

# ENERGY ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2: Sustainability and Renewable Energy Sources**

##### *Chapter 1: Sustainable Energy*

##### *Section 81: Reports under section 1 of the Sustainable Energy Act 2003*

236. [Section 81](#) amends section 1 (annual reports on progress towards sustainable energy aims) of the Sustainable Energy Act 2003. The annual report required under the Sustainable Energy Act must now include information about the development and bringing into use of new energy sources and actions taken to maintain the levels of scientific and engineering expertise necessary for the development of new energy sources. The report will need to cover work carried out in relation to clean coal technology, coal mine methane, biomass, biofuels, fuel cells, photovoltaics, wave and tidal generation, hydrogeneration, microgeneration, geothermal sources and any other carbon-reducing technologies. The section also imposes a requirement for this annual report to look at actions taken to achieve the Government's energy efficiency aims designated under the Sustainable Energy Act.

##### *Section 82: Microgeneration*

237. [Section 82](#) requires the Secretary of State to prepare, publish, and take reasonable steps to implement, a strategy for the promotion of microgeneration in Great Britain. For the purposes of this strategy, microgeneration is defined as the generation of under 50kW electricity or, in relation to heat, the production of under 45kW thermal. The strategy will look at electricity and/or heat generated from biomass, biofuels, fuel cells, photovoltaics, water (including waves and tides), wind, solar power, geothermal sources, combined heat and power, and any other source of energy that will, in the opinion of the Secretary of State, help reduce greenhouse gas emissions. The section stipulates that the strategy must be published within 18 months of commencement of the relevant section of the Energy Act.

##### *Section 83: Sustainable development*

238. [Section 83](#) inserts a new duty into section 3A of the [Electricity Act 1989 \(c.29\)](#) and section 4AA of the [Gas Act 1986 \(c.44\)](#) which requires the Secretary of State and GEMA to carry out their respective functions under Part 1 of both Acts in a manner he or it considers is best calculated to contribute to the achievement of sustainable development.

##### *Chapter 2: Offshore Production of Energy*

##### *Section 84: Exploitation of areas outside the territorial sea for energy production*

239. This section vests in Her Majesty the rights of the UK in Part V of UNCLOS only as regards the production of energy from water or winds. Section 104(2) makes it clear

that the reference to energy from water includes the production of energy from both currents and tides. The rights vested encompass exploration activities and exploitation of these renewable energy resources and related purposes. The most important such purpose is the transmission and distribution of the electricity generated using water and wind power to markets onshore. Part V of UNCLOS includes rules about establishing the breadth of the exclusive economic zone. The section contains a power to designate by an Order in Council the extent of a Renewable Energy Zone around the UK to be established in accordance with the rules laid down in UNCLOS. The Renewable Energy Zone is the area within which the UK is able to exercise its rights to produce energy from water or winds.

### ***Section 85: Application of criminal law to renewable energy installations***

240. This section provides a power to establish, by Order in Council, criminal jurisdiction over any “renewable energy installation” in a Renewable Energy Zone and over the waters within a safety zone declared pursuant to section 95. A “renewable energy installation” is defined in section 104, subsections (3) to (5). This section also provides for an Order in Council to extend the jurisdiction of the police in relation to offences which might have been committed on, under or above a renewable energy installation or in waters within a safety zone.
241. An Order in Council may extend not only to renewable energy installations in a Renewable Energy Zone but also to those in tidal waters and parts of the sea in or adjacent to Great Britain up to the limits of the territorial sea. The intention is that an Order in Council will ensure uniformity of criminal jurisdiction for all renewable energy installations in the waters covered.

### ***Section 86: Prosecutions***

242. This section makes provision for the prosecution of criminal offences which might have been committed on, under or above a renewable energy installation in tidal waters, the territorial sea or the Renewable Energy Zone or on, under or above such of these waters that at the time of the alleged offence were within a safety zone. It excludes offences created by or under a number of statutes which have their own prosecuting regimes. The section provides that the consent of the Director of Public Prosecutions or the Director of Public Prosecutions for Northern Ireland is required before proceedings for an offence are brought in England and Wales, and Northern Ireland respectively. No provision is necessary in respect of Scotland as the consent of the Lord Advocate is needed for all prosecutions.

### ***Section 87: Application of civil law to renewable energy installations***

243. This section enables civil law to be applied by Order in Council to renewable energy installations and to cables which are, will be or were used for carrying electricity to or from such an installation. The Order in Council can specify which part of the law in force in the United Kingdom is to apply and can also make provision for which courts (defined to include tribunals and regulatory bodies) are to have jurisdiction.

### ***Section 88: Orders in Council under sections 85 and 87***

244. Sections 85 and 87 apply to renewable energy installations wholly or partly in Scottish offshore waters including the Scottish part of the Renewable Energy Zone designated under section 84(5). An Order in Council could potentially cover civil or criminal law matters which are wholly reserved under the Scotland Act 1998, wholly devolved or a mix of both. Section 88 sets out the parliamentary procedure to be followed, depending on the subject matter of the Order in Council. In the case of wholly reserved matters the Order in Council would be subject to the negative resolution procedure in the Westminster Parliament. Where the Order in Council deals with wholly devolved matters then it would be subject to an annulment in pursuance of a resolution of the

Scottish Parliament. Where the Order in Council includes both reserved and devolved matters it would need to be subject to the procedures of both the Westminster and Scottish Parliaments.

### ***Section 89: Activities offshore requiring 1989 Act licences***

245. Section 4 of the Electricity Act 1989 prohibits the generation, transmission, distribution and supply of electricity to any premises without a licence (section 135 of this Act amends section 4 in respect of transmission activities requiring a licence while section 145(2) also amends section 4 to include the participation in the operation of an electricity interconnector as a licensable activity). Section 5 of that Act gives a power to the Secretary of State to grant exemptions from this licensing requirement and section 6 provides for the issue of licences. This section amends section 4 of the Electricity Act so that the prohibitions (and licensing and exemption regime) also apply in a Renewable Energy Zone and confirms that the regime applies in the territorial sea adjacent to Great Britain.

### ***Section 90: Modification of licence conditions for offshore transmission and distribution***

246. This section empowers the Secretary of State to modify the standard conditions of transmission and distribution licences (and make incidental, consequential or transitional changes to particular transmission or distribution licences) and associated codes. This power will enable the Secretary of State to reflect in standard licence conditions the different environment offshore, for example the differences in engineering involved in putting cables in the sea rather than on land. The power is only exercisable within 18 months of the commencement of the section.

### ***Section 91: Extension of transmission licences offshore***

247. **Section 135** amends section 4 of the Electricity Act by replacing the prohibition on transmission of electricity with a prohibition on participation in the transmission of electricity. Section 135(3) provides that coordinating and directing the flow of electricity onto and over a transmission system constitutes participation. This section enables the Secretary of State to modify a transmission licence in force at the commencement of the section which authorises a person to co-ordinate and direct the flow of electricity so it applies offshore to the extent set out in section 91(2). Section 91(4) also gives the Secretary of State power to modify standard conditions of any electricity licence or a particular electricity licence for incidental, consequential or transitional purposes. The power is only exercisable within 18 months of the commencement of the section.

### ***Section 92: Competitive tenders for offshore transmission licences***

248. This section inserts a new section 6C into the Electricity Act 1989 to enable GEMA to make regulations setting out the process to be followed by it in awarding offshore transmission licences by competitive tender. There were no offshore transmission licences in force at the time of the passing of this Act.

### ***Section 93: Consents for generating stations offshore***

249. The effect of subsection (1) is to extend the requirement for consent to the construction, extension or operation of a generating station as set out at section 36 of the Electricity Act 1989 to a generating station in a Renewable Energy Zone and to confirm that the regime applies in territorial waters adjacent to Great Britain.
250. Schedule 8 to the Electricity Act 1989 sets out detailed provisions about the operation of the section 36 licensing regime. Subsection (2) introduces new provisions to cater for situations where the generating station for which a consent is required is not within the area of a relevant planning authority. Schedule 8 to the Electricity Act provides

at the moment that where a relevant planning authority maintains an objection to an application for a section 36 consent, the Secretary of State must arrange for a public inquiry to be held. This Schedule was drawn up before marine generating stations were a reality and its effect in regard to such generating stations is not wholly clear. The new provisions make it clear that the requirement for a public inquiry following an objection by a local planning authority does not apply where none of the places to which the application for section 36 consent relates is within the area of a relevant planning authority. The subsection goes on to provide for situations where the section 36 application relates to places which are partially within the jurisdiction of one or more relevant planning authorities.

#### ***Section 94: Application of regulations under 1989 Act offshore***

251. Section 29 of the Electricity Act 1989 provides for regulations to be made relating to the supply and safety of electricity. Section 30 of that Act provides for electrical inspectors to be appointed and describes their role. This section extends these provisions to a Renewable Energy Zone and confirms their application to the territorial sea adjacent to Great Britain.

#### ***Sections 95 to 98: Safety zones for installations***

252. These sections give a discretionary power to the Secretary of State to issue a notice declaring one or more safety zones around a renewable energy installation. The Secretary of State has the flexibility to declare a safety zone as appropriate for the main stages of the life of renewable energy installation - the construction, extension and decommissioning phases, which are relatively short, as well as the longer operational phase. A notice can be issued where the renewable energy installation is at the proposal stage in regard to its construction, extension, operation or decommissioning or equally when these activities are in progress.
253. They also give the Secretary of State the flexibility to state in the notice which activities are prohibited within a safety zone or how such matters are to be determined, and which vessels may enter or remain in the safety zone or carry on prohibited activities. Determinations under a safety zone notice may be made by the Secretary of State or delegated to some other person.
254. **Section 96** prohibits vessels from entering or remaining in a safety zone and carrying out activities except where permitted to do so by a notice declaring a safety zone. The Secretary of State also has the power to make regulations setting out general permissions allowing vessels to enter any safety zone and carry out activities. This is in addition to any individual permissions granted in the notice declaring that safety zone.
255. **Section 97** makes it an offence for a vessel to enter or remain in a safety zone and for activities to be carried on there unless permission has been given in an individual safety notice or regulations made by the Secretary of State. The section sets out certain defences. Section 98 extends criminal responsibility to certain persons other than the master or owner of the vessel who were responsible for the commission of the offence.

#### ***Sections 99 and 100: Navigation and public rights of navigation***

256. These sections introduce a new section, section 36A, into the Electricity Act 1989 whereby the Secretary of State or Scottish Ministers (within their respective competence) have the power to make a declaration extinguishing public rights of navigation. The power applies only where the generating station is to be located in territorial waters adjacent to Great Britain and other tidal waters up to the low water mark. Section 100 applies in cases where a section 36 consent has been granted before the commencement of section 99.
257. The declaration relates only to public rights of navigation which apply to the site of the renewable energy installation. There is various provision in respect of the effect of the

declaration on rights of navigation, when it takes effect and the information which the declaration has to give. It is important that the declaration becomes known to those with an interest and subsection (6) of new section 36A of the Electricity Act 1989, as inserted by section 99, places an obligation on the Secretary of State to ensure that this happens.

258. Subsection (2) of section 99 integrates the process for applying for a declaration with the process for a section 36 consent, as set out in Schedule 8 of the Electricity Act 1989. Subsection (3) of section 99 excludes the functions in the new sections 36A and 36B of the Electricity Act from the principal objectives and general duties of the Secretary of State set out in sections 3A to 3C of that Act.
259. **Section 99** also introduces a second new section, section 36B, into the Electricity Act 1989 which places certain duties on the Secretary of State or Scottish Ministers in relation to navigation when exercising their section 36 powers. Subsection (1) of section 36B requires the Secretary of State and Scottish Ministers to refuse to grant a section 36 consent where a generating station is likely to cause interference with the use of recognised sea lanes essential to international navigation. The term “use of recognised sea lanes essential to international navigation” is defined at section 36B(7).
260. Where in the judgment of the Secretary of State or Scottish Ministers there would be no interference with the use of recognised sea lanes essential to international navigation, subsection (2) requires them then to have regard to the nature of any obstruction or danger to navigation in deciding whether to grant a section 36 consent and, if a consent is granted, what conditions may be included in the consent. Under subsections (3) and (4) (a) the Secretary of State and Scottish Ministers must take into account the cumulative impact of generating stations in the area which have already been consented to and those which are likely to be consented to in making their assessment of the effect on the safety of navigation, as well as how they have or will exercise their powers in regard to the extinguishment of public rights of navigation. The Secretary of State must also take account of how he has or will exercise his powers under the Act in respect of safety zones and decommissioning (subsection (4)(b)).
261. As subsection (2) of section 36B provides the same safeguards as a consent under section 34 of the Coast Protection Act 1949, generating stations which are granted a section 36 consent after the commencement of these provisions do not require a Coast Protection Act consent. This disapplication of the requirement for a section 34 Coast Protection Act consent applies in Scotland only if Scottish Ministers so provide by order made by a statutory instrument and approved by the Scottish Parliament.

### ***Section 101: Application of civil aviation regulations to renewable energy installations***

262. By virtue of section 60(3) of the **Civil Aviation Act 1982 (c.16)** the Civil Aviation Authority may regulate, by means of an Air Navigation Order, aircraft on or in the neighbourhood of offshore oil and gas installations and the lighting of such installations for safety purposes. Section 106 of the 1982 Act states that an Order made under section 60 extends to territorial waters. Section 101 enables the Civil Aviation Authority to regulate (a) aircraft on or in the neighbourhood of a renewable energy installation in a Renewable Energy Zone and (b) the lighting of such an installation.

### ***Section 103: Other amendments consequential on Chapter 2 of Part 2***

263. The **Submarine Telegraph Act 1886 (c.49)** brought into effect the 1884 Submarine Telegraphs Convention for the protection of submarine telegraph cables. Section 8 of the **Continental Shelf Act 1964 (c.29)** extended the provisions of the Act to cover other submarine cables and pipelines. Additionally the 1964 Act extended the Submarine Telegraph Act to cover pipelines only in the territorial sea. Subsection (1) extends the Submarine Telegraph Act to all submarine cables under the territorial sea and to waters in an area designated under section 1(7) of the Continental Shelf Act.

264. It may be the case that there is an overlap between sites which are most suitable for the exploration and exploitation of renewable energy sources on the one hand and petroleum resources on the other. Subsection (4) enables the Secretary of State to take the generation of electricity and related activities into account in exercising or performing the powers and duties conferred or imposed on him by or under the Petroleum Act 1998. Conversely the Secretary of State will take into account the exploration for or exploitation of petroleum resources in the exercise of the powers available to him in regard to the generation of electricity from renewable resources, although no legislative changes are necessary in this case.

### ***Chapter 3: Decommissioning of Offshore Installations***

#### ***Section 105: Requirement to prepare decommissioning programmes***

265. This section gives a discretionary power to the Secretary of State to impose an obligation on a person to submit a costed decommissioning programme before a renewable energy installation (or part of it) or a related electric line has been installed. The Secretary of State may impose this obligation on a person at any time after at least one of the relevant statutory consents has been granted (or has been applied for and is likely to be granted) so that arrangements for decommissioning are in place at an early stage. Equally the Secretary of State can also issue a notice requiring a decommissioning programme to be submitted at subsequent stages in the life cycle of these assets. This section works in conjunction with section 112 which makes it an offence for a person not to inform the Secretary of State when he becomes responsible for these assets.
266. The decommissioning programme may be accompanied by details of the security arrangements, whether financial or otherwise, which the recipient of the notice proposes to put in place to ensure that funds are available to carry out the decommissioning programme. A non-exhaustive list of things that will constitute security for this purpose is given at section 114(2).

#### ***Sections 106 and 107: Approval of decommissioning programmes and failure to submit or rejection of decommissioning programmes***

267. These sections set out a process for the approval of decommissioning programmes by the Secretary of State and provide for situations where either the person responsible for submitting the programme fails to do so or the programme which is submitted is considered by the Secretary of State to be inadequate and is rejected. In these latter two cases the Secretary of State has the power to prepare himself a suitable decommissioning programme and recover costs from the responsible person.

#### ***Section 108: Reviews and revisions of decommissioning programmes***

268. Subsection (1) sets out the Secretary of State's duty to review approved decommissioning programmes from time to time. Subsections (2) to (9) set out the process for dealing with modification of decommissioning programmes and the transfer of ownership of renewable energy installations or related electric lines. The process can be initiated either by the Secretary of State or the person who has the duty to carry out the decommissioning programme. Again the powers in the section are supplemented by the requirement at section 112 to inform the Secretary of State where a person becomes responsible for a renewable energy installation or related electrical lines.

#### ***Section 109: Carrying out of decommissioning programmes and section 110: Default in carrying out decommissioning programmes***

269. In the normal course of events these sections come into play when the renewable energy installation or related electric line is ready to be decommissioned. In most cases decommissioning will take place many years after the initial decommissioning programme was drawn up. Section 110 sets out a process to cover such situations

where either the decommissioning does not take place or is not in accordance with the approved programme. These sections also provide sanctions if a condition relating to decommissioning, such as the obligation to maintain the required security, is breached before the decommissioning stage actually commences.

#### ***Chapter 4: Renewables Obligations Relating to Electricity***

##### ***Section 115: Discharge of renewables obligation in Great Britain by payment***

270. Section 32(3) of the Electricity Act 1989 provides that electricity suppliers must before one or more specified days provide to GEMA evidence regarding their supply of electricity generated from renewable sources to discharge their renewables obligation. The effect of section 115(1) is to make it clear that the Secretary of State may provide for more than one specified day in a year. This would mean suppliers would be required to produce evidence of their compliance with the renewables obligation before each of the days. The timing of each specified day and the associated obligation periods would be set out in an order.
271. Section 32C of the Electricity Act 1989 provides that an order made under section 32 may allow electricity suppliers to discharge their renewables obligation by making buy-out payments to GEMA, instead of producing evidence regarding their supply of electricity generated from renewable sources. Section 115(2) – (5) amends section 32C and provides for suppliers who have not discharged their renewables obligation by the specified day, to be treated as having discharged it by making a late buy-out payment. The Secretary of State is also empowered to introduce surcharges which will be added to any late buy-out payments made by a supplier. This power also allows for the surcharge to increase at a daily rate from the date on which the supplier should have complied with the renewables obligation. The Secretary of State may also specify steps under 27A of the Electricity Act 1989 which cannot be taken during a specified period following the date on which the supplier should have complied with the renewables obligation. The period during which late payments can be made, the amount of the surcharge and the manner of its calculation would be set out in an order.
272. **Section 115** also provides that an order under section 32 of the Electricity Act may require suppliers to make payments to GEMA to make good some or all of any previous unrecovered shortfall in the buy-out fund. This process is known as mutualisation. Mutualisation payments can be required from either suppliers with a renewables obligation at the time the shortfall occurred, or suppliers with a renewables obligation in a subsequent specified period, and can be adjusted or repaid as provided in the order. To allow for the operation of the late payment regime described above, mutualisation will not take place until after the end of the late payment period. Section 115 also provides that an order under section 32 of the Electricity Act 1989 may provide that sections 25 to 28 of the 1989 Act apply, in relation to mutualisation, to a person who is not the holder of a relevant licence as though they were a holder of such a licence. This provision would enable GEMA to take enforcement action for breach of the mutualisation provisions against a company who had been a licensed supplier at the time of a shortfall, but who had subsequently disposed of its licence. The Secretary of State is also empowered to provide for mutualisation payments to be made where there is a shortfall in the Northern Ireland buy out fund.

##### ***Section 116: Issue of green certificates in Great Britain***

273. **Section 116** provides that an order under section 32 of the Electricity Act 1989 may, by virtue of section 32B, empower GEMA to issue renewables obligations certificates (“ROCs”) to Northern Ireland suppliers as well as to GB suppliers and the operators of generating stations. It also provides that such an order may provide for the issue of ROCs in respect of renewables electricity which is generated by certain generating stations and supplied to customers in Northern Ireland, and that a GB supplier may discharge its renewable obligation in GB by presentation of these certificates.

***Section 117: Use of green certificates issued in Northern Ireland***

274. [Section 117](#) provides that an order made under section 32 of the Electricity Act 1989 may provide for a GB electricity supplier to discharge its renewables obligation in GB by producing a renewables obligation certificate issued under the Northern Ireland equivalent of the section 32 order (a “NIROC”).

***Section 118: Distributions to Northern Ireland suppliers***

275. Section 32C of the Electricity Act 1989 provides that an order made under section 32 may allow electricity suppliers, instead of producing evidence regarding the supply of electricity generated from renewable sources, to discharge their renewables obligation by making payments to GEMA. Section 32C(3) requires GEMA to distribute the amounts so received (which are known as the “buy-out fund”) to electricity suppliers in Great Britain in accordance with an order made under section 32. Section 118 amends section 32C by providing that Northern Ireland electricity suppliers shall also be potentially eligible for distribution by GEMA by virtue of section 32C(3).

***Section 120: Issue of green certificates in Northern Ireland***

276. [Section 120](#) relates to the issue of NIROCs under the Energy (Northern Ireland) Order 2003 and amends that Order accordingly. The section defines Northern Ireland for the purpose of the issue of NIROCs as excluding the territorial sea adjacent to Northern Ireland. This avoids overlap between GEMA’s role and that of the Northern Ireland Authority for Energy Regulation (“NIAER”) in respect of electricity supplied to customers in Northern Ireland, by providing that NIAER will issue NIROCs for generating stations located in Northern Ireland (including its inland waters but not UK territorial waters adjacent to Northern Ireland). GEMA will issue ROCs under the Electricity Act in respect of electricity produced by all other generating stations (including electricity supplied to customers in Northern Ireland).
277. The section also inserts a new provision providing for arrangements to be made for the sale of NIROCs, relating to electricity supplied under the non fossil fuel regime as applicable to Northern Ireland, separately from that electricity. Without this provision, Great Britain suppliers are unlikely to participate in auctions of NIROCs with the underlying electricity since they would have no use for the electricity which currently cannot in practice be exported from Northern Ireland to Great Britain because of interconnector limitations. This provision therefore puts all UK electricity suppliers on an equal footing in respect of such NIROCs, and at the same time improves the liquidity of the market in any competitive auction or other sale process for those NIROCs.
278. The section also allows the Department of Enterprise, Trade and Investment in Northern Ireland (“DETI”) to direct the application of the proceeds of such sale.

***Section 121: GEMA’s power to act on behalf of Northern Ireland regulator***

279. This section permits GEMA and NIAER to enter into, and give effect to, arrangements for GEMA to carry out NIAER’s functions under articles 52 to 55 of the [Energy \(Northern Ireland\) Order 2003 \(S.I. 2003/419\)\(N.I.6\)](#) (that is, NIAER’s functions in administering the Northern Ireland renewables obligation). These arrangements are expected to be negotiated subsequently between GEMA and NIAER.

***Section 122: Consultation in relation to Northern Ireland renewables orders***

280. This section enables DETI to consult on a renewables obligation order in Northern Ireland as soon as possible, and if necessary before it has made the amending order that it needs to make to the Energy (Northern Ireland) Order 2003 to reflect the changes introduced to the Electricity Act by this Act.

***Section 123: Modification of conditions of Northern Ireland electricity licenses***

281. This section inserts a new provision into the Energy (Northern Ireland) Order 2003 that provides DETI and NIAER with a power to modify electricity licence conditions in Northern Ireland where they consider it necessary or expedient to do so in connection with amendments made to that Order either directly by section 120 of this Act or by an amending order made to take account of amendments to the Electricity Act made by this Chapter of the Energy Act.

***Chapter 5: Renewable Transport Fuel Obligations***

***Section 124: Imposition of renewable transport fuel obligations***

282. This section enables the Secretary of State to make an order imposing a “renewable transport fuel obligation” (“RTFO”) on specified parts of the UK transport fuel supply sector. Sections 125 to 132 elaborate on this order-making power. The powers in these sections apply to the whole of the United Kingdom.
283. Subsection (2) defines the obligation. An RTFO would require designated transport fuel suppliers to produce to the appointed Administrator evidence of a specified kind and in a specified form, showing that, within the relevant period, a specified amount of “renewable transport fuel” was supplied within the UK. The section would allow the requisite amount of fuel to be supplied either by the obligated supplier directly, or (wholly or partly) by other suppliers. The obligation periods, and the amount of “renewable transport fuel” (“RTF”) to be supplied in each period, would be specified. For these purposes “specified” means specified in, or determined in accordance with, the order (see section 132(1)).
284. Subsection (4) requires the Secretary of State to consult with relevant stakeholders before making any order under this section.
285. Subsection (5) states that the power to make an order introducing an RTFO is subject to the affirmative resolution procedure.

***Section 125: The Administrator***

286. This section enables the Secretary of State to appoint a body to administer an RTFO, and to determine the functions and funding of that body.
287. Subsection (2) allows an order to confer or impose powers, duties and discretions upon the Administrator in connection with an RTFO and to impose duties on suppliers in relation to the Administrator.
288. Under subsection (3), these may include powers for the Administrator to require suppliers to provide certain information it needs to carry out its functions, and to impose charges on suppliers. The level of charges (or 'specified amounts') would be specified in the order.
289. Subsection (4) states that sums received through any charges imposed must be used solely towards meeting costs incurred by the Administrator in carrying out his functions. This would allow the Administrator potentially to be funded entirely through the operation of the RTFO itself.
290. Where an order imposes duties on suppliers, subsection (5) allows such duties to be framed by reference to determinations made by the Administrator. For example, such a duty may be framed in such a way so that it only arises on the making of a particular determination by the Administrator.
291. Subsection (6) enables the Secretary of State to appoint either an existing statutory body or person as the Administrator, or to establish a new body specifically for the purpose in accordance with subsection (8). Where an existing statutory body is appointed,

subsection (7) allows the order to amend any relevant legislation as appropriate to enable that body to carry out the functions of the Administrator.

292. Subsection (8) allows an order to establish a body corporate to be appointed as the Administrator, and to provide for matters related to the functioning of the body, including membership, staffing, expenditure and procedures. Subsection (9) allows an order to confer related discretions on the Secretary of State, the body itself, or members or staff of the body.
293. Subsection (10) enables the Secretary of State to make grants to the Administrator, which might be used, for example, to meet costs in establishing the body or to contribute towards the ongoing operational costs of the Administrator.

### ***Section 126: Determinations of amounts of transport fuel***

294. This section allows a renewable transport fuel order to make provision about how amounts of transport fuel are to be counted or determined for the purposes of provision made by or under this Chapter, for example, in relation to the discharging of an RTFO. For these purposes, regard may be had to the life-cycle effects of different fuels based on carbon emissions, sustainable development, agriculture and other economic activities, and the environment generally. The purpose is to allow a wide degree of flexibility in the operation of an RTFO, in particular, as regards what fuels 'count' towards the discharge of an RTFO, and to what extent.
295. For example, an order may:
- Stipulate that only RTFs of a specified description will count towards discharge of an RTFO.
  - Set maximum amounts for RTFs of specified descriptions that will count towards discharge of an RTFO.
  - Set minimum amounts for RTFs of specified descriptions that will count towards discharge of an RTFO.
  - Make provision that only a certain proportion of a particular type of RTF is to count for the purposes of an RTFO. For example, in the case of blended biofuel, it may be provided that only the proportion of the blended biofuel that is attributable to biofuel will count towards discharge of an RTFO. Blended biofuel is a fuel that consists of a blend of biofuel and fossil fuel (see section 132(1)).
  - Make provision for how such proportions are to be determined. For example, in the case of blended biofuel, there needs to be a way of determining the extent to which the blend is attributable to biofuel, as opposed to fossil fuel. This could be done by reference to the volumes of each of those fuels used to produce the blend.
  - Make provision for a supply of RTFs to be counted towards discharge of an RTFO only where it meets specified conditions relating to the fuel's supply (e.g. might relate to the purposes of the supply), the person by or to whom it was supplied (e.g. might limit to supply by the obligated supplier itself), or the place it was supplied to (e.g. might limit to certain geographical boundaries).
  - Make provision preventing evidence of the supply of the same RTF to be counted towards discharge of an RTFO for more than one supplier (i.e. 'double-counting').
  - Make provision for the supply of any fuel that is subsequently exported outside the UK not to count towards discharge of an RTFO.
  - Make provision for how units of various transport fuels are to be measured for the purposes of an obligation (for example, by energy, volume, etc).

- Make provision for specified RTFs to be allocated more or less “credit” per unit of fuel supplied than other RTFs.
- Make provision for aggregating different units of measurement applying to different transport fuels.
- Make provision allowing certain presumptions to be made. For example, it may be appropriate for certain presumptions to be made for the purpose of determining the effect of evidence provided to the Administrator by a supplier in support of the discharge of his RTFO.

### ***Section 127: Renewable transport fuel certificates***

296. This section enables the Secretary of State to make provision in an order for the Administrator to issue renewable transport fuel certificates (“RTF certificates”) to suppliers. An RTF certificates scheme would enable the trading of certificates between suppliers, and ‘banking’ of certificates for use in future obligation periods. The section allows an order to make provision for both these options.
297. Subsection (2) provides that an RTF certificate would certify that the stated amount of RTF has been supplied by the stated supplier, to the stated place and in the stated period. It would count as sufficient evidence of the facts certified for the purposes of an RTFO.
298. Subsection (3) provides that an order may specify conditions or requirements relating to the issue of certificates, including, as to the making of applications for certificates (including information to be provided).
299. Subsection (4) provides that an order may allow for transfers of certificates between specified persons, which would facilitate the trading of such certificates. Subsection (5) provides that an order may provide certain conditions in relation to such transfers, such as informing the Administrator.
300. Subsection (7) provides that an order may allow for certificates to be accepted after the deadline for producing evidence of discharge of an obligation. For example, an order might provide for a ‘reconciliation’ period during which suppliers are given a period of time to acquire additional certificates where necessary for the purpose of discharging their RTFOs.
301. Subsection (8) provides that an order may allow for certificates to be accepted in later periods than the period for which they were issued. This would allow companies, for example, to ‘bank’ certificates for future use or sale where they had more in one period than was required to fulfil their RTFO.

### ***Section 128: Discharge of obligation by payment***

302. This section enables the Secretary of State to make provision in an order requiring obligated suppliers who do not discharge their RTFOs through the production of evidence, to pay a specified amount (commonly described as a “buy-out price” - ‘BOP’) to the Administrator. This might relate to the amount of RTF by which a supplier has fallen short of its obligation in the relevant period (e.g by requiring payment of a specified sum per unit of RTF for the shortfall). A purpose of the power is to allow for a degree of flexibility for suppliers in meeting their obligations, and a safety net to limit the costs to the consumer should the price of renewables be higher than expected.
303. The section also allows for a two-stage enforcement approach to be adopted, whereby a supplier is given a period of time to pay the BOP, then a further period to pay at a penalty rate, before civil penalties may be invoked (see subsection (2)(a) and (d)).
304. Subsection (2) enables amounts to be increased in line with inflation (paragraph (b)). An order may provide for the BOP (and any penalty sums) to be repaid to a company in certain circumstances (e.g. where RTFO certificates produced by the company after

the obligation period are accepted by the Administrator by virtue of section 127(7) (paragraph (c)). An order may prohibit the Administrator from seeking to recover BOP sums owing where specified conditions are satisfied (e.g. where a decision is taken to pursue civil penalties instead) (paragraph (d)).

305. Subsection (4) would allow an order to require specified suppliers to make payments into the “buy-out” fund, to cover any shortfall in payments due caused, for example, by an obligated supplier becoming insolvent without paying amounts owing for the relevant period. Under subsection (5), an order may provide for subsequent adjustment or repayment of such sums. For example, it may be appropriate for repayments to be made where the administrator or liquidator of a supplier who has become insolvent is subsequently able to raise funds to make a payment into the “buy-out” fund.
306. Subsections (6) and (7) provide that an order may require the Administrator to use a specified portion of BOP revenues to cover its operational costs; otherwise, the money must be recycled to specified transport fuel suppliers (e.g. only those who met their obligation in the relevant period) in accordance with a specified allocation system.

### ***Section 129: Imposition of civil penalties***

307. This section allows an order to provide for persons who contravene designated provisions made by or under Chapter 5 of Part 2 of the Act to be liable to a civil penalty of such amount considered appropriate by the Administrator. This might cover, for example, failure to discharge an obligation, or infringement of requirements relating to the provision of information or payment of administrative charges. The Administrator may issue “civil penalty notices” to persons who breach the relevant provisions.
308. Subsection (3) allows an order to set a maximum penalty. But no penalty may be imposed on a defaulter which exceeds 10 per cent of the turnover of the defaulter’s business.
309. Subsections (4) to (6) set out the procedure for the issuing and payment of penalties under the section.
310. Subsection (7) requires the Administrator to pay any penalty sums received to the Secretary of State, who in turn must pay them into the Consolidated Fund.

### ***Section 130: Objections to civil penalties***

311. This section allows persons issued with a civil penalty notice to give a notice of objection to the Administrator. Subsection (1) sets out the possible grounds for objection. Subsection (2)(b) requires any notice of objection to be given in the manner and timeframe specified in the order.
312. Subsection (3) requires the Administrator to consider any notice of objection. The Administrator must then notify the objector of its decision in the manner and timeframe specified in the order (subsection (5)). In the meantime, the Administrator cannot enforce the penalty (subsection (4)). The original civil penalty notice will be amended or reissued as appropriate (subsection (6)).

### ***Section 131: Appeals against civil penalties***

313. This section provides for persons issued with a civil penalty notice to appeal to the courts, on the grounds stated in subsection (1). The merits of the Administrator’s decision would be considered in a rehearing of the matter.
314. Subsection (6) allows an appeal to the courts to be brought even where a notice of objection has been given to the Administrator in respect of the same matter, and regardless of the outcome of that objection process.

### ***Section 132: Interpretation***

315. This section defines words and phrases used in sections 124 to 131. The definition of “renewable transport fuel” in subsection (1) covers biofuel, blended biofuel, and any other fuel produced from renewable energy sources (e.g. some forms of hydrogen). In addition, the section allows an order to designate any other description of fuel as being a RTF for the purposes of an RTFO, for example, a fuel produced (wholly or partly) from renewable sources that might be developed or become available in the future or which might be identified as part of the consultation process.
316. The definition of “transport fuel supplier” in subsection (1) essentially allows an RTFO to be placed on persons who supply fossil fuels, renewable transport fuels or any other transport fuel with a view to it being used for transport purposes (see the definition of “supply” in subsection (1) as well as subsection (3) in relation to transport purposes). This may include persons who are refiners, producers, blenders, distributors or retailers of fuel.
317. The definition of “biomass” in subsection (4) refers to the biodegradable portion of a specified product, waste or residue. There is a wide spectrum of waste streams capable of use for producing biofuel. The subsection allows for an Order to determine which would qualify under the definition for the purposes of an RTFO.

## **Part 3: Energy Regulation**

### **Summary and Background**

#### ***Chapter 1: Electricity Trading and Transmission***

318. This Chapter provides a legal framework for a single competitive wholesale electricity market for the whole of England, Scotland and Wales. Specifically it allows for the implementation of the British Electricity Trading and Transmission Arrangements (“BETTA”).
319. Proposals for this Chapter were published for pre-legislative scrutiny in January 2003 as the Draft Electricity (Trading and Transmission) Bill. The House of Commons Select Committee on Trade and Industry published a report on the proposals in April 2003 and the Government’s response to its report on the BETTA proposals in July 2003. These publications can be found at:

<http://www.parliament.the-stationery-office.co.uk/pa/cm/cmtrdind.htm> - reports

320. In order to deliver BETTA, arrangements are being proposed that are designed to promote the creation of a GB-wide wholesale electricity market, to create a single set of arrangements for access to and use of the transmission system and to create a single GB-wide transmission system operator. BETTA will also bring about the introduction of a GB-wide Balancing and Settlement Code (“BSC”), a GB Connections and Use of System Code (“CUSC”) and a GB Grid Code, which will mean a fully integrated and consistent set of rules in relation to connection to and use of the transmission system, and balancing and settlement, for the whole of GB. BETTA will also result in the introduction of a new code governing the interface between the system operator and transmission owners (an ‘SO-TO’ Code).
321. The main statute regulating the electricity industry is the [Electricity Act 1989 \(c.29\)](#) (the “Electricity Act”). Section 4 of the Electricity Act prohibits anyone from carrying out certain activities unless licensed or exempted from the requirement to be licensed. There are four types of electricity activity that are prohibited by the Electricity Act, and therefore licensable – generation, transmission, distribution and supply. In relation to electricity transmission there are currently three licences in GB, held by the National Grid Company, covering England and Wales, Scottish Power Transmission Limited and Scottish Hydro Electric Transmission Limited.

322. The Gas and Electricity Markets Authority (“GEMA”), supported by Ofgem (the Office of Gas and Electricity Markets), regulates the gas and electricity industries in Great Britain. Its powers are provided for under the [Gas Act 1986 \(c.44\)](#) (the “Gas Act”), the Electricity Act and, most recently, the [Utilities Act 2000 \(c.27\)](#) (the “Utilities Act”). The Electricity Act (section 6) provides for GEMA to grant licences for each of the four prohibited activities. Each licence has an accompanying set of Standard Conditions that set out the obligations and duties that each licensee must adhere to. In addition each licence may include specific or special conditions applicable to a particular licensee. It is also GEMA’s role to enforce any breach of these obligations.

## **England and Wales**

323. England and Wales currently operates as a single wholesale electricity market. The New Electricity Trading Arrangements (“NETA”) came into effect in March 2001, replacing the Electricity Pool. The Pool was a relatively centralised market that determined the wholesale price of electricity. The trading arrangements under NETA, in contrast, are based on the bilateral trading of electricity contracts between generators, suppliers, traders and customers. They operate as far as possible like other commodity markets with a forward and futures market that allows contracts for electricity to be struck well in advance and for short-term power exchanges which give participants the opportunity to ‘fine tune’ their contract positions. The Government, and Ofgem in particular, have continued to work closely with industry, through consultations and other means, to improve the mechanisms in place under NETA to ensure it works as effectively and competitively as possible. A brief overview of NETA is also available on the Ofgem web site.

## **Scotland**

324. The arrangements put in place under NETA did not encompass Scotland. At the time of privatisation, the wholesale trading arrangements that were put in place in Scotland were significantly different to those in England and Wales. As a result the Scottish market has only two main players. The key features of this structure are:
- Two vertically integrated groups, ScottishPower and Scottish & Southern Energy, who retain interests in generation, transmission, distribution and supply;
  - The allocation of virtually all Scottish generating capacity, through ownership or contracts, between ScottishPower and Scottish and Southern Energy;
  - Duopoly control over the bulk of interconnector capacity with England & Wales.
325. The result of this structure is:
- In Scotland GEMA administers prices because competition is underdeveloped and the market offers much less choice for both industrial and domestic consumers;
  - Current market arrangements make it difficult for independent Scottish generators to connect to the grid and sell to the wider GB market. This hinders competition and is a barrier to achieving the Government’s renewables target of 10% by 2010.

## **Europe**

326. The Lisbon European Council in March 2000 agreed to accelerate energy liberalisation with the ultimate objective of a fully open internal electricity and gas market. This was followed in March 2001 by proposals from the European Commission for new Electricity and Gas Directives and a Regulation on cross-border trade in electricity. Political agreement on these proposals was reached at the Energy Council on 25 November 2002.
327. The new Directives require, among other things, independent regulation, transparent, non-discriminatory access to infrastructure, the unbundling of vertically integrated

monopolies and for all consumers to choose their electricity and gas suppliers by July 2007. The Regulation establishes a mechanism for developing cross-border trading arrangements.

328. The Government strongly endorses these measures, which it believes are essential prerequisites for a properly functioning internal energy market. BETTA will allow us to apply even greater pressure on our European partners to implement the changes agreed in the Directive in terms of opening their markets and increasing competition.

### **Main provisions**

329. In summary, this Chapter provides for:

- a power for the Secretary of State to amend electricity licences; to enable the implementation of a single British transmission system and a single system operator; and to allow for a single set of trading arrangements and a single set of arrangements for access to and use of the transmission system, modelled on those currently operating in England and Wales, to be extended to the whole of Britain;
- changes to the prohibition on transmitting electricity. In simple terms this will re-define what the prohibition covers. Section 4 of the Electricity Act defined what was meant by transmitting electricity and made it illegal to undertake such activity without an appropriate licence. As a result of the proposal to introduce a single system operator for Great Britain, the Act will amend section 4 in order to ensure that the licensable transmission activity covers separate components:
- the co-ordination and direction of the flow of electricity across the whole transmission system i.e. an activity of the transmission system operator, and
- the making available for use for the purposes of such a transmission system of anything which forms part of it.

This reflects the fact that both the system operator and the transmission asset owners will have an important role to play in the process of transmission under the new arrangements;

- A power for the Secretary of State to instruct GEMA to award a transmission licence;
- Changes to the licensing powers contained in the Electricity Act to reflect the two transmission functions as outlined above;
- Other changes to the Electricity Act consequent upon a single trading market and revised transmission arrangements;
- A licensing scheme so that existing transmission licences will become transmission licences under the amended prohibition on transmission;
- A scheme to enable the transfer of certain assets to the transmission system operator in order to enable it to carry out its activities effectively in the event that the transmission licence holders concerned cannot agree the need for, or aspects of, the transfer amongst themselves.

### **Chapter 2: Interconnectors for Electricity and Gas**

330. [Chapter 2](#) extends the licensing regimes under the Electricity Act and the Gas Act 1986 to electricity and gas interconnectors respectively. An interconnector is a connection between the electricity or gas system in Great Britain and such a system in another country.
331. These provisions partially implement the following European Community Legislation:

- Articles 20 and 23 of Directive [2003/54/EC](#) of the European Parliament and the Council, concerning common rules for the internal market in electricity;
  - Articles 18, 22 and 25 of Directive [2003/55/EC](#) of the European Parliament and the Council, concerning common rules for the internal market in natural gas.
332. A Transposition Note setting out how the Government will transpose into GB law the main elements of these Directives applicable to interconnectors is available from the Energy Markets Unit, Department of Trade and Industry, 1 Victoria Street, London SW1.

### ***Chapter 3: Special Administration Regime for Energy licensees***

333. [Chapter 3](#) provides for a special administration regime for the holders of electricity transmission or distribution licences or gas transportation licences. These provisions are designed to ensure the uninterrupted operation of gas and electricity networks essential to security of supply in the event of actual or threatened insolvency of such a licence holder. There are similar provisions in the water and rail sectors.

### ***Chapter 4: Further Provisions about Regulation***

#### **Annual report on security of energy supplies**

334. [Section 172](#) requires the Secretary of State to publish an annual report on the security of energy supplies, and to lay the report before Parliament.

#### **Appeals from GEMA decisions**

335. [Sections 173 to 176](#) provide for an appeals mechanism to the Competition Commission against GEMA decisions on modifications to the Gas and Electricity Network Codes. The measure is designed to improve the accountability of the process by which the detailed rules that govern activities in the gas and electricity markets as set out in various industry codes are amended. The codes are designed to allow ongoing amendment. Modifications can currently be proposed by a party to the code. Such proposals are then considered in accordance with the modification procedure set out in the code which results in a recommendation to GEMA. GEMA makes the final decision whether the proposed modification should be accepted or rejected. The regulator is not bound to accept the recommendation, although it must issue a decision letter explaining its choice. In the absence of an appeals mechanism, market participants' only means of redress at present is to initiate a judicial review of GEMA's decision.

#### **Meaning of electricity supply**

336. [Section 179](#) provides for electricity conveyed by a transmission system to a substation, and then supplied from there to premises, to be brought within the definition of supply in the Electricity Act 1989.

#### **Meaning of "high voltage line"**

337. [Section 180](#) defines "high voltage line" in respect of offshore electric lines as such lines which are of a nominal voltage of 132 kilovolts or more.

#### **Prepayment meters**

338. [Section 181](#) provides GEMA with the power, with the consent of the Secretary of State, to make regulations to extend the range of sums that could be collected from a prepayment meter.

### **Inquiries under sections 36 and 37 of the 1989 Act**

339. [Section 182](#) fulfils the Government's commitment set out in paragraph 4.33 of the Energy White Paper, "*Our energy future – creating a low carbon economy*" (Cm 5761), to apply proposals by Government for major infrastructure projects handled in the planning process in England to major energy projects in England and Wales where consents are awarded by the Secretary of State.

### **Exclusion of confidential information from the Register**

340. [Section 183](#) inserts new subsections into the Electricity Act 1989 and the Gas Act 1986 which allow GEMA, when entering information on the registers it is required to maintain under section 49 of the Electricity Act 1989 and section 36 of the Gas Act 1986, to exclude details in certain circumstances.

### **Assistance for areas with high distribution costs**

341. [Section 184](#) gives the Secretary of State the power to make an order to establish a scheme requiring authorised transmitters (in practice the Great Britain System Operator) to make a payment to a distributor when that distributor faces costs that are significantly higher than in other areas of Britain.

### **Payments into the Scottish Consolidated Fund**

342. [Section 187](#) provides a power for Scottish Ministers to direct GEMA to pay into the Scottish Consolidated Fund monies from funds paid to GEMA and arising from the auctioning of electricity generated under Scottish Renewables Obligation contracts. There is also a corresponding duty on Scottish Ministers to include provision in budget proposals to the Scottish Parliament that monies thus raised shall be used to promote the use of energy from renewable sources.