

Domestic Bulk Liquefied Petroleum Gas Market Investigation Order

Response to consultation

Introduction

1. As a result of our consultation on the draft Order, published on 31 July 2007, the Competition Commission (CC) has received a number of submissions. In this paper the CC summarizes the changes of substance it has made to the draft Order as a result of points made in those submissions and gives the reasons why it has not made changes in response to other points made in those submissions.

Changes made

2. In this section of the paper we outline the material changes that we have made to the draft Order and set out why these changes have been made. Non-material changes are not discussed here.

Scope of the order

3. The draft order published on 31 July 2007 consisted of two parts. Part I implemented our remedies in respect of domestic bulk LPG not supplied to metered estates while Part II implemented the remedies in respect of metered estates. A number [eg Calor, BHHPA, Consumer Council, LPGA] of the responses to the consultation pointed out difficulties with Part II of the order, and some have expressed doubts as to its workability [LPGA]. These difficulties included:
 - the definition of ‘metered estate customer’ and the fact that as drafted it covers only the holder of the contract with the gas supply company (which may be the park home owner rather than the individual resident) [Calor, NPHC];
 - the existence of different contractual matrices on different metered estates (eg on some metered estates there is a single contract between the owner or the management company and the gas supplier while on others there are individual contracts between residents and the gas supplier, which may include different terms) [BP, Carver];
 - how best to ensure that customers have the necessary authorization to switch supplier and how the gas supplier may satisfy itself that this is the case [Shell];
 - the extent to which time limits could be imposed in respect of the new supplier informing the old supplier of tank transfer and for the obliteration of the signage of the old supplier by the new supplier [Calor];
 - how best to deal with the fact that metered estates sometimes include both residential and businesses users (eg residential mobile homes and holiday caravan businesses) [Consumer Council, NPHC]; and
 - clarification of the definition of ‘service pipework’ as it related to metered estates [Flogas].

Submissions received [eg BHHPA, NPHC] noted that Part II of the draft order was entirely freestanding and suggested that a delay in issuing Part II may be justifiable in order fully to consider any necessary amendments. It has been noted that this should not stand in the way of our issuing Part I.

4. In the light of these submissions and further consideration on the part of the CC itself, we have therefore decided to implement our remedies in two stages by means of two separate Orders: the first dealing with supply of domestic bulk LPG not to metered estates and the second dealing with supply of domestic bulk LPG to metered estates. We are now consulting on a draft of the first Order, which accompanies this document. We are also undertaking further work on metered estates, which we hope will allow us to consult on the second order later this year.

Title, commencement, application and interpretation

Article 1.1

5. The transition period has been shortened from nine months to three months. This is because the delay in making the order has given the LPG suppliers longer to put the necessary processes and protocols in place, such that a nine-month transition period is no longer considered necessary.

Article 1.2

6. Changes have been made to this article to make clear that the order does not apply in respect of the supply of domestic bulk LPG to metered estates.

Article 1.3

7. The previous definition of date of purchase was linked to the date on which payment for the tank was received. It was suggested to us that there would be confusion over this date as the date on which payment was received may be sometime after the date on which payment was sent [Shell]. It was also suggested that suppliers may agree to aggregate payment for a number of tanks (eg on a quarterly basis) rather than paying for each individually [BP]. We have therefore changed the definition of 'date of purchase' in order to avoid linking the definition to the date of payment for the tank. Instead, date of purchase is linked to the date on which the existing supplier receives notification from the new supplier that the new supplier agrees to buy the tank, or the date upon which the existing supplier is deemed to have received such notification. (Notification is dealt with in article 4.4 below.)
8. We have added a new definition of 'deemed notification' to provide for circumstances where there may be a dispute over whether notification was actually given [Calor]. The requirement for the use of first class recorded delivery post is intended to ensure that claims for deemed notification can be properly supported.
9. The definition of 'eligible to switch' has been tightened to remove the ambiguity that existed with the previous definition [Shell].
10. The definition of 'exclusivity period' has been changed to allow for suppliers' standard terms and conditions that permit a customer unilaterally to terminate a contract even during an exclusivity period in certain circumstances, eg on moving house [Shell].

11. We have added a new definition of 'existing contract' in order to clarify the provisions in relation to the point at which a customer may exercise the option to switch supplier.
12. The definition of 'existing supplier' has been changed so that the definition is now linked to an objective act, namely that of actual or deemed notification of the customer's desire to switch supplier [Shell]].
13. The definition of 'industry trade association' has been changed to ensure that it applies only to those trade associations that represent suppliers of domestic bulk LPG in their capacity as suppliers of domestic bulk LPG, rather than, for example, as road hauliers [Shell]. We have also reflected the recent establishment of UKLPG as the main industry trade association.
14. We have added a new definition of 'new contract' in order to clarify the provisions in relation to the point at which a customer may exercise the option to switch supplier.
15. The definition of 'new supplier' has been changed so that the definition is now linked to an objective act, namely that of actual or deemed notification of the customer's desire to switch supplier [Shell].
16. Definitions of 'notice of tank transfer request', 'notice of termination of contract' and 'notice of tank uplift request' have been added to provide greater clarity as to what these notices comprise.
17. The definition of signage has been changed so as to refer to any notice (rather than a notice, as previously). As used in article 6.5, this change will ensure that all notices stating the ownership of the tank are rendered illegible once the tank has transferred [Calor].
18. The definition of 'statement of tank ownership' has been changed so that the existing supplier provides a statement of whether or not the tank is owned by the existing supplier (rather than by the customer, as previously). This is because the existing supplier can be expected to know whether it owns the tank, but not necessarily who owns the tank if the existing supplier does not [BP].
19. A definition of 'supplier's address for service' has been added. This is linked to the changes we have made to provide greater clarity in respect of the various notices we have required in the order (see article 4 below).
20. The definition of 'working day' has been amended to provide greater clarity, in particular in respect of differences in bank holidays between England, Wales, Scotland and Northern Ireland [BP].

Tank transfer and tank uplift general provisions

The request for a tank transfer

21. This article has been redrafted so as not to create a 'right' for customers to request tank transfer but rather to oblige suppliers to facilitate the option of switching using tank transfer and inform customers of that option at the appropriate time [Shell].

Article 2.1

22. This is a new article inserted in order to create an obligation on suppliers to facilitate generally the option of switching using tank transfer [Shell].

Article 2.2

23. This is a new article placing an obligation on a supplier to inform a customer of the option of switching using tank transfer when a contract is first entered into.

Article 2.3

24. This is a new article placing an obligation on a supplier to inform a customer with a contract already in existence at the time the Order comes into force of the option of switching using tank transfer. This obligation arises at the end of any period of exclusivity and at the termination of the existing contract. Where a customer chooses not to switch at the end of an exclusivity period, the supplier is still obliged to inform the customer of that option at the termination of the existing contract.

Article 2.4

25. This article creates the fundamental obligation on the existing supplier to transfer the existing tank and any service pipework to the new supplier, if the customer so requests.
26. One response [BP] to our consultation noted that customers may indicate their desire to switch either by informing the existing supplier of termination of contract or the new supplier of the desire to switch to it. As now drafted, this article explicitly provides for this.

Article 2.5

27. This article provides that where a customer wishes to switch but does not wish to use the tank transfer option, he may instead request tank uplift and the existing supplier will be obliged to remove the existing tank.

Article 2.6

28. This is a new article inserted to provide for the situation in which a customer, for whatever reason, no longer wishes to proceed with the tank transfer request. A customer may withdraw his request at any time up to the date of purchase (as defined) of the existing tank by the new supplier.

Article 2.7

29. This article has been amended in two respects. The word 'connected' is qualified by the word 'directly', and the words 'at the time of tank transfer' have been added. The intention is to ensure that there is no possibility of a charge being imposed at the time of tank transfer, so as to disincentivize a consumer from switching, while at the same time acknowledging that those costs will inevitably have to be recovered in some way through the operation of the supplier's business.

Tank transfer and tank uplift

Article 3.1(c)

30. One response [Shell] to our consultation suggested that the previous reference in this article to 'current safety requirements' was ambiguous as it was not clear whether the reference was to safety requirements in force at the time of the issuing of the Order or at the time of the transfer or uplift. This article has been changed to make clear that the tank transfer or uplift should happen in accordance with *relevant* safety requirements in force *at the time of the transfer or uplift*.

Article 3.2

31. One respondent to our consultation [Shell] said that this article as previously drafted could have placed an obligation on any person who supplies domestic bulk LPG rather than on specific suppliers on the context of tank transfer or tank uplift. The drafting has therefore been amended to make clear that the obligation applies only to the existing supplier and the new supplier in the context of tank uplift or tank transfer.

Tank transfer process requirements

Notices

32. Article 4 generally has been amended to refer to the notification provided by the customer of termination of contract and request for tank transfer, consistent with article 2.

Article 4.4

33. This is a new article inserted to cover the circumstance where a customer sends only a notice of termination of contract. Given the relative level of likely costs involved, it is assumed that the customer intends that his tank should be transferred unless he has explicitly stated otherwise.

Article 4.5

34. Respondents to our consultation [Shell, Flogas] said that it was not clear from the previous draft of the order precisely what would constitute notification and they noted scope for confusion over whether notice had been given at the point at which it had been sent or the point at which it had been received. This article has therefore been amended to set out clearly what constitutes notification.

Article 4.6

35. Given the clarification of what constitutes notification under the new article 4.5, we have inserted article 4.6 to make clear that a supplier may send notification electronically provided that this notification has also be sent by first class post.

Statements and documents

Article 5.1

36. Article 5.1 has been amended to refer to the notification provided by the customer of termination of contract and request for tank transfer, consistent with article 2.4. Respondents [Shell, BP] noted that the previous drafting of this article suggested that notice of a tank transfer request would have no effect if not accompanied by contractual notice and that there was no provision for the customer to provide these notices directly to the existing supplier. Our redrafting makes clear that the existing supplier must be in receipt of both a tank transfer notice and contractual notice, but that these notices may have come either from the new supplier or the customer. Article 5.1 has also been amended to align with the new provision in article 4.4.

Article 5.2

37. Article 5.2(a) as previously drafted created an obligation on the existing supplier to provide documents in relation to the tanks that were in its 'control'. One respondent [Shell] suggested that it was not clear what would constitute control and that the article was therefore ambiguous. We have therefore amended the article to refer to documentation that the existing supplier has. This article has also been amended to exclude provision of information on telemetry equipment, as one respondent [Calor] to the consultation noted that this equipment will not transfer with the tank and it may be proprietary.
38. Article 5.2(b) has been inserted to deal separately with telemetry equipment, requiring the existing supplier to provide information to the new supplier as to its existence, rather than (as previously) documentation in relation to the equipment itself [Calor].
39. Article 5.2(c) as previously drafted created an obligation on the existing supplier to provide information in relation to the service pipework. One respondent [Shell] noted that, as previously drafted and unlike the obligation to provide information in relation to the tank, there was no qualification on this obligation. We have therefore amended this article so that the existing supplier is obliged to provide any information that it has. This article now mirrors article 5.2(a).
40. Article 5.2(d) has been added in response to the point noted by one respondent [Calor] that it will be important in the case of underground tanks for any documentation relating to cathodic protection to be supplied by the existing supplier to the new supplier.

Article 5.4

41. This article has been amended to make clear that the requirement to provide a copy of the customer's contract 'as soon as is reasonably practicable' means 'in any event within five working days'.

Article 5.5

42. One respondent [Shell] noted that, as previously drafted, this article did not contain a time period within which the existing supplier must provide the customer with a copy of his or her contract or else have the customer deemed eligible to switch, and said that it therefore would not be clear to the supplier when the customer had been

deemed eligible to switch. In order to make this clear, where the statement of eligibility states that a customer is not eligible to switch, the existing supplier is now required under Article 5.4 to provide the customer with a copy of his or her contract stating when he or she will be eligible to switch within five working days of having received notification of termination of contract and a request for tank transfer. This means that the existing supplier will need to provide the customer with a copy of his or her contract in the same period in which it must provide the new supplier with a statement of eligibility to switch.

Article 6.2

43. Wording has been added to give the new supplier and the existing supplier two working days to reach agreement on the price of the tank, following the new supplier's receipt of the information and documentation set out in articles 5.2 and 5.3. As one respondent [Shell] pointed out, such a provision was stipulated in our final report in paragraph 7.21.

Article 6.3

44. This article has been amended to make clear that once the new supplier has decided to purchase the tank and notified the existing supplier accordingly, the new supplier has no right to insist on the installation of a new tank.
45. One respondent [BP] suggested that we should require the new supplier only to provide reasons for any decision not to acquire the tank to the customer, and not to the existing supplier. Article 6.3 now makes appropriate provision.

Article 6.4

46. [Shell] pointed out that, without the words 'unless the tank has already been sold by the existing supplier to a new supplier or another new supplier has already given notice under Article 6.3', this article could create an obligation on the existing supplier to uplift the tank where another new supplier serves notice in relation to the same customer. Another respondent [BP] suggested that the provisions of article 10 should not apply unless the new supplier and the existing supplier had agreed that a new tank should be installed. This article has now been extensively redrafted to clarify its purpose, which is to ensure that when a customer who has decided to switch using tank transfer but is unable to do so because the new supplier serves a notice under article 6.3(b) may then opt for a tank uplift with the same new supplier without the timetable being restarted.

Article 6.5

47. One respondent [BP] told us that, as previously worded, the requirement on the new supplier to 'obliterate' the signage of the existing supplier was too strong, noting that some information may be stamped into the surface of the tank. We have therefore amended this article to oblige the new supplier to render the existing supplier's signage illegible, which we consider important in order to maintain clarity over responsibility for emergency cover.
48. Article 6.5(c) has been amended, in response to a comment from a respondent [Calor], to require the new supplier to display its signage not only on or near to the tank but also on or near to the emergency control valve.

Article 6.6

49. The words 'if applicable' have been added to reflect that fact that the ownership of service pipework will not in all cases transfer.

Article 7.2(a)

50. This article has been amended to make clear that the 'supplier' for the purposes of article 7.1 may be the existing supplier or the new supplier.

Article 8.1

51. One respondent [Shell] noted that in some cases telemetry equipment is integrated with the tank contents gauge so that, where the telemetry equipment is removed, a new contents gauge will be needed in order to allow the reading of the volume of LPG in the tank, which is important for health and safety reasons. We have therefore amended this article to oblige an existing supplier removing its telemetry equipment to supply and fit an appropriate contents gauge to the tank where necessary and at no cost to the new supplier.

Tank transfer time limit

Article 9.1

52. This article has been amended to incorporate the new provisions covering deemed notification.

Article 9.2

53. One respondent [BP] noted that it may be necessary for works to take place that do not require the tank to be resited. We have added the words 'or that other works are required' to provide for this. This respondent suggested that we should refer to 'civil or other remedial works' but we consider that 'other works' is sufficient to cover this.

Article 9.3

54. One respondent [Shell] commented that the new supplier should inform the existing supplier of the change to the tank transfer time limit as a result of resiting or other work. This article has been added to achieve this.

The tank uplift process requirements

Notices and statements

Article 10.1

55. This article has been simplified and the requirement for a statement of tank ownership has been removed as it was considered unnecessary for a tank uplift process [Calor].

Article 10.2

56. This article has been amended to align with the provisions of article 5.4.

Article 10.3

57. This article has been amended to mirror article 5.5 in relation to the circumstances in which a customer is deemed eligible to switch [Shell].

Article 13

58. This article makes clear that the existing supplier cannot charge the customer for any costs directly connected with the uplift of the tank at the point of uplift. The intention is that a customer should not be disincentivized or precluded from changing suppliers because of the imposition of a charge by the existing supplier. For the avoidance of doubt, it is not intended that the existing supplier should be unable to recover such costs, but they must be built into a supplier's overall cost of supply when taking on a new customer, not levied at the point where the customer exercises a choice to switch supplier.

The switching process time limit

The overall limit

Article 14

59. This article has been amended to improve clarity and also to provide for days to be disregarded in specific circumstances for the purposes of calculating compliance with the time limit.
60. Article 14.3 has been added so as to ensure that the overall time allowed for the switching process will not include any days disregarded if resiting or other works need to be undertaken.
61. Article 14.4 has been added in order to clarify how the time limits in this Order relate to the 'cooling-off' period that applies after a customer signs a contract [Shell].

Articles 15.5 and 15.6

62. This Article has been amended to make clear the distinction between those elements which must be incorporated as terms into a contract between a customer and a supplier and those which must be provided by way of information at the time that such a contract is made.

Customer contracts

Article 16.4

63. This article has been inserted to provide for a situation in which trade associations cease to exist.

Information on invoices

Article 17.1

64. This article has been amended slightly to ensure that the amount of LPG supplied is stated in litres, conforming explicitly to paragraph 7.109 of the final report, and also to make clear that the statement of price in pence per litre is for the amount of LPG supplied under that invoice.

Suggested changes not made

Title, commencement, application and interpretation

Article 1.3

65. The definition of 'metered estates' has been retained here as it is necessary to make clear what this first Order does not cover. The definition has not been amended to refer to the consumption of 'each customer' being measured by a meter as we understand that it is not always the case that each customer's consumption is measured by an individual meter [Shell].
66. We have not amended the definition of 'existing supplier' so as to link the definition to the responsibility for provision of emergency cover under article 7. This is because we wish to ensure, for the purposes of legal certainty, that the emergency cover provisions in this Order mirror as closely as possible in their wording those of the GSIUR [Calor].

Article 2.1

67. One respondent to our consultation [Shell] suggested that only customers who were eligible to switch should be permitted to request tank transfer. We consider that it is better to allow all customers to request tank transfer but to provide for an assessment of the customer's eligibility to switch, and the notification of this by the existing supplier to the new supplier, in the switching process (as is provided for in article 5).

Article 3.2

68. One respondent suggested that article 3.2 should compel suppliers to use their best endeavours to ensure continuity of supply. We considered that this went too far, as there may be circumstances where it would be unreasonable to require suppliers to ensure continuity of supply.

Notices

Article 4.1

69. One respondent [LPGA] suggested that article 4.1 should begin 'If a new supplier receives a notice from a customer *following receipt of a formal quote*, requiring the new supplier ...'. Although it is likely to be the case, we did not consider that it should be necessary for the customer to have received a formal quote from a new supplier before giving notice of termination of contract to the existing supplier. We have not therefore made this change.

Statements and documents

Article 5.2

70. One respondent [Shell] noted that it does not own the service pipework and therefore cannot transfer title to it. We do not consider that this suggests any need to change this article, as we consider that the existing supplier should be required to provide what information it has in relation to service pipework whether or not it owns that pipework and whether or not title will transfer.

Article 5.5

71. One respondent [Shell] said that it was not appropriate for the new supplier to determine whether or not the existing supplier has complied with its obligations as the new supplier has an interest in the customer switching away from the existing supplier. First, we do not consider that the new supplier will ultimately determine whether the existing supplier has complied with its obligations; this will be a role for the OFT. Second, we note that if the switching process and the tank transfer process has begun, then it is likely that the customer is already lost to the existing supplier. Third, we consider that the fact that the new supplier will wish to maintain a good relationship with its new customer provides it with an incentive to work to complete the switching process and the tank process in line with our remedy, to observe whether the behaviour of the existing supplier is in line with our remedies and to pursue suspicions of non-compliance as appropriate, which may include reporting them to the OFT. We have therefore made no change to this article in response to this comment.

Tank transfer and valuation

Article 6.2

72. One respondent [BP] asked us to clarify whether VAT will be payable on tanks. We do not consider that it is appropriate for us to provide guidance on such matters and refer suppliers to HMRC.

Article 6.4

73. One respondent suggested introducing a new article following article 6.4 stating that 'the new supplier shall take ownership of the tank and full responsibility for the tank on the date of purchase'. However, we consider that such a statement may work against the wording in article 7 in relation to emergency cover, and we therefore do not consider it appropriate to insert this article.

Emergency cover

Article 7

74. One respondent [Calor] suggested amending the beginning of article 7.1 to refer to 'the new or existing supplier' and then to delete article 7.2(a). It also suggested ways in which article 7.2(a) could be clarified. However, we consider that the wording of article 7 is closely related to the wording of the GSIUR so that it would not be helpful to amend it.

75. Another respondent [BP] asked for clarification as to the identity of the ‘supplier’ where title of the tank has transferred but gas supplied by the existing supplier remains in the tank. We consider that since this clarification relates to the operation of the GSIUR, and since the wording of this article is closely related to the wording of the GSIUR, the HSE is better placed to respond to this point. It has now confirmed that in its view the wording and provisions of Article 7 are compatible with the requirements of the GSIUR.

Telemetry equipment

Article 8

76. One respondent [Shell] suggested that we should make clear that the new supplier will not be obliged to pay compensation to the existing supplier for any damage to the telemetry equipment. Since the new supplier will only remove the telemetry equipment if the existing supplier has agreed that it will do so, or if the existing supplier has not removed it within 14 days of the date of purchase of the tank, we do not consider that it is necessary to stipulate that no compensation will be paid. If suppliers wish to agree to have telemetry equipment removed by the new supplier on a ‘no compensation’ basis, they will be free to do so.

Tank uplift

Article 11

77. One respondent [Shell] noted that the time limits in this article allow for a switching customer to be without LPG for up to six working days, which it considered undesirable from a customer service perspective. We note that article 3.2 requires the new supplier and the existing supplier to use all reasonable endeavours to ensure continuity of supply during the switching process. We also do not consider that it would be in the interests of either the existing supplier or the new supplier to leave the customer without LPG for any period longer than was strictly necessary. We therefore do not consider it necessary to change this article.
78. Another respondent [BP] asked for greater clarity as to what was meant in the previous draft by ‘make arrangements’ (now ‘put in place arrangements’). We have not materially changed the wording of the order but have amended the explanatory note to make clear what is meant.
79. The same respondent asked us to change the five working day limit in article 11.1(c) to ten working days because it believed that contractors that complete such installation would require at least a week’s notice prior to the installation taking place and in busy periods may not have capacity to complete installations in requested timescales. However, we note that the five working day time period begins when the new supplier has received notice of the existing supplier having removed its tank and we consider that in practice a new supplier is very likely to be able to put in place arrangements for an installation before it receives this notice. We also note that we would expect the existing supplier and the new supplier to work together to ensure continuity of gas supply (as stipulated by article 2.3). We have therefore not made any change to accommodate this request.

Tank uplift charges

Article 13

80. One respondent [BP] suggested that we should allow the existing supplier to charge the customer where the customer has undertaken work or has omitted to undertake work with the consequence that the existing supplier is unable to conduct a standard uplift process. We note that no provision for such a charge was set out in our final report, which stated in paragraph 7.87 that 'switching charges outgoing suppliers are permitted to levy on customers who switch should be capped at zero'. We also consider that such a provision would add substantial complexity to our remedies, as it would be necessary to set out what constituted a standard uplift process and how the judgement as to whether the customer had taken steps (or not taken steps) that necessitated a non-standard uplift would be made. We do not therefore intend to make this change.

The switching process time limit

The overall time limit

Article 14

81. One respondent [Shell] said that we should place an obligation both on the new supplier and the existing supplier to effect the switch within 42 days, rather than just having an obligation on the new supplier. However, we consider that it is preferable to have the obligation rest on a single supplier rather than on both suppliers, and we consider that it is preferable to place the obligation on the new supplier, as the new supplier will have the incentive to effect the switch to acquire the customer. We note that the order does place time-specific obligations on the existing supplier where the existing supplier would have scope to delay the switching process (eg by failing to provide documents). We have therefore made no change in this respect.