



Making a positive difference
for energy consumers

To all interested stakeholders

Email: EUExit@ofgem.gov.uk

Date: 04 July 2019

Dear Colleagues,

Preparing for EU Exit: update on consequential licence changes in the event the UK leaves the EU without a deal

On 14 January 2019, we consulted on licence modifications, in the event the United Kingdom (UK) leaves the European Union (EU) without a deal, to ensure licences are fit for purpose.¹

This letter provides our response to stakeholder feedback received and an update on our EU Exit license change work.

Consultation responses

We received 18 responses to our consultation. We have published the non-confidential responses on our website. The broad majority of responses supported our proposed modifications, with a group of respondents providing feedback on the drafting of specific conditions or proposing additional changes. In addition, several responses contained comments outside the scope of this particular exercise, which generally related to the UK's future energy arrangements with the EU. We append to this letter (Appendix A) a summary of responses received in relation to our proposed licence changes and our views on them, including our minded to position on where we would incorporate changes into final modifications. We note that if external circumstances change we will respond appropriately.

National Grid Electricity System Operator (NGESO)

On 01 April 2019, NGESO became the holder of its own, distinct electricity transmission licence. Alongside this letter, we have published a statutory consultation proposing consequential changes to the new NGESO licence to ensure it is fit for purpose in the event the UK leaves the EU without a deal.² The modifications proposed to the NGESO licence adopt the same approach used in our January 2019 statutory consultation, except in minor instances where we intend to amend the modifications proposed in the January 2019 consultation to incorporate stakeholder feedback. These amendments are set out in Annex A.

¹<https://www.ofgem.gov.uk/publications-and-updates/statutory-consultation-licence-modifications-event-uk-leaves-eu-without-deal>

² https://www.ofgem.gov.uk/system/files/docs/2019/07/eso_eu_exit_notice.pdf

Next Steps

Following our statutory consultation on the NGESO licence and subject to sufficient clarity that the UK will leave the EU without a deal, we will publish our decision letter to make the licence modifications as soon as is practicable. This letter will be accompanied by direction notices modifying the nine licences we will have consulted upon. The licence changes would take effect a minimum of 56 days after the date of publication.

The effect of the modifications would be to ensure that the licences continue to function effectively at the point of exit and take into account the provisions in the relevant Statutory Instruments that have been prepared under the European Union (Withdrawal) Act 2018, in the event the UK leaves the EU without a deal. As far as possible, the modifications will not seek to change the current obligations and duties of licensees, nor will they seek to change current policy positions.

If there is a period between exit day and the licence changes taking effect, we will interpret the licence conditions affected by EU Exit in line with the European Union (Withdrawal) Act 2018 and the Statutory Instruments prepared under it. Requirements arising from licence conditions will continue to have effect and any breach of such requirements will continue to be subject to enforcement action in accordance with our Enforcement Guidelines.³

In the period up to Exit Day, we will keep our proposed changes under review to identify if further consequential changes must be made or an inoperability arises. We do not intend to re-consult unless material changes are required in addition to those set out in the January 2019 consultation, including those we intend to modify to incorporate stakeholder feedback, and the NGESO statutory consultation.

Yours sincerely

Cathryn Scott
Director, Wholesale Markets & Commercial

³ <https://www.ofgem.gov.uk/publications-and-updates/enforcement-guidelines>

Appendix A: Stakeholder feedback on proposed licence modifications

Overview

The tables below provide an overview of the feedback received on the modifications proposed in the statutory consultation. It provides our view on the feedback and clarifies whether we intend to incorporate any changes into our final modifications. Deletions are shown in strike through and new text is double underlined. Drafting changes following the statutory consultation are also highlighted in ***bold italics***.

We received feedback on all 8 modification Notices, with some comments relevant to all 8 licences identified as requiring modification. As noted in the accompanying letter, several responses also contained comments outside the scope of this particular exercise which we will consider as part of our wider EU Exit preparedness. All non-confidential responses have been published on our website.

The broad majority of responses supported our proposed modifications with some feedback from stakeholders on:

1. Ofgem's proposed modification drafting
2. Additional proposed changes
3. Points of clarification, and/or
4. Process

1. Feedback on Ofgem's proposed modification drafting

Stakeholder Feedback	Relevant Licences	Our View
A respondent suggested that we should retain part of the original wording ("where possible") in Standard Licence Condition (SLC) 27.15(b) of the electricity transmission licence to avoid any unintentional alteration of the nature of the current obligation.	Electricity Transmission	We agree and intend to incorporate the revised wording into the electricity transmission licence modification: "(b) be consistent with the ETYS and where <i>possible, but only if requested by Ofgem</i> , align with the Ten Year Network Development Plan as defined in standard condition C11 (Production of information about the national electricity transmission system) <u>and</u> , in the event of any material differences between the Ten Year Network Development plan and the NOA report an explanation of the difference and any associated implications must be provided; and..."
A respondent suggested that we should amend the definition of 'Vertically Integrated Undertaking' in the electricity	Electricity Transmission and Electricity	We do not intend to make further amendments to align the definitions. The obligations that apply to electricity distribution operators are different from

Stakeholder Feedback	Relevant Licences	Our View
transmission licence to align with the wording in the distribution licence. The respondent considered this change would better meet the test of being the minimum change necessary to maintain an effective regulatory framework.	Distribution Licences	<p>those applied to electricity transmission operators.</p> <p>The definition of 'vertically integrated undertaking' has been modified across electricity transmission and interconnector licences to remove direct references to the Electricity Directive and align with the approach taken to transmission operators in the Electricity Act 1989.</p> <p>We also intend to retain the modification proposed to the definition of 'vertically integrated undertaking' in the electricity distribution licence, as the relevant requirements for electricity distribution operators in respect of generation and supply functions are different from those of electricity transmission operators. We intend to keep this under review, and may make further modifications in the future if necessary.</p>
<p>A respondent suggested we amend SLC 27 ('Indebtedness & Transfer of Funds') in the smart meter communication licence to restrict the Data Communications Company (DCC) to hold Smart Energy Code (SEC) Parties' funds in an account within the UK only:</p> <p>"...is a bank account held within the United Kingdom and/or the European Economic Area in the name of the Licensee that:..."</p>	Smart Meter Communication Licence	<p>We note the view that it may be prudent for the DCC to ensure, wherever possible, its operations, assets and finances are located within the UK. We may consider these points separately after the UK leaves the EU without a deal as this exercise does not intend to change the current obligations and duties of licensees, nor does it aim to change current policy positions. The purpose of this exercise is to ensure there is no inoperability and to reflect changes in the legislative regime under the EUWA.</p>
<p>A respondent noted that we proposed to replace 'European Commission' with 'Authority' in SLC 5.6 of the electricity and gas supply licences:</p> <p>"With respect to transactions in gas derivatives, the obligation to keep the Relevant Data shall only apply once the European</p>	Electricity and Gas Supply	<p>We have considered this and intend to make further drafting changes to SLC 5.5, 5.6 and 5.9 in the gas and electricity supply licences.</p> <p>The guidelines referred to in SLC 5.6 of the licences have not been published by the European Commission. As a consequence, SLC 5.6 would not apply at the point of Exit Day. We do not consider</p>

Stakeholder Feedback	Relevant Licences	Our View
<p>Commission <u>Authority</u> has adopted guidelines pursuant to paragraph 4 of Article 44 of the Directive, <u>to be read as if the references to the European Commission are references to the Authority.</u></p> <p>The respondent provided the view that it is not clear that the Authority has powers to make provisions on an equivalent basis to any guidelines otherwise adopted by the European Commission, as such guidelines would express legislative policy intent. It was suggested that consideration be given to amending the modifications so that references to the European Commission are instead to be read as references to the Secretary of State.</p>		<p>that Ofgem requires specific permission to issue guidelines, therefore, we have removed this condition:</p> <p>"5.6 [NOT IN USE] With respect to transactions in gas derivatives, the obligation to keep the Relevant Data shall only apply once the European Commission has adopted guidelines pursuant or paragraph 4 of Article 44 of the Directive."</p> <p>We also intend to amend SLCs 5.5 and 5.9 in the gas and electricity supply licences as the current policy is that we do not require licensees to keep data on transactions in electricity or gas derivatives. For example, the gas supply licence would read:</p> <p>"5.5. The licensee shall keep, for at least five years, the Relevant Data relating to any transactions in gas supply contracts and gas derivatives with wholesale customers, transmission system operators, storage facility and LNG import or export facility owners, or any person who sells gas to the licensee, which have been entered into by the licensee on or after the day after the day on which the Electricity and Gas (Internal Markets) Regulations 2011 are made.</p> <p>[...]</p> <p>5.9 "Relevant Data" means details on the characteristics of all transactions in gas supply contracts and gas derivatives with wholesale customers, transmission system operators, storage facility and LNG import or export facility owners, or any person who sells gas to the licensee, including but not limited to the duration, delivery and settlement rules, the quantity, the dates and times of execution and the transaction prices and means of identifying the wholesale customer concerned, as well as specified</p>

Stakeholder Feedback	Relevant Licences	Our View
		<p>details of all unsettled gas supply contracts and gas derivatives;"</p> <p>We also intend to correct the omission of the reference '5.7' in the electricity supply licence before what is currently the second paragraph of SLC5.6. We intend to take this opportunity to correct this typographic mistake for clarity and to align the provision to its equivalent in the gas supply licence:</p> <p>"5.7 After receiving a request from the Authority for the Relevant Data, the licensee must give the Relevant Data to the Authority when and in the form requested."</p>
A respondent suggested that we provide additional clarity as to when the definition of 'regulatory authority' will apply to the Northern Ireland Utility Regulator.	Electricity and Gas Interconnector	We do not consider it necessary to further amend the definition. We believe the terms of the gas and electricity interconnector licences are clear as to when the Northern Ireland Utility Regulator will be engaged.
A respondent suggested that we revise Standard Special Condition B4.5 in the gas transporter licence to correct a pre-existing typographical error.	Gas Transporter	<p>We agree and intend to incorporate the suggested drafting in our modification:</p> <p>"...whether any event or circumstance has occurred, or is likely to occur, that may cause the Authority to think that the licensee has become <u>a person from</u> a country outside the United Kingdom or <u>a person from</u> a country outside the United Kingdom has taken control of the licensee,...."</p>
A respondent suggested that we should amend the calculation of 'Other Shrinkage Costs' in Special Condition 3D.16 of the gas transporter licence to include both EU Emissions Trading System costs (EU ETS) and Carbon Emissions Tax (CET) costs.	Gas Transporter	<p>We do not agree with the proposed amendment as we consider that it would introduce unnecessary uncertainty and duplication. The purpose of the change is to ensure that the licence continues to correctly capture the costs incurred by the licensee in calculating other shrinkage costs.</p> <p>As part of a No Deal exit, the UK would no longer be part of the EU ETS scheme and these costs would not apply. The scheme would instead be replaced by the</p>

Stakeholder Feedback	Relevant Licences	Our View
		proposed new UK CET, which our proposed amendment intends to reflect. This is why we intend to amend the condition to replace the reference to the EU ETS with the CET.

2. Additional changes proposed by respondents

Stakeholder Feedback	Relevant Licences	Our View
A respondent suggested we should amend the definition of 'Directive' in the licences to include a reference to the European Union (Withdrawal) Act 2018 ('EUWA').	All	<p>We do not agree that the definition of Directives needs to be amended to reflect the EUWA. The EUWA and any parts of EU Directives implemented into domestic law at the point of exit will continue to have effect without this reference.</p> <p>This is because Directives do not have direct effect in domestic law – Directives are instead implemented by Member States through domestic legislation. Those parts of Directives fully implemented in domestic law at the point of exit will therefore continue to be captured within the definition of "direct EU legislation" in the EUWA. Any further amendments to those Directives by the EU after the UK leaves the EU will not form part of domestic law.</p> <p>For example, in the electricity supply licence:</p> <p>"Directive means Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC <u>as it has effect immediately before Exit Day as read with the modifications set out in the Act.</u>"</p>
A respondent suggested we should amend the definition of 'Regulation' in the licences to include a reference to the EUWA.	All	We do not agree as section 3 of the EUWA provides that EU Regulations, in operation immediately before Exit Day, form part of domestic law on and after Exit Day. This means that the definition of 'Regulation' in the licences will

Stakeholder Feedback	Relevant Licences	Our View
		<p>continue to have the same effect post Exit Day.</p> <p>The Statutory Instruments prepared by the UK Government (The Electricity and Gas etc. (Amendment etc.) (EU Exit) Regulations 2019) amend the relevant Regulations, meaning we do not need to change the licences to reflect the amendments to the Regulations.</p>
A respondent suggested that a definition is required for the 'Act' when using it to refer to the EUWA.	All	We do not agree as we are not referring to the EUWA. The term 'Act' refers to the Electricity Act 1989 or the Gas Act 1986, which are already defined in the licences.
A respondent suggested we amend the definition of 'General Data Protection Regulation' (GDPR) to refer to the EUWA.	Electricity and Gas Supply	We do not agree with this suggestion as GDPR is captured within the definition of "Retained EU Law" inserted into the gas supply and electricity supply licences.
A respondent suggested we should make it clear that we are referring to the Agency for the Co-operation of Energy Regulators in the definition of "legally binding decisions of the European Commission and/or the Agency" in the gas transporter licence, as 'agency' is also used in the licence to refer to Exoserve.	Gas Transporter	<p>We agree and intent to incorporate the suggested drafting in our modification to the gas transporter licence:</p> <p>"legally binding decisions of the European Commission and/or Agency <u>for the co-operation of Energy Regulators</u>".</p>
A respondent identified that an additional modification is required in the gas transporter licence – the reference to 'EU Law' in SCL 14.5 should become 'Retained EU Law'.	Gas Transporter	We agree. SLC 14.5 in the gas transporter licence came into effect after the publication of our statutory consultation on 14 January 2019. We intend to update the condition in line with the feedback.
A respondent noted that the reference to 'SLC40' in the gas transporter Notice should read 'SLC40A'.	Gas Transporter	We agree with this feedback and intend to correct the reference in the gas transporter modification direction notice. SLC40 relates to 'Appointment of Compliance Officer'. We instead intend to amend SLC 40A (Notification of Vertical Integration):

Stakeholder Feedback	Relevant Licences	Our View
		<p>"Vertically Integrated Undertaking" has the meaning given in section 8C of the Act. means a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform in the European Economic Area at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas. Terms within paragraph 2 of this Condition 40A shall have the meaning given to them in the Directive.</p>

3. Points for clarification

Stakeholder questions	Relevant Licences	Our View
<p>One respondent asked for clarification on why some conditions that contain a reference to the European Commission are not being amended. Specific reference was given to SLC 13.3 in the electricity distribution licence which contains a requirement for Charging Methodologies to be compliant with EU Regulations and legally binding decisions of the European Commission and Agency.</p>	<p>Electricity Distribution / All</p>	<p>We do not intend to amend references to EU bodies across all individual conditions. We would instead amend existing definitions and insert new definitions into the licences. Conditions should be read in line with the amended and new definitions.</p> <p>For example, we have inserted a new definition of 'legally binding decisions of the European Commission and/or the Agency':</p> <p><u>"means any relevant legally binding decision or decisions of the European Commission and/or the Agency for the Co-operation of Energy Regulators, but a binding decision does not include a decision that is not, or so much of a decision as is not Retained EU law."</u></p> <p>This amendment reflects the fact that EU law and decisions from EU bodies made up until Exit Day will be binding and may still need to be incorporated after Exit Day. SLC 13.3 in the electricity distribution licence should be read in line with this definition.</p>

One respondent asked whether the new definition of “legally binding decision(s) of the European Commission and/or the Agency” means that any decision made by the European Commission and/or Agency made after EU Exit Day will not be a binding decision.	Electricity Transmission / All	This is correct. In line with the EUWA, decisions made by EU bodies up until Exit Day will be binding.
Two respondents ask for clarification on whether, in line with the modification to SLC B.21.5(b) of the electricity transmission licence, a company with a controller from a country outside of the UK would need to notify Ofgem of this fact post-EU Exit.	Electricity Transmission	Our view is that a company with a controller from outside the UK will not need to notify us of this fact on Exit Day. Annual notification made by 31 July, in accordance with condition 21.5(b), remains appropriate. We intend to keep these notifications under review and may make further changes in the future. This is also relevant for gas transporter, and electricity and gas interconnector licensees.

4. Process

Comments on the modifications process	Relevant Licences	Our View
A respondent suggested we should consider issuing the modification directions as soon as possible and revoke them within the 56-day standstill period if the changes become unnecessary.	All	<p>Ofgem does not have the power to revoke modification directions once they have been made. We would have to re-consult to remove the changes made. On this basis, and recognising that we have not identified inoperabilities if the changes are not in place for Exit Day, we consider the most appropriate way forward is to make our final modification directions only in the event of a No Deal EU Exit.</p> <p>In the period between Exit Day and the licence changes taking effect, we will interpret the licence conditions affected by EU Exit in line with the European Union (Withdrawal) Act 2018 and the Statutory Instruments prepared under it. Requirements arising from licence conditions will continue to have effect and any breach of such requirement will continue to be subject to enforcement action in accordance with our Enforcement Guidelines.</p>

Comments on the modifications process	Relevant Licences	Our View
A respondent suggested we should not issue the gas and electricity interconnector licence modifications until enduring trading arrangements between GB and I-SEM have been finalised as additional licence changes may be required.	Electricity and Gas Interconnector	We do not agree with this suggestion. The purpose of our modifications is to ensure that retained EU law will function effectively at the point of exit and that licences take into account the provisions in the relevant Statutory Instruments that have been prepared under the European Union (Withdrawal) Act 2018. We do not consider that a delay to making these changes is justified. Any additional changes that may be required as a result of new arrangements will be developed and progressed at the appropriate time.