Response by Energia to the Utility Regulator Consultation Paper

Implementation of the EU Third Internal Energy Package

07 October 2011

1. Introduction

Energia welcomes the opportunity to respond to the consultation paper published by the Utility Regulator (UR) on the implementation of the EU Third Internal Energy Package. Energia has previously responded to the Department of Enterprise, Trade and Investment (DETI) consultation paper on this matter and, where appropriate, some of the points raised as part of that submission are reiterated herein.

The remainder of this response firstly presents our general submission on the proposed implementation of IME3, before concentrating specifically on a number of the questions posed in the paper.

2. General Submission

As a starting point, it is important to state Energia's acknowledgement that compliance with binding EU Directives/Regulations under IME3 is a requirement on Northern Ireland (DETI and UR, as appropriate). While we are fully cognisant of these requirements, it is considered similarly important that as part of implementation of the same it is ensured that, as far as possible;

- The requirements under the Third Package are not 'gold-plated';
- The adoption of changes do not unnecessarily restrict the development of the market by market participants for the benefit of customers.

In light of the detailed proposals outlined in the extensive consultation paper issued by the UR and noting the previous DETI consultation, Energia considers many of the proposals to be proportionate and unlikely to restrict market development. Nevertheless, instances of 'gold-plating' arising for numerous possible reasons, including unintended reasons, have been proposed whereas other aspects of the proposals are considered to be excessively vague. Specifically, we cite the examples of contract variation notification in the case of the former (**Q23**) and the promotion/facilitation of competition in the gas market with respect to the latter (including **Q26** & **Q33**).

Both of the general concerns raised within this section contain a degree of overlap and in essence it is considered important that changes made to ensure compliance with the Directive and Regulations do not go over and above these explicit requirements, as doing so may have unintended and/or inefficient consequences. In many of the issues considered, additional regulation may not be considered to be the first best outcome and as such, as far as possible, the market may be able to provide such outcomes through innovation and development that otherwise may be restricted by additional regulation. Again we wish to stress that where additional regulation is required by the Third Package, we of course support its introduction such that compliance with the Regulations and Directives are achieved.

Another general point relates to the manner of adoption of some of the measures proposed. Where appropriate it may be possible to consider the introduction and/or amendment of codes of practice rather than engaging in extensive additions/amendments to the relevant licences considered to be affected by the new

requirements for compliance. It may also be appropriate to consider the extent to which compliance with the Regulations and Directives is currently being met in the absence of formal regulations and/or new Licence requirements.

Finally, an important consideration for UR should be the impact of any new Licence conditions and/or amendments on customers. Increasing the cost of regulation and the regulatory burden on companies, over and above the legislative requirements, may have implications for customers with increases in the cost of the supply chain potentially filtering down to them. It is therefore important that any such measures satisfy the principle of proportionality.

Although not covered as part of this consultation paper, Energia has consistently stressed the need for full compliance with IME3 and that the initiative to ensure this is brought about extends to provisions relation to the National Regulatory Authorities (NRAs) themselves. One of the most important changes for market participants required under the Third Package, is the introduction of a requirement on RAs to provide reasoned decisions in relation to all decision taken. Furthermore, the need for Member States to ensure a suitable mechanism exists at national level for a party affected by a decision of the RAs has a right to appeal to a body independent of the parties and of any government. Arising out of the previous DETI consultation our understanding of the DETI proposal in relation to Articles 37(17) and 41(17) of the Electricity and Gas Directives respectively, were to largely follow the DECC approach. Our concern is that this approach defines the remit for appeal too narrowly (Licence modifications) and as such the remit should be broader to comply with the Directive. It is important that in the discussion of EU compliance, compliance of the NRAs is no forgotten.

The remainder of this response contains specific comments on a large number of the proposals contained in the consultation paper.

3. Specific Comments

One of the principle objectives of economic regulation is to address the problem of market failure and to put in place arrangements (structural or behavioural) that mitigate the impacts of the specific market failure identified to ensure that the “best” outcome achievable for all parties in the market is reached. Noting this objective, it is essential that regulation is both appropriate and proportionate to ensure markets are not overly restricted by regulation which, absent market failures, should be seen as a second best alternative to functioning markets. Therefore, in consideration of the appropriateness of a precautionary principle (**Q3**) it is first important to consider the suitability and similarity of any comparator market. Absent such analysis, the implications of imposing (in the home market) regulatory solutions to observed deficiencies in other markets risks failing the general principle of economic regulation and could be detrimental to the development of the market. As such and as presented, Energia would caution against the use of such a precautionary principle noting the substantial differences between the GB and NI retail markets.

Energia supports the UR’s position not to propose extending the universal service standard to small enterprises (**Q5**).

With respect to switching, and noting the comments included in response to the DETI consultation, Energia does not consider it appropriate to extend licence obligations to suppliers to ensure compliance with the three week switching period in instances where delayed meter reads, which are outside of their control, are the reason for the failure to comply with the timetable outlined in the Directive (**Q6**). UR could consider appropriate obligations (penalties/incentives) on electricity and gas distributors to ensure the timeframe in the Directive is achievable (**Q7**). In such circumstances, any such extension to suppliers would both be misdirected and inappropriate as they cannot alter the performance of the DSOs.

Energia agrees with both the UR's interpretation and the Directive that customers should have access to their consumption data but note the wording of the Directive places such a requirement on the party responsible for data management and that the relevant data be accessible in an agreed form to customers and suppliers (**Q9**). We note that data made available to customers under this requirement has to be done without charge. Energia supports, as a matter of good practice, the proposed requirement to keep records of the reasonable endeavours made to obtain an actual meter read for a period of 3 years (**Q10**). However, extension of supplier obligations to address distribution/meter reading issues is considered inappropriate (Q11) and similarly we do not consider there to be a need to regulate further with respect to customer access to consumption data (**Q11**). Once compliance has been achieved, the market should be left to deliver such products to customers if there is such a demand.

The introduction of a Customer Checklist (**Q13**) is a central aspect of the customer protection section of the IME3 Directives and as such Energia supports their introduction in the NI market. However, in light of the dynamic nature of the retail market and market trends, it is suggested that the introduction of the checklist be cognisant of this and not prevent genuine market development and innovation. In this regard, we would ask the UR to consider the practicalities of the checklist across the range of customer acquisition channels. Noting developments in online services and possible future developments (e.g. use of tablets in face-to-face interactions) it may be more appropriate for customers to be provided with the checklist during the official cooling-off period. It is also considered appropriate to question the benefit to the customer in being provided with this checklist annually, as opposed to when the checklist is updated/amended and/or other such times deemed appropriate.

Energia has no issue with the proposed dispute settlement provisions proposed (**Q14** & **Q25**). This position similarly extends to proposals in relation to transparency requirements (**Q22**), choice of payment methods (**Q24**) and the maintenance of records relating to wholesale contracts (**Q30**).

With respect to proposals relating to the transparency of information (**Q15**), Energia wishes to draw particular attention to the discussion in paragraph 2.7.4 of the consultation paper and reiterate the need to get the balance correct when considering the benefits to customers of additional information provision, the costs (environmental and financial), as well as the potential benefits utilising technology and ensuring suppliers can respond to the needs of their customers and the market.

Energia also supports the proposed direction being taken with respect to the provision of forecasts to customers and notes the objections to the initial proposal outlined in the DETI consultation paper.

On the issue of debt repayment on prepayment meters (**Q16**), Energia has no objection to a maximum percentage of 40% being applied; is supportive of an alignment of licence obligations for electricity and gas (**Q18**); and as it is not our area of expertise, do not wish to comment on the proposal to standardise the definition of disabled (**Q19**) but caution with respect to potential unintended consequences of applying an inappropriate definition.

Considering the UR's proposals with respect to contract variation (**Q23**), these do not appear to align with the requirements of the Directives and as such, Energia would urge the UR to review the proposals and where necessary, provide reasoned arguments for why requirements on suppliers may go beyond that specified in the Directives. Specifically, the proposals are for advance notice (at least 28 days) to be provided to customers ahead of any change in contract terms, including price. The Directives, specifically Annex 1 ("Measures on Customer Protection") do not align with this proposal and, for the avoidance of doubt, state;

Annex 1.1.(b) *"…Service providers shall notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal billing period after the increase comes into effect in a transparent and comprehensible manner."*

Furthermore with respect to contract variations, Energia requests that UR clarify the reference to an "individual written notice" to be provided to customers; firstly what requirement this places on suppliers with respect to the format and form of the communication; and secondly why explicit reference of this type is required for inclusion as it appears absent from the Directive.

Energia supports, in principle, the UR proposals on 'branding separation' in the gas market (**Q26**), however has concerns over the thresholds proposed as being too high. Notwithstanding the ability of the proposed threshold to address the problem of branding of netwrk and supply businesses in the Belfast region, the threshold would act as a barrier to competition, particularly market entry in ten towns currently exclusively served by *firmus energy*. The gas market in these respective areas, (Belfast and 10 towns), are different and at different stages of development. It is our view that the thresholds should acknowledge this in preparation for when the exclusivity arrangements are removed in the ten towns and barriers to competition shift from a regulated barrier to a matter for regulation.

Energia supports the UR's proposals in relation to a direction to NIE (**Q27**) and, more generally, the associated proposals on licence provisions (**Q28**).

On the issue of fuel mix disclosure (**Q29**), Energia is supportive of the general proposal to ensure customers are provided with information on the fuel mix of their chosen supplier. Energia understands from the consultation paper and proposed licence conditions that FMD would be presented on an aggregate basis to all customers. In light of the recent RA consultation on this matter of FMD methodology, we note the practical difficulties with some of the proposals therein and consider the

approach outlined in this consultation paper to be, on balance, appropriate. Further to the FMD consultation paper, Energia has met with CER to discuss these issues.

Regarding cross border capacity (**Q31**) and effective competition in the gas market (**Q32**), Energia has consistently offered the view that compliance with the respective Regulations and Directives of IME3, (as well as IME2), should be ensured. While noting the UR's contention that the inclusion of such proposals in the licence provisions will make little practical difference to the gas market, it may give rise to a wider discussion on the potential need for investment in the existing gas network in NI to facilitate integration with networks in other jurisdictions. This is an important issue in the concurrent consultation process around CAG albeit not one that the process to date has focussed on.

Energia fully supports the UR's proposals to strengthen the existing licence obligations on PNG and *firmus energy* to enhance the non-discrimination provisions and to promote effective competition (**Q33**). Further to this, the provisions around the promotion/facilitation of effective competition are presently somewhat vague and we would call on the UR to outline a process by which this matter can be consulted upon and definitive measures identified.

With respect to the unbundling proposals for DSOs (**Q34**) and proposals to regulate the marketing activities of DSOs (**Q35**), Energia supports the proposals in principle, however in the case of the first set of proposals we would encourage a review of the threshold values (see discussion re. *Q26*) and a view that such separation is appropriate to all DSO/supplier activities in NI. To avoid ambiguity, brand separation is taken to mean separate brand identity in both name and symbols.

Considering the final two questions of the consultation paper, Energia supports the introduction of a complaints handling procedure into the licence obligations of gas DSOs (Q37) and that these parties should prepare and comply with a Customer Information Code (Q38), pursuant to the Directive.