

This Explanatory Memorandum refers to the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2013

EXPLANATORY MEMORANDUM TO

The Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2013

SR 2013 No. 92

1. INTRODUCTION

This Explanatory Memorandum has been prepared by the Department of Enterprise, Trade and Investment ('the Department') to accompany the above Statutory Rule which is to be laid before the Northern Ireland Assembly. The Explanatory Memorandum is designed to assist the reader in understanding the Regulations. It does not form part of the Regulations.

2. PURPOSE

The Regulations will implement various legislative measures in order to achieve compliance with a number of requirements arising from the EU Third Energy Package of European legislation ('IME3').

The legislative measures involve amendments to:

- the Gas (Northern Ireland) Order 1996 ('the Gas Order');
- the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 ('the SEM Order');
- the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011 ('the 2011 Regulations');
- the Energy (Northern Ireland) Order 2003 ('the Energy Order'); and
- the Competition and Service (Electricity) (Northern Ireland) Order 1992.

These amendments are necessary in order to implement certain requirements of the Gas Directive, the Gas Regulation, the Electricity Directive and the Electricity Regulation which all form part of the IME3 package.

3. BACKGROUND

Work has been ongoing across a number of areas to complete implementation of IME3, an energy liberalisation package that represents a further major step towards the creation of fully competitive, liberalised internal markets in natural gas and electricity within the European Community. The Department made the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011 ('the 2011 Regulations') in March 2011 to implement the majority of the Third Energy Package requirements in respect of Northern Ireland. Great Britain completed its own transposing legislation in November 2011.

These Regulations will implement additional obligations under IME3 and cover a number of legislative provisions, including:

- Arrangements for regulating Liquefied Natural Gas (LNG) facilities in Northern Ireland;
- Provisions to ensure that conditions attached to exemptions from the requirement to hold a licence to convey, store or supply natural gas, or to operate a LNG facility, are compliant with the Gas Directive; to ensure that Gas Order provisions for dealing with disputes apply to all categories of gas exemption holder; and to make provision for the Northern Ireland Authority for Utility Regulation ('NIAUR') to make costs orders in relation to any such disputes;
- Clarification of the wording within the legislative basis in the Gas Order for permitting gas undertakings with less than 100,000 customers an exemption from the unbundling requirements of the Gas Directive;
- Provisions to transpose Article 48 of the Gas Directive which would permit gas undertakings to apply for a temporary derogation from the Directive's obligations on third party access to gas infrastructure if providing such access would cause serious economic or financial difficulties as a result of 'take or pay' commitments the undertaking has made in gas purchase contracts;
- Changes to the Energy Order and the SEM Order to align the functions of the SEM Committee and NIAUR under the SEM Order with the requirements of the Electricity Directive;
- Amendment of Regulations 91 and 92 of the 2011 Regulations to revise the date by which NIAUR may, with the consent of the Department, make modifications to existing electricity and gas licences to give effect to requirements under the Electricity and Gas Directives respectively;
- Amendments to the way in which the Gas Regulation and the Electricity Regulation are defined within the Energy Order so as to capture any amendments to those Regulations by the European Commission;
- Provisions to transpose Article 36 of the Gas Directive which permits new gas infrastructure, including major pipelines, gas storage facilities and LNG facilities, a derogation from certain Gas Directive obligations; and
- A provision in respect of licence conditions to ensure that vertically integrated transmission system operators comply with the requirements of Article 7(4) of the Gas Directive which requires promotion of regional cooperation.

The Regulations will also correct a number of small drafting errors in the Gas Order and in the 2011 Regulations as well as repealing Article 6 (Billing disputes) of the Competition and Service Order which has been superseded.

4. CONSULTATION

During a six-week public consultation on 'Further Legislative Measures to Transpose the EU Third Energy Package' which ended on 25th February 2013, the Department received 8 responses and 3 acknowledgements. The respondents were broadly content with most of the proposed legislative measures. However, the majority of respondents did not agree with the proposal to extend indefinitely the powers under Regulations 91 and 92 of the 2011 Regulations which permit NIAUR, with the consent of the Department, to modify electricity and gas licences in order to ensure that IME3 requirements are met. The respondents felt that any extension to these powers should be time bound.

Having considered the consultation responses, the Department decided to implement the policy proposals as outlined in the consultation, with the exception of the extension of the licence modification powers for an indefinite period. In respect of this matter, the Department decided to time-limit the powers for making IME3-related licence modifications until 30th April 2014.

As a result of further consideration of IME3-related issues with NIAUR, the Department has also decided to make legislative provision to transpose Article 7(4) and Article 36 of the Gas Directive (as outlined above), although these issues were not included in the consultation paper, in order to achieve full IME3 compliance and avoid infraction fines.

The consultation paper and its annexes can be assessed at:

http://www.detini.gov.uk/consultation_document_on_further_legislative_measures_to_transpose_the_eu_third_energy_package.pdf

5. EQUALITY IMPACT

The Regulations have been screened for compliance with Section 75 of the Northern Ireland Act 1998. The Department has determined the Regulations are largely technical in nature and will affect primarily local natural gas and electricity undertakings. The Department has concluded that the Regulations should not have a significant impact on equality of opportunity or good relations for people within any of the equality and good relations categories. It was therefore found that a full EQIA was not considered necessary.

6. REGULATORY IMPACT

The Department does not consider that there will be a significant cost impact on the business sector. The Regulations will mainly impact upon companies in the natural gas and electricity sectors but, in practical terms, the immediate impact should be limited. For example, the proposal to introduce a licensing regime for LNG facilities will have no impact as Northern Ireland does not have any LNG facilities at present and none are planned or anticipated. The completed Regulatory Impact Assessment is attached for further information at **Annex A**.

7. FINANCIAL IMPLICATIONS

The Regulations should not lead to any significant additional costs for the Department or NIAUR.

The key benefit of implementing the proposed legislative measures is that this action will help to complete transposition of the Electricity and Gas Directives. Transposition of the Directives is required to meet obligations imposed by European law; failure to comply could result in infraction proceedings and the imposition of substantial fines.

8. SECTION 24 OF THE NORTHERN IRELAND ACT 1998

The Department has considered section 24 of the Northern Ireland Act 1998 and is satisfied the Regulations do not contravene the Act.

9. EU IMPLICATIONS

The Regulations have no negative implications for the EU or its Member States. Instead the legislation will have a positive effect by transposing obligations under the Electricity and Gas Directives. A transposition note in relation to the Regulations is attached for further information at **Annex B**.

10. PARITY OR REPLICATORY MEASURE

The Department of Energy and Climate Change (DECC) has transposed the Gas and Electricity Directives via the Gas and Electricity (Internal Markets) Regulations 2011 and these can be accessed at

http://www.legislation.gov.uk/uksi/2011/2704/pdfs/uksi_20112704_en.pdf

11. 21 DAY RULE

The Department will breach the 21-day rule when laying this statutory rule at the Assembly due to the need to amend Regulations 91 and 92 of the 2011 Regulations in order to extend the date by which NIAUR may, with the consent of the Department, make modifications to existing electricity and gas licences to give effect to requirements under the Electricity and Gas Directives. The current deadline for making IME3-related licence modifications is 15th April 2013. **It is proposed that the Regulations should come into operation on 12th April 2013**, before the current power expires, in order to extend this deadline to 30th April 2014. This extension is essential to enable the necessary licence modifications to be made in order complete transposition of the Electricity and Gas Directives and avoid significant infraction fines.

There already is an imminent threat of referral to the European Court of Justice following the Commission's press notice of 24th January 2013 which announced its intention to refer the UK to the European Court of Justice for failing to fully transpose the Electricity and Gas Directives which form part of IME3. The Commission has recommended a daily penalty payment of €148,177.92 for each of the partially transposed Directives and Northern Ireland would proportionally bear any penalty imposed on the UK. Departmental officials are in close contact with Cabinet Office, the European Commission and the Department of Energy and Climate Change (DECC) in Great Britain and, while no further formal

communication has been received from the Commission, it is clear that it is imperative to maintain progress across the remaining compliance issues.

12. ADDITIONAL INFORMATION

The Regulations shall come into operation on 12th April 2013.

ENERGY DIVISION

DEPARTMENT OF ENTERPRISE, TRADE AND INVESTMENT

28 March 2013

REGULATORY IMPACT ASSESSMENT

1. TITLE OF PROPOSAL

The implementation of further legislative measures to transpose the EU Third Energy Package of European Legislation (“**the Third Package**” or “**IME3**”)

2. INTRODUCTION

This Regulatory Impact Assessment (RIA) supports a number of proposed legislative measures which are to be implemented to achieve compliance with a number of outstanding IME3 requirements. The proposed legislative measures will involve amendments to:

- the Gas (Northern Ireland) Order 1996 (**‘the Gas Order’**);
- the Electricity (Single Wholesale Market) (Northern Ireland) 2007 (**‘the SEM Order’**);
- the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011 (**‘the 2011 Regulations’**);
- the Energy (Northern Ireland) Order 2003 (**‘the Energy Order’**); and
- the Competition and Service (Electricity) (Northern Ireland) Order 1992.

The RIA considers how implementation of these proposals is likely to affect businesses, particularly natural gas and electricity companies.

Since the mid-1990s, the European Union (**‘EU’**) has put in place legislation that aims to support the creation of a single energy market within the EU by introducing competition and removing barriers to cross-border trade. This gradual transition has been progressed to date through three packages of European legislation. The Third Package was adopted in July 2009.

The Department of Enterprise, Trade and Investment (**‘the Department’**) made the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011 (**‘the 2011 Regulations’**) in March 2011 to implement the majority of the Third Package requirements in respect of Northern Ireland (**‘NI’**). Great Britain (**‘GB’**) completed its own transposing legislation in November 2011 and notified the European Commission on 29 November 2011 of action taken in both GB and NI to achieve transposition. There remains however, a number of additional measures to be taken to complete transposition of the Third Package and the Department is seeking to progress these as soon as possible.

3. PURPOSE AND INTENDED EFFECT

3.1 Objective

The Department is proposing a number of legislative amendments to the Gas Order; the Energy Order; the SEM Order; the 2011 Regulations; and the Competition and Service Order which will implement certain requirements of:

- Directive 2009/73/EC of the European Parliament and the Council concerning common rules for the internal market in natural gas (“**the Gas Directive**”);
- Regulation (EC) No. 715/2009 of the European Parliament and the Council on conditions for access to the natural gas transmission networks (“**the Gas Regulation**”);
- Directive 2009/72/EC of the European Parliament and the Council concerning common rules for the internal market in electricity (“**the Electricity Directive**”); and
- Regulation (EC) No. 714/2009 of the European Parliament and the Council on conditions for access to the network for cross-border exchanges in electricity (“**the Electricity Regulation**”).

The Gas Directive, the Gas Regulation, the Electricity Directive and the Electricity Regulation are all part of the Third Package, an energy liberalisation package that represents a further major step towards the creation of fully competitive, liberalised internal markets in both natural gas and electricity in the European Union.

Work is ongoing across a number of areas to complete Third Package implementation. Most recently, for example, the Department has completed consultations on the introduction of electricity distribution licensing exemptions and the imposition of obligations on licence exempt distributors and suppliers, and on a revised procedure for electricity and natural gas licence modification and appeals. Copies of those consultations can be accessed here:

<http://www.detini.gov.uk/content-home-consultations.htm>.

In September 2012, the Utility Regulator published a package of licence modifications to implement a range of obligations under the Electricity and Gas Directives. Further licence modifications are required and the Utility Regulator is conducting its own consultation exercise on these.

3.2 Further Legislative Measures

The proposed further legislative measures which this RIA is considering cover a range of matters including:

- (i) Arrangements for regulating Liquefied Natural Gas (LNG) facilities in NI (Note: Northern Ireland does not have any LNG facilities at present and none are planned or anticipated but provision for regulating such facilities is an IME3 requirement);

- (ii) To require that conditions attached to exemptions from the requirement to hold a licence to convey, store or supply natural gas are compliant with the Gas Directive; ensure that the provisions of the Gas Order apply to disputes involving all categories of gas exemption holder; to make provision for the Utility Regulator to make costs orders in relation to any such disputes;
- (iii) Clarification of the wording within the legislative basis in the Gas Order which permits gas undertakings with less than 100,000 customers an exemption from the unbundling requirements of the Gas Directive;
- (iv) Provisions to transpose Article 48 of the Gas Directive which would permit gas undertakings to apply for a temporary derogation from the Directive's obligations on third party access to gas infrastructure if providing such access would cause serious economic or financial difficulties as a result of 'take or pay' commitments the undertaking has made in gas purchase contracts;
- (v) Proposed changes to the Energy Order and the SEM Order to align the functions of the SEM Committee and the Utility Regulator under the SEM Order with the requirements of the Electricity Directive;
- (vi) A proposal to amend Regulations 91 and 92 of the IME 3 Regulations to remove the date attached to the currently time bound power by which the Utility Regulator may, with the consent of the Department, make licence modifications to existing licences to give effect to requirements under the Electricity and Gas Directives; and
- (vii) Proposed amendments to the way in which the Gas Regulation and the Electricity Regulation are defined within the Energy Order so as to capture any amendments to the Regulations which the European Commission has made or may make in the future.

In addition to the above, the Department is considering the possible future development of standard licence conditions for both gas and electricity which will apply for each category of licensable activity.

Finally, the Department is also proposing to take this opportunity to correct a number of small drafting errors in the Gas Order and in the 2011 Regulations as well as repealing Article 6 (Billing disputes) of the Competition and Service Order which has been superseded.

4. OPTIONS

The key options are:

- **Option 1 - Do nothing** – If NI fails to fully implement the Third Package, the European Commission will commence infraction proceedings against the United Kingdom which could result in very substantial fines. Such fines would have to be met by the NI Block. This option is therefore not being put forward.
- **Option 2 – Introduce the proposed legislative amendments** – Implementing the proposed legislative provisions will contribute towards NI achieving

compliance with the requirements of the Third Package and will therefore help NI to avoid substantial fines. This option is therefore carried forward.

5. COSTS & BENEFIT ANALYSIS

A summary of the costs and benefits of the proposed legislative measures may be outlined as follows:

5.1 Arrangements for regulating LNG facilities in Northern Ireland

Implementation in NI

The Gas Directive contains a number of requirements in respect of the regulation of LNG facilities. For the purposes of the Gas Directive, an LNG facility is defined as “a terminal which is used for the liquefaction of natural gas or the importation, offloading and re-gasification of LNG, and includes all ancillary services and temporary storage necessary for the re-gasification process and subsequent delivery to the transmission system, but does not include any part of LNG terminals used for storage”. An LNG system operator means “a natural or legal person who carries out the function of liquefaction of natural gas, or the importation, offloading and re-gasification of LNG and is responsible for operating a LNG facility”.

To meet the Gas Directive’s requirements in respect of LNG facilities, Member States must ensure that LNG system operators are designated and that each LNG system operator operates, maintains and develops under economic conditions a secure, reliable and efficient facility to secure an open market, with due regard to the environment, ensure adequate means to meet service obligations. Member States must also ensure the implementation of a system of third party access to LNG facilities.

Northern Ireland does not have any LNG facilities at present and none are planned or anticipated. However, in order to transpose the Gas Directive’s requirements in respect of the regulation of LNG facilities into domestic law as required, the Department would propose to make legislative provision for a licensing regime for LNG facilities in Northern Ireland which will require amendment of the Gas Order.

By introducing a system for licensing LNG facilities through the Gas Order, the Department will establish the basic legislative framework for implementing the controls required to ensure compliance with the Gas Directive. The actual controls will be detailed in licence conditions to be developed by the Utility Regulator as part of a draft LNG licence in due course.

Potential Costs and Benefits

As Northern Ireland does not have any LNG facilities at present and none are anticipated, this legislative measure will not have any immediate impact upon local businesses. The Northern Ireland Authority for Utility Regulation (“**the Utility Regulator**”) may, however, experience some small additional costs due to the work required to develop IME3-required LNG licence conditions.

As regulation of certain aspects of the operation of an LNG facility is an IME3 requirement, the key benefit of this legislative measure is that it will help to ensure NI's compliance with the Third Energy Package and thus avoid infraction fines.

5.2 Gas Exemptions

Implementation in NI

Article 7 of the Gas Order provides that the Department, after consultation with the Utility Regulator, may by order grant an exemption from the requirement to have a licence in order to convey, store or supply natural gas in Northern Ireland. It is proposed that the Department should also have the power to make an order to grant an exemption from the new licence to operate a LNG facility. To date, the exemptions provision under Article 7 has not been utilised in practice and there are no plans at present to do so. Should we wish, at some point in the future, to utilise this provision, the Department would have to make an Order, as provided for in Article 7, which would set out the circumstances in which exemptions would be offered.

There would also be a public consultation exercise on the appropriate conditions which should be placed on licence exempt suppliers, distributors, gas storage operators and LNG facility operators. To comply with the Third Package, such conditions would have to reflect the relevant duties imposed by the Gas Directive. In order to translate this requirement into domestic law, the Department would propose to amend Article 7 of the Gas Order by adding a provision that gas licence exemption conditions must reflect specified requirements of the Gas Directive. In practice, this would ensure that anyone who may, in the future, be granted an exemption from a licence to convey, store or supply gas or to operate a LNG facility would be subject to certain conditions to ensure compliance with the Third Package requirements.

The Department also proposes that any disputes arising in relation to compliance with the exemption conditions as between the exemption holder and a third party should be determined by the Utility Regulator. In this regard, the Department proposes that the provisions of the Gas Order should be revised to apply to disputes involving all categories of gas exemption holder and, in addition, that provision should be made for the Utility Regulator to make costs orders in relation to any such disputes.

Potential Costs and Benefits

The main benefit is that the Department would have a legislative basis for ensuring any future exemption conditions are compliant with the Gas Directive and for dealing with disputes between gas exemption holders and a third party. As the gas exemption provision has not been used in Northern Ireland to date, and at present there are no plans to do so, it is not anticipated that this provision will have any impact on costs to business for the foreseeable future.

5.3 Gas Exemptions - Closed Distribution Systems

Implementation in NI

Article 32 of the Gas Directive requires the provision of third party access to distribution systems. Where a distribution system has been designated as a Closed Distribution System by the Utility Regulator under Article 28 of the Gas Directive, it can be exempted from the requirement to have the underlying charging methodologies for such access approved by the Utility Regulator prior to their entry into force. The Department proposes that provision should be made for designation of networks as Closed Distribution Systems by way of conditions applying to licence exempt distributors.

Broadly, a Closed Distribution System is a system that is mainly for the distribution of gas to non-domestic customers within a geographically confined area. In order to be classified as a Closed Distribution System, a network must be used to distribute gas in a geographically confined industrial, commercial or shared services site and either (i) the operations or production processes of the users must be integrated for technical or safety reasons, or (ii) the system must distribute gas primarily to the owner or operator of the system or their related undertakings which meet the designation requirements.

Classification as a Closed Distribution System will not, however, remove the obligation on the licence exempt distributor to provide third party access.

Potential Costs and Benefits

Again, the key benefit of this legislative measure will be its contribution towards ensuring compliance with the Third Package. At present, no gas distribution systems in NI have been classified as Closed Distribution Systems and the provision for gas licence exemptions has not yet been used in practice. If the provision for gas licence exemptions is utilised at a future date in respect of a gas distribution system which is classified as a Closed Distribution System, the licence exempt distributor will be exempted from the need to seek the Utility Regulator's approval for the company's charging methodology for third party access to the system prior to its entry into force. This measure therefore represents a form of deregulation which could benefit a company at a future date.

5.4 Use of Permitted Exemption from Unbundling Requirements

Implementation in Northern Ireland

Article 26 of the Gas Directive states that, "Where the distribution system operator is part of a vertically integrated undertaking, it shall be independent, at least in terms of its legal form, organisation and decision making, from other activities not relating to distribution." 'Unbundling', in practice, requires the effective separation of activities of energy transmission from production and supply interests. However, Article 26(4) further states that Member States may decide not to apply this unbundling requirement to integrated natural gas undertakings serving less than 100,000 connected customers.

It was always intended that Northern Ireland should transpose Article 26(4) into national law in order to continue to make a derogation from the unbundling requirement available to natural gas undertakings serving less than 100,000 connected customers. For this purpose, Article 10A(5), which was inserted into the Gas Order through the 2011 Regulations, was worded as follows: “The conditions included in a licence...shall...in the case of a [gas conveyance] 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 that provision for independence in terms of his legal form, organization and decision-making in relation to his activities under the licence...”.

However, having given this provision further consideration, the Department proposes to amend the wording of Article 10A(5) of the Gas Order in order to provide additional clarity. The proposed amendment will make clear that the unbundling requirement outlined in Article 26(1) of the Gas Directive applies to natural gas distribution system operators serving 100,000 or more connected customers.

Potential Costs and Benefits

The main benefit will be the additional clarity in the wording of the current legislative provision and hence greater certainty in relation to compliance with the Third Package. This amendment does not, however, represent a substantive change in legislative provision and it will not therefore impact on businesses.

5.5 **Derogation in relation to take or pay commitments**

Implementation in NI

Article 48 of the Gas Directive states that, if a natural gas undertaking encounters, or considers it would encounter, serious economic or financial difficulties because of ‘take or pay’ commitments accepted in one or more gas purchase contracts, it may apply for a temporary derogation from the Directive’s Article 32 obligations on third party access. This is designed to address the concern that, if an incumbent gas company has such ‘take or pay’ contracts (e.g. in order to ensure sufficient quantities of gas to meet all their customers’ needs), an occasion might arise where it would be financially damaging for the company to have to grant third party access to their gas pipes if this meant that they couldn’t take the gas they had already paid for. The Department proposes to transpose Article 48 into national law through an amendment to the Gas Order in order to make this option available for future use, if required, in NI.

Potential Costs and Benefits

The key benefit of this legislative measure is that it will transpose Article 48 of the Gas Directive, which is an IME3 requirement, and provide the legislative basis for businesses to seek a derogation from third party access obligations in certain circumstances. The provision is designed to assist businesses in certain circumstances which may be in danger of falling into financial difficulties. There may be some small additional administrative costs for the Utility Regulator.

5.6 Proposed changes to the Energy Order and the SEM Order to align with Electricity Directive Requirements

Implementation in NI

Regulation 38 of the IME 3 Regulations inserted a new Article 8A in the Energy Order to require the Utility Regulator, when carrying out its functions as designated regulatory authority for Northern Ireland, to have regard to the need for consultation and co-operation with the regulatory authorities of Great Britain or other Member States. Article 12 of the Energy Order sets out the principal objectives and general duties of the Utility Regulator and the Department. Article 13 sets out the exceptions from these general duties. Article 12 was amended by Regulation 39 of the IME3 Regulations to insert a new paragraph (1A) reflecting the objectives of Article 36(a) to (h) of the Electricity Directive, thus making those objectives part of the general objectives of the Utility Regulator in Northern Ireland.

The SEM Order, which makes provision in relation to the single wholesale market in the island of Ireland, was not amended at the same time. As a result, the objectives of the Utility Regulator in relation to Northern Ireland under the Energy Order and the objectives of the Utility Regulator in relation to the SEM under the SEM Order are out of alignment. In particular, Article 9 of the SEM Order which sets out the objectives and duties of the Utility Regulator and the SEM Committee do not include the objectives set out in Article 36(a) to (h) of the Electricity Directive. Thus, when dealing with matters within the scope of the SEM Order, the Utility Regulator has a different set of objectives to those which it has in respect of its other functions and those objectives do not reflect the requirements of the Electricity Directive. The Department proposes to introduce a new provision into the Energy Order which will correct this and ensure that, in carrying out its functions in relation to the SEM, the objectives of the Utility Regulator and the SEM Committee would include the objectives of Article 36(a) to (h) of the Electricity Directive.

Furthermore, in carrying out its functions as a designated regulatory authority for Northern Ireland in consultation and co-operation with regulatory authorities in Great Britain and other Member States, the Utility Regulator should only have regard to consumers in Northern Ireland rather than consumers on the island of Ireland as a whole. To the extent, therefore, that Article 9 of the SEM Order requires the Utility Regulator to have regard to consumers outside Northern Ireland, this will be disapplied from the Utility Regulator's functions under Article 8A of the Energy Order. As a result, any duties of the Utility Regulator in relation to consumers on the island of Ireland as a whole will not apply in relation to the exercise of its duties of co-operation under Article 8A.

The Department also proposes to amend Schedule 1 to the SEM Order to ensure the independence and impartiality of appointees and amend the provision for the term of appointment to reflect the requirements of Article 35 of the Directive along the lines of the changes made to Schedule 1 to the Energy Order by Regulation 45 of the IME 3 Regulations.

Potential Costs and Benefits

This amendment will help to ensure compliance with IME3 as well as bringing the Utility Regulator's functions as outlined in Article 12 of the Energy Order into line with

the Utility Regulator's functions in relation with SEM. It is not anticipated that this will have any significant impact on businesses.

5.7 Licence Modification Procedures

Implementation in NI

The Department proposes to amend Regulations 91 and 92 of the IME 3 Regulations to remove the date by which licence modifications must be made. These Regulations made provision for a time bound power for licence modifications to be made to existing licences to give effect to requirements under the Electricity and Gas Directives respectively. This power was intended to cover all modifications necessary to give effect to the requirements of the Directives, including any modifications required to give effect to the certification of relevant electricity transmission licensees and gas conveyance licensees (pursuant to Regulations 11 and 13).

The time bound power was extended to the maximum permitted under the Regulations and is due to end on 15 April 2013. The Department had consulted on proposals for changes to the ongoing licence modification process which it had intended to put in place after the time bound power ended (see the Department's consultation at http://www.detini.gov.uk/consultation_on_revised_procedure_for_licence_modifications_and_appeals_process.pdf which closed on 12 October 2012).

On 13 September 2012, the Utility Regulator published licence modifications addressing a wide range of issues under the Directives, largely relating to consumer protection and retail matters. However, at the date of publication of this consultation paper, not all the necessary licence modifications have been made by the Utility Regulator to give effect to the obligations under the Directives and further modifications are required.

In addition, no final certification decisions have been made in relation to either electricity or gas and further licence modifications are likely to be required to give effect to certain certification decisions. In the absence of completion of the licence modification and certification processes within the anticipated timescale under the Regulations, an extension is necessary to enable this power to be used to complete the licence modification and certification processes in a consistent way. The proposed changes to the 'ongoing' licence modification process will be developed in light of consultation responses but will not come into effect until the initial Directive and certification related modifications are completed. The Department intends to remove the 'free-standing' licence modification powers under the IME 3 Regulations when the new Directive compliant arrangements for the 'ongoing' process are brought into effect

Potential Costs and Benefits

This amendment will simply extend the current provision for the Utility Regulator to make IME3-related licence modifications with the consent of the Department and it is designed to ensure that licence modifications necessary to ensure compliance with the Directives may be made past the current deadline of 15 April 2013. It will not have a significant impact in terms of costs and benefits other than allowing such licence modifications to be completed in a consistent way. In view of consultation

responses on this issue, the Department will establish an end date of 30 April 2014 for this power rather than leaving it open-ended (see paragraph 12 below for further information).

5.8 Proposal to Effect Standard Electricity and Gas Licence Conditions via Legislation

Implementation in NI

The Department intends, once all the electricity and gas licence modifications have been made, to effect these as part of the development of new electricity standard licence conditions and the revision of the existing gas standard licence conditions. The Department is further considering whether it might be appropriate to enshrine in legislation, as Schedules to the Electricity and Gas Order, the standard licence conditions which will apply for each category of licensable activity. The Utility Regulator is already required, under Article 10A of the Gas Order and Article 11A of the Electricity Order, to include conditions ensuring compliance with Directive requirements in all new licences granted after 15 April 2011.

The Department will work closely with the Utility Regulator in developing the standard licence conditions, although a significant amount of work has already been completed by the Utility Regulator in relation to the licence modifications published on 13 September 2012 as noted above. The standard conditions will also be informed by the additional work still underway by the Utility Regulator to complete the licence modification process for Directive compliance.

When this process is completed, the Department envisages that the proposed standard conditions would be subject to a separate consultation exercise by the Utility Regulator before any legislative action under section 2(2) powers would be taken by the Department to include them in the Electricity and Gas Orders.

Potential Costs and Benefits

The development of standard licence conditions for electricity and gas should lead to greater transparency and clarity in the licensing process. However, it is not anticipated that the development of standard conditions would result in licence conditions which are significantly different from those already in place in each company's gas or electricity licence which are already required to comply with IME3. The development of standard licence conditions should not, therefore, have a significant impact on businesses. The development of such conditions, however, could represent a substantial amount of work for the Department and the Utility Regulator.

5.9 Proposed Amendment to the Energy Order

Implementation in NI

The definitions of the EU 'Gas Regulation' and the EU 'Electricity Regulation' which were inserted into the Energy Order by the 2011 Regulations may be interpreted to mean that the Department can only designate as relevant requirements those provisions of the Electricity Regulation and the Gas Regulation which existed at the time the 2011 Regulations were made in March 2011.

The Department would therefore propose to amend the Energy Order by expanding the definitions of the Gas Regulation and the Electricity Regulation so as to capture any amendments made to those Regulations, i.e. making the definitions “ambulatory”.

Potential Costs and Benefits

This will ensure that the Department has the power to revisit the published designations whenever the Electricity or Gas Regulations are amended without having to amend the definitions of these Regulations in the Energy Order. This represents a streamlining of administrative and legislative processes.

If amendment to the Electricity or Gas Regulations involves a change of substance to what has or has not been designated as “relevant requirements”, the Department will have to revoke and replace the existing designation. This process will, of course, be subject to consultation on the issue in question before a new designation is issued.

5.10 The Competition and Service (Electricity) (Northern Ireland) Order 1992: Repeal of Article 6 (Billing Disputes)

Implementation in NI

The Department proposes to repeal Article 6 of the above Order which inserted the original Article 47A in the Electricity Order relating to billing disputes. Article 6 of the Competition and Service Order does not appear to have been commenced and the Department is advised that it should now be repealed. Article 47A was subsequently substituted by Regulation 7 of the IME 3 Regulations which came into operation on 15 April 2011. The Department does not intend to disturb the new Article 47A which was substituted in the Electricity Order, and has been advised that the repeal of Article 6 of the Competition and Service Order will not affect the validity of the substituted Article 47A.

Potential Costs and Benefits

The repeal of Article 6 of the Competition and Service order will have no impact as the Article was never commenced and has now, in any case, been superseded.

- 5.11 In addition to the amendments outlined above, the Department would propose to take this opportunity to correct a number of minor drafting errors in the Gas Order and the IME3 Regulations which will not create any additional costs for businesses.

6. RISK ASSESSMENT

The Department is obliged under European Law to fully implement the Third Package. Failure to do so would be a breach of such legal obligations and would expose the UK, as a Member State, to infraction proceedings and potentially to very substantial financial penalties. Failure to fully transpose the Third Package would also mean that the objectives of the Gas Directive and Electricity Directive would not be achieved in respect of NI. In such circumstances, the wide range of enhanced consumer protection measures, the re-structuring, where necessary, of energy undertakings and the establishment of increased energy regulatory powers and

obligations would not be put fully into place. This could have the effect of restricting transparency and competition and would put NI gas and electricity consumers at a disadvantage in comparison with consumers in other Member States where full transposition had been achieved.

7. CONCENTRATION OF SMALL BUSINESS: THE SMALL BUSINESS IMPACT TEST

The proposed amendments should not result in increased costs for small businesses as the amendments are largely technical in nature and, in some cases, designed to provide additional clarity on issues already introduced as part of work to ensure compliance with the Third Package. Any additional business costs should be minimal and apply only to the local gas and electricity companies; however there will be some additional administrative costs for the Department and the Utility Regulator.

8. ENVIRONMENTAL IMPACT

The proposed amendments focus mainly on the structure and regulation of the gas industry and the electricity industry. It is not anticipated that these will have any significant impact on environmental issues.

9. HUMAN RIGHTS IMPACT

The proposed amendments raise no apparent human rights issues.

10. ENFORCEMENT AND SANCTIONS

Many aspects of the proposed amendments will be implemented in practical terms through future licence or exemption conditions and other industry documentation by which market participants must abide. Compliance with such conditions is enforced by the Utility Regulator who has the powers to impose financial penalties up to 10% of the turnover of the licensees in the event of a breach.

11. MONITORING AND REVIEW

The Department, in liaison with the Utility Regulator, will monitor the operation of the NI Gas and Electricity markets to assess if these further measures to transpose the Third Package are delivering the anticipated benefits.

12. CONSULTATION

The consultation on further legislative measures to transpose the EU Third Energy Package of European Legislation (“**the Third Package**” or “**IME3**”) may be found on the Department’s website at www.energy.detini.gov.uk/consultations. The Department received 3 acknowledgements and 8 responses which were broadly content with the proposed legislative measures to be undertaken. The Department would propose to implement the policy proposals as outlined in the consultation, with the exception of the extension of the ‘free-standing’ licence modification power for an indefinite period. In respect of this matter, the Department would propose to limit the power for an additional 12 month period by including an end date for the exercise of the power of 30 April 2014. This should be sufficient time to complete the

modifications required as part of the certification process for electricity and gas companies, which has already been underway for a two year period.

It should also be noted that the proposal to effect all IME3-related electricity and gas licence modifications as part of the development of new electricity standard licence conditions and the revision of the existing gas standard licence conditions is being considered further by the Department and will not be progressed as part of the immediate legislative changes being made.

In addition to the above-mentioned consultation, there has been extensive consultation on the implementation of the Third Package, in NI. In NI, the main [consultation paper was published in October 2010](#) which covered a range of aspects of the Third Package. It followed an earlier consultation in [December 2009 on the unbundling requirements](#). The [Department's subsequent decision paper was published in March 2011](#). Following that, the Department made [the Electricity and Gas \(Internal Markets\) Regulations \(Northern Ireland\) 2011](#) ('the 2011 Regulations') which came into operation on 15 April 2011 to implement the vast majority of the requirements of the Directives as outlined in the Department's decision paper. The 2011 Regulations made a number of amendments to the Gas Order, the Energy Order and the Electricity (Northern Ireland) Order 1992. The updated text of these Orders can be found at: www.legislation.gov.uk.

More recently, the Department has completed consultations on the introduction of electricity distribution licensing exemptions and the imposition of obligations on licence exempt distributors and suppliers, and on a revised procedure for electricity and natural gas licence modification and appeals. Copies of those consultations can be accessed here: <http://www.detini.gov.uk/content-home-consultations.htm>. In September 2012, the Utility Regulator published a package of licence modifications to implement a range of obligations under the Electricity and Gas Directives. Further licence modifications are required and the Utility Regulator will conduct its own consultation exercise on these.

13. Summary and Recommendation

On the basis of the assessment of the costs and benefits that have been identified, the Department is of the opinion that there will be no significant negative impact brought about by the introduction of the proposed Regulations.

14. Declaration

"I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs."

[SIGNED]

ARLENE FOSTER MLA
Minister of Enterprise, Trade and Investment

8 March 2013

NORTHERN IRELAND**ELECTRICITY AND GAS TRANSPOSITION NOTE****Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC ('the Electricity Directive')****Directive 2009/73/EC concerning common rules for the internal market in gas and repealing Directive 2003/55/EC ('the Gas Directive')**

The majority of obligations under the Electricity Directive and the Gas Directive were implemented via the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2011 (S.I. 2011 No. 155) ('**the 2011 Regulations**') and a comprehensive transposition note was completed in relation to those Regulations. This transposition note concerns the transposition of certain outstanding requirements of the Gas Directive and the Electricity Directive through the Gas and Electricity (Internal Markets) Regulations (Northern Ireland) 2013 ('**the Regulations**') which were made and laid on 28 March 2013 and will come into operation on 12 April 2013.

Electricity

ARTICLE	INFORMATION ON COMPLIANCE AND IMPLEMENTATION
3(13)	Public Service obligations and customer protection
Annex 1(f)	Consumer rights, complaints and standards of service
	<p>Articles 3(13) and Annex 1(f) of the Electricity Directive require that Member States ensure that an independent mechanism exists, for example a consumer body or energy ombudsman, to ensure efficient treatment of complaints and out of court settlements and that information regarding customers' rights as regards this means of dispute resolution is available to customers.</p> <p>The 2011 Regulations substituted Article 47A of the Electricity (Northern Ireland) Order 1992 which relates to billing disputes. However, Article 6 of the Competition and Service (Electricity) Order 1992, which inserted the original Article 47A, does not appear to have been commenced. To clarify the position, Regulation 31 therefore repeals Article 6 of the Competition and Service (Electricity) Order 1992 and Regulation 7 of the 2011 Regulations and inserts a new Article 47A in the Electricity (Northern Ireland) Order 1992.</p>

ARTICLE	INFORMATION ON COMPLIANCE AND IMPLEMENTATION
35	Designation and independence of regulatory authorities
	<p>Article 35 of the Directive sets out requirements for the designation and independence of regulatory authorities.</p> <p>Regulation 33 extends the licence modification power in Regulation 91 of the 2011 Regulations to 30 April 2014 to ensure the Northern Ireland Authority for Utility Regulation ('the Authority') continues to have the power to make Directive related licence modifications.</p> <p>In addition, Regulations 6 to 10 amend Schedule 2 to the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 to ensure that appointment of members of the Single Electricity Market ('SEM') Committee complies with the requirements of Article 35. This is the Committee which effectively exercises regulatory functions in relation to the Single Market in Electricity in Northern Ireland.</p>
36	General objectives of the regulatory authority
	<p>Article 36 of the Electricity Directive requires regulatory authorities to take into account a number of objectives when it carries out its regulatory tasks.</p> <p>Regulation 5 amends the Energy (Northern Ireland) Order 2003 to ensure that, in carrying out its functions in relation to Single Electricity Market, the objectives of the Authority and the SEM Committee include the objectives of Article 36 of the Electricity Directive.</p> <p>Regulation 4 disapplies Article 9 of the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 from the Authority's functions under Article 8A of the Energy Order. As a result, in the exercise of duties of cooperation under Article 8A, the Authority will only have regard to the interests of Northern Ireland consumers.</p>
37	Duties and powers of the regulatory authority
	<p>Article 37 sets out requirements in relation to the regulatory authority's powers and duties.</p> <p>As noted above, Regulation 33 extends the licence modification power in Regulations 91 and 92 of the 2011 Regulations to 30 April 2014 to ensure the Authority continues to have the power to make Directive-related licence modifications in relation to existing licences.</p>

ARTICLE	INFORMATION ON COMPLIANCE AND IMPLEMENTATION
38	Regulatory regime for cross-border issues
	<p>Article 38 sets out requirements in relation to the regulatory regime for cross-border issues.</p> <p>The previous transposition note for the 2011 Regulations referred to the new Article 8A of the Energy (Northern Ireland) Order 2003; as noted above under Article 36, Regulation 4 of these Regulations amends Article 8A.</p>

Gas

ARTICLE	INFORMATION ON COMPLIANCE AND IMPLEMENTATION
Article 3	Public service obligations and customer protection
3(9)	<p>Article 3(9) of the Gas Directive requires Member States to ensure the provision of single points of contact to provide consumers with all necessary information concerning their rights, current legislation and the means of dispute settlement available to them.</p> <p>Regulation 32 of the Regulations revokes regulation 8 of the 2011 Regulations and inserts a new Article 24B (Billing disputes) into the Gas (Northern Ireland) Order 1996 in order to correct a numbering error.</p>
Article 7	Promotion of regional cooperation
7(4)	<p>Article 7(4) of the Gas Directive requires that, where vertically integrated transmission system operators participate in a joint undertaking established for implementing regional cooperation, the joint undertaking shall establish and implement a compliance programme which sets out the measures to be taken to ensure that discriminatory and anticompetitive conduct is excluded.</p> <p>Article 10A(5)(c) of the Gas (Northern Ireland) Order 1996, as inserted by regulation 18(2) of the Regulations, requires licence conditions to ensure that vertically integrated transmission system operators to whom Article 7(4) applies comply with the requirements of that paragraph. The Authority has developed an associated licence modification for existing gas conveyance (transmission) licences.</p>
Article 12	Designation of storage and LNG operators
	<p>Article 12 of the Gas Directive requires that Member States shall designate, or shall require natural gas undertakings which own storage or LNG facilities to designate, having regard to considerations of efficiency and economic balance, one or more storage and LNG system operators.</p> <p>Northern Ireland does not have any LNG facilities at present and none are planned or anticipated. However, in order to transpose the Gas Directive's requirements in respect of the regulation of LNG facilities into domestic law as required, Regulations 3(b) and (c), 12 to 14, 17, 18(4), 19-28 in the Regulations have amended the Gas (Northern Ireland) Order 1996 in order to make legislative provision for a licensing regime for LNG facilities in Northern Ireland. In particular, the amendments to the Gas Order require licence conditions to ensure that LNG system operators comply with the requirements of the Gas Directive. The relevant Directive Articles are 13, 16, 31 and 32.</p> <p>Regulation 29 further requires official consents for the construction of an LNG facility or an increase in capacity of an LNG facility.</p>

ARTICLE	INFORMATION ON COMPLIANCE AND IMPLEMENTATION
Article 13	Tasks of transmission, storage and/or LNG system operators
	<p>Article 13 of the Gas Directive establishes the tasks of transmission, storage and/or LNG system operators. See Article 12 above in respect of new Northern Ireland provisions for LNG system operators.</p>
Article 14	Independent system operators
	<p>Regulation 18(3) of the Regulations corrects an error in Article 10A(6)(b)(ii) of the Gas (Northern Ireland) Order 1996 by amending the reference to Article 13 of the Gas Directive to Article 14.</p>
Article 26	Unbundling of distribution system operators
	<p>Article 26(4) of the Gas Directive states that Member States may decide not to apply unbundling requirements in respect of distribution system operators to integrated natural gas undertakings serving less than 100,000 connected customers.</p> <p>In the Gas Order, Article 10A(5) is amended and (5A) is inserted by regulation 18(1) of the Regulations to clarify Northern Ireland's transposition of the derogation available under Article 26(4).</p>
Article 28	Closed distribution systems
	<p>Article 28 of the Gas Directive states that Member States may provide for national regulatory authorities to classify a system which distributes gas within a geographically confined industrial, commercial or shared services site as a closed distribution system.</p> <p>Articles 7A-7D of the Gas (Northern Ireland) Order 1996, as inserted by regulation 16 of the Regulations, provides for a conveyance exemption holder to apply to the Authority for any distribution system through which gas conveyed under this exemption to be classified as a closed distribution system.</p>

ARTICLE	INFORMATION ON COMPLIANCE AND IMPLEMENTATION
Article 32	Thirty party access
	<p>Article 32 of the Gas Directive requires that Member States shall ensure implementation of third party access to transmission and distribution systems and to LNG facilities based on published tariffs, applicable to all eligible customers and applied objectively and without discrimination.</p> <p>Articles 7(4A)-(4B) of the Gas (Northern Ireland) Order 1996, as inserted by regulation 15 of the Regulations, requires exemption conditions to ensure that exemption holders comply with the requirements of the Gas Directive.</p> <p><i>Note: Article 7 of the Gas Order provides that the Department, after consultation with the Authority, may by order grant an exemption from the requirement to have a licence in order to convey, store or supply natural gas in NI. To date, the exemptions provision under Article 7 has not been utilised in practice and there are no plans at present to do so. In order to utilise this provision at any point in the future, the Department would have to make an Order, as provided for in Article 7, which would set out the circumstances in which exemptions would be offered. This would include specifying in the Order all conditions to which the exemption holder is subject. There would further be a public consultation exercise on the appropriate conditions which should be placed on licence exempt suppliers, distributors, gas storage operators and LNG facility operators. Articles (4A)-(4B) of the Gas Order ensure that such conditions will reflect the relevant duties imposed by the Gas Directive.</i></p>
Article 36	New Infrastructure
	<p>Article 36 of the Gas Directive allows exemptions in respect of third party access to be granted in the case of major new gas infrastructure, such as interconnectors and LNG and storage facilities, where certain conditions are satisfied.</p> <p>Article 39A of the Gas Order, as inserted by regulation 30 of the Regulations, provides for exemptions from certain requirements of the Gas Directive, imposed under the Gas Order, in the case of new gas infrastructure.</p>
Article 39	Designation and independence of regulatory authorities
	<p>Article 39 of the Gas Directive sets out requirements for the designation and independence of regulatory authorities.</p> <p>Regulation 33 of the Regulations extends the licence modification power in Regulation 92 of the 2011 Regulations to 30 April 2014 to ensure the Authority has the power to make Directive-related licence modifications.</p>

ARTICLE	INFORMATION ON COMPLIANCE AND IMPLEMENTATION
Article 41	Duties and powers of the regulatory authority
	<p>Article 41 sets out requirements in relation to the regulatory authority's powers and duties.</p> <p>As noted above Regulation 33 extends the licence modification power in Regulations 91 and 92 of the 2011 Regulations to 30 April 2014 to ensure the Authority continues to have the power to make Directive related licence modifications.</p>

ARTICLE	INFORMATION ON COMPLIANCE AND IMPLEMENTATION
Article 48	Derogations in relation to take or pay commitments
	Article 10B of the Gas (Northern Ireland) Order 1996, as inserted by regulation 19 of the Regulations, transposes the Article 48 derogation in relation to take or pay commitments into domestic law.