

EXPLANATORY MEMORANDUM TO
THE ELECTRICITY AND GAS (OWNERSHIP UNBUNDLING) REGULATIONS

2014 No. 3333

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 The EU Third Energy Package introduced provisions in relation to the control and ownership of investments in the electricity transmission sector including inter-connectors and off-shore and on shore transmission networks. These requirements prevent the same person having simultaneous ownership or control over the function of transmission and/or a transmission system (a TSO) and in generation, supply or gas production. TSOs need to be certified by the national regulatory authority (NRA)¹ as compliant with the ownership unbundling tests in the unbundling provisions transposed in The Electricity Act 1989 and Gas Act 1986.

2.2 The purpose of the instrument is to amend the ownership unbundling provisions of the Electricity Act 1989 and Gas Act 1986 to introduce further flexibility to Ofgem's consideration of certification cases. The overall intended effect is to give Ofgem more discretion to certify TSOs where the ownership unbundling tests are not met in full provided the ownership arrangements do not lead to a risk of discriminatory treatment. This is intended to remove unnecessary constraints on investment in the UK energy markets whilst retaining the overall aims of the EU Directives' ownership unbundling requirements.

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

3.1 None

4. Legislative Context

4.1 Articles 9 of the Electricity and Gas Directives 2009 of the EU Third Energy Package², provided the legal framework for the structural separation ("unbundling") between transmission system operator (TSO) activities and generation and supply activities. The aim of the Directives on unbundling of networks is to avoid conflicts of interest and to make sure that TSOs take their decisions independently, ensuring transparency and non-discrimination towards all network users. This is important to ensure both the on-going operational decisions of TSOs and their long-term strategic investment decisions reflect fair treatment of all network users. The Directives require the National Regulatory Authority in each Member

¹ GEMA (Gas and Electricity Markets Authority)) whose executive arm is Ofgem. For ease of reference Ofgem is used.

² The term "Third Package" refers to a package of EU legislation on European electricity and gas markets. It entered into force on 3 September 2009. The purpose of the Third Package is to help the EU achieve more secure, competitive and sustainable energy. DECC was primarily responsible for its transposition in Great Britain and had to do this by 3 March 2011. The Gas and Electricity Markets Authority has been designated as the National Regulatory Authority of Great Britain. One of its roles is to certify Great Britain's transmission system operators.

State to certify transmission undertakings as compliant with the ownership unbundling requirements. These include on-shore transmission licensees³, interconnector licensees and offshore transmission licensees.

4.2 The Electricity and Gas (Internal Markets) Regulations 2011 amended the Electricity Act 1989 and Gas Act 1986 in order to transpose the requirements of the EU Third Package into GB law. There was a separate transposition for Northern Ireland where transmission operators are certified against the requirements of the Third Package by Northern Ireland authorities.

5. Territorial Extent and Application

5.1 This instrument extends to Great Britain.

6. European Convention on Human Rights

The Secretary of State has made the following statement regarding Human Rights:

In my view the provisions of the Electricity and Gas (Ownership Unbundling) Regulations 2014 are compatible with the Convention rights

7. Policy background

7.1 The EU Third Energy Package introduced provisions in relation to the control and ownership of investments in the transmission sector including inter-connectors and off-shore and on shore transmission networks. These requirements prevent the same person having simultaneous ownership or control over the function of transmission and/or a transmission system in a given area (a TSO) and in generation, supply or gas production. TSOs operating in GB need to be certified by Ofgem as compliant with the ownership unbundling tests in GB legislation.

7.2 The Government considered that the transposition of the ownership unbundling requirements of the Third Package might have been unduly constraining investment because Ofgem may not have been able to certify certain cases that, in the Authority's opinion, did not present a risk of discriminatory treatment. The European Commission has published a working document⁴ that sets out its own approach to certification. In this document the Commission indicates that it is proportionate for the National Regulatory Authorities to certify some transmission businesses even if the test in the Directives is not met, if in practice no conflict of interest arises.

7.3 These Regulations therefore amend the ownership unbundling provisions of the Electricity Act 1989 and Gas Act 1986 to introduce further flexibility to Ofgem's consideration of certification cases that do not present a risk of discrimination, in the form of a new discretionary power to certify a TSO where one or more of the ownership unbundling tests is not passed. Ofgem will decide on a case by case basis whether the relationship between the TSO or its controller and a producer or supplier may give rise to an ability and incentive for discriminatory behaviour.

³ National Grid, SPT and SHETL.

⁴http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/swd_2013_0177_en.pdf

7.4 These Regulations amend the Electricity and Gas (Internal Markets) Regulations 2011, but only in a limited respect – namely the review provision. The review provision in the 2011 Regulations has also been amended by the Electricity and Gas (Internal Markets) Regulations 2014, which comes into force the day before these Regulations come into force. The Department does not consider it appropriate to consolidate these Regulations with the Electricity and Gas (Internal Markets) Regulations 2014, given that a consultation and impact assessment have been carried out specifically in respect of the changes to the ownership unbundling regime made by these Regulations. The Department therefore considers that it would not improve transparency for stakeholders for these regulations to be consolidated.

8. Consultation outcome

8.1 Consultation via a ‘Call for Comments’⁵ on amending the current GB ownership unbundling provisions was undertaken in September/October this year. There were 6 responses to the call for comments and they were positive about DECC’s proposal to give Ofgem more discretion when it is considering certification cases that do not present any risk of discrimination.

9. Guidance

9.1 Ofgem is developing guidance for applicants.

10. Impact

10.1 The proposed amendments to GB Law are intended to enable investment in transmission, supply and generation assets in the UK. While it has not been possible to quantify the potential benefits of the policy, it would be reasonable to expect a net incremental benefit to business given a positive impact on conditions for investment. Therefore, it is considered that this proposal should be scored as a zero net cost measure for the purposes of better regulation impacts.

10.2 There are no impacts on the public sector.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 It is expected that the businesses (TSOs) directly affected by the proposed new regulations will be medium or large organisations. The proposal is a pro-investment measure as it is aimed at removing an unnecessary barrier to investment and places no direct administrative burden on businesses of any size. There is potential for small and micro businesses, particularly in the electricity generation sector, to benefit from the amendments as they should enable a wider class of financial investors to invest simultaneously in transmission and generation assets where there is no risk of discrimination.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/354981/unbundling_call_4_comments.pdf

12. Monitoring & review

12.1 The Regulations will be reviewed alongside the Electricity and Gas (Internal Markets) Regulations 2011 in 2016 to ensure that they are still effective and fit for purpose. Such a review will adhere to the Better Regulation principles of proportionality.

13. Contact

Pauline Spetsioti at the Department for Energy and Climate Change Tel: 0300 068 5178 or email: Pauline.spetsioti@decc.gsi.gov.uk can answer any queries regarding the instrument.