

SCHEDULE 1

Regulation 94

Property Arrangements Schemes

Scheme-making power

- 1.—(1) The Authority may, on application, make a scheme providing for—
- (a) the transfer to the nominated transferee of; or
 - (b) the creation in favour of the nominated transferee of any rights in relation to,
- property, rights or liabilities of an applicant for certification.
- (2) A scheme under sub-paragraph (1) (“a property arrangements scheme”) may also contain—
- (a) provision for the creation, in relation to property which the scheme transfers, of an interest in or right over the property in favour of the applicant for certification;
 - (b) provision for the creation of any rights or liabilities as between the applicant for certification and the nominated transferee;
 - (c) provision for imposing on the applicant for certification or the nominated transferee an obligation to enter into a written agreement with, or to execute an instrument of another kind in favour of, the other; and
 - (d) supplemental, incidental and consequential provision.
- (3) The property, rights or liabilities which may be transferred by a property arrangements scheme include property, rights or liabilities which would not otherwise be capable of being transferred.
- (4) If a property arrangements scheme provides for the division of an estate in land and any rent is—
- (a) payable in respect of the estate under a lease; or
 - (b) charged on the estate,

the scheme may contain provision for apportionment or division so that one part is payable in respect of, or charged on, only one part of the estate and the other part is payable in respect of, or charged on, only the other part of the estate.

(5) A property arrangements scheme that contains provision which adversely affects a third party may also contain provision requiring the nominated transferee or the applicant for certification to pay the third party compensation.

Applications for schemes

- 2.—(1) An application for the making of a property arrangements scheme may be made where—
- (a) a qualifying application for certification has been made to the Authority;
 - (b) a person is nominated in that application for certification as a person to whom any property, rights or liabilities of the applicant for certification should be transferred, or in favour of whom any rights in relation thereto should be created, for unbundling purposes; and
 - (c) the person so nominated either has consented in writing to such nomination or is an existing related licensee.
- (2) An application for the making of a property arrangements scheme may be made by—
- (a) the nominated transferee;
 - (b) the applicant for certification; or
 - (c) by both jointly.

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(3) Except with the consent of the Authority, no application for a property arrangements scheme may be made more than 6 weeks after the making of the qualifying application for certification in connection with which it is made.

(4) An application for a property arrangements scheme shall specify the property, rights or liabilities in relation to which provision of a kind mentioned in paragraph 1(1) is proposed to be included in the scheme.

The Authority's functions in relation to applications

3.—(1) On an application for the making of a property arrangements scheme, the Authority shall, in relation to any property, rights or liabilities in respect of which the application proposes provision of a kind mentioned in paragraph 1(1), determine whether provision of such a kind is, in relation to that property, or those rights or liabilities, necessary or expedient for unbundling purposes.

(2) Sub-paragraph (1) does not apply if the nominated transferee and the applicant for certification agree that provision of a kind mentioned in paragraph 1(1) is, in relation to the property, rights or liabilities concerned, necessary or expedient for unbundling purposes.

(3) If the Authority determines under sub-paragraph (1) that provision of a kind mentioned in paragraph 1(1) is not, in relation to any property, rights or liabilities, necessary or expedient for unbundling purposes, it shall refuse the application in relation to that property, or those rights or liabilities.

(4) If the Authority is minded to make a final decision to certify the applicant for certification pursuant to the qualifying application for certification and—

(a) the Authority determines under sub-paragraph (1) that provision of a kind mentioned in paragraph 1(1) is, in relation to any property, rights or liabilities, necessary or expedient for unbundling purposes; or

(b) the nominated transferee and the applicant for certification agree that that is the case,

the Authority shall, subject to paragraph 4(2), make a property arrangements scheme in relation to that property, or those rights or liabilities.

(5) The Authority shall publish the terms of any property arrangements scheme in such manner as the Authority considers appropriate for bringing it to the attention of persons likely to be affected by the scheme.

4.—(1) Subject to the following provisions of this paragraph, where the Authority is required to make a property arrangements scheme, the terms of the scheme shall be such as the nominated transferee and the applicant for certification may agree or, if they fail to agree, as the Authority may determine.

(2) The Authority may not include in a property arrangements scheme provision which would adversely affect a third party unless it determines that it is necessary or expedient for unbundling purposes for the provision to be made.

(3) Where the Authority does include in a property arrangements scheme provision which would adversely affect a third party, the Authority shall determine whether the scheme should include provision for compensation and, if so, what that provision should be.

(4) A property arrangements scheme shall not provide for any provision to come into operation before the end of the period of 21 days beginning with the day on which the scheme is made.

5.—(1) A determination under paragraph 4, so far as relating to any financial matter, shall be made on the basis of what is just in all the circumstances of the case.

(2) A determination under paragraph 4, so far as relating to any other matter, shall be made on the basis of what appears to the Authority to be appropriate in all the circumstances of the case having regard, in particular, to what is necessary or expedient for unbundling purposes.

6. The Authority may require any of the following persons to give it information and assistance in connection with the making of a determination under this Schedule, that is to say—

- (a) the nominated transferee;
- (b) the applicant for certification; and
- (c) any person who makes representations to the Authority about the application for certification to which the determination relates.

7. The Authority may engage such consultants as it thinks fit for the purpose of advising it in relation to the making of a determination under this Schedule.

Effect of property arrangements scheme

8. A property arrangements scheme shall, by virtue of this paragraph, have effect according to its terms.

9.—(1) A transaction of any description effected by or under a property arrangements scheme shall have effect subject to the provisions of any statutory provision which provides for transactions of that description to be registered in any statutory register.

(2) Subject to sub-paragraph (1), a transaction of any description effected by or under a property arrangements scheme shall be binding on all persons, notwithstanding that it would, apart from this provision, have required the consent or concurrence of any person.

Review of determinations

10.—(1) Any person aggrieved by a determination of the Authority under this Schedule may apply to the Competition Appeal Tribunal for a review of the determination.

(2) Subject to sub-paragraph (3), no application under sub-paragraph (1) may be made after the end of the period of 7 days beginning with the day on which the determination is made.

(3) Where the Authority has made a property arrangements scheme, an application under sub-paragraph (1) may be made in respect of a determination relating to the scheme at any time before the end of the period of 7 days beginning with the day on which the scheme is made.

(4) On an application under sub-paragraph (1), the Competition Appeal Tribunal may—

- (a) dismiss the application; or
- (b) make an order substituting its own determination.

11.—(1) This paragraph applies where—

- (a) the Competition Appeal Tribunal makes an order under paragraph 10(4)(b);
- (b) the Authority has made a property arrangements scheme in relation to the property, rights or liabilities concerned; and
- (c) the scheme has not come into operation.

(2) Where the Tribunal's determination is that provision of the kind mentioned in paragraph 1(1) is not, in relation to the property, rights or liabilities concerned, necessary or expedient for unbundling purposes, it may include in the order provision quashing the scheme.

(3) In any other case, the Tribunal may include in the order—

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- (a) provision for the scheme to have effect with such amendments with respect to any matter dealt with by the Authority's determination as it thinks fit; and
- (b) to the extent that the Authority's determination dealt with any financial matter, provision requiring the Authority to redetermine the matter in accordance with the order and to amend the scheme accordingly.

12.—(1) This paragraph applies where—

- (a) the Competition Appeal Tribunal makes an order under paragraph 10(4)(b);
- (b) the Authority has made a property arrangements scheme in relation to the property, rights or liabilities concerned; and
- (c) the scheme has come into operation.

(2) The Tribunal may include in the order such provision as it thinks fit for the purpose of doing justice between—

- (a) the nominated transferee;
- (b) the applicant for certification; and
- (c) any third party adversely affected by the scheme,

in the light of its determination.

(3) Without prejudice to the generality of sub-paragraph (2), the Tribunal may include in the order—

- (a) provision for retransfer;
- (b) provision for the surrender or extinction of rights; and
- (c) provision for the payment of compensation.

13. An order under paragraph 10(4)(b) may include provision for the award of interest at such rate and for such period as the Competition Appeal Tribunal thinks fit.

14. Sections 120(6) to (8) of the Enterprise Act 2002 (c.40) (appeal with leave on point of law from decision of Competition Appeal Tribunal to Court of Appeal) shall apply in relation to decisions of the Tribunal under this Schedule as they apply in relation to decisions under that section.

Interim arrangements pending review of determination

15.—(1) This paragraph applies where—

- (a) a person makes an application under paragraph 10(1) for the review of a determination; and
- (b) the Authority has not made a property arrangements scheme in relation to the property, rights or liabilities to which the determination relates.

(2) The Competition Appeal Tribunal may on application by the nominated transferee or the applicant for certification make such interim arrangements as it thinks fit with respect to the property, rights or liabilities concerned.

(3) Without prejudice to the generality of sub-paragraph (2), the power under that sub-paragraph includes, in particular, power to make provision for the nominated transferee to have access to, or otherwise to enjoy the benefit of, any of the property or rights concerned for such period, and on such terms, as the Tribunal thinks fit.

(4) No application under sub-paragraph (2) may be made after the end of the period of 7 days beginning with the day on which the application under paragraph 10(1) is made.

16.—(1) This paragraph applies where—

- (a) a person makes an application under paragraph 10(1) for the review of a determination; and
 - (b) the Authority has made a property arrangements scheme in relation to the property, rights or liabilities to which the determination relates.
- (2) The Competition Appeal Tribunal may on application by—
- (a) the nominated transferee;
 - (b) the applicant for certification; or
 - (c) a third party who is adversely affected by any provision of the scheme,
- make such interim arrangements as it thinks fit with respect to the property, rights or liabilities concerned.
- (3) Without prejudice to the generality of sub-paragraph (2), the power under that sub-paragraph includes, in particular, power—
- (a) to make provision postponing or suspending the operation of any provision of the scheme for such period, and on such terms, as the Tribunal thinks fit;
 - (b) to make provision for the nominated transferee to have access to, or otherwise to enjoy the benefit of, any of the property or rights concerned for such period, and on such terms, as the Tribunal thinks fit.
- (4) No application under sub-paragraph (2) may be made after the end of the period of 7 days beginning with the day on which the application under paragraph 10(1) is made.
17. In exercising its powers under paragraph 15 or 16, the Competition Appeal Tribunal shall have regard, in particular, to what is necessary or expedient for unbundling purposes.
18. Paragraphs 15 and 16 are without prejudice to any powers of the Competition Appeal Tribunal to make orders on an interim basis under rules under section 15 of the Enterprise Act 2002 (c.40).
- 19.—(1) If an order under paragraph 15 or 16 is registered in the High Court, it shall be enforceable as an order of the High Court.
- (2) An order under paragraph 15 or 16 may be registered by a person entitled to any right under the interim arrangements for which the order makes provision.
- (3) Sub-paragraphs (1) and (2) have effect subject to any provision made by rules of court.
- (4) Sub-paragraphs (1) and (2) apply to an order on an interim basis made under rules under section 15 of the Enterprise Act 2002 (c.40) in connection with an application under paragraph 10(1) as they apply to an order under paragraph 15 or 16.

Supplementary

20. An application under this Schedule shall not be made orally.
- 21.—(1) In this Schedule—
- “application for certification” means an application for certification under Article 10C of the Electricity Order or Article 8C of the Gas Order;
 - “certification ground” has the meaning given to it in Article 10F of the Electricity Order or Article 8F of the Gas Order as the context requires;
 - “certification” means certification in accordance with Article 10E of the Electricity Order or Article 8E of the Gas Order as appropriate;
 - “existing related licensee” means, in relation to an applicant for certification—
 - (a) a related transmission licensee falling within paragraph (a) of the definition thereof in Article 10L(1) of the Electricity Order; or

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- (b) a related conveyance licensee falling within paragraph (a) of the definition thereof in Article 8L of the Gas Order,

as the case may be;

“nominated transferee” means the person nominated (as described in paragraph 2(1)(b)) in a qualifying application for certification;

“property arrangements scheme” has the meaning given by paragraph 1(2);

“qualifying application for certification” means—

- (a) an application for certification on the first or third certification ground in Article 10F of the Electricity Order; or
- (b) an application for certification on the first, second or third certification ground in Article 8F of the Gas Order,

which is made by a person who holds a transmission licence at the date these Regulations come into operation and who has not previously been certified;

“third party”, in relation to a property arrangements scheme, means a person other than the nominated transferee or the applicant for certification; and

“unbundling purposes”, in relation to a property arrangements scheme, or an application for such a scheme, means the purposes of satisfying or facilitating the satisfaction of any condition required for the relevant certification ground to be met (where the relevant certification ground is the certification ground on the basis of which the relevant qualifying application for certification was made).

(2) In this Schedule, a reference to the applicant for certification, in relation to a property arrangements scheme, or an application for such a scheme, means the applicant for certification to whose property, rights or liabilities the scheme, or application, relates.

(3) For the purposes of this Schedule, a provision of a property arrangements scheme adversely affects a third party if—

- (a) his consent or concurrence would be required to the making of the provision otherwise than by means of the scheme; and
- (b) he does not consent to the making of the provision by means of the scheme.