

DETI response to comments made during the consultation on the draft Energy Order 2003 (Supply of Information) Regulations (NI)

Regulation	Consultee Comments	DETI Response
3	<p>Clarification was sought as to why the Department of Enterprise, Trade and Investment (“DETI”) considers that the power to certify whether the provision of specific information would be against the interests of national security is beyond the scope of its primary powers given by Article 27(1) of the Energy (NI) Order 2003 (“the Energy Order”) which is identical to section 27 of the Utilities Act 2000, under which the corresponding GB legislation was made.</p>	<p>DETI’s legal advice is that the power to replicate this provision in the Northern Ireland Regulations is beyond the scope of its primary powers contained in the Energy Order. In addition, Northern Ireland departments have no legal basis to certify matters of national security.</p>
4	<p>Clarification was sought that Regulation 4(1)(a) would not detract from the General Consumer Council for Northern Ireland’s (“GCCNI”) ability to gather information and thereby hinder development of fully informed policies and decisions.</p> <hr/> <p>Clarification was sought that Regulation 4(1)(b) and (c) do not conflict with the obligation on licence holders to consult GCCNI prior to any price increases.</p> <hr/> <p>The meaning of “significant effect” in 4(1)(d) has not been specified.</p>	<p>Information can only be withheld by the Northern Ireland Authority for Utility Regulation (“NIAUR”) or a licence holder under this Regulation where all of the conditions (a) to (d) in Regulation 4(1) have been met. It would be a criminal offence to disclose information in relation to securities which would be considered to be insider dealing and, therefore, this type of information could be withheld. It follows the insider dealing regime which is set out in the Criminal Justice Act 1993.</p> <hr/> <p>Licence holders can only exercise the discretion under Regulation 4(1) if all 4 conditions are satisfied. In relation to Regulation 4(1)(b) and (c) the information may be withheld provided adequate reasons are given.</p> <hr/> <p>The words “significant effect” are part of the Criminal Justice regime. They relate to whether someone has insider knowledge which could, to a significant degree, affect the price of securities.</p> <hr/> <p>Section 54 of the Criminal Justice Act 1993 defines securities as those which fall within any paragraph of Schedule 2 to that Act and which satisfy any conditions applying to it under an order made by the Treasury for the purposes of that subsection. Schedule 2 lists the following as securities: shares; debt securities; warrants; depository receipts; options; futures; and contracts for differences.</p>
5	<p>The reference to the Energy Order in Regulation 5(2)(a) should be removed as it potentially places a licence holder in a position with conflicting obligations. On the one hand, a licence holder may be prohibited by Article 63 of the Energy Order from disclosing the information, but on the other it would be unable to rely on this exemption.</p>	<p>There is no conflict as the disclosure would also be prohibited by the 3 Orders cited. The Energy Order was included for completeness, if it was not included it would cast doubt on whether the disclosure prohibitions were dealt with.</p>

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	<p>Under Regulation 5(3) GCCNI could potentially refuse to provide information to NIAUR which constitutes 'personal data' under the DPA 1998 if the onward disclosure of that information by NIAUR 'to a member of the public' would contravene the data protection principles of the DPA 1998. Potentially therefore GCCNI could refuse to provide specific information relating to individual consumers.</p>	<p>Regulation 5(3) provides that NIAUR, a licence holder or GCCNI may refuse to supply information under Articles 24 and 26 of the Energy Order which constitutes personal data under Section 1(1) of the Data Protection Act 1998. If the information constitutes personal data it could not be disclosed by GCCNI to NIAUR and vice versa unless it is with the consent of the individuals concerned, or it has been appropriately anonymised (e.g. by removing names, etc).</p>
	<p>NIAUR is restricted (under Article 63 of the Energy Order) as to the extent to which it can make further disclosures of information it has received. It is arguably unnecessary to subject a transfer of information to the test set out in Regulation 5(3). There is expectation that transfers of information between GCCNI and NIAUR would take precedence over, rather than being subject to, restrictions within the DPA 1998, particularly in light of the Article 63 protection. Given the strength of Article 63, comfort was sought that the strict use of Regulation 5(3) to prevent NIAUR receiving information on particular consumers or complainants, is not envisaged.</p>	<p>Article 63(1) of the Energy Order provides that information which:</p> <p>“(a) has been obtained by virtue of the provisions of the Energy Order, Part II of the Electricity Order or Part II of the Gas Order; and (b) relates to the affairs of any individual or to any particular business,</p> <p>shall not be disclosed during the lifetime of the individual or so long as the business continues to be carried on,”</p> <p>except as provided for in Article 63(2), (3) and (4). Article 63(2) does not apply to a disclosure made with the consent of the individual or the person for the time being carrying on the business.</p> <p>Therefore, disclosure may be made between GCCNI and NIAUR under Article 63(2) where <u>consent</u> has been obtained from the “individual or the person for the time being carrying on the business” or under Article 63(3) where, if consent is refused, it may be disclosed for the purpose of facilitating the performance of any functions of DETI, NIAUR, GCCNI or the Competition Commission.</p>
<p>6(3)</p>	<p>Confirmation that Regulation 6(3) and Articles 10(3) and 30 of the Gas (NI) Order 1996 will not diminish GCCNI’s ability to represent consumers was sought.</p>	<p>The Regulations do not affect the operation of Articles 10(3) and 30 of the Gas Order. For information, Article 30(1) has been repealed and replaced by Article 51(1) of the Energy Order.</p> <p>Consequently, DETI does not consider that the operation of Regulation 6(3), or Articles 10(3) and 30 of the Gas Order, will diminish GCCNI’s ability to represent consumers.</p>

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	<p>Concerns were raised regarding the omission reference to a licence holder as well as to NIAUR in Regulation 6(3), including that:</p> <ul style="list-style-type: none"> • it is possible that a licence holder could provide information that would prejudice enforcement action; • it appears inconsistent with regulation 6(1) where a licence holder may refuse to supply information where the disclosure may prejudice criminal proceedings; • a licence holder can refuse to release documentation to NIAUR on the grounds of self incrimination but may be required to give the same documentation to GCCNI. Given the general duty on NIAUR and GCCNI under Article 11 of the Energy Order to co-operate in the exchange of information, a licence holder could be expected to assume that information released to GCCNI in respect of a matter which NIAUR is investigating will be made available to NIAUR by GCCNI. Therefore the release of any information, which may incriminate a licence holder, by GCCNI to NIAUR would be a breach of the laws of fairness or natural justice in circumstances where Article 31(3) of the Electricity (NI) Order 1992 has relieved a licence holder of an obligation to provide such information to NIAUR. There is no doubt that the release of such information by GCCNI would be prejudicial to a licence holder as regards the making of an order by NIAUR under Article 42 of the Energy Order. 	<p>DETI noted the comments in relation to Regulation 6(3). The Regulations have now been amended to include a reference to “licence holder” in Regulation 6(3). This will bring Regulation 6(3) into line with the position in the equivalent GB Regulations.</p>
	<p>The word “prejudice”, which denotes an adverse impact upon the enforcement action, should be replaced by “affect”.</p>	<p>The word “affect” would widen the scope of the information which could be withheld under this provision potentially leading to information which would assist any enforcement action being capable of being withheld by a party. DETI has therefore rejected this comment.</p>
<p>7</p>	<p>Clarification was sought on the operation of Regulation 7(1)(a) and (b).</p> <hr/> <p>On Regulation 7(1)(c)-(d) clarification was sought on why it allows licence holders to seek certain information from GCCNI, but does not permit GCCNI to the same information from a licence holder.</p> <hr/> <p>Clarification was sought on the operation of this Regulation against the Freedom of Information legislation.</p>	<p>The power in Regulation 7(1)(a) and (b) is not restricted to cases where the decision or action in question is taken by the person who may refuse to supply the information. For example, GCCNI could refuse to supply information which concerns discussions or deliberations of a licence holder if, for example, the licence holder has not yet acted upon those deliberations or decisions. The Explanatory Note to the Regulations has been amended to make this clear.</p> <hr/> <p>The Regulations only provide for information to be sought from GCCNI by NIAUR, not licence holders. Regulation 7(1)(c)-(d) prescribe descriptions of information which a licence holder or NIAUR may refuse to provide to GCCNI, and which GCCNI may refuse to provide to NIAUR.</p> <hr/> <p>The Regulations deal solely with the operation of Articles 24 and 26 of the Energy Order which do not cover the provision of information to licence holders.</p>

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		<p>The Regulations will therefore not interfere with licence holders' rights to seek information under the Freedom of Information Act 2002 ("Fol Act").</p> <p>In a situation where information is required to be released under the Fol Act but an exemption under these Regulations applies, consultees are referred to Sections 30 and 31 of the Fol Act.</p> <p>Part I of the Fol Act provides a right of access to recorded information held by public authorities. Part II of the Fol Act creates exemptions from this duty to disclose information and sets out the cases in which information is exempt. Section 30 of the Fol Act provides for investigations and proceedings conducted by public authorities and Section 31 provides for law enforcement. Section 31 exempts information whose disclosure would or is likely to prejudice law enforcement matters. In particular Section 31(2) concerns investigations into whether circumstances exist or may exist justifying regulatory action or whether regulatory investigations relating to failure or incompetence of company directors or investigations of persons in regulated professions to carry out activities which require a licence.</p>
8	Clarification was sought on who determines whether the cost or effort incurred in providing the information is excessive.	As the information is being refused by the licence holder on the basis that the cost or effort incurred in providing the information would be excessive it is the licence holder who would make the determination.
9	Why does this Regulation refer to a "person", rather than NIAUR, licence holder or GCCNI.	The term "person" derives from Article 24(2) of the Energy Order which refers to "A person to whom a direction under this Article is given shall comply with it as soon as is reasonably practical". The term "person" is also used in Article 26 of the Energy Order.