

Bord Gáis Energy Response

Review of the Natural Gas Supply Licence CER Consultation Paper CER/13/220

1.0 Introduction

Bord Gáis Energy welcomes the revision of the Natural Gas Supply Licence to update it in readiness for full deregulation of the retail market and full unbundling of the Bord Gáis Eireann networks companies. We are broadly in agreement with the proposed changes to the Gas Supply Licence, however, we have serious concerns regarding the proposals set out by the CER in relation to “re-regulation” of the market via Licence Condition 16. The threat of re-regulation within the Gas Supply Licence will undoubtedly lead to regulatory uncertainty with the consequent lack of investment and market entry. We would also question the legality of these proposals. The CER says it may not be prudent to rely on Competition Law in the first instance yet does not set out any criteria or market conditions when it would seek to re-regulate the market. Surely these proposals also undermine the fundamental EU principle of an internal market in gas.

We would also ask the CER to note that the current Gas Shipping Licence will require a similar consultation and review as it has the same structure as the Gas Supply Licence and contains many of the same Conditions. We assume a review of the Gas Shipping Licence will be issued in due course.

2.0 Comments in Response to CER Questions in CER/ 13/220

Q1. Respondents are invited to comment on the proposal that Condition 23 be removed, with full deregulation of the gas retail markets, from the natural gas supply licence. Are you in favour of this proposal? Outline reasons for agreement or disagreement.

Response: Bord Gáis Energy is in favour of the proposal to remove Licence Condition 23 from the Gas Supply Licence at full market de-regulation as it will no longer be necessary to require Bord Gáis Energy to purchase gas economically as a competitive gas retail market will necessitate this for Suppliers.

Q2. Respondents are invited to comment on the proposal that Condition 24 be removed, upon full deregulation of the gas retail markets, from the natural gas supply licence. Are you in favour of this proposal? Outline reasons for agreement and disagreement.

Response: Bord Gáis Energy is in favour of the removal of Licence Condition 24 upon full deregulation of the gas retail markets as it will no longer be necessary to regulate the terms (including as to price) upon which Bord Gáis Energy supplies customers as a competitive market will be deemed to be in place.

However, we note with alarm that in the Consultation Paper, the CER states:-

“The CER... would not hesitate in re-imposing ex-ante price regulation where necessary...”

The Consultation Paper states that the CER would use Licence Condition 16 (Compliance with Laws and Directions) as a means of re-introducing price regulation (the legislative basis being Section 2 of the Gas (Amendment) Act 1987 as amended by the Gas Regulation Bill 2013).

Bord Gáis Energy has serious concerns about the possibility of “re-regulation” within the de-regulated Gas Supply Licence. We have set out concerns below:-

1) Regulatory Uncertainty leading to Lack of Investment and Market Entry

The CER does not set out the market conditions or any criteria at all as to when it would be necessary to impose “re-regulation” on the gas retail market. We note that this would apply to all Licensed Gas Suppliers in the market not just the incumbent. This threat of re-regulation (and moreover with no criteria being set) is hugely uncertain for business and could seriously hamper investment in the market and discourage new market entry.

In the Consultation Paper it is stated “*CER would note that such a step would only be taken as a last resort, where all other effective alternatives had been exhausted*”. Such “*last resort*” measures need some form of reference point which is not offered in the Consultation Paper. Effectively, through the views set out in the Consultation Paper, the CER has woven into the new Gas Supply Licence latent perpetual state tariffs in the retail gas market. The EU Commission has recently set out that EU legislation must be more effective and efficient in achieving public policy objectives and “*The final result must be a simple, clear, stable and predictable regulatory framework for*

businesses, workers and citizens”¹. It is difficult to see how the principles of “Better Regulation” (transparency, consistency, accountability, effectiveness, proportionality and effectiveness) have been followed by the CER in the Consultation Paper – the CER leaves the threat of re-regulation within the Gas Supply Licence without giving any indication of the market conditions which may necessitate it. This does little to assist regulatory certainty.

2) The Legal Basis – Competition Law and the EU Internal Market in Gas

We would also question the legality of a future “re-regulation”. The CER states that “*it is not seen as prudent to rely, in the first instance, on competition law alone to remedy any unintended consequences.*” Yet this is the basis upon which all new market participants have entered the market. It is unclear in the paper why the CER does not believe it prudent to rely on Competition Law. No detailed rationale is given yet Competition Law encompasses both a large body of legislation and judgements both domestic and from the EU, with a wide and well-established application in the economy. Surely, we would argue, the de-regulated and competitive Irish energy markets must be subject to the well-established principles of Competition Law in the first instance.

Directive 2009/73/EC provides that Regulators monitor “*the level and effectiveness of market opening and competition at wholesale and retail levels...as well as any distortion or restriction of competition*” (Art 41 (1)(j)). This Article then expressly provides that the Regulatory Authority bring “*any relevant cases to the relevant competition authorities*”. There is clearly no reference to the re-regulation of supply tariffs as a remedy to address any restriction or distortion in competition under the market monitoring powers given to Regulators. However, there is a very clear reference to the competition authorities investigating such cases (we assume under the auspices of established Competition Law). This is why it is all the more confusing that the CER proposes to re-regulate tariffs on foot of a distortion in competition uncovered via its market monitoring and also states that “*it is not seen as prudent to rely, in the first instance, on competition law alone.*”

Similarly, Directive 2009/73 (transposed into Irish law by S.I 630 of 2011), advanced at Article 41(13) that Member States “*shall create appropriate and efficient mechanisms for the regulation of the abuse of a dominant position*” and “*Those mechanisms shall take account of the provisions of the Treaty, and in particular*

¹ http://ec.europa.eu/smart-regulation/better-regulation/documents/com_2013_en.pdf

Article 82 [Article 102] thereof. CER makes no reference to an abuse of a dominant position in the Consultation Paper. We would argue that “re-regulation” in the form proposed could negate the existence of Article 102. Moreover, if the national authorities were to action an undertaking under Article 102 or the EU Commission were to fine (up to 10% annual turnover), we would question where a “re-regulation” as planned by CER would fit into the penalty procedure for breach of Competition Law. It is not possible to set-aside Competition Law with the subsequent curtailment of the powers of the EU Commission, the national authorities and the courts. Surely both could not work in tandem, applying, in essence, a double penalty.

We would also question the legality of re-regulation in the light of the EU internal market for gas. The Consultation Paper states:-

“The provisions of the 3rd Package allow the CER to take action where it finds that customers are not benefiting from competition.”

Certain extra functions have been extended to the CER by the 3rd package legislation enacted in Ireland by S.I 450 2010 and S.I 630 2011. Sections within the SIs set out a call for action for CER to “*prevent a distortion or restriction of competition in the supply of electricity and gas to final customers*” and further functions to monitor the market. We would argue that these obligations on the CER do not mandate the broad-ranging authority of re-regulation or indeed the setting aside of Competition Law principles. Moreover, an EU Directive (such as the 3rd package) cannot legislate out the treaties of the European Union which establish as its base premise the internal market in gas.

The European Court of Justice has confirmed that regulated prices may only be adopted if they serve the general economic interest, being confirmed in the judgements in the Federutility² and ENEL³ cases. Federutility was concerned with the Directive 2003/55, and certain prices set by AEEG (Italian Regulator) it was enunciated that the public service obligation must be clearly defined, transparent, non-discriminatory and verifiable, and guarantee equal access for EU gas companies to consumers but, in application, they must be for a limited period of time. It was found in the case that only where free competition would instruct supply could regulated prices be acceptable and this only when certain criteria are reached. The perennial threat of “re-regulation”

² Case C-265/08.

³ C-242/10

(firstly via Licence Condition 16) could be assumed from the amendment to the Gas (amendment) Act 1987 in Ireland.

The EU Commission is currently taking Poland before the ECJ over regulated gas prices and State-set tariffs⁴ in the non-household sector. The Commission confirmed that according to EU law, regulated prices can only be applied in exceptional circumstances and not as a main rule for price setting: a number of strict conditions have to be met. The Commission stated that Poland failed to comply with the EU internal market in setting prices in the non-household sector, and said that state-set tariffs for non-household end users impede new gas suppliers from entering the market. The Commission also highlighted that Poland does not set a time limit on the application of regulated prices. This could be argued to be the case in Ireland with the threat of future re-regulation being embedded in the Gas Regulation Bill 2013.

Further, France was instructed last year to revise its system of regulated prices for non-household end users. French legislation failed to comply with Directive 2003/55 now replaced by 2009/73. The Commission stated “*The Commission considers France’s protection of prices for all non-household users, regardless of their size and situation, to be disproportionate*”. Again the infringement speaks of the need for these actions to be clearly defined and transparent.

It has been noted by ERGEG in a 2010 report that Poland along with Ireland are the only Member States with regulated tariffs where the Regulator both sets the regulation price and determines when it is removed⁵. The CER clearly has very broad powers, therefore, it must be made absolutely clear and unequivocal when these powers can be exercised.

3) Conclusion

The action of “re-regulation” cannot be centred on precedent as it is unknown across the whole of the European Union. Current state set tariffs being applied by CER are a means to an end. The competitive market is the culmination of an ideology, seeing a free internal market in the European Union. Freedoms of the EU are seen as possible only in a fully open market. The proposal by the CER to re-regulate the market if deemed appropriate (and set aside Competition Law) seems fundamentally counter to

⁴ http://europa.eu/rapid/press-release_IP-13-580_en.htm

⁵ ERGEG Status Review of End-User Price p.45 http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_PUBLICATIONS/CEER_PAPERS/Customers/Tab1/E10-CEM-34-03_price%20regulation_8-Sept-2010.pdf

the principles of the EU legal order and indeed to the very wording of Article 41 (1) (j) of Directive 2009/73/EC.

The legal “procedure” CER proposes to use should re-regulation of the market be required is via Gas Supply Licence Condition 16, which obliges all Licensees “*to comply with all applicable laws*”. To create an environment of regulatory certainty and to establish compliance with the EU principle of an internal market in gas and Article 41 (1) (j) of Directive 2009/73/EC, we would propose that the CER sets out now the criteria in which it would seek to impose re-regulation.

Q3. Respondents are invited to comment on the proposal that a licence condition be introduced in all natural gas supply licences to reflect suppliers’ obligations to maintain regulatory accounts. Are you in favour of this proposal? Outline reasons for agreement or disagreement.

Response:- Bord Gáis Energy is in favour of this proposal. We note that it would bring the Gas Supply Licence into line with the Electricity Supply Licence where this requirement has always been placed on all Suppliers in the market.

We would ask the CER to bring the wording into line with the Electricity Supply Licence. For example, we note that there are still references to “Separate Business”. This should be replaced with “Supply Business”.

Q4. Respondents are invited to comment on the proposal that Condition 26 be removed from the natural gas supply licence, where Bord Gáis Éireann’s networks business is certified under the Full Ownership Unbundled provision of the 3rd Package. Are you in favour of this proposal? Outline reasons for agreement or disagreement.

Response: Bord Gáis Energy is in favour of the proposal to remove Licence Condition 26 when the Bord Gáis Eireann Networks business is certified as having been unbundled (under the FoU provision of the 3rd package) as it will no longer be necessary.

Q5. Respondents are invited to comment on the proposal that Condition 27 be removed from the natural gas supply licence where the gas retail markets have been fully deregulated and the where Bord Gáis Éireann’s networks companies have been certified as fully ownership unbundled. Are you in favour of this proposal? Outline reasons for agreement or disagreement.

Response:- Bord Gáis Energy is in favour of the proposal to remove Licence Condition 27 when the Bord Gáis Eireann Networks business is certified as having been unbundled (under the FoU provision of the 3rd package) as it will no longer be necessary.

Q6. Respondents are invited to comment on the proposal that Condition 28 be removed from the natural gas supply licence where Bord Gáis Éireann's networks companies have been certified as fully ownership unbundled. Are you in favour of this proposal? Outline reasons for agreement or disagreement.

Response:- Bord Gáis Energy is in favour of the proposal to remove Licence Condition 28 when the Bord Gáis Eireann Networks business is certified as having been unbundled (under the FoU provision of the 3rd package) as it will no longer be necessary.

Q7. Respondents are invited to comment on the proposal to remove condition 29 of the natural gas supply licence when the market is fully deregulated. Are you in favour of this proposal? Outline reasons for agreement or disagreement.

Response:- Bord Gáis Energy is in favour of the proposal to remove Licence Condition 29 from the Gas Supply Licence. It should not be necessary in a fully competitive market and could distort the competitive market resulting in less consumer choice and increased prices. We note that the CER also reached this conclusion in the electricity market as part of its consultation on “Price Discrimination and Customer Protection in the Deregulated Electricity Market” (CER/11/059). The same regulatory approach should be applied to the Gas Supply Licence and Licence Condition 29 removed.

Q8. Respondents are invited to comment on the proposal that a duty to supply for domestic and I&C business customers should be introduced in all natural gas supply licences. Do you agree with the duty including both domestic and I&C customers? Do you agree that the current duty (which is not limited to domestic and I&C businesses) should remain with Bord Gáis Energy? Outline reasons for agreement or disagreement.

Response:- Bord Gáis Energy agrees that a duty to offer supply should be retained in the Gas Supply Licence and should be applied to all Gas Suppliers. We note that this is currently the case in the generic Electricity Supply Licence. However, we do not agree that it is appropriate that this duty to offer supply should extend to the level of I&C

business customers. In the Electricity Supply Licence, this duty only extends to the level of small business customers. The same regulatory principle should apply to the Gas Supply Licence. We would also ask the CER to note that the duty to supply in G.B. Licence Condition 22 *only* relates to domestic customers. It does not extend to business customers (at any level). Moreover, the Irish gas I&C market is highly competitive and this level of regulation is un-necessary. We would urge the CER to re-consider applying a duty to offer supply to gas I&C customers and only extend this duty to domestic and small business customers as per the Electricity Supply Licence.

Given that a fully competitive market will be in place and an obligation on Suppliers to offer a supply should not be necessary, Bord Gáis Energy would ask the CER to consider inserting 2 further exceptions to the duty to offer supply which come from the G.B. Gas Supply Licence. The relevant clauses from the G.B. Gas Supply Licence are:-

- 22 (c) without prejudice to paragraph 13 of Standard Condition 25B it is not reasonable in all the circumstances of the case for the licensee to supply gas to the Domestic Premises, provided that, if it is already supplying gas to the premises, it has given at least seven Working Days' Notice of its intention to stop doing so; or
- 22 (d) the licensee requires the Domestic Customer to pay a Security Deposit and he does not do so, except if that deposit is in breach of any of the requirements in paragraphs 3 and 4 of standard condition 27 (Payments, Security Deposits and Disconnections).

Q9. Respondents are invited to comment on the proposal to change the structure of the natural gas supply licence so it only has one section. Do you agree with this proposal? Do you agree that the additional licence obligation placed on the incumbent would only be included in the natural gas supply licence granted to them? Outline reasons for agreement or disagreement.

Response:- Bord Gáis Energy agrees that the structure of the Gas Supply Licence be changed so that it only has one section. Following the unbundling of the BGE networks business and full market de-regulation, it will no longer be necessary to have a Section “B” which is applicable to the Board (BGE).

However, we do not see why it is necessary to have a separate Licence which applies to the incumbent following full market de-regulation and certification of the unbundling of the networks businesses. In the current proposed drafts of the Licences,

there are no differences between the generic Licence and the proposed “incumbent” Licence. We do not think it is justified to have a separate BGE “incumbent” Licence when the CER is not proposing any additional or amended Conditions from the generic Licence.

We would ask CER to note that a reference to the Board is still included in the Proposed draft Licences (Definitions Section). This will be required to be deleted.