

Price Cap - final consultations on updating the credit and PPM SMNCC allowances

Legal Annex to Centrica's Response to the Consultations

Summary and introduction

1. This legal annex forms part of Centrica's response to Ofgem's consultations on updating the credit and PPM SMNCC allowances, each dated 29 April 2021 (referred to singularly as the "**Consultation**"). It explains where Ofgem is at risk of falling into error and rendering its decisions susceptible to challenge. It also sets out how, in certain areas, the Consultation's proposals are even more closely aligned to Ofgem's duties and the public law framework than Ofgem itself has explained so far and are (a fortiori) therefore particularly robust.
2. Dealing with possible errors:
 - a) To the extent that the smart meter allowances specified by Ofgem are not sufficient to fund efficient suppliers to meet their legal obligations, two consequences will flow:
 - i. the SMNCC decisions will be vulnerable to challenge; and
 - ii. suppliers' smart meter roll-out obligations will not be enforceable.Certain of these potential failures are explained in more detail in the accompanying report by Frontier Economics ("**Frontier Report**")¹.
 - b) The proposal to treat previous SMNCC allowance levels as including 'advanced payments' (referred to as 'clawback') is an error in principle and must not artificially lower the level of the SMNCC allowances such that suppliers cannot recover sufficient revenue to cover their efficient costs under the cap.
 - c) The consultation is insufficiently clear in addressing the interaction between suppliers' smart meter rollout obligations mandated by BEIS and Ofgem's role in allowing efficient suppliers to adequately recover their costs from their cap customers in order that suppliers may fund the meeting of their obligations, thus putting suppliers at unacceptable risk of breaching standard licence conditions ("**SLCs**").
3. Consistent with the Consultation, it is essential that Ofgem, as a minimum, ensures that:

¹ Frontier Report, April SMNCC Consultation (June 2021).

- a) Ofgem's chosen profile does not render it impossible for suppliers to recover sufficient revenue to cover the efficient costs of meeting their minimum rollout obligations. This, as Ofgem has correctly identified, can only be achieved if Ofgem adopts a rollout profile based on a 'market leader' approach; and
 - b) the application of the clawback (by way of a future adjustment for advanced payments) (if pursued, despite its inherent legal flaws (see below)), does not compromise funding of future rollout obligations.
4. Suppliers are currently under an obligation to take 'all reasonable steps' to roll out smart meters ("**ARS Obligation**").² In June 2020, BEIS confirmed its intention to replace the ARS Obligation with a new smart meter rollout framework ("**New Framework**"), which will impose fixed installation targets for each individual supplier on a trajectory to market-wide rollout (the "**100% Objective**"), subject to an annual tolerance level. The switch to the New Framework was recently postponed from July 2021 until January 2022.
5. In response to BEIS' decision to delay the switch to the New Framework, Ofgem issued an addendum to the Consultation, indicating that it will launch another short consultation in early autumn 2021 that will focus on the impact of BEIS' decision for smart rollout profiles. Such a 'double consultation process' is highly unusual. Ofgem notes that it expects stakeholders to focus responses to this autumn consultation on 'new information' provided. Naturally, Centrica will aim to address all relevant matters in relation to this Consultation in this legal annex. However, this does not exclude that there may be a need to come back to this in response to the autumn consultation, or that new issues that may need to be addressed in relation to the Consultation will arise before then. Therefore, Centrica reserves its rights to make any such submissions, without limitation, in response to the subsequent autumn consultation. As set out in the main body of Centrica's response, it is also essential that consultees have access to all relevant information, including that already provided pursuant to confidentiality undertakings, in that later consultation.
6. Finally: it is axiomatic that Ofgem may only enforce smart meter rollout obligations to the extent that it has allowed recovery of sufficient revenue to fund them.

² Standard conditions of electricity supply licence, Condition 39, para 39.1 / Standard conditions of gas supply licence, Condition 33, para 33.1.

Under the New Framework suppliers are only legally required to meet the rollout target under the SLCs, as adjusted for tolerance

7. Currently, energy suppliers are subject to the ARS Obligation under the SLCs for gas and electricity suppliers:

*“The licensee must take **all reasonable steps** to ensure that a Relevant Smart Metering System is installed on or before the ARS Specified Date at each Domestic Premises or Designated Premises in respect of which it is the Relevant [Gas/Electricity] Supplier”³ (emphasis added).*

8. In January 2022, the ARS Obligation is set to be replaced with BEIS’ New Framework. Under the SLCs, energy suppliers will be subject to individual smart meter rollout targets, which they will be required to meet on an annual basis.⁴ The SLCs clearly use ‘target’ to denote binding rollout figures as adjusted for tolerance.
9. However, there is an inconsistency in the terminology used by Ofgem in the Consultation (and by BEIS in their consultation), compared with the SLCs. For example, Ofgem speaks of “*BEIS’s policy ambition of market-wide rollout by mid-2025 (a ‘target’ approach)*”, contrasting it with suppliers’ minimum installation requirements, which it calls a ‘tolerance’ approach.⁵
10. This inconsistent use of the term ‘target’ risks creating confusion as to what the legally binding rollout obligation that energy suppliers must meet really is. It seems to us that Ofgem (and BEIS) sometimes incorrectly refer to BEIS’ 100% objective as the target, whilst the SLCs clearly set out that the tolerance adjusted target is the only legal obligation suppliers must in fact meet. This has also been acknowledged by BEIS in its Smart Meter Policy Consultation, where it stated that “[f]or the avoidance of doubt, the **minimum installation requirements after the application of tolerances constitute the legal obligation that energy suppliers are required to meet**”⁶ (emphasis added).
11. In response to a letter from Centrica, requesting confirmation of a number of points relating to the smart meter obligations, Ofgem has now confirmed that “*the legally-enforceable requirement is defined by the [SLC] formula (ie after the application of the tolerance level)*”.⁷ However, there has been no confirmation that Ofgem (and BEIS) fully

³ Electricity Act 1989, Standard conditions of electricity supply licence, Condition 39, para 39.1 / Gas Act 1986, Standard conditions of gas supply licence, Condition 33, para 33.1.

⁴ SLCs 33A.5 (gas) and 39A.5 (electricity).

⁵ Consultation, p. 4.

⁶ BEIS, Smart Meter Policy Framework Post 2020: Minimum Annual Targets and Reporting Thresholds for Energy Suppliers (November 2020), para 65.

⁷ Letter from Jonathan Spence, General Counsel (Interim) to Centrica, dated 8 June 2021.

appreciate that they are not setting obligations (or related allowances) for the claimed or stated policy outcome.

12. To avoid any unnecessary confusion, whenever ‘target’ is mentioned in this legal annex, it refers solely to the legally binding target under the SLCs (unless otherwise stated).
13. Failure to meet the target would effectively be a breach of the SLCs. Consequently, it is essential that Ofgem, as set out further below, ensures that all suppliers can reasonably comply with the SLCs by setting the SMNCC allowance at a level that allows all efficient suppliers to recover adequate revenue to meet their rollout obligations. Anything else would be legally questionable, as it would put suppliers at risk of unreasonable and unlawful enforcement actions through no fault of their own.

The SMNCC allowance in the default tariff cap must provide all efficient suppliers with adequate revenue to meet their rollout obligations

14. The cost of complying with the rollout obligations must be recovered from energy suppliers’ customers. However, suppliers remain subject to the default tariff cap set by Ofgem. Ofgem has included, when setting and updating the cap, an express allowance for the costs to suppliers of complying with their smart meter rollout obligations. This SMNCC allowance effectively constrains the amounts that suppliers can sustainably spend to achieve the rollout obligations imposed by BEIS.
15. In setting the SMNCC allowance, Ofgem is, under the Domestic Gas and Electricity (Tariff Cap) Act 2018 (“DTC Act”), required to have regard to a number of considerations:

*“The Authority must exercise its functions under this section with a **view to protecting existing and future domestic customers** who pay standard variable and default rates, and in so doing it must have regard to the following matters—*

(a) the need to create incentives for holders of supply licences to improve their efficiency;

(b) the need to set the cap at a level that enables holders of supply licences to compete effectively for domestic supply contracts;

(c) the need to maintain incentives for domestic customers to switch to different domestic supply contracts;

(d) the need to ensure that holders of supply licences who operate efficiently are able to finance activities authorised by the licence.”⁸ (emphasis added).

⁸ Domestic Gas and Electricity (Tariff Cap) Act 2018, Section 1(6).

16. Requiring suppliers to roll out smart meters without the ability to recover sufficient revenue to meet their efficient costs is inconsistent with both the objective of protecting existing and future consumers (as it risks delaying the rollout) and the need to ensure suppliers' financeability (as it is likely to put suppliers under significant financial strain).
17. A smart meter in credit mode comes at a net cost to the supplier. Simply put, the more smart meters a supplier installs, the higher its cost base will be. As a result, energy suppliers can only roll out smart meters if the SMNCC allowance adequately allows them to recover sufficient revenue to cover their efficient costs in doing so. If not, suppliers cannot reasonably be expected to meet their tolerance adjusted rollout targets; especially in the current financial climate where profitability across (large) suppliers has reduced rapidly, such that suppliers are operating at a loss, and given the general uncertainty created by the ongoing Covid-19 pandemic.
18. To summarise, Ofgem has a duty to ensure that energy suppliers are able to finance their licenced activities. Consequently, Ofgem must ensure that the SMNCC allowance provides for sufficient revenue to be recovered by efficient suppliers to comply with the SLCs rollout targets. If not, its decision is vulnerable to challenge on appeal.
19. As highlighted in Section 2 of the Frontier Report, Ofgem's 'Method 2' would be a more appropriate approach (than its proposed 'Method 1') and there is a serious risk of error in relation to its approach to amortisation in the context of sunk costs, the use of a combined dual fuel profile, and various other areas. A failure by Ofgem to correct its approach in any of the areas identified by Frontier creates the risk that suppliers will not be able to fund their rollout. This will render the decision vulnerable to challenge.
20. In relation to the use of a combined dual fuel profile: this is clearly not envisaged by the statutory framework. The DTC Act in general refers to the two fuel types separately. Additionally, in the definition of the tariffs which are to be controlled – the "standard variable" and "default" rates – the reference is to the supply of gas or electricity, not gas and electricity. The supply of each of the fuels is governed by separate licences granted under separate acts. In the absence of some compelling reasons, therefore, there is no legal justification for treating the two together by applying a combined dual fuel profile.
21. In relation to the assumption about amortisation: it was precisely the use of an untested assumption which led Ofgem into error when it first set the default tariff cap, resulting in British Gas's successful challenge.⁹ The current gap in the evidence points to 'Method 2' as a better option.

⁹ R (British Gas Trading Limited) v. Gas and Electricity Markets Authority [2019] EWHC 3048 (Admin).

The ‘market leader’ profile is the minimum required to ensure that all efficient suppliers are able to recover sufficient revenue – anything less would be contrary to Ofgem’s legal duties and BEIS’ policy objective

22. The retail price cap imposes the same price constraints on all energy suppliers.¹⁰ However, the more smart meters a supplier has installed, the higher its smart meter cost base will be, given that meters have ongoing costs such as those for rental and maintenance. Naturally, this raises concerns when a single price is set for all suppliers.
23. In choosing the rollout profile, Ofgem has indicated that it will have regard to the following four principles:
 - “• *reducing costs to default tariff customers*
 - *increasing the benefits from smart metering*
 - *supporting suppliers to deliver their obligations*
 - *ensuring cost-effectiveness.*”¹¹ (emphasis added).
24. In this regard, the February 2021 Working Paper further notes that “[t]he **rollout profile will affect how many suppliers can recover revenues** which reflect the efficient costs of delivering their rollout obligations. **If a supplier cannot recover revenue to do this, it will incur a deficit**, unless it has below-average unit costs (e.g. for purchasing and installing a smart meter)”¹² (emphasis added).
25. In the Consultation, Ofgem proposes to use a ‘market leader’ profile. In principle, using this profile is the only way to support all efficient suppliers in meeting their tolerance adjusted targets and to ensure financeability across the board since it provides sufficient revenue to allow an efficient ‘market leader’ to meet its tolerance adjusted rollout obligations under the New Framework. This ensures that no supplier - and in particular not one that has done its utmost to advance BEIS’ rollout objective - would be penalised for doing too well. Accordingly, this is the minimum Ofgem can do to promote further rollout in the interest of domestic consumers and ensure supplier financeability.
26. Conversely, using a rollout profile based on an ‘average’ rollout profile would be outright inappropriate, it would harm suppliers with above average rollout, i.e. suppliers that have complied with the ARS Obligation and been successful in rolling out smart meters early to secure BEIS’ policy objective (and consequently incurred costs for this). Such a perverse outcome cannot be lawful, as it would punish suppliers for doing their best to comply with

¹⁰ Domestic Gas and Electricity (Tariff Cap) Act 2018, Section 2(2).

¹¹ Consultation, para 3.1.

¹² Ofgem Smart meter rollout and the default tariff cap: working paper, para 2.25 (February 2021).

the SLCs and to meet an established policy objective. It would, effectively, punish suppliers who had most diligently complied with their licence obligations.

27. In short, the only way for Ofgem to support efficient energy suppliers in meeting their obligations is by allowing sufficient revenue to be recovered under the SMNCC allowance. This can only be achieved if Ofgem adopts a ‘market leader’ profile which is the minimum Ofgem can do to ensure the financeability of all suppliers. Accordingly, we agree in principle that Ofgem should adopt a market leader profile. However, the proposed application of the market leader approach does not give proper effect to the principle in practice for a number of reasons, as set out in Section 3 of the Frontier Report. Should Ofgem fail to set the SMNCC allowance at a level sufficient to ensure that an efficient market leader can recover all of its efficiently incurred costs, its decision will be vulnerable to challenge on appeal.

Clawback is legally questionable in principle and must not compromise suppliers’ ability to fund their rollout obligations

28. Clawback (in the Consultation referred to as ‘advanced payments’) decreases the SMNCC¹³ allowance and is intended to adjust for when suppliers have received payment in advance for smart metering costs that they have not yet incurred.¹⁴ In the Consultation, Ofgem says that it expects clawback to reduce the SMNCC allowance by:
- a) in electricity supply, £0.04 per customer in period 7 (1 October 2021 to 31 March 2022) and by £0.05 per customer for the remaining periods 8-11;¹⁵ and
 - b) in gas supply, £1.92 per customer in period 7 rising gradually to £1.98 in period 11.¹⁶
29. The ‘clawback’ represents an artificial reduction of the SMNCC allowance that is improper and legally flawed for a number of reasons:
- a) First, it is a simple mistake of fact because the allowance at the time was not in fact an ‘advanced payment’. Indeed, in now purporting that there were such ‘advanced payments’, Ofgem is failing to meet the legitimate expectations of suppliers, who relied on Ofgem’s previous interventions.
 - b) Secondly, such an approach is irrational and disproportionate. Effectively, Ofgem assumes that an efficient supplier would have put themselves in potential breach of

¹³ Consultation, p. 5.

¹⁴ Consultation, para 6.3.

¹⁵ Consultation, p. 65 Table 5.

¹⁶ Consultation, p. 65 Table 6.

their regulatory obligations by not taking all reasonable steps to roll out. No reasonable supplier could have taken that approach.

- c) Thirdly, the clawback is inconsistent with public law considerations of consistency, predictability and regulatory certainty. Economic regulators across the UK have acknowledged the harm caused by retrospective adjustments of this type and the threat that retrospective clawback poses to business and investment certainty.
 - d) Finally, this approach is clearly unreasonable where a supplier has fully invested the relevant funds to advance rollout, as it ultimately deprives suppliers who have diligently complied with their rollout obligations of future funding for ongoing smart rollout.
30. Further, the clawback cannot be used as a way to punish all suppliers on the basis that some suppliers have not properly spent past allowances or otherwise done enough to reasonably advance rollout. To the extent suppliers have not complied with their obligations, this should be dealt with through targeted enforcement, not all-encompassing clawback, as set out below.
31. Though we have substantial legal reservations about clawback in principle, if Ofgem decides to pursue this option it must ensure that the clawback does not leave suppliers without sufficient funding to meet their efficient costs in meeting their future rollout obligations.

Ofgem should pursue ARS enforcement where there is prima facie evidence of non-compliance

32. While we note Ofgem's clear statements that it cannot require suppliers to outperform their legally enforceable obligations under the new regime applicable from January 2022, that cannot preclude Ofgem requiring remedial action to make good any past non-compliance under the ARS regime (in addition to potential financial penalties for proven non-compliance).
33. While Centrica has conscientiously pursued its ARS Obligations and consistently sought to apply smart cost allowances within the default tariff cap for their intended purpose, the observed wide variation in ARS performance across obligated suppliers provides prima facie evidence of failure by some suppliers to take 'all reasonable steps'.
34. Those suppliers have not only avoided the upfront costs of smart installs to date, they have also avoided the ongoing net costs associated with existing installs which compliant suppliers have efficiently incurred to meet their ARS Obligation.

35. It cannot be right that Ofgem allows non-compliant suppliers to entrench competitive cost advantage gained through non-compliance at the expense of responsible suppliers who have conscientiously pursued their ARS Obligations.
36. We appreciate that the one-size-fits-all nature of the price cap does not enable Ofgem to address this competitive imbalance directly through SMNCC allowances. The roots of the competitive distortion Ofgem must now address lie in dubious past compliance by some suppliers and lack of sufficiently proactive enforcement by Ofgem to date.
37. We note that Ofgem is now preparing to assess all suppliers' ARS compliance as the end of the ARS regime approaches. Centrica will, of course, cooperate fully with that process, confident that we have met our ARS obligations. We stress, however, that the integrity of the regulatory regime requires that suppliers should be held to account fairly. That must include pursuing enforcement action in appropriate cases so that compliant suppliers and their customers can be assured non-compliant competitors are not allowed to profit from their non-compliance.
38. Ofgem must use all of the tools available to it in its toolkit to ensure maximum deterrent effect. The range of powers available to Ofgem under ss28ff of the Gas Act and ss25ff of the Electricity Act to enforce roll-out requirements is very wide. While fines may have an important incentive effect, they may not be enough on their own and nothing should be ruled out.
39. It would be very surprising indeed if Ofgem were not minded to pursue this robustly. Ofgem's clear, public view is that smart meters bring immediate benefits to consumers and further its environmental goals. Both engage directly with Ofgem's statutory duties; and the competitive distortion highlighted above directly conflicts with Ofgem's duty to promote effective competition. A failure by Ofgem to act is clearly reviewable in principle (see CPR Rule 54.1(2)(A)(ii)) and in these circumstances would render Ofgem vulnerable to challenge in practice.

Ofgem must update its modelling approach to the COVID-sunk cost adjustment to ensure that suppliers are able to fund their rollout obligations

40. Ofgem accepts that where suppliers were unable to install as many smart meters as expected due to COVID-19, they may have been unable to scale down their cost bases proportionately. Typically, suppliers pay for the costs of the smart meters through meter rental charges. However, rental charges only include the costs that can be amortised through Meter Asset Provider ("MAP") financing for those meters that were actually installed. Consequently, suppliers may have to bear costs incurred in relation to their

smart meters' installation programmes that they were not able amortise through MAP financing. These costs are described as 'sunk costs'.¹⁷

41. Hence, during Covid, suppliers are incurring fixed costs that reflect the intended scale of operations that they are not able to refinance with MAPs through no fault of their own. If suppliers were to act to reduce fixed costs too aggressively this will have a knock-on effect later on. Doing so would reduce capacity for future installations and so risk breaching the ARS Obligation once restrictions ease allowing a return to normal operations post pandemic. Indeed, further costs may be incurred in rescaling the operation.
42. Ofgem cannot apply its 'normal' approach to updating installation costs using annual supplier return ("ASR") data because they may be distorted by the impact of Covid-19 and do not distinguish between costs which can be amortised and those which are sunk. Estimating sunk costs as a residual by subtracting a modelled value of installation costs (based on ASR volumes and modelled unit costs) from total installation costs – is likely to be most appropriate option.¹⁸

Ofgem cannot lawfully take enforcement action against efficient suppliers who fail to meet their rollout target unless it allows sufficient revenue to be recovered under the SMNCC allowance

43. In the Consultation, Ofgem states that they "*expect suppliers to comply with all their licence obligations, including those relating to smart metering*" and that "[f]ailure to meet minimum installation requirements will be a breach of licence".¹⁹
44. It is true that failure to meet the rollout targets would, in principle, be a breach of the SLCs. However, Ofgem cannot legally enforce against a supplier who has taken reasonable action to comply with its rollout obligations if Ofgem fails to set the SMNCC allowance at a level that allows efficient energy suppliers to recover sufficient costs from customers. To do so would be improper and unlawful for several reasons:
 - a) First, it would not be reasonable or proportionate to enforce against a breach of the SLCs if Ofgem itself is responsible for the suppliers not being in a position to finance such rollout. In particular, Ofgem is under a duty to "*ensure that holders of supply licences who operate efficiently are able to finance activities authorised by the licence*". Ofgem cannot impose a decision that is not reasonable. It is a long-established principle of law that it is unreasonable to impose a requirement that the

¹⁷ Consultation, para 4.3; Ofgem Working Paper: *Updating allowance for smart metering costs in the default tariff cap*, 20 November 2020, paras 3.3 and 3.4.

¹⁸ Centrica: Response to Ofgem Working Paper: *Updating allowance for smart metering costs in the default tariff cap*, 21 December 2020, Appendix 1 p. 3.

¹⁹ Consultation, para 3.20.

subject of the requirement is unable to perform because of reasons out of their control. See e.g. *Arlidge v Islington Corporation* [1909] 2 KB 127 at 134-135, under which it was found to be not reasonable to require a person to carry out work on a premises to which they did not have a right of access.

- b) Secondly, it naturally follows that it could not be a proper exercise of Ofgem's enforcement powers to enforce a rigid penalising requirement on suppliers where the efficient supplier has done everything reasonable to comply with the rollout obligations.
 - c) Thirdly, Ofgem must ensure that suppliers can earn a normal rate of return, they cannot be forced to operate at loss. As already explained, the more credit smart meters a supplier installs, the higher its cost base will be. As a result, efficient energy suppliers can only roll out smart meters if the price cap allows them to recover sufficient costs do so. This is particularly the case in the current financial climate where profitability across (large) suppliers has reduced rapidly, such that suppliers are operating at loss, and given the general uncertainty created by the ongoing Covid-19 pandemic. Accordingly, suppliers cannot reasonably be held to their rollout targets if it would effectively result in them operating at loss.
45. For the reasons we have set out above, enforcement by Ofgem of a rollout obligation which is not reasonably achievable given the allowance available would be both unreasonable and disproportionate, especially if the shortfall is a direct result of the approach taken by Ofgem in setting the allowance at a level which does not allow an efficient market leader supplier to recover all of its efficiently incurred costs (as further explained in the Frontier Report). Further, any enforcement action Ofgem takes needs to take account of its statutory objectives in relation to the circumstances of the specific supplier concerned. Therefore, any decision to enforce against a supplier who failed to meet its rollout obligation because of Ofgem's failure to set the allowance at a sufficient level would be liable to face appeal and, in our view, would be unlikely to hold up against scrutiny in court.

Further consultation requirements in light of BEIS' June 2021 decision

46. We note Ofgem's addendum proposals, which we understand are prompted by publication of BEIS' final decisions on tolerance after publication of Ofgem's own consultation documents. BEIS' final decisions are materially different from the earlier consultation proposals Ofgem had previously assumed would be confirmed, both as regards final tolerance values and the six-month extension of ARS prior to commencement of the new regime from January 2022.

47. It is appropriate for Ofgem to take account of these material changes, and to invite stakeholder representations on them. However, the combination of late changes and present lack of supporting data to enable stakeholders to make fully informed responses within the window Ofgem has allowed for the present statutory consultation is concerning.
48. We understand that Ofgem's proposal for a further consultation in the autumn is partly driven by a desire to use the most recent data to inform modelling for cap period 8. However, Ofgem's suggestion that this will be a limited consultation not requiring disclosure of its model and supporting data is both concerning and completely unjustified.
49. Ofgem has previously recognised the need for controlled disclosure within an appropriate confidentiality ring in previous rounds of SMNCC consultation. In relation to the present consultation, stakeholders had a legitimate expectation that the permitted purpose extends (at least) to setting SMNCC allowances for cap periods 7 and 8. The fact that Ofgem is effectively deferring decisions for cap period 8 does not obviate the need for stakeholders to be able to retain and make use of analysis based on disclosure material for the purpose of responding to the second part of Ofgem's consultation.
50. Ofgem, of course, needs no reminding of the public law requirements for adequate consultation. A decision-maker must disclose sufficient information for consultees to understand the reasons behind a proposed decision and to be able to correct any errors. So, to the extent the autumn consultation touches on information disclosed in the current exercise, consultees must be able to use that information to respond to it.
51. In addition, the requirement in the undertakings is to delete information disclosed in the current exercise only once the time for a legal challenge has passed; and the likely time for Ofgem's decision is after the autumn consultation. It is very likely, therefore, that information already disclosed will still be in the possession (and, at least up to a point, in the minds) of interested parties. This would put consultees in the bizarre position of having the information, knowing the information, but not being able to use the information to respond to the consultation even where it is relevant. This is clearly a perverse outcome and unreasonable in a public law sense.
52. The appropriate course is therefore for Ofgem to confirm that the 'permitted purpose' in the confidentiality undertakings extends to the autumn consultation, postponing any requirement for permanent deletion until subsequent decisions have been taken and the window for challenge elapsed. This can be reflected by a simple agreed change to the Undertakings. This would not require a complete re-issue – rather Ofgem could simply issue an updated form, effective once signed and returned by the undertaker, amending the definition of permitted purpose.

Conclusion

53. In setting the SMNCC allowance, Ofgem must ensure that all energy suppliers can adequately recover their rollout costs to be able to sustainably comply with their obligations under the SLCs. Failure to do so would unlawfully punish suppliers who have reasonably complied with the current ARS Obligation by putting them at risk of unwarranted enforcement.
54. To ensure that all suppliers receive sufficient revenue to comply with the rollout obligations, Ofgem must – as proposed in the Consultation - (as a minimum) adopt a market leader profile. However, as noted above and in the Frontier Report, Ofgem’s proposed application of the market leader approach fails to give proper effect to the principle in practice and Ofgem needs to make necessary enquiries and corrections to ensure that all efficient suppliers are properly funded.
55. Further, and though we have substantial legal reservations about clawback in principle, if Ofgem decides to proceed with clawback it must ensure that it does not leave efficient suppliers without sufficient funding to meet future rollout obligations.
56. In summary, it is essential that Ofgem ensures that all efficient suppliers are able to recover sufficient revenue to fund their rollout obligations. Any decision that would effectively leave suppliers without sufficient funding to meet their rollout obligations would be vulnerable to appeal as: (a) Ofgem, among other things, would not be giving effect to its stated policy intentions; and (b) Ofgem would not be in compliance with its duty in Section 1(6)(d) of the DTC Act. The changes which are necessary for Ofgem to make are broadly as set out in the main body of Centrica’s response and the Frontier Report.