Ireland Electricity plc.

(7) The requirements of paragraphs (4) and (5) as to consultation may be satisfied by consultation before, as well as by consultation after, the coming into operation of this regulation.

(8) Where the Authority makes any modifications of the successor transmission licence or the successor distribution licence under this regulation, it—

- (a) shall publish those modifications in such manner as it considers appropriate; and
- (b) may publish the modified licence in such manner as it considers appropriate, either as a composite document comprising both licences or as separate documents each comprising one of the licences.

(9) The power to make modifications under this regulation may not be exercised after the end of the period of 12 months beginning with the day on which this regulation comes into operation.

(10) The Department may, prior to the date referred to in paragraph (9), and if it considers there are good reasons for doing so, extend that date by a period of no more than 12 months.

(11) Article 38(1) of the Energy Order applies in relation to the power to modify a licence under this regulation as it applies in relation to a power to amend a licence under the Electricity Order.

(12) Nothing else in this regulation prejudices the generality of any other power to modify a licence.

(13) Anything done in pursuance of the existing transmission licence, or any condition thereof, in connection with the transmission or distribution by Northern Ireland Electricity plc of electricity shall be deemed to have been done in pursuance of the successor transmission licence or the successor distribution licence respectively.

(14) Each of the successor transmission licence and the successor distribution licence shall be treated as an existing electricity licence for the purposes of regulation 94.

Modification of existing electricity licences

91.—(1) The Department, after consultation with the Authority, or the Authority with the consent of the Department, may by notice in writing make such modifications to the conditions of an existing electricity licence as the Department or the Authority, as the case may be, considers requisite or expedient—

- (a) to ensure that any activity authorised by the licence is carried out in compliance with the relevant requirements and prohibitions laid down by the Electricity Directive; or
- (b) otherwise for the purpose of the Electricity Directive.

(2) A notice under paragraph (1) may in particular—

- (a) revoke or modify such conditions of; or
- (b) include such new conditions in,

an existing licence as the Department or the Authority, as the case may be, considers requisite or expedient for the purposes of that paragraph.

(3) Conditions included in a licence by virtue of the power conferred by this regulation—

- (a) may do any of the things authorised by Articles 11(2) to (6B) of the Electricity Order;
- (b) shall, in particular, ensure that existing electricity licences comply with the requirements of Article 11A of the Electricity Order.

(4) Before making modifications under this regulation, the Department or the Authority shall consult the holders of the licences being modified and such other persons as it considers appropriate.

(5) The requirements of paragraphs (1) and (4) as to consultation may be satisfied by consultation before, as well as by consultation after, the coming into operation of this regulation.

(6) Where the Department or the Authority makes any modifications under this regulation, it shall publish those modifications in such manner as it considers appropriate.

(7) The power to make modifications under this regulation may not be exercised after the end of the period of 12 months beginning with the day on which this regulation comes into operation.

(8) The Department may, prior to the end of the period referred to in paragraph (7), and if it is satisfied there are good reasons for doing so, extend that period by no more than 12 months.

(9) Article 38(1) of the Energy Order applies in relation to the power to modify a licence under this regulation as it applies in relation to a power to amend a licence under the Electricity Order.

(10) Nothing in this regulation prejudices the generality of any other power to modify a licence; and nothing in paragraph (3) prejudices the generality of paragraph (1).

Modification of existing gas licences

92.—(1) The Department, after consultation with the Authority, or the Authority with the consent of the Department, may by notice in writing make such modifications to the conditions of an existing gas licence as the Department or the Authority, as the case may be, considers requisite or expedient—

- (a) to ensure that any activity authorised by the licence is carried out in compliance with the relevant requirements and prohibitions laid down by the Gas Directive; or
- (b) otherwise for the purpose of the Gas Directive.

(2) A notice under paragraph (1) may in particular—

- (a) revoke or modify such conditions of; or
- (b) include such new conditions in,

an existing licence as the Department or the Authority, as the case may be, considers requisite or expedient for the purposes of that paragraph.

(3) Conditions included in a licence by virtue of the power conferred by this regulation—

- (a) may do any of the things authorised by Articles 10(2) to (6A) of the Gas Order;
- (b) shall, in particular, ensure that existing gas licences comply with the requirements of Article 10A of the Gas Order.

(4) Before making modifications under this regulation, the Department or the Authority shall consult the holders of the licences being modified and such other persons as it considers appropriate.

(5) The requirements of paragraphs (1) and (4) as to consultation may be satisfied by consultation before, as well as by consultation after, the coming into operation of this regulation.

(6) Where the Department or the Authority makes any modifications under this regulation, it shall publish those modifications in such manner as it considers appropriate.

(7) The power to make modifications under this regulation may not be exercised after the end of the period of 12 months beginning with the day on which this regulation comes into operation.

(8) The Department may, prior to the end of the period referred to in paragraph (7), and if it is satisfied there are good reasons for doing so, extend that period by no more than 12 months.

(9) Article 38(2) of the Energy Order applies in relation to the power to modify a licence under this regulation as it applies in relation to a power to amend a licence under the Gas Order.

(10) Nothing in this regulation prejudices the generality of any other power to modify a licence; and nothing in paragraph (3) prejudices the generality of paragraph (1).

Existing members of the Authority

93. For the purposes of sub-paragraph (3) of paragraph (3) of Schedule 1 to the Energy Order, a person who at the date these Regulations come into operation has been appointed to hold office as chairman or other member of the Authority for one or more terms in total not exceeding 7 years shall be treated as having been appointed only once.

Property arrangements schemes

94. Schedule 1 (which makes provision about property arrangements schemes in respect of certain licence holders) shall have effect.

Sealed with the Official Seal of the Department of Enterprise, Trade and Investment on 23rd March 2011.



A F Hepper
A senior officer of the
Department of Enterprise, Trade and Investment

SCHEDULE 1

Regulation 94

Property Arrangements Schemes

Scheme-making power

- 1.—(1) The Authority may, on application, make a scheme providing for—
- (a) the transfer to the nominated transferee of; or
 - (b) the creation in favour of the nominated transferee of any rights in relation to, property, rights or liabilities of an applicant for certification.
- (2) A scheme under sub-paragraph (1) (“a property arrangements scheme”) may also contain—
- (a) provision for the creation, in relation to property which the scheme transfers, of an interest in or right over the property in favour of the applicant for certification;
 - (b) provision for the creation of any rights or liabilities as between the applicant for certification and the nominated transferee;
 - (c) provision for imposing on the applicant for certification or the nominated transferee an obligation to enter into a written agreement with, or to execute an instrument of another kind in favour of, the other; and
 - (d) supplemental, incidental and consequential provision.
- (3) The property, rights or liabilities which may be transferred by a property arrangements scheme include property, rights or liabilities which would not otherwise be capable of being transferred.
- (4) If a property arrangements scheme provides for the division of an estate in land and any rent is—
- (a) payable in respect of the estate under a lease; or
 - (b) charged on the estate,
- the scheme may contain provision for apportionment or division so that one part is payable in respect of, or charged on, only one part of the estate and the other part is payable in respect of, or charged on, only the other part of the estate.
- (5) A property arrangements scheme that contains provision which adversely affects a third party may also contain provision requiring the nominated transferee or the applicant for certification to pay the third party compensation.

Applications for schemes

- 2.—(1) An application for the making of a property arrangements scheme may be made where—
- (a) a qualifying application for certification has been made to the Authority;
 - (b) a person is nominated in that application for certification as a person to whom any property, rights or liabilities of the applicant for certification should be transferred, or in favour of whom any rights in relation thereto should be created, for unbundling purposes; and
 - (c) the person so nominated either has consented in writing to such nomination or is an existing related licensee.
- (2) An application for the making of a property arrangements scheme may be made by—
- (a) the nominated transferee;
 - (b) the applicant for certification; or
 - (c) by both jointly.

(3) Except with the consent of the Authority, no application for a property arrangements scheme may be made more than 6 weeks after the making of the qualifying application for certification in connection with which it is made.

(4) An application for a property arrangements scheme shall specify the property, rights or liabilities in relation to which provision of a kind mentioned in paragraph 1(1) is proposed to be included in the scheme.

The Authority's functions in relation to applications

3.—(1) On an application for the making of a property arrangements scheme, the Authority shall, in relation to any property, rights or liabilities in respect of which the application proposes provision of a kind mentioned in paragraph 1(1), determine whether provision of such a kind is, in relation to that property, or those rights or liabilities, necessary or expedient for unbundling purposes.

(2) Sub-paragraph (1) does not apply if the nominated transferee and the applicant for certification agree that provision of a kind mentioned in paragraph 1(1) is, in relation to the property, rights or liabilities concerned, necessary or expedient for unbundling purposes.

(3) If the Authority determines under sub-paragraph (1) that provision of a kind mentioned in paragraph 1(1) is not, in relation to any property, rights or liabilities, necessary or expedient for unbundling purposes, it shall refuse the application in relation to that property, or those rights or liabilities.

(4) If the Authority is minded to make a final decision to certify the applicant for certification pursuant to the qualifying application for certification and—

(a) the Authority determines under sub-paragraph (1) that provision of a kind mentioned in paragraph 1(1) is, in relation to any property, rights or liabilities, necessary or expedient for unbundling purposes; or

(b) the nominated transferee and the applicant for certification agree that that is the case,

the Authority shall, subject to paragraph 4(2), make a property arrangements scheme in relation to that property, or those rights or liabilities.

(5) The Authority shall publish the terms of any property arrangements scheme in such manner as the Authority considers appropriate for bringing it to the attention of persons likely to be affected by the scheme.

4.—(1) Subject to the following provisions of this paragraph, where the Authority is required to make a property arrangements scheme, the terms of the scheme shall be such as the nominated transferee and the applicant for certification may agree or, if they fail to agree, as the Authority may determine.

(2) The Authority may not include in a property arrangements scheme provision which would adversely affect a third party unless it determines that it is necessary or expedient for unbundling purposes for the provision to be made.

(3) Where the Authority does include in a property arrangements scheme provision which would adversely affect a third party, the Authority shall determine whether the scheme should include provision for compensation and, if so, what that provision should be.

(4) A property arrangements scheme shall not provide for any provision to come into operation before the end of the period of 21 days beginning with the day on which the scheme is made.

5.—(1) A determination under paragraph 4, so far as relating to any financial matter, shall be made on the basis of what is just in all the circumstances of the case.

(2) A determination under paragraph 4, so far as relating to any other matter, shall be made on the basis of what appears to the Authority to be appropriate in all the circumstances of the case having regard, in particular, to what is necessary or expedient for unbundling purposes.

6. The Authority may require any of the following persons to give it information and assistance in connection with the making of a determination under this Schedule, that is to say—

- (a) the nominated transferee;
- (b) the applicant for certification; and
- (c) any person who makes representations to the Authority about the application for certification to which the determination relates.

7. The Authority may engage such consultants as it thinks fit for the purpose of advising it in relation to the making of a determination under this Schedule.

Effect of property arrangements scheme

8. A property arrangements scheme shall, by virtue of this paragraph, have effect according to its terms.

9.—(1) A transaction of any description effected by or under a property arrangements scheme shall have effect subject to the provisions of any statutory provision which provides for transactions of that description to be registered in any statutory register.

(2) Subject to sub-paragraph (1), a transaction of any description effected by or under a property arrangements scheme shall be binding on all persons, notwithstanding that it would, apart from this provision, have required the consent or concurrence of any person.

Review of determinations

10.—(1) Any person aggrieved by a determination of the Authority under this Schedule may apply to the Competition Appeal Tribunal for a review of the determination.

(2) Subject to sub-paragraph (3), no application under sub-paragraph (1) may be made after the end of the period of 7 days beginning with the day on which the determination is made.

(3) Where the Authority has made a property arrangements scheme, an application under sub-paragraph (1) may be made in respect of a determination relating to the scheme at any time before the end of the period of 7 days beginning with the day on which the scheme is made.

(4) On an application under sub-paragraph (1), the Competition Appeal Tribunal may—

- (a) dismiss the application; or
- (b) make an order substituting its own determination.

11.—(1) This paragraph applies where—

- (a) the Competition Appeal Tribunal makes an order under paragraph 10(4)(b);
- (b) the Authority has made a property arrangements scheme in relation to the property, rights or liabilities concerned; and
- (c) the scheme has not come into operation.

(2) Where the Tribunal's determination is that provision of the kind mentioned in paragraph 1(1) is not, in relation to the property, rights or liabilities concerned, necessary or expedient for unbundling purposes, it may include in the order provision quashing the scheme.

(3) In any other case, the Tribunal may include in the order—

- (a) provision for the scheme to have effect with such amendments with respect to any matter dealt with by the Authority's determination as it thinks fit; and
- (b) to the extent that the Authority's determination dealt with any financial matter, provision requiring the Authority to redetermine the matter in accordance with the order and to amend the scheme accordingly.

12.—(1) This paragraph applies where—

- (a) the Competition Appeal Tribunal makes an order under paragraph 10(4)(b);
- (b) the Authority has made a property arrangements scheme in relation to the property, rights or liabilities concerned; and
- (c) the scheme has come into operation.

(2) The Tribunal may include in the order such provision as it thinks fit for the purpose of doing justice between—

- (a) the nominated transferee;
- (b) the applicant for certification; and
- (c) any third party adversely affected by the scheme,

in the light of its determination.

(3) Without prejudice to the generality of sub-paragraph (2), the Tribunal may include in the order—

- (a) provision for retransfer;
- (b) provision for the surrender or extinction of rights; and
- (c) provision for the payment of compensation.

13. An order under paragraph 10(4)(b) may include provision for the award of interest at such rate and for such period as the Competition Appeal Tribunal thinks fit.

14. Sections 120(6) to (8) of the Enterprise Act 2002 (c.40) (appeal with leave on point of law from decision of Competition Appeal Tribunal to Court of Appeal) shall apply in relation to decisions of the Tribunal under this Schedule as they apply in relation to decisions under that section.

Interim arrangements pending review of determination

15.—(1) This paragraph applies where—

- (a) a person makes an application under paragraph 10(1) for the review of a determination; and
- (b) the Authority has not made a property arrangements scheme in relation to the property, rights or liabilities to which the determination relates.

(2) The Competition Appeal Tribunal may on application by the nominated transferee or the applicant for certification make such interim arrangements as it thinks fit with respect to the property, rights or liabilities concerned.

(3) Without prejudice to the generality of sub-paragraph (2), the power under that sub-paragraph includes, in particular, power to make provision for the nominated transferee to have access to, or otherwise to enjoy the benefit of, any of the property or rights concerned for such period, and on such terms, as the Tribunal thinks fit.

(4) No application under sub-paragraph (2) may be made after the end of the period of 7 days beginning with the day on which the application under paragraph 10(1) is made.

16.—(1) This paragraph applies where—

- (a) a person makes an application under paragraph 10(1) for the review of a determination; and
- (b) the Authority has made a property arrangements scheme in relation to the property, rights or liabilities to which the determination relates.

(2) The Competition Appeal Tribunal may on application by—

- (a) the nominated transferee;
- (b) the applicant for certification; or
- (c) a third party who is adversely affected by any provision of the scheme,

make such interim arrangements as it thinks fit with respect to the property, rights or liabilities concerned.

(3) Without prejudice to the generality of sub-paragraph (2), the power under that sub-paragraph includes, in particular, power—

- (a) to make provision postponing or suspending the operation of any provision of the scheme for such period, and on such terms, as the Tribunal thinks fit;
- (b) to make provision for the nominated transferee to have access to, or otherwise to enjoy the benefit of, any of the property or rights concerned for such period, and on such terms, as the Tribunal thinks fit.

(4) No application under sub-paragraph (2) may be made after the end of the period of 7 days beginning with the day on which the application under paragraph 10(1) is made.

17. In exercising its powers under paragraph 15 or 16, the Competition Appeal Tribunal shall have regard, in particular, to what is necessary or expedient for unbundling purposes.

18. Paragraphs 15 and 16 are without prejudice to any powers of the Competition Appeal Tribunal to make orders on an interim basis under rules under section 15 of the Enterprise Act 2002 (c.40).

19.—(1) If an order under paragraph 15 or 16 is registered in the High Court, it shall be enforceable as an order of the High Court.

(2) An order under paragraph 15 or 16 may be registered by a person entitled to any right under the interim arrangements for which the order makes provision.

(3) Sub-paragraphs (1) and (2) have effect subject to any provision made by rules of court.

(4) Sub-paragraphs (1) and (2) apply to an order on an interim basis made under rules under section 15 of the Enterprise Act 2002 (c.40) in connection with an application under paragraph 10(1) as they apply to an order under paragraph 15 or 16.

Supplementary

20. An application under this Schedule shall not be made orally.

21.—(1) In this Schedule—

“application for certification” means an application for certification under Article 10C of the Electricity Order or Article 8C of the Gas Order;

“certification ground” has the meaning given to it in Article 10F of the Electricity Order or Article 8F of the Gas Order as the context requires;

“certification” means certification in accordance with Article 10E of the Electricity Order or Article 8E of the Gas Order as appropriate;

“existing related licensee” means, in relation to an applicant for certification—

- (a) a related transmission licensee falling within paragraph (a) of the definition thereof in Article 10L(1) of the Electricity Order; or
- (b) a related conveyance licensee falling within paragraph (a) of the definition thereof in Article 8L of the Gas Order,

as the case may be;

“nominated transferee” means the person nominated (as described in paragraph 2(1)(b)) in a qualifying application for certification;

“property arrangements scheme” has the meaning given by paragraph 1(2);

“qualifying application for certification” means—

- (a) an application for certification on the first or third certification ground in Article 10F of the Electricity Order; or
- (b) an application for certification on the first, second or third certification ground in Article 8F of the Gas Order,

which is made by a person who holds a transmission licence at the date these Regulations come into operation and who has not previously been certified;

“third party”, in relation to a property arrangements scheme, means a person other than the nominated transferee or the applicant for certification; and

“unbundling purposes”, in relation to a property arrangements scheme, or an application for such a scheme, means the purposes of satisfying or facilitating the satisfaction of any condition required for the relevant certification ground to be met (where the relevant certification ground is the certification ground on the basis of which the relevant qualifying application for certification was made).

(2) In this Schedule, a reference to the applicant for certification, in relation to a property arrangements scheme, or an application for such a scheme, means the applicant for certification to whose property, rights or liabilities the scheme, or application, relates.

(3) For the purposes of this Schedule, a provision of a property arrangements scheme adversely affects a third party if—

- (a) his consent or concurrence would be required to the making of the provision otherwise than by means of the scheme; and
- (b) he does not consent to the making of the provision by means of the scheme.

“SCHEDULE 6

Electricity Distribution Licence Application and Further Requirements

PART I

FORM OF APPLICATION FOR A DISTRIBUTION LICENCE

1. Full name of the applicant(s)

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2. Address of the applicant(s) or, in the case of a body corporate, the registered principal office

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3. Where the applicant is a company, the full names of the current Directors and the company’s registration number

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4. Where a holding of 20 per cent, or more of the shares (see Note) of an applicant is held by a body corporate or partnership or an unincorporated association carrying on a trade or business with or without a view to profit, the name(s) and address(es) of the holder(s) of such shares shall be provided.

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5. Desired date from which the licence will take effect.

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6. A list of the local government districts (in whole or in part) in the area to which the application relates.

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Note

References to shares—

- (a) in relation to an applicant with a share capital, are to allotted shares;
- (b) in relation to an applicant with capital but no share capital, are to rights to share in the capital of the applicant;
- (c) in relation to an applicant without capital, are to interests—
 - (i) conferring any right to share in the profits or liability to contribute to the losses of the applicant; or
 - (ii) giving rise to an obligation to contribute to the debts or expenses of the applicant in the event of a winding up.

PART II

DOCUMENTS AND PARTICULARS TO ACCOMPANY AN APPLICATION FOR A DISTRIBUTION LICENCE

1. Current statements of the accounts kept by the applicant in respect of any undertaking carried on by him, showing the financial state of affairs of that undertaking and its profit or loss, and the statements for the most recent period, together with copies of the latest audited annual accounts where such have been prepared.

2. An outline statement of the business proposals, for the business of the applicant to which the application relates, for the next 5 years which includes—

- (a) particulars of the person or persons from whom, and the points at which, the applicant expects to receive the electricity which he will distribute; particulars of distribution of the electricity; particulars of the expected points of off-take, and quantities;
- (b) interconnections to other distribution systems and/or transmission systems;
- (c) proposed metering arrangements;
- (d) schedule of generating plant owned by the applicant including—
 - (i) pumped storage; and
 - (ii) clutched gas turbine generators/synchronous compensators;
- (e) forecast annual maximum demands in his distribution system (GW) and energy (GWh) to be distributed;
- (f) summary large scale map, together with detailed maps providing information on areas where activities are concentrated as necessary;
- (g) a single line diagram of the distribution system showing all distribution voltage levels and distinguishing from overhead lines and electric lines which are or will be placed underground;
- (h) annual forecasts of costs, sales and revenues and project financing, stating the assumptions underlying the figures provided; and
- (i) details of the arrangements that are in place, or will be put in place, for managing the interfaces between the system to which the application relates and—
 - (i) other distribution systems;
 - (ii) transmission systems;
 - (iii) the transmission system operator; and
 - (iv) any persons who are, or will be at any future point, connected to the system to which the application relates.

3. Details of any expected subsequent substantial capital outflows including major decommissioning costs.

4. Estimates of net annual cash flows for the subsequent period sufficient to demonstrate the financial security and feasibility of the project(s) to which the application relates.”

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations inter alia amend the Electricity (Northern Ireland) Order 1992 (“the Electricity Order”), the Gas (Northern Ireland) Order 1996 (“the 1996 Gas Order”), the Energy (Northern Ireland) Order 2003 (“the Energy Order”), the Energy Act (Northern Ireland) 2011 (“the Energy Act”) and the Electricity (Applications for Licences and Extensions of Licences) (No. 2) Regulations (Northern Ireland) 2007 to ensure that they conform with the requirements of:

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

(2) Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (“the Gas Directive”);

(3) Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No. 1228/2003 (“the Electricity Regulation”);

(4) Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No. 1775/2005 (“the Gas Regulation”); and

(5) Regulation (EC) No. 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (“the Agency Regulation”).

Part I

Part I contains certain introductory provisions and definitions of terms used in these Regulations.

Part II

Part II implements certain provisions of the Electricity Directive and the Gas Directive dealing with the protection of electricity and gas consumers. In particular—

- (a) Regulation 3 amends Article 12(3) of the Energy Order to require the Department of Enterprise, Trade and Investment (“the Department”) and the Northern Ireland Authority for Utility Regulation (“the Authority”), in carrying out their electricity functions, to have regard to the need to protect certain categories of electricity customers, consistent with the Electricity Directive;
- (b) Regulation 4 amends Article 14(3) of the Energy Order to require the Department and the Authority, in carrying out their gas functions, to have regard to the need to protect certain categories of gas customers, consistent with the Gas Directive;
- (c) Regulations 5 and 6 amend Articles 26 and 42A of the Electricity Order to provide for a defined period of time for resolution of disputes;
- (d) Regulation 7 substitutes a new Article 47A in the Electricity Order, in place of the existing Article 47A, giving the Authority, or an arbitrator appointed by the Authority, power to determine electricity billing disputes and sets out requirements regarding such determination;
- (e) Regulation 8 inserts a new Article 24A into the Gas Order, giving the Authority, or an arbitrator appointed by the Authority, power to determine gas billing disputes and sets out requirements regarding such determination; and
- (f) Regulation 9 amends Section 2 of the Energy Act to provide for a defined period of time for resolution of disputes.

Part III

Part III implements certain provisions of the Electricity Directive and the Gas Directive which provide for a new unbundling regime for transmission system operators. This new regime requires the full separation of electricity and gas transmission activities from production and supply activities and for the certification of operators approved under procedures laid down in the Electricity Regulation and the Gas Regulation. Under the Directives there are a number of different models for the achievement of this unbundling and the Regulations set out the different grounds that an operator must satisfy for each model. In particular—

- (a) Regulation 10 inserts new Articles 10B to 10L into the Electricity Order, which sets out the process for the certification and designation of electricity transmission system operators;
- (b) Regulation 11 provides for the modification of electricity licence conditions where the Authority is minded to make a final decision on certification;
- (c) Regulation 12 inserts new Articles 8B to 8L into the Gas Order, which set out the process for the certification and designation of persons who convey gas through gas transmission pipelines; and
- (d) Regulation 13 provides for the modification of gas licence conditions where the Authority is minded to make a final decision on certification.

Part IV

Part IV provides for the modification of gas and electricity licence conditions to implement certain requirements of the Electricity Directive and the Gas Directive. In particular—

- (a) Regulation 14 substitutes a new Article 11A in the Electricity Order, requiring the inclusion of appropriate conditions in licences to ensure that the authorised activities comply with various requirements of the Electricity Directive; and
- (b) Regulation 15 substitutes a new Article 10A in the Gas Order, requiring the inclusion of appropriate conditions in licences to ensure that the authorised activities comply with various requirements of the Gas Directive.

Part V

Part V provides for the introduction, under the Electricity Order, of a separate prohibition on the unauthorised distribution of electricity, creates a licensing regime for distribution and widens the scope of duties of electricity distribution system operators. In particular—

- (a) Regulation 16 amends Article 3 of the Electricity Order to include a new definition of “distribution licence” and an amended definition of “electricity distributor”;
- (b) Regulation 17 inserts a new sub-paragraph (bb) into Article 8(1) of the Electricity Order to introduce a new prohibition on unauthorised distribution of electricity for the purposes of giving a supply to any premises or enabling a supply to be so given;
- (c) Regulation 18 amends Article 9 of the Electricity Order to provide for the Department to make exemptions from the requirement to hold a distribution licence, to provide for electricity licence exemptions to be granted subject to conditions and to provide for a power of revocation of such exemptions where the conditions are not complied with;
- (d) Regulation 19 amends Article 10 of the Electricity Order to provide for the grant of distribution licences;
- (e) Regulation 20 inserts a new Article 10AA into the Electricity Order to provide for distribution licences to be granted for a particular area;
- (f) Regulation 21 and Regulations 23 to 30 make consequential amendments to the Electricity Order;

- (g) Regulation 22 amends Article 12 of the Electricity Order to widen the scope of duties of the holder of a distribution licence, to ensure that those duties reflect the requirements of the Electricity Directive for long-term planning and security of supply;
- (h) Regulation 31 suspends the effect of the new prohibition on the unauthorised distribution of electricity until 30 September 2012 and Regulation 32 provides for the extension of that date;
- (i) Regulation 33 amends the Electricity (Applications for Licences and Extensions of Licences) (No. 2) Regulations (Northern Ireland) 2007 to provide for the making of applications for distribution licences, and given effect to Schedule 2 of these Regulations which provide for the form or application for a distribution licence and the documents and particulars that to accompany the application; and
- (j) Regulation 34 makes consequential amendments to the Energy Order.

Part VI

Part VI implements certain provisions of the Electricity Directive and the Gas Directive dealing with national regulatory authorities and cross-border co-operation within the European Union. In particular—

- (a) Article 35 inserts:
 - (i) a new Article 3A(1) into the Energy Order, designating the Authority as national regulatory authority for Northern Ireland;
 - (ii) a new Article 3A(2) into the Energy Order, requiring the Authority to ensure that its staff act independently; and
 - (iii) a new Article 3A(3) into the Energy Order, providing for the Authority to make representations to the energy regulator in Great Britain for the purposes of representing the interests of Northern Ireland at meetings of the Agency for the Cooperation of Energy Regulators;
- (b) Regulation 36 inserts:
 - (i) a new Article 6A into the Energy Order requiring the Authority to prepare each year a report on its activities as designated regulatory authority for Northern Ireland; and
 - (ii) a new Article 6B into the Energy Order to provide for the implementation by the Authority of decisions of the Agency for the Cooperation of Energy Regulators and of the European Commission;
- (c) Regulation 37 inserts new paragraphs (5) and (6) into Article 7 of the Energy Order to provide for the preparation by the Authority of guidance for customers (the consumer checklist);
- (d) Regulation 38 inserts a new Article 8A into the Energy Order, requiring the Authority to have regard to the need for consultation and cooperation with other regulatory authorities;
- (e) Regulations 39 to 42 amends Articles 12(1) and 14(1) of the Energy Order, as well as making some consequential amendments, to align the Authority's principal objectives for electricity and gas with the Directives;
- (f) Regulations 43 and 44 amend Article 62 of the Energy Order to expand the Authority's obligation to give reasons for its decisions;
- (g) Regulation 45 amends Schedule 2 to the Energy Order, by inserting a new paragraph 2A and substituting paragraph 3, to strengthen the provisions dealing with the independence of the Authority and its board members;
- (h) Regulation 46 amends Article 6(3) of the Energy Order to strengthen the autonomy of the Authority;
- (i) Regulations 47 to 54 make various amendments to the Electricity Order to vest in the Authority, rather than the Department, the power to grant electricity licences and to allow for the determination, publication and modification of standard licence conditions for electricity licences, to align the licence provisions with those under the Gas Order;

- (j) Regulation 55 substitutes a new Article 31A(1) in the Electricity Order to widen the scope of disputes to be resolved by the Authority pursuant to that Article;
- (k) Regulation 56 amends Article 50(2) of the Electricity Order to strengthen the autonomy of the Authority;
- (l) Regulation 57 inserts a new paragraph 3B into Article 50 of the Electricity Order, to widen the Authority’s monitoring functions in relation to electricity;
- (m) Regulations 58 to 66 make various amendments to provisions of the Gas Order to vest in the Authority, rather than the Department, the power to grant gas licences;
- (n) Regulations 67 and 68 amend Article 27(2) and Article 30(2) of the Gas Order respectively, to strengthen the autonomy of the Authority;
- (o) Regulation 69 inserts a new paragraph 3B into Article 27 of the Gas Order, to widen the Authority’s monitoring functions in relation to gas; and
- (p) Regulation 70 substitutes a new Article 27A(1) in the Gas Order to widen the scope of disputes to be resolved by the Authority pursuant to that Article.

Part VII

Part VII amends the Authority’s enforcement powers under the Energy Order, to implement certain requirements of the Electricity Directive and the Gas Directive and to give the Authority power to enforce certain requirements of the Electricity Regulation and the Gas Regulation. In particular;

- (a) Regulations 71 to 74 amend Articles 41 to 52 of the Energy Order, to extend the enforcement power to all persons regulated under the Electricity Order and the Gas Order, not just licence holders;
- (b) Regulation 75 substitutes the definition of “relevant requirements” in Article 42(2) of the Energy Order to refer to new Articles 41A and 41B of the Energy Order;
- (c) Regulation 76 inserts a new Article 41A into the Energy Order to clarify the meaning of “relevant requirements” in the context of electricity and to include relevant provisions under the Electricity Directive and the Electricity Regulation. It also inserts a new Article 41B into the Energy Order to clarify the meaning of “relevant requirements” in the context of gas and to include relevant provisions under the Gas Directive and the Gas Regulation;
- (d) Regulation 77 substitutes a new Article 45(9) in the Energy Order to allow the maximum penalty that may be imposed by the Authority in relation to the contravention of certain requirements of the Directives to be calculated by reference to the turnover of vertically integrated undertakings; and
- (e) Regulations 78 and 79 make consequential amendments to the Electricity Order.

Part VIII

Part VIII (Regulations 80 to 89) makes consequential amendments to the Electricity Order, the Gas Order, the Energy Order and the Energy Act.

Part IX

Part IX sets out various transitional provisions. In particular—

- (a) Regulation 90 provides for the existing transmission licence held by Northern Ireland Electricity plc to be treated as a transmission licence and distribution licence, and also provides for the separation of the terms and conditions of the existing licence into the two successor licences;
- (b) Regulations 91 and 92 provide for the modification of existing electricity and gas licences to ensure compliance with the provisions of the Electricity Directive and the Gas Directive;

- (c) Regulation 93 provides for transitional provisions dealing with the terms of appointment of members of the Board of the Authority, applying to those members of the Board who have already been appointed at the date these Regulations come into operation; and
- (d) Regulation 94 gives effect to Schedule 1 of these Regulations. Schedule 1 gives the authority powers to make certain property arrangements schemes, where required pursuant to the transmission unbundling provisions set out in Part III.

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