

# **Explanatory Memorandum to**

## **The Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015**

**SR 2015 No. 1**

### **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 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 purpose of the Regulations is to amend the Electricity (Northern Ireland) Order 1992 (“the Electricity Order”) and the Gas (Northern Ireland) Order 1996 (“the Gas Order”) to establish a new procedure for electricity and gas licence modifications. The Regulations make provision for the Northern Ireland Authority for Utility Regulation (“the Utility Regulator”) following consultation to impose licence modifications which are subject to appeal by specified parties to the Competition and Markets Authority (“the CMA”). The requirement to establish a new licence modification and appeals process arises from obligations under the Electricity Directive (Directive 2009/72/EC) and the Gas Directive (Directive 2009/73/EC) which form part of the EU Third Energy Package of legislation known as IME 3. Equivalent changes were introduced in GB in 2011.

The Regulations revoke and replace the existing licence modification arrangements (which included procedures for the Utility Regulator to make a referral to the CMA) in the Electricity and Gas Orders. They also make provision for transition to the new procedure. Any referral under way under the ‘old’ process can be concluded under previous legislation. The Regulations make a number of consequential changes to the Electricity and Gas Orders and to the Energy (Northern Ireland) Order 2003. Additional consequential changes are required to the Enterprise and Regulatory Reform Act 2013 (“the ERRA”) and these will be effected by the Department of Business, Innovation and Skills (BIS) under separate Regulations.

### **3. BACKGROUND**

The EU Third Package of legislation comprises two EU Directives and three EU Regulations. Transposition of the IME 3 Electricity and Gas Directives has spanned several years and included changes to legislation and licences.

The Department acknowledged during the transposition process of the IME 3 Directives that further work was required to revise the electricity and gas licence modification process. Interim provision was made to ensure that the necessary modifications to electricity and gas licences could be implemented while work on the ongoing licence modification process progressed.

The Regulations will ensure Northern Ireland maintains compliance with the IME 3 Directive requirements that member states ensure that Regulatory Authorities can take

autonomous decisions, implement binding decisions in relation to specified regulatory tasks and that appeal mechanisms are in place to permit parties affected by a decision to make an appeal independent of the parties involved and of any government bodies.

#### **4. CONSULTATION**

There has been extensive consultation on the proposal to move to a new licence modification process aligned with that in place in GB. A 2010 consultation on implementation of IME 3 sought views on the development of independent appeal procedures as proposed by the Department of Energy and Climate Change (DECC) in an earlier GB consultation paper.

This was followed by a more detailed 12 week policy consultation on the proposed changes which ended in October 2012.

A further 8 week consultation on the legislative proposals ended in March 2014. This paper addressed issues arising from the 2012 consultation in the context of the requirement to establish a new licence modification process.

In July 2014, the Department published its response to the consultation. It acknowledged a licensing issue which had been raised by the Utility Regulator and industry, relating to alignment of the new arrangements with procedures under licences which relied on the referral process. The Regulations include a transitional power to enable existing electricity and gas licences to be modified to align with the new procedures.

#### **5. EQUALITY IMPACT**

The policy will ensure EU compliance and facilitate effective regulation which will benefit all section 75 groups. The policy has been screened out.

#### **6. REGULATORY IMPACT**

A Regulatory Impact Assessment was carried out and is attached to this memorandum at **Annex A**.

The proposal to move to an arrangement which aligns with those already in place in GB aims to balance the needs of all stakeholders and provide a proportionate response to the need to alter the current arrangements. If Northern Ireland does not maintain compliance with the Electricity and Gas Directives then the United Kingdom is left open to infraction proceedings, the result of which could be a proportionate financial fine.

DECC estimated that the cost of an appeal from a licence modification to the CMA might be around £150k and notes it is possible that price control appeals might be more lengthy and complex and could cost more than this. The evidence used by DECC suggests that companies may spend £175k per appeal and Ofgem £600k. The Department sought evidence from consultees in relation to potential costs. None of the respondents provided cost information but a number voiced concern about the financial impact of an appeal saying that NI energy companies are much smaller than their GB counterparts. The Department considers that the additional obligations on the Utility Regulator regarding consultation with licensees and the giving of reasons for its decisions will minimise any impact.

## **7. FINANCIAL IMPLICATIONS**

The new arrangements will affect the Utility Regulator and electricity and gas licensees but are not expected to result in any significant additional costs.

Failure to fully maintain compliance with the Electricity and Gas Directives could result in financial penalties. If the infraction were due to NI alone not maintaining compliance with the Directives, these costs would be passed on in full to NI.

## **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 proposed Rule does not contravene the Act.

Having considered the Human Rights Act, the Department has identified that Article 6, concerning the right to a fair hearing and matters such as the rights to a trial within a reasonable time, the right to an independent and impartial tribunal, and a right of appeal is engaged in relation to the proposed policy to review the existing energy licence modification arrangements. However, the Department considers that while the provisions engage the Article, they do not interfere with Article 6 rights.

The Department also considers that the proposed changes engage Article 1 First Protocol, relating to the peaceful enjoyment of property. However, the Department considered that this is justified and required under EU law and that therefore the proposals will not unjustifiably interfere with Article 1 First Protocol rights.

## **9. EU IMPLICATIONS**

The proposed legislation is required to maintain compliance with the Electricity and Gas Directive requirements. The Commission has been notified in relation to the Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015. A Transposition Note is attached at **Annex B**.

## **10. PARITY OR REPLICATORY MEASURE**

DECC made equivalent changes in GB via the Electricity and Gas (Internal Markets) Regulations 2011. These Regulations can be accessed at the following link:

<http://www.legislation.gov.uk/ukxi/2011/2704/contents/made>

## **11. ADDITIONAL INFORMATION**

The Regulations shall come into operation on 6<sup>th</sup> February 2015.

**ENERGY DIVISION  
DEPARTMENT OF ENTERPRISE, TRADE AND INVESTMENT  
5th January 2015**

## Regulatory Impact Assessment

### REVISED PROCEDURE FOR GAS AND ELECTRICITY LICENCE MODIFICATIONS IN NORTHERN IRELAND

#### 1. Title of Proposal

Legislative proposals to revise the electricity and gas licence process in Northern Ireland.

#### 2. Introduction

This Regulatory Impact Assessment (RIA) supports the introduction of a revised procedure for gas and electricity licence modifications process in Northern Ireland to maintain compliance with requirements of EU Directive EC/72/2009 (“the Electricity Directive”) and EC/73/2009 (“the Gas Directive”) which form part of the EU Third Package of Energy legislation also known as ‘IME 3’.

There has been extensive consultation on the proposal to move to a new licence modification process aligned with that in place in GB. Views were sought initially as part of a 2010 consultation on implementation of the EU Third Package. This was followed by a more detailed twelve week consultation on the policy proposals which ended in October 2012 and a further eight week consultation on the legislative proposals ending in March 2014.

Copies of these consultation papers and additional relevant information are available on the Department’s website and should be read in conjunction with this RIA.

The legislative proposals are driven by EU Directive requirements and the Department is bound to implement them. The implementation of revised arrangements for energy licence modifications and appeals in Northern Ireland will be by way of regulations made by the Department under section 2(2) of the European Communities Act 1972 to amend existing provisions, mainly in the Gas (Northern Ireland) Order 1996 and the Electricity (Northern Ireland) Order 1992.

Consequential changes are required to the Enterprise and Regulatory Reform Act 2013 (“the ERRA”) when the new arrangements come into operation and these will be effected by the Department of Business, Innovation and Skills (BIS) under separate legislation.

#### 3. Background and objective

The Electricity and Gas Directives require that National Regulatory Authorities (NRAs) must be capable of, among other things:

- taking autonomous decisions;
- implementing binding decisions of the European Commission and ACER (the Agency for the Cooperation of Energy Regulators); and
- carrying out their regulatory tasks in an efficient and expeditious manner.

They also require that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal.

#### **4. Purpose and intended effect**

The legislation will maintain compliance with the requirements of the Electricity and Gas Directives and provide an effective regime for the electricity and gas licence modification process in Northern Ireland.

This should result in a more equitable arrangement in the gas and electricity markets in Northern Ireland by providing licence holders (and other specified parties) with a right of appeal.

#### **5. Risk Assessment**

The Department is obliged under European Community Law to comply with the Third Package. Failure to do so would be in breach of such legal obligations and would therefore expose the UK, as a Member State, to infraction proceedings and Northern Ireland to significant financial penalties.

#### **6. Analysis of the options and the costs and benefits**

The legislation is required to maintain compliance with the EU Electricity and Gas Directives and the Department has no option but to proceed to make legislation to give effect to a new, Directive compliant licence modification process.

DECC estimates from 2010 suggest that the cost (to the Competition Commission, now the Competition and Markets Authority) of an appeal in relation to a licence modification might be around £170k. Price control appeals might be more lengthy and complex and could cost more than this. However, it is difficult to quantify the possible costs of the proposed revised arrangements since the cost of appeals will depend on the nature and complexity of the modification(s) in question. There have been no appeals since the introduction of the arrangements in GB in 2011.

The Department does not have any information on the costs to companies or to the Utility Regulator of an appeal (since there have not been any), but notes in the evidence used by DECC that companies may spend £175k per appeal and Ofgem £600k. The Department sought evidence from consultees in relation to potential costs as part of its consultation in 2012, but no further breakdown of costs was provided.

The Department considers that the additional obligations on the Utility Regulator regarding consultation with licensees and the obligation for the Utility Regulator to give reasons for its decisions will help to minimise any adverse effect on licensees or indeed the need for an appeal.

#### **7. Concentration of Small Business: The Small Business Impact Test**

The proposals reduce a competitive disadvantage faced by smaller industry participants under the current arrangements for gas, by giving all licensees an equal right of appeal. The Department proposes to give the CMA discretion to award costs and in doing so to take into account the reasonableness of the costs incurred. This would help to prevent smaller companies being denied access to the appeals process because of the potential costs. There should be no direct impact on other non-energy small businesses.

## **8. Environmental Impact**

The proposals deal with the technical process of making energy licence modifications. There are therefore no matters in the implementing provisions which should have an adverse environmental impact.

## **9. Human Rights Impact**

Article 6, concerning the right to a fair hearing and matters such as the rights to a trial within a reasonable time, the right to an independent and impartial tribunal, and a right of appeal is engaged. However, the proposals, by ensuring Directive compliance with regard to the independent decision making of the Utility Regulator in respect of its licensing powers, are justified and proportionate. Therefore while Article 6 is engaged, the proposals do not interfere with Article 6 rights. Article 1 First Protocol, relating to the peaceful enjoyment of property is also engaged. However, the proposals will not unjustifiably interfere with Article 1 First Protocol rights.

## **10. Enforcement and Sanctions**

The proposed new energy licence modification arrangements will be introduced via legislation. Compliance with licence obligations is enforceable by the Utility Regulator using its powers under the existing enforcement regime in Part VI of the Energy Order. These include the making of provisional and final orders to secure compliance and the power to impose financial penalties.

## **11. Monitoring and Review**

The Utility Regulator will be responsible for the outworkings of the new licence modification arrangements under the legislation. The Department has no role in the appeals process.

## **12. Consultation**

As noted under section 2 above, the Department has consulted extensively on the policy and legislative proposals to move to a new licence modification process aligned with that in place in GB.

Copies of these consultation papers and additional relevant information are available on the Department's website [www.energy.detini.gov.uk](http://www.energy.detini.gov.uk). and should be read in conjunction with this RIA.

## **13. 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**

**[20<sup>th</sup> October 2014]**

## TRANSPOSITION NOTE

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

Transposition of the Electricity and Gas Directives in Northern Ireland was effected by several pieces of legislation made by the Department of Enterprise, Trade and Investment and modifications to electricity and gas licences by the Northern Ireland Utility Regulator.

In order to maintain compliance with Directive requirements, changes to the electricity and gas licence modification process are required. The Gas and Electricity Licence Modification and Appeals Regulations (Northern Ireland) 2015 ("the Regulations") introduce a revised licence modification and appeals process in Northern Ireland for this purpose.

Regulation 3 amends the Gas (Northern Ireland) Order 1996 to establish the new procedure for gas licence modifications and Regulation 4 amends the Electricity (Northern Ireland) Order 1992 to establish the new arrangements for electricity licence modifications. The Regulations also include consequential, transitional and savings provisions.

The requirements of the Electricity and Gas Directives which are reflected in the new licence modification arrangements are set out below.

**Electricity Directive 2009/72/EC**

ARTICLE	INFORMATION ON COMPLIANCE AND IMPLEMENTATION
35	<p data-bbox="296 1290 1155 1328"><b>Designation and independence of regulatory authorities</b></p> <p data-bbox="296 1361 1366 1440">Article 35(4) requires member states to guarantee the independence of the regulatory authority.</p> <p data-bbox="296 1473 1445 1552">Article 35(5) requires member states, in order to protect the independence of the regulatory authority, to ensure that it can take autonomous decisions.</p>
37	<p data-bbox="296 1585 995 1624"><b>Duties and powers of the regulatory authority</b></p> <p data-bbox="296 1657 1445 1736">Article 37(1)(d) requires regulatory authorities to comply with and implement any legally binding decisions of ACER and of the European Commission.</p> <p data-bbox="296 1769 1414 1915">Article 37(4) requires member states to ensure that regulatory authorities have the powers to carry out their duties in an efficient and expeditious manner and specifically requires that they should be able to issue binding decisions on electricity undertakings.</p> <p data-bbox="296 1948 1430 2060">Article 37(17) requires member states to ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal.</p>

## Gas Directive 2009/73/EC

ARTICLE	INFORMATION ON COMPLIANCE AND IMPLEMENTATION
<b>39</b>	<b>Designation and independence of regulatory authorities</b>
	<p>Article 39(4) requires member states to guarantee the independence of the regulatory authority.</p> <p>Article 39(5) requires member states, in order to protect the independence of the regulatory authority, to ensure that it can take autonomous decisions.</p>
<b>41</b>	<b>Duties and powers of the regulatory authority</b>
	<p>Article 41(1)(d) requires regulatory authorities to comply with and implement any legally binding decisions of ACER and of the European Commission.</p> <p>Article 41(4) requires member states to ensure that regulatory authorities have the powers to carry out their duties in an efficient and expeditious manner and specifically requires that they should be able to issue binding decisions on electricity undertakings.</p> <p>Article 41(17) requires member states to ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal.</p>