

EXPLANATORY MEMORANDUM TO
THE ELECTRICITY AND GAS APPEALS (DESIGNATION AND EXCLUSION)
ORDER 2013

2013 No. 2429

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change (DECC) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order extends the right of appeal to the Competition Commission against certain decisions of the Gas and Energy Markets Authority (GEMA) to include decisions in relation to the Smart Energy Code, a new industry code governing the relationship between different licensed parties with respect to smart meters. It also sets out the circumstances in which such decisions are excluded from the right of appeal.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Many of the detailed rules that apply to activities in Great Britain's gas and electricity markets are set out in codes and other industry documents which have been designated as part of the regulatory framework.

4.2 The roll-out of smart metering across Great Britain requires changes to the regulatory framework governing energy industry participants. These include the creation of a new type of licensee responsible for the centralised provision of communications services, and a new industry code, the Smart Energy Code, which is a multiparty agreement setting out the terms for the provision of the smart metering communications service and specifying other provisions to govern the end-to-end management of smart metering. The first version of this code was designated by the Secretary of State on 23 September 2013 and is available from the Government's website (www.gov.uk). Licence modifications have been made to several different classes of electricity and gas licences by the Secretary of State using section 88 of the Energy Act 2008, requiring those parties to accede to and comply with the Smart Energy Code.

4.3 Like other industry codes, the Smart Energy Code makes provision for its ongoing amendment. Modification proposals are considered either by a Code Panel or by its subcommittee, the Change Board, both of which are composed of industry and consumer representatives. The Change Board has been established to recommend to GEMA whether or not a modification proposal should be accepted, but in some cases this recommendation will instead be carried out by the Panel. GEMA then approves or rejects the proposal in

line with its statutory duties. GEMA is not bound to accept the SEC Panel or Change Board's recommendation, but it must issue a letter setting out and explaining its decision.

4.4 Prior to 2005, the only route of appeal against GEMA's decisions regarding the amendment of industry codes was by judicial review. To make the code modification process more accountable, the Government created a statutory right of appeal to the Competition Commission under the Energy Act 2004. The right of appeal applies to codes which are designated under section 173 of that Act.

4.5 This right of appeal is limited to parties who are materially affected by a particular modification. The Competition Commission may refuse to hear appeals that it deems trivial or vexatious or with no reasonable prospect of success. Parties may not appeal where GEMA determines that the delay caused by the holding of the appeal against that decision is likely to have a material adverse effect on the availability of electricity or gas for meeting the reasonable demands of consumers in Great Britain. The requirements of the modification will continue to apply unless, following an application, the Competition Commission decides that this would result in significant costs and that the balance of convenience does not otherwise require effect to be given to the decision.

4.6 On consideration of the appeal, the Competition Commission will either confirm GEMA's decision or overturn it. It can only overturn the decision where it finds that GEMA failed to have proper regard to the objectives of the code or the regulator's statutory obligations; that GEMA failed to give sufficient weight to one or more of those objectives or obligations; that the decision was based on an error of fact; or that the decision was wrong in law. If the Competition Commission overturns the decision, it may quash the decision, refer it back to GEMA for further consideration, or give directions to ensure a modification proposal has effect as if GEMA had given consent.

4.7 Five industry codes are already subject to a right of appeal under the Energy Act 2004.

5. Territorial Extent and Application

5.1 This Order applies to Great Britain.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The Smart Metering Implementation Programme is a major programme that will lead to the roll-out of some 53 million smart gas and electricity meters to domestic properties and smaller non-domestic sites.

7.2 The communications required to support smart metering are to be organised by a new licensed central communications body, the Data and Communications Company (“the DCC”). Gas and electricity suppliers will be required to use the DCC to communicate with smart meters at domestic premises and will be permitted to use the DCC for meters at non-domestic premises. Any person using the services of the DCC will be required to accede to and comply with the Smart Energy Code. The DCC, electricity suppliers, electricity distributors, gas suppliers and gas transporters are all required in their licences to be parties to and to comply with the code.

7.3 The Order designates the Smart Energy Code as being subject to the right of appeal, thereby increasing the accountability of the regulator by offering market participants a right of appeal against its decisions with respect to the Smart Energy Code.

7.4 The Order excludes from the right of appeal decisions made by GEMA which accord with the majority recommendation of the relevant industry panel. The right is also restricted where the delay that would result from the holding of an appeal could have a significant adverse effect on consumers’ continuity of energy supply.

8. Consultation outcomes

8.1 The Government consulted on the policy in November 2012 as part of a wider consultation on Stage 1 of the Smart Energy Code. No respondents objected to the Government’s intention to make the Smart Energy Code an appealable code in line with other industry codes.

9. Guidance

9.1 The Government does not intend to publish any guidance related to these modifications.

10. Impact

10.1 The impact on business, charities or voluntary bodies is that costs from an appeal would arise to the appellant, and that there is also the potential for costs to arise to interested third parties, for example costs associated with collating or providing evidence in relation to the appeal. The regulation provides the right, not the obligation, to appeal. Therefore any costs do not directly arise from the regulation but rather arise from a Party’s decision to exercise a right that is provided through the regulation. Parties will only choose to appeal when code modifications have commercial significance for them, and costs will only arise when justified by private business benefits. The Government estimates that the overall cost per appeal will be in the region of £1m to £1.5m.

10.2 In the absence of this Order, Parties to the SEC would still have a right to appeal GEMA decisions through judicial review, thus incurring costs themselves and imposing costs on the judicial system. It is therefore not anticipated that any additional costs will result from laying the Order against the counterfactual of not doing so.

10.3 The impact on the public sector is that costs from an appeal would also arise to the Competition Commission and to GEMA.

10.4 An Impact Assessment has not been prepared for this instrument. The Government's policy on smart meters is reflected in the attached Programme Impact Assessment, which was published in January 2013. DECC will produce an update of the Programme Impact Assessment later this year, which will update the cost and benefit estimates to account for the latest available evidence arising from the detailed implementation work, including the outcome of the procurement process, developments in the design of the end-to-end solution, and broader updates to the evidence base. Potential cost implications of this Order will be reflected in the updated IA.

11. Regulating small business

11.1 This Order applies to small business, in that small businesses which are parties to the Smart Energy Code will have the same rights to appeal against GEMA decisions under the Energy Act 2004 as any other party to the Code.

12. Monitoring & review

12.1 The Government has a monitoring and evaluation strategy for the Smart Metering Implementation Programme, which will ensure that it is subject to a comprehensive and integrated review and evaluation process, both during the initial stage and towards the end of the mass roll-out of meters.

13. Contact

Alistair Paul at the Department of Energy and Climate Change (Tel: 0300 068 6660 or email: Alistair.Paul@decc.gsi.gov.uk) can answer any queries regarding the instrument.