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# 1

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## DEVELOPMENTS IN UTILITY LAW

### A. Introduction

This book aims to provide an introduction to the regulation of gas, electricity, water, sewerage, and communications services and infrastructure for non-regulatory lawyers. It has been finalized at a time of important changes, or proposals for change, in each of the sectors considered. The law governing each utility has evolved, often piecemeal, over decades; this has been no less true since these sectors were privatized in the 1980s and 90s and subsequently liberalized to allow new entrants to compete in newly created markets. **1.01**

Where possible, changes arising during the course of writing have been incorporated directly into the text—for example, the process for connection to the National Transmission System in gas was approved by the Gas and Electricity Markets Authority (GEMA) in sufficient time to be included in Chapter 6; a very different process (if it could be called that) would have been reported when the first draft of Chapter 6 was written. **1.02**

Unfortunately, other change processes do not fit conveniently within production timescales—particularly in a text that aims to cover four regulatory regimes in reasonable detail. Happily, the much publicized ‘Electricity Market Reform’ being undertaken by the Department of Energy and Climate Change does not, in its current form, impact on the substantive contents of this text. However, the legal instruments implementing GEMA’s ‘Retail Market Review’ in gas and electricity are intended to be in force at around the same time this book will be published. The proposed licence conditions are currently available in draft form only and are undergoing what the Office of Gas and Electricity Markets (Ofgem) hopes will be a final industry consultation before the statutory change process is engaged; it would be leaving hostages to fortune to try to anticipate the final form of these provisions, so an outline of the key themes of the Retail Market Review is given in paras 1.06–1.16 in so far as relevant to the contents of this book. **1.03**

Conversely, conversations with the Department for Environment, Food and Rural Affairs (DEFRA) suggest that the Water Bill, which has just returned to DEFRA **1.04**

from the Pre-Legislative Scrutiny process, will not receive Royal Assent (assuming it does) until some time after this book has been published. The fact that the Bill has been through the Pre-Legislative Scrutiny process means that the draft Bill may be amended before it is introduced to Parliament, let alone during the Parliamentary process. An outline of the main aims of the Water Bill has therefore been set out in paras 1.17–1.27 in so far as relevant to the contents of this book.

- 1.05** It should also be noted that, at the behest of the Department for Culture, Media and Sport (DCMS), the Law Commission is conducting an independent review of the Electronic Communications Code (the Code), dealt with in Chapters 5 and 16. The Law Commission’s final report is anticipated at the end of February 2013. Unfortunately, the proximity of the finalization of this text to publication of the Law Commission’s final report means that an exposition of the Law Commission’s initial proposals from the Consultation Paper is unlikely to be helpful, and is therefore not considered at any length.

## B. Gas and Electricity—The Retail Market Review

### Overview of the Retail Market Review

- 1.06** In 2008, Ofgem, the executive body of GEMA, undertook an ‘Energy Supply Probe’ (the Probe), following which Ofgem concluded that the gas and electricity markets may not be working in the best interests of consumers. Ofgem’s conclusion was that structural features of the market, reinforced by the behaviour of suppliers and the lack of engagement and poor decision making by consumers, were stifling competition. This resulted in the introduction of new supply licence conditions for gas and/or electricity retailers, many of which are discussed in Chapters 8 (Gas) and 11 (Electricity).
- 1.07** In 2010, Ofgem considered that the new licence conditions had improved the information being provided to consumers but that consumer engagement was still lacking. The Retail Market Review—commonly known as RMR—aims to introduce new requirements on suppliers to address these concerns. This Chapter reflects Ofgem’s most recent consultation on RMR, published on 26 October 2012 and closed for responses on 21 December 2012.<sup>1</sup>

### Overview of RMR proposals for Domestic Customers

- 1.08** Ofgem proposes that suppliers should only be able to offer four tariffs per fuel to any Domestic Customer. The intention is to increase the likelihood of customers switching between suppliers by simplifying the range of products available.

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<sup>1</sup> *The Retail Market Review—Updated Domestic Proposals* (Ofgem, 26 October 2012) and *The Retail Market Review—Updated Proposals for Businesses* (Ofgem, 26 October 2012).

Each tariff would therefore have a simple two part structure. A range of payment types would still be permitted, provided that any price differentials resulting from choice of payment type (eg discounts for paying by direct debit) would be the same across all tariffs, as would any dual fuel<sup>2</sup> discounts (which would be required to be expressed in a pounds-per-annum figure).

Domestic Customers would no longer be permitted to remain on an evergreen tariff<sup>3</sup> that is no longer open to new customers unless their current tariff is cheaper than any of the supplier's evergreen tariffs which *are* still open to new customers. If the other, open tariff would be cheaper, the Domestic Customer would be migrated to it automatically. Ofgem also intends to introduce new rules on contractual provisions around fixed-term tariffs in order to prevent unilateral price increases and other unilateral changes. **1.09**

In order to encourage proactive switching, Ofgem proposes that suppliers must clearly prompt Domestic Customers to consider switching supplier and provide information on the different routes available for exploring alternative providers. Additionally, Ofgem has consulted on requiring suppliers to provide personalized information to each Domestic Customer about the supplier's estimated cheapest tariff, which will be included on the Domestic Customer's Bill, Annual Statement, and other regular communications. This would include regular, personalized projections of the Domestic Customer's energy spend over the next year on their current tariff. **1.10**

Along similar lines, a new 'Tariff Comparison Rate' is proposed to be included in all marketing materials as well as the Domestic Customer's Bill, Annual Statement, and other communications; the intention is that the Tariff Comparison Rate will act as a 'common currency' to facilitate like-for-like comparison of tariffs. Ofgem has also proposed that Domestic Customers should be provided with information, possibly on an annual basis, regarding savings potentially available to them if they switched to the cheapest tariffs in the market. **1.11**

As indicated in Chapters 8 and 11, the Standard Conditions for gas and electricity supply licences (respectively) include rules governing interactions with Domestic Customers during Marketing Activities and Telesales Activities. Ofgem's RMR proposals include the introduction of enforceable standards of conduct to govern all interactions with customers. In summary, the aim is to place an enforceable obligation on suppliers to treat their Domestic Customers fairly and—in Ofgem's words—to 'make it clear [that suppliers] are responsible for embedding this fairness objective in their business'. **1.12**

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<sup>2</sup> 'Dual fuel' refers to a situation where one supplier provides both gas and electricity to a customer.

<sup>3</sup> That is, a tariff of indefinite length.

- 1.13** Ofgem hopes that its proposals can be implemented on a phased basis from summer 2013, with the intention that the entire RMR package for Domestic Consumers would be in force within six months.

#### **Overview of RMR proposals for business customers**

- 1.14** Ofgem's proposals for business customers acknowledge that there are organizations which may benefit from protection under Standard Licence Condition (SLC) 7A of the Standard Conditions of gas and electricity supply licences, but which do not currently fall within the definition of a 'Micro Business Consumer' under that SLC. Ofgem therefore proposes to increase the number of businesses protected by SLC 7A by including customers who meet one of the following characteristics: they consume less than or equal to 100,000kWh of electricity per year; they consume less than or equal to 293,000kWh of gas per year; or they employ fewer than ten employees and their turnover or balance sheet is no greater than EUR 2 million. Ofgem states that this change would cover 91% of all non-domestic electricity meters and businesses with an annual spend of approximately £10,000 per fuel, whereas the existing coverage of SLC 7A is approximately 84% of non-domestic electricity meters and customers with an annual spend of approximately £5,000 per fuel. No figures were given for gas. The current ambit of SLC 7A is set out in Chapter 8 (gas) and Chapter 11 (electricity).
- 1.15** In order to facilitate proactive switching of customers between suppliers, Ofgem intends to expand the range of information that must be given to small business customers (as tentatively defined in para 1.14), so that these customers will be reminded of the end date of their contract on every Bill or other statement of account that they are sent. Ofgem's proposals also include a right for these business customers to be able to terminate their contracts at any time up to a point which is generally to be between 30 and 90 days prior to the end of their contracts. This would require amendments to SLC 7A of the gas and electricity supply licences.<sup>4</sup>
- 1.16** Ofgem has also called for industry to improve the 'behind-the-scenes' processes involved in transferring customers between suppliers under SLC 14.<sup>5</sup> To facilitate this, Ofgem proposes introducing binding standards of conduct governing suppliers' interactions with small businesses when transferring them between suppliers, as well as when initially entering into contracts with them and when billing them.

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<sup>4</sup> See Chapter 8 (gas) and Chapter 11 (electricity).

<sup>5</sup> See Chapter 8 (gas) and Chapter 11 (electricity).

## C. Changes to the Water Sector—The Water Bill

### Overview

On 10 July 2012, DEFRA published a draft Water Bill,<sup>6</sup> intended to implement the proposals outlined in the white paper, *Water for Life*.<sup>7</sup> The Environment, Food and Rural Affairs Committee published its Pre-Legislative Scrutiny report (the Report)<sup>8</sup> on 1 February 2013, and at the time of writing DEFRA was considering the recommendations contained in the Report with the aim of introducing the Bill to Parliament in May 2013, subject to available Parliamentary time. **1.17**

### Upstream/wholesale proposals

As noted in Chapter 4, the starting point in the water supply chain is abstraction of water from a source of supply. The Water Bill aims to introduce competition to this ‘upstream’ end of the supply chain by allowing the introduction of raw or treated water into an existing water supply system without the introducer being obliged to provide retail services to customers; at present, it is only possible to introduce water in this way as part of a retail supply licence. The Report indicated that witnesses had some concerns about both the policy drivers for and the practicalities of implementing the proposed upstream reforms, and DEFRA is considering the Report’s recommendations. **1.18**

### Networks proposals

The draft Bill would introduce a ‘network infrastructure authorization’ to enable new entrants to own and operate their own infrastructure (mains, pipes, storage, and treatment). This would be different from a ‘retail infrastructure authorization’.<sup>9</sup> Infrastructure provided under a ‘network infrastructure authorization’ would still be connected to an incumbent water company’s<sup>10</sup> network, but would be used to bypass parts of that network before reintroducing the water to it in order to make a later retail supply—the new network would not, itself, be used to make that retail supply. **1.19**

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<sup>6</sup> *Draft Water Bill* (DEFRA, 10 July 2012).

<sup>7</sup> *Water for Life*, CM8230 (DEFRA, December 2011).

<sup>8</sup> *Draft Water Bill* (Environment, Food and Rural Affairs Committee of the House of Commons, Sixth Report of Session 2012–13, 1 February 2013).

<sup>9</sup> See para 1.20.

<sup>10</sup> DEFRA’s proposals suggest that a person holding a network authorization would not necessarily be an ‘undertaker’ as currently understood (see Chapter 4), so this Chapter refers, loosely, to water ‘companies’.

- 1.20** By contrast, a ‘retail infrastructure authorization’ would enable the authorization-holder to provide infrastructure connecting eligible premises to incumbent undertakers’ water supply systems, alleviating many of the difficulties experienced under the existing inset appointment regime.<sup>11</sup> The new regime would allow holders of a retail infrastructure authorization to focus on network provision and operation, while a third party (say, a supply licensee) provided retail services to end customers in a similar way to the regimes in gas and electricity.
- 1.21** It is anticipated that the new regime of authorizations would only extend to industrial and commercial users initially, but could be extended to domestic users by statutory instrument. The intention is that such authorizations would be national in scope, potentially overcoming many of the barriers to market entry represented by geographically exclusive areas of appointment.
- 1.22** It is expected that there would be an equivalent system of authorizations for sewerage infrastructure.
- 1.23** The draft Bill also aims to remove the detailed methodologies for connection charging in the Water Industry Act 1991<sup>12</sup> and to allow the Water Services Regulation Authority (WSRA)<sup>13</sup> to determine connection charging rules in accordance with any guidance produced jointly by the Secretary of State and the Welsh Ministers.

#### **Downstream/retail proposals**

- 1.24** DEFRA proposes that the existing 50 megalitre threshold at which non-domestic customers are able to switch their water supplier should be removed in England (although the Welsh Government intends to retain the existing threshold in Wales at the time of writing).<sup>14</sup> Provisions dealing with the introduction of charging rules and market codes, and the removal of the requirement for new entrants to establish a separate ring-fenced limited company before entering the market, are intended to make the regulatory burdens of market entry more manageable. A further option to be made available to suitable customers is to purchase water and sewerage services directly at wholesale prices in order to remove licensees as middlemen. The Bill would also introduce separate sewerage retail licences within a similar framework. The Report indicates that the overall approach to reforming the retail market was broadly supported in evidence; however, for the moment, the intention is for the existing retail water supply licensing regime to remain in place in Wales.

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<sup>11</sup> See Chapter 4.

<sup>12</sup> See Chapter 12.

<sup>13</sup> WSRA acts through its executive agency, the Office of Water Services or ‘Ofwat’.

<sup>14</sup> See Chapter 4.

In its current form, the Bill would repeal the existing duty to obtain WSRAs prior approval of a charges scheme<sup>15</sup> and replace it with a duty for WSRAs to produce charging rules in accordance with guidance produced jointly by the Secretary of State and the Welsh Ministers. Companies would then be obliged to follow WSRAs rules in setting their charges scheme, and WSRAs would be granted a power to enforce breaches of the rules by, for example, directing that infringing schemes be replaced within specified timescales. The Consumer Council for Water would be a statutory consultee in producing both the guidance and WSRAs charging rules. **1.25**

In order to protect non-domestic consumers as the market for non-domestic supply begins to develop, the Bill will give WSRAs a power to apply to the Secretary of State to make statutory provision to prevent mis-selling through a statutory code of practice. Such a code of practice would be applicable to incumbent water undertakers and water supply and sewerage licensees, as well as their agents, brokers, subcontractors, or any other intermediaries. Such a code would be intended to cover doorstep selling, telesales, cold calling, and all forms of publicity and advertising. Those operating in the non-household retail market would also be required to publish information to inform customers' choices about switching suppliers. **1.26**

The Bill would create a power to make appropriate regulations governing customer service standards applicable to all licensees operating in the retail market, whereas, at present, such rules do not cover water supply licensees. **1.27**

#### D. Changes to the Communications Sector—The Communications Code

In 2011, DCMS embarked on a wide-ranging review of the UK regulatory regime for the communications sector with the aim of ensuring that it is 'fit for the digital age'.<sup>16</sup> As part of this review, DCMS asked the Law Commission to conduct an independent review of the Electronic Communications Code (the Code). The process for obtaining powers under the Code is discussed in Chapter 5, and Code powers themselves are discussed in Chapter 16. **1.28**

The Law Commission began its project in December 2011 and published *The Electronic Communications Code—A Consultation Paper* (the Consultation Paper)<sup>17</sup> on 28 June 2012. The Law Commission's final report is anticipated at the end of February 2013. **1.29**

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<sup>15</sup> See Chapter 14.

<sup>16</sup> *Open Letter on A Communications Review for the Digital Age* (DCMS, 16 May 2011).

<sup>17</sup> *The Electronic Communications Code—A Consultation Paper* (Law Commission, Law Com 205, 2012).

- 1.30** The proximity of the finalization of this text to the publication of the Law Commission's final report means that an exposition of the Law Commission's initial proposals from the Consultation Paper is unlikely to be helpful, as it will have been superseded during the publication process. However, it is a noteworthy development and should be kept under review by interested readers.

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