

# **DECC – Department of Energy and Climate Change**

## **Implementation of the EU Third Package**

### **Consultation on licence modification appeals.**

URN: 10D/807

Sept 2010

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## Executive Summary

In our main consultation on the implementation of the EU Third Internal Energy Package, which was published on the 27 July and closes on 19 October<sup>1</sup>, we set out some of the key new requirements in the Directives in relation to the role of the national regulatory authorities (Chapter 4, “Role of National Regulatory Authorities”).

The Third Package requires Member States to ensure that national regulatory authorities are able to take autonomous decisions in relation to specified regulatory tasks, and can implement any binding decisions of ACER (the Agency for the Cooperation of European Regulators) and of the Commission. Member States must also ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a suitable right of appeal to a body independent of the parties involved and of any Government.

In our main consultation we stated that, in view of the requirements that the national regulatory authority must be independent and able to implement its decisions in an efficient and expeditious manner, we believe it is doubtful whether the current licence modification process allows Ofgem to act with sufficient autonomy. We have also queried whether this process provides Ofgem with an effective and expeditious way to exercise its functions in the way envisaged by the Third Package.

In the main Third Package consultation published on 27 July 2010 the Government put forward a proposal that the current licence modification process be replaced with a process that allows Ofgem to amend licence conditions subject to appeal to an appropriate body. This document builds on this proposal by outlining the key features of what a potential new appeals process might look like. This consultation is without prejudice to the ongoing Third Package consultation.

### **The main proposals in this document include;**

- A new appeals process would apply to standard, standard special, and special licence modifications for electricity and gas, but with some unique provisions for special licence modifications relating to price controls.
- The appeal body would reach its decision through a rehearing of the parties’ arguments (except for special licence modifications relating to price controls) based on the merits of the case.
- The appeal body would be the Competition Commission (CC).

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<sup>1</sup> <http://www.decc.gov.uk/publications/basket.aspx?FilePath=Consultations%2feu-third-package%2f246-eu-third-package-condoc.pdf&filetype=4&minwidth=true>

- Directly affected licensees i.e. those holding the same type of licence, would have the right of appeal.
- The appeal body would have the ability to confirm, quash, remit the matter back to the regulator or give specific recommendations.
- Price control matters would be subject to a full investigation by the appeal body and the appeal body would have additional powers to substitute a new price control determination for that reached by Ofgem.

Without prejudice to the main consultation, this consultation document builds on informal discussions we have had with interested parties and seeks to illustrate and consult on how the proposed licence modification appeal process would operate if we decided to introduce it following this and our main 27 July Third Package consultation. The Government will consider the responses to the 27 July consultation and this consultation together.

As a Member State of the European Union, we are obliged to implement the Third Package fully by the 3<sup>rd</sup> March 2011 transposition deadline. We are consulting on the most significant changes. There are likely to be other minor and technical areas where changes to the law and to Licence Conditions will be required that will be reflected in the full package of transposition measures.

## How to take part

**This Consultation was issued on 1 October 2010 and will close on 29 October 2010.** When responding, please state whether you are responding as an individual or representing the views of an organisation. Please make it clear on the Response Form who the organisation represents, and where applicable, how the views of members were assembled.

For your ease, you can reply to this consultation online at

[http://www.decc.gov.uk/en/content/cms/consultations/imp\\_eu\\_third/imp\\_eu\\_third.asp](http://www.decc.gov.uk/en/content/cms/consultations/imp_eu_third/imp_eu_third.asp)  
[X](#)

A copy of the Response Form is available electronically at the same address.

The Form can also be submitted by letter, fax or email to:

**Third Package Consultation Team**  
**Department of Energy and Climate Change**  
**Area 4C**  
**3 Whitehall Place**  
**London SW1A 2HD**  
[third.package@decc.gsi.gov.uk](mailto:third.package@decc.gsi.gov.uk)

## Additional copies

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Other versions of the document such as Braille, audiocassette or large print are available on request. This includes a Welsh version.

## Confidentiality and Data Protection

Information provided in response to this Consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including any personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, in itself, be regarded as binding on the Department.

## Help with queries

Questions about the policy issues raised in this document, and completed response forms, can be addressed to:

**Third Package Consultation Team**  
**Department of Energy and Climate Change**  
**Area 4C**  
**3 Whitehall Place**  
**London SW1A 2HD**  
[third.package@decc.gsi.gov.uk](mailto:third.package@decc.gsi.gov.uk)

## Next steps

Once the responses have been considered together with the responses to the main consultation, the Government will be issuing a response and a final Impact Assessment. It is intended that the Regulations and (subject to parliamentary time), the required legislation, giving effect to the Third Package will be made in time to

enter into force by the implementation date of 3<sup>rd</sup> March 2011.

This consultation document is only concerned with the implications of the Directive for England, Wales and Scotland; it does not cover Northern Ireland.

## Introduction

### Overview of the current licence modification process

- 1.1 The Electricity Act 1989 and Gas Act 1986<sup>2</sup> set out the current process for amending Conditions of gas and electricity licenses. *Standard* licence conditions apply collectively to all licensees with the same type of licence. In respect of gas, they apply to interconnectors, shippers, suppliers and transporters. In respect of electricity, they apply to distribution, generation, interconnectors, supply and transmission. *Special* conditions apply individually to the network companies for gas and electricity. There are also *standard special* conditions which apply to gas transporter licences.
- 1.2 Currently, in order for changes to *standard* or *standard special* licence conditions to be made, Ofgem's proposals have to be supported by 80% of the relevant licensees. To determine whether this threshold is met, Ofgem has to apply two tests: that at least 80% of relevant licensees do not object and that 80% of relevant licensees measured by market share do not object. If one or other of these tests is not met, Ofgem is not able to proceed with the proposed modification and has a number of options. It may abandon the proposals, it may alter them in the hope of gaining sufficient support in a further consultation, or it may decide to make a licence modification reference to the Competition Commission (CC). In order for changes to be made to *special* licence conditions Ofgem must agree the change with each individual licence holder. Failure to reach agreement with the licensee means Ofgem must abandon the proposals, alter the proposals, or make a licence modification reference to the CC.
- 1.3 This process raises real concerns in terms of its compatibility with the Third Package requirements. The Third Package Directives stipulate that the National Regulatory Authority (NRA) must be able to take "autonomous decisions" (see Electricity Directive (ED), article 35(5)(a), Gas Directive (GD), article 37(5)(a))<sup>3</sup> and must be "functionally independent from any other public or private body" (ED art. 35(4)a, GD art. 37(4)(a)). This has consequences *ex ante* (before a decision is taken) and *ex post* (after a decision is taken)."<sup>4</sup> The Directives also state that Member states must ensure that "suitable mechanisms exist at national level under which a party affected

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2 sections 11-14A of the Electricity Act 1989 and sections 23-26A of the Gas Act 1986

3 For the purposes of this document 'ED' refers to an article in the Third package Electricity Directive 2009/72/EC, and 'GD' refers to an article in the Third Package Gas Directive 2009/73/EC.

4 Interpretative note on Regulatory Authorities, (page 9, first bullet point), European Commission, 22 January 2010.

by a decision of a regulatory authority has a right of appeal” (ED art. 37(17), GD art. 41(17)).

1.4 Subject to this and our main consultation, our view is that taking the new Third Package requirements together, the current licence modification arrangements may not enable the regulator to take independent decisions as, when certain conditions are met, the industry is able to force Ofgem to reconsider its decisions, or have to revert to another body before proceeding. We also believe it is problematic that while some standard licensees are in a position individually to prevent these decisions from being implemented unless Ofgem make a reference to the CC (because they represent of themselves the relevant threshold required to prevent implementation), smaller affected licensees with the same type of licence cannot prevent implementation when acting alone. Even if all affected licensees with the same type of licence were given the same right to require Ofgem to reconsider a decision before it is made, our view is that this would be unlikely to be compatible with the Third Package as it would still compromise Ofgem’s ability to make autonomous decisions. We therefore believe that for the reasons we have outlined above, all affected licensees should have an equivalent appeal right available to them, actionable following implementation of the change by Ofgem.

1.5 We believe that such parties should have equal access to an appeal process which is capable of scrutinising factual issues of an economic/ technical nature to ensure the regulator is held to account for their decisions. We therefore consider that a mechanism over and above an ability to bring a claim for Judicial Review is required in these circumstances. However, it remains the case that parties to whom the new appeals process will not apply will still have the process of Judicial Review available to them.

## Government proposals for change

1.6 In our main Third Package consultation document we proposed to:

- **replace the current licence modification process with a process that allows Ofgem to reach its decisions subject to appeal to an appropriate body. This would reinforce Ofgem’s power to implement decisions in line with the EU Third Package, and give all licensees of the relevant type the same right of appeal. Ofgem’s decisions, as now, would need to be reached following consultation and subject to the principles of better regulation. This proposal would include all Ofgem licence modification decisions. As is the current position, third parties affected by the decision would have the right to bring a judicial review.**



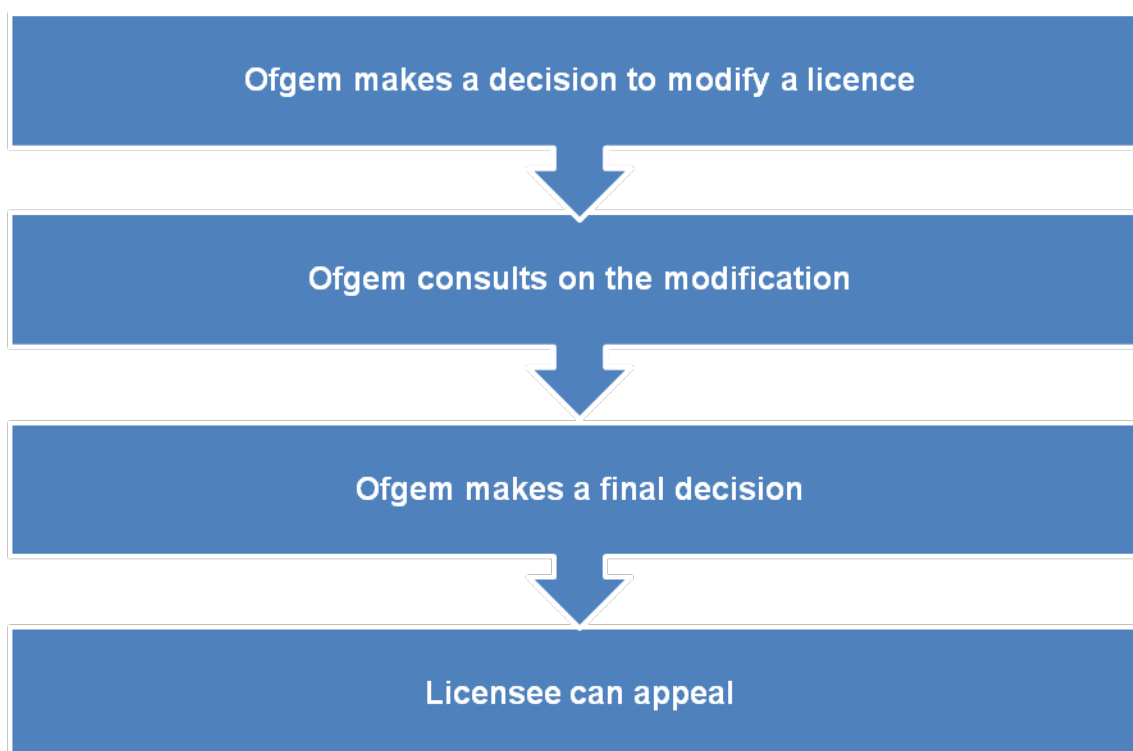
- 1.7 Our proposed option for implementing licence modification changes to meet Third Package requirements does exceed the minimum requirements of the Directive, in that it applies to all Ofgem licence modifications. However, our view is that the proposed change would be less costly, less burdensome and less complex than a minimum implementation option that resulted in two parallel but linked processes for making licence modification decisions. We have considered the case for introducing changes to strictly implement Third Package decisions, in other words, those relating to regulatory tasks and other Third Package duties. However we have concluded that this would be impractical and inconsistent with better regulation principles as it would require the separation of the domestic and European elements of a particular decision, creating two substantively different, yet potentially linked regimes. We believe that this would be particularly cumbersome as a number of duties imposed on the national regulatory authorities under the Third Package are functions which Ofgem already carry out under the domestic regulatory framework. For example, price control packages can include certain Third Package regulatory elements, as well as domestic ones. Creating two separate regimes risks confusion and uncertainty for licensees and the regulator and could lead to inconsistencies in decision-making as well as disputes over the correct process for decisions with third package and non-third package elements.
- 1.8 In addition, the implementation of a decision may have both a domestic and European requirement, depending on the context and licences involved. We therefore consider that, assuming that this separation was possible in practice, it would be complex and dysfunctional to create two parallel regimes for implementing and subsequently appealing the same decision, running counter to better regulation principles. In practice this could mean that the same licensees would be given different rights in respect of the different elements of a single decision.
- 1.9 Below we outline, in more detail than the main 27 July consultation, what a potential new process for licence modifications could look like. Final proposals will take into consideration responses to both consultations. We will also take into consideration any relevant responses to the recent Call for Evidence on the Ofgem Review<sup>5</sup>, which closed on 24 September and is focussed how the energy regulatory framework can take account of the Government's broader principles for economic regulation and its energy and climate change objectives.

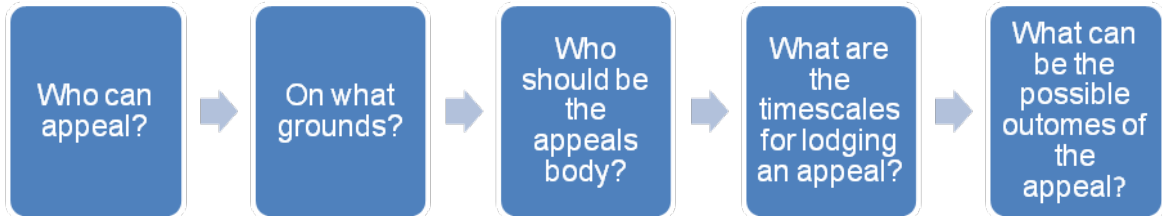
## **Overview of the proposed new process for licence modifications**

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<sup>5</sup> [http://www.decc.gov.uk/en/content/cms/consultations/ofgem\\_review/ofgem\\_review.aspx](http://www.decc.gov.uk/en/content/cms/consultations/ofgem_review/ofgem_review.aspx)

- 1.10 Currently, Ofgem consults affected parties before seeking to make licence modifications. This is important as it gives relevant parties the ability to feed in their views to Ofgem before a final decision is made. Whatever process is decided upon for an appeal against final licence modification decisions, the current procedure for *reaching* a decision will still apply; including the final statutory consultation and the standard 28 day period to respond before a final decision is made and announced. The proposed appeal process will only apply once Ofgem's final decision has been made.
- 1.11 One of the key differences between the new licence modification process we propose and the current one is that, instead of some licensees having the ability to act alone and object to Ofgem's proposal before it is implemented, all affected licensees will now have **a right of appeal after the decision has been made**. Below is a diagrammatic representation of the new system and the key questions that need to be considered.





1.12 In developing the proposals in the next chapter the Government has considered relevant practice in other regulated sectors and informally consulted relevant stakeholders. We have also considered the existing Energy Code Modification Rules.<sup>6</sup>

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<sup>6</sup> The code modification procedure is set out in sections 173-177 and schedule 22 of the Energy Act 2004; <http://www.legislation.gov.uk/ukpga/2004/20/section/173>, and the Electricity and Gas Appeals (Designation and Exclusion) Order 2005 ;<http://www.legislation.gov.uk/uksi/2005/1646/contents/made>

## Proposals for the new licence modification appeals process

2.1 This section outlines the Government's proposals for an appeals process, should consultation confirm the Government's view that such a change is necessary. Views are invited on how these proposals might work and how effective they would be in practice. We would also welcome evidence of costs and benefits in relation to these and any alternative proposals put forward by consultees.

2.2 These proposals should be viewed in the context of the Third Package requirements, explained above, and of our policy aims. These are:

- To implement the requirements of the Third Package directives.
- To do this in a way which results in a coherent, consistent, and practical domestic framework.
- To ensure equity among all licensees of the same type.
- To ensure robust regulation for the benefit of consumers.
- To provide appropriate safeguards for licensees to challenge a decision of the Regulator where it considers the Regulator has not acted within its powers and in a way which is consistent with the facts.

2.3 This chapter covers the key questions for an appeals system. These are:

- What should be the scope of the appeal mechanism?
- What should be the structure of the appeal?
- What should be the grounds for appeal?
- Who are the affected parties that should have the right of appeal?
- Who should be the appeal body?
- What will be the possible outcomes of an appeal?
- What should the time limits be for the process from beginning to end?
- Can Ofgem's decisions be suspended pending the outcome of an appeal?
- How will the costs of appeal be recovered?

## Scope of the appeal mechanism

2.4 The proposals put forward in the 27 July Third Package consultation are directed at the process for making ‘collective licence modifications’, this applies to standard, and standard special licence conditions. However, our view is that the Third Package also requires changes to the process for special licence modifications.

2.5 Special licence conditions mainly cover the price control arrangements and apply to individual network companies. **The Government considers that there may be a case for allowing different treatment of special licence condition modifications relating to price controls, in terms of the structure of the appeal process being introduced.** Price controls are fundamental decisions for network companies, and it is important to ensure that the framework does not discourage investment. The complex nature of these decisions may suggest that they should be subject to closer levels of scrutiny on appeal. This is developed further in the relevant sections of this chapter.

### Consultation Questions

|   |  |
|---|--|
| 1 | <b>Does the fundamental nature of price controls require that they are subject to different treatment from other licence modifications? Please explain what changes you consider are required, why you consider they are required and how they would be compatible with the Third Package.</b> |
|---|--|

## Structure of the appeal

2.6 **The Government proposes that the appeal body is required to reach its decision on modifications (other than those relating to special licence modifications on price controls) through a rehearing process.** By this we mean an adjudicative process where the appeal body will consider evidence submitted by the appellant, Ofgem, and potentially other parties submitting evidence, and weigh up the arguments and evidence to reach a decision. The appeal body would be able to seek clarification of evidence where the facts are

not clear, however it would not have the information gathering powers required to carry out its own full investigation.

2.7A full investigation would, in the Government's view, be excessive given the nature of the appeals likely to be raised on licence modifications, due to the length of time it would take to complete and therefore the cost of the process. It would arguably be unnecessarily in-depth and duplicate Ofgem's efforts of analysis and consultation. We consider an adjudicative process would allow for the appropriate level of economic scrutiny in what is a technical, but key area, of the regulatory framework.

2.8 However, as noted above, our view is that the complex economic nature of price control decisions may suggest that such decisions, key to the business of an individual company, should be the subject of an in-depth investigation and determination of the relevant price control matter, in which the appeal body can seek evidence and consider what conclusion the regulator should have drawn (similar to the process currently adopted by the CC under section 12B of the Electricity Act).<sup>7</sup> This approach would also be consistent with the way price controls are handled in other regulatory regimes.

### Consultation Questions

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| 2 | <b>Do you agree that a rehearing approach to appeals for modifications other than price controls strikes the right balance between appropriate economic scrutiny of the regulator's decisions and a timely appeals process that controls potential costs for the parties?</b> |
| 3 | <b>Do you agree there should be a full investigative hearing for price controls?</b>  |

### Grounds for appeal

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<sup>7</sup> <http://www.legislation.gov.uk/ukpga/1989/29/section/12B>

2.9 Our view is that the grounds for an appeal should be wide enough to anticipate legal, factual and economic issues which may give rise to a dispute, and yet be sufficiently focussed so as to prevent trivial and vexatious appeals and avoid unnecessary repetition. It is also important to ensure that the requirement for the regulator to have regard to its European obligations in order to be compliant with the Third Package, is included in the test that is applied by the appeal body.

**2.10 The Government is minded to introduce a carefully defined right of appeal on the merits enabling the appeal body to assess whether;**

- a) Ofgem failed to have regard to its statutory duties;
- b) Ofgem failed to give proper weight to the above;
- c) Ofgem's decision was based on an error of fact; or
- d) Ofgem's decision was based on an error of law.

2.11 This approach would ensure there are appropriate checks on the decisions of the regulator, as the appeal body would be able to consider significant economic and factual questions relevant to the determination. This structure has the benefit that it would be familiar to industry participants as they are similar to those contained in the Energy Act 2004 which provides the procedure for reviewing amendments to industry codes.<sup>8</sup> This would support a consistent approach to energy regulation.

2.12 Whilst it is essential that all legitimate concerns would be able to prompt an appeal, restrictions would need to be put in place so as to prevent trivial, vexatious, or completely unfounded appeals which would be costly and time consuming. **We therefore propose to give the appeal body discretion to dismiss trivial and vexatious appeals and those with no reasonable chance of success. This is also a feature of the code appeals process.**<sup>9</sup>

## Consultation Questions

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<sup>8</sup> The code modification procedure is set out in sections 173-177 and schedule 22 of the Energy Act 2004;

<http://www.legislation.gov.uk/ukpga/2004/20/section/175>

<sup>9</sup> Section 173(5) of the Energy Act 2004; <http://www.legislation.gov.uk/ukpga/2004/20/section/173>.

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|---|---|
| 4 | <b>Do you agree with our proposal for an appeal on the merits?</b>  |
| 5 | <b>Would our proposed grounds allow for consideration of legitimate legal, factual and economic issues, without undermining regulator independence? If not, please state why.</b> |

## Right of appeal

2.13 The Third Package 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” (Article 37(17)ED, 41(17)GD). **The Government is minded to allow those parties directly affected by a decision a right of appeal ie. those licensees whose licences are subject to modification. Other affected parties will continue to have access to Judicial Review.**

2.14 However, the Government would welcome views on whether there are situations in which licensees who do not hold the type of licence being amended may be materially affected as a consequence of a licence condition change to another type of licence to the extent they should be given the right to appeal the modification in order to protect significant interests. For example, could a situation arise in which changes to one type of licence had a material impact on the holders of another type of licence, such that the second category of licence holders’ business interests would be significantly affected?

2.15 The Government notes Ofgem’s recent proposals for third party rights concerning price control decisions.<sup>10</sup> Ofgem’s draft guidance document explains how they will consider requests from both network licensees and any third parties to make a modification reference to the Competition Commission on price control decisions. Ofgem’s proposals aim to facilitate increased and more effective stakeholder engagement during their price control review process. In order to encourage this engagement and dialogue with other interested parties, **the Government is minded to allow a limited right for materially affected third parties, such as consumer groups and holders of other licences, to**



be able to intervene in the case where they have a vested interest and something material to contribute; consumer groups and materially affected licensees would be able to provide support and evidence on either side of an appeal at the discretion of the appeal body.

## Consultation Questions

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| <b>6</b> | <b>Do you see any case for extending the right of appeal in relation to an Ofgem decision to any licensees or other materially affected parties beyond directly affected licensees? Please explain which and why.</b> |
|----------|---|

## The appeal body

2.16 **The Government considers there is a strong case for appointing the Competition Commission (CC) as the responsible appeal body in relation to licence modifications.** The CC already has relevant exposure to the energy sector as they hear energy code appeals and are the body to which Ofgem can currently make licence modification references if its decisions are blocked. They are therefore well placed to continue to develop the necessary expertise and sectoral knowledge to handle appeals on energy licence modifications. The CC also has valuable expertise handling issues that are economic in nature which would be beneficial considering the issues likely to arise. The CC has wider regulatory experience on price control appeals, and therefore has the ability to carry out the in-depth economic investigations these appeals may require.

2.17 The alternative appeal tribunal would be the Competition Appeal Tribunal (CAT). If appeals were heard by the CAT their rules of procedure would be adopted, which would determine the timetable, and other aspects of the process. The CAT has relevant expertise in matters of law and general competition issues, it also has experience handling appeals against regulatory decisions in the telecommunications sector. However the Government considers the CC is best placed to apply the economic, competition and sector

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<sup>10</sup> These proposals formed part of Ofgem's 'Recommendations' consultation document on a new regulatory framework for energy network companies. See the RPI-X@20 review website for further details:

<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=81&refer=Networks/rpix20/ConsultDocs>

expertise we would want to see brought to appeals of complex economic regulatory decisions. The CAT would also be unable to consider price control appeals, and these decisions would in any event need to be referred to the CC.

## Consultation Questions

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| 7 | <b>Do you agree the CC is the most appropriate appeal body? Why/why not?</b> |
|---|--|

## Outcomes of an appeal?

2.18 We would need to set out the range of possible remedies the appeal body is able to enforce. These might include the ability to;

- confirm Ofgem's decision
- quash the decision appealed against, and;
  - remit the matter to Ofgem for reconsideration and determination, or
  - give specific recommendations to the regulator.
  - vary Ofgem's decision
  - substitute its own determination for that of Ofgem.

2.19 The chosen outcomes would need to take the structure of the appeal process into consideration. We have proposed to put in place a rehearing, (see paragraph 2.6) this approach would not provide the appeal body with the scope for investigation necessary to give a complete redetermination of all decisions. Instead the appeal body must determine the issue before it upon the information and evidence provided by the parties either side of an appeal. **The Government is therefore minded to give the appeal body the power to confirm or quash the decision, remit the matter back to the regulator, and give specific recommendations.** However the Government welcomes views on whether there are strong benefits in providing the appeal body with powers to vary Ofgem's decision.

2.20 It should be noted that for price control matters our view is that the appeal body would need the additional power to substitute a new price control determination for that of Ofgem, due to the in-depth nature of the investigations required to determine the issue. This would be consistent with the investigation

appeal we are proposing and would enable the Competition Commission to change price control packages if the findings of their investigation showed this was appropriate.

## 2.21 **If parties are not satisfied with the outcome of an appeal, judicial review is still an available remedy.**

### Consultation Questions

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| <b>8</b> | <b>The Government would welcome views on whether the appeal body should have the power to vary Ofgem’s decisions on matters, other than price controls, or whether such cases would be better handled by remitting decisions back to Ofgem to re-take, with any necessary binding recommendations.</b> |
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### **Time limits for the process**

2.22 The Third Package requires the Government to ensure that the regulator has “the powers enabling them to carry out [their] duties in an **efficient and expeditious manner**” (Article 37(4)). It would be important, therefore, to ensure that any appeals process is timely and does not cause avoidable delay to Ofgem’s ability to implement binding decisions.

2.23 **The Government proposes that there should be a time limit both for lodging an appeal, and for the maximum time within which an appeal must be heard.** Time limits will need to take into consideration the structure of the appeal, and the chosen appeal body.

2.24 As the appeal concerns an Ofgem decision, rather than a decision on an industry proposal, the Government considers an appropriate time limit for lodging an appeal would be 4 weeks, consistent with the current timescale for raising objections.

2.25 The Government considers a period of 4 months to be appropriate for the resolution of the appeal. We have discussed this period with the CC, who consider it would be acceptable for the type of appeals envisaged, although there would need to be some flexibility for complex cases (which may need longer) or for Commission and ACER (Agency for the Cooperation of Energy Regulators) decisions that may require quicker implementation.

2.26 Price control decisions may also require a slightly longer time limit if they were to be handled through an investigative appeal process. We would propose a 6 month period for price control appeals, consistent with the current initial period for modification references.

### Consultation Questions

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| 9  | <b>Do you think the Government's suggested timescales of 4 weeks to lodge an appeal, and a period of 4 months for the hearing of most appeals will ensure appropriate scrutiny and efficient decision making?</b> |
| 10 | <b>Do you see any circumstances in which an appeal may need to be subject to a faster timeline. If so can you provide examples?</b>   |

### **Can Ofgem's decisions be suspended pending the outcome of an appeal?**

2.27 There may be some cases where a decision which is the subject of an appeal ought to be suspended, pending the outcome of the appeal, particularly when the decision being implemented may have irreversible consequences that cannot otherwise be avoided. Examples of this may be an irreversible spend on new IT systems or irreversible disclosure of confidential information that would be unnecessary if an appeal were to succeed.

2.28 **The Government is therefore minded to allow appellants to apply to the appeal body for the suspension of the effects of Ofgem's decision pending the outcome of the appeal. The appeal body will be given discretion to suspend decisions on application where those decisions would result in significant expense for the appellant and/or the need to disclose confidential information that would be unnecessary if the appeal succeeded.**

### Consultation Questions

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| 11 | <b>Do you agree the appeal body should be given the discretion to suspend Ofgem's decisions on application if they could lead to significant and potentially unnecessary expense and/or disclosure</b> |
|----|--|

|  |                              |
|--|------------------------------|
|  | of confidential information? |
|--|------------------------------|

## How will the costs of appeal be recovered?

2.29 Appeals will involve costs for the appeal body, these costs will need to be recovered. They will also involve costs for the Regulator and any other party to the proceedings. In order not to deter appeals with a reasonable chance of success, or regulatory decisions unlikely to attract a successful appeal, it should be possible for the 'winner's' costs to be paid by the 'loser': this is common practice. It should also act to deter trivial and vexatious appeals (see paragraph 2.9) or regulatory decisions likely to attract a successful appeal. **The Government is minded to provide the appeal body with the discretion to award costs on either side of an appeal.** The appeal body should be able to make decisions on the costs of the parties, and its own economic cost. It should have discretion to apply the 'loser pays' principle or to require both parties to pay costs, as appropriate.

### Consultation Questions

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|----|---|
| 12 | <b>What will be the likely costs and benefits of these changes on your organisation?</b>  |
| 13 | <b>How do you recommend potential costs could be reduced? How could we maximise the potential benefits to the regulatory regime as a whole?</b> |



## Consultation Questions

| <b>Consultation Questions</b>   |  |
|---|--|
| <b>What should be the scope of the appeal mechanism?</b>                  |  |
| <b>1</b>  | <b>Does the fundamental nature of price controls require that they are subject to different treatment from other licence modifications? Please explain what changes you consider are required, why you consider they are required and how they would be compatible with the Third Package.</b> |
| <b>What should be the structure of the appeal?</b>                        |  |
| <b>2</b>  | <b>Do you agree that a rehearing approach to appeals for modifications other than price controls strikes the right balance between appropriate economic scrutiny of the regulator's decisions and a timely appeals process that controls potential costs for the parties?</b>                  |
| <b>3</b>  | <b>Do you agree there should be a full investigative hearing for price controls?</b>   |
| <b>Grounds for appeal</b>   |  |
| <b>4</b>  | <b>Do you agree with our proposal for an appeal on the merits?</b>   |
| <b>5</b>  | <b>Would our proposed grounds allow for consideration of legitimate legal, factual and economic issues, without undermining regulator independence? If not, please state why.</b>  |
| <b>What who are the affected parties who should have right of appeal?</b> |  |
| <b>6</b>  | <b>Do you see any case for extending the right of appeal in relation to an Ofgem decision to any licensees or other materially affected parties beyond directly affected licensees? Please explain which and why.</b>  |

|  |  |
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| <b>The appeal body</b>                     |  |
| 7  | Do you agree the CC is the most appropriate appeal body? Why/ why not?   |
| <b>Outcome</b>                             |  |
| 8  | The Government would welcome views on whether the appeal body should have the power to vary Ofgem's decisions on matters other than price controls, or whether such cases would be better handled by remitting decisions back to Ofgem to re-take, with any necessary binding recommendations. |
| <b>Time Limits for the process</b>         |  |
| 9  | Do you think the Government's suggested timescales of 4 weeks to lodge an appeal, and a period of 4 months for the hearing of most appeals will ensure appropriate scrutiny and efficient decision making?   |
| 10   | Do you see any circumstances in which an appeal may need to be subject to a faster timeline. If so can you provide examples?   |
| <b>Can Ofgem's decisions be suspended?</b> |  |
| 11   | Do you agree the appeal body should be given the discretion to suspend Ofgem's decisions on application if they could lead to significant and potentially unnecessary expense and/or disclosure of confidential information?   |
| <b>How will the costs be recovered?</b>    |  |
| 12   | What will be the likely costs and benefits of these changes on your organisation?  |
| 13   | How do you recommend potential costs could be reduced? How could we maximise the potential benefits to the regulatory regime as a whole?   |
| <b>Impact Assessment</b>                   |  |
| 14   | Are the assumptions made in the Impact Assessment correct and have we correctly identified the costs and benefits associated   |



|           |  |
|-----------|--|
|           | <b>with this measure? The Government would welcome any information that could improve our analysis of the costs and benefits highlighted in the Impact Assessment.</b>   |
| <b>15</b> | <b>What would be the likely costs and benefits of the 'minimum implementation option' of having two parallel separate regimes; one for those relating to regulatory tasks and Third Package duties, and one for Ofgem's domestic tasks? How would these compare to the costs and benefits of the proposed implementation option?</b> |

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**URN**