

Statutory Consultation on strengthening milestone assessments and additional reporting requirements

EUK Response - 17 January 2022

Introduction

Energy UK is the trade association for the energy industry with over 100 members spanning every aspect of the energy sector – from established FTSE 100 companies right through to new, growing suppliers and generators, which now make up over half of our membership.

We represent the diverse nature of the UK's energy industry with our members delivering over 80% of both the UK's power generation and energy supply for the 28 million UK homes as well as businesses. The energy industry invests £13bn annually, delivers £31bn in gross value added on top of the £95bn in economic activity through its supply chain and interaction with other sectors, and supports 738,000 jobs in every corner of the country.

This is a high-level industry view in response to Ofgem's Statutory Consultation on strengthening milestone assessments and additional reporting requirement. Energy UK's members may hold different views on particular aspects of the call for input. We would be happy to discuss any of the points made in further detail with Ofgem or any other interested party if this is considered to be beneficial.

Executive Summary

Energy UK has long supported Ofgem's wider Supplier Licensing Review, and its work to improve the robustness of its regulatory oversight of suppliers. Overall, we recognise and welcome Ofgem's intention to learn from the ongoing crisis and take urgent action to address any deficiencies in the regulation of the retail market that may have exacerbated the impacts of the crisis on the stability of the market. However, Energy UK has significant concerns with Ofgem's rushed approach to regulatory change and industry engagement through this consultation, particularly regarding its proposals to place additional reporting requirements on suppliers in respect of personnel changes and trade sales. Ofgem notes that the proposals could have a 'significant impact' on the market but has proceeded straight to statutory consultation stage without previous engagement with industry. Prior engagement would have highlighted a number of significant consequences of its proposals that Ofgem has not addressed in its consultation document. The consultation itself also provides no evidence nor explanation of how the current rules introduced in 2020 are deficient, nor how the proposed changes would have improved the market if they had been in effect during the current crisis.

In addition, the consultation does not provide sufficient information to allow market participants to offer informed views on the proposals. No information is provided on what type of assessment Ofgem would undertake. Without details of what exactly an assessment would entail, it is not reasonable to expect industry to be able to offer a sufficiently informed view of whether the proposals would more adequately mitigate the alleged risks than the pre-existing rules.

In addition, it is not clear why Ofgem is seeking to push these changes through ahead of April 2022. We recognise that other proposals within its "Winter Package" require implementation ahead of its decision

on the April price cap period in February, but that is not the case with the proposed additional requirements around personnel changes and trade sales. We urge Ofgem, therefore, to ensure that it engages further with industry before implementing any changes, including setting out its evidence for the deficiencies of the current rules, and full details of what it would expect any assessment would entail. It is only after such information is provided can industry provide Ofgem with a full view of its proposals' impacts, their benefits/costs and any unintended consequences.

Personnel Changes

Ofgem notes that the proposals could have a 'significant impact' on the market but has proceeded straight to statutory consultation stage. It has done so without providing sufficient information to allow market participants to offer informed views on the proposals.

No information is provided on the manner of assessment Ofgem would intend to undertake – for example, whether Ofgem expects to see the CV of every senior manager before they leave/are appointed, and whether it will request to see criminal records check or just want a certification that these things have been done. There may also be benefit in consulting on more clearly defining '*Significant Managerial Responsibility or Influence*', as its current definition in SLC 1 could see the requirement being applied differently across the market, meaning the administrative/compliance burden (and any benefits Ofgem hopes to see) will vary between suppliers. Without this understanding of the process Ofgem expects to undertake for an assessment, it is not reasonable to expect market participants to be able to fully scrutinise and offer an informed view on whether the proposals more adequately mitigate the alleged risk than the pre-existing rules.

Ofgem's compressed impact assessment makes a number of unsubstantiated claims (e.g. that these proposals will reduce the risk of consumers bearing the costs due to supplier failure, or make customers more confident to switch). There is no evidence to support these points – and they remain questionable given that Ofgem has put forward no explanation or evidence to suggest the current rules introduced through its Supplier Licensing Review in 2021 are somehow deficient or have prevented Ofgem acting in any particular circumstances.

The equivalent rules in financial services were introduced by an Act of Parliament, with the Financial Conduct Authority undertaking a comprehensive consultation and impact assessment. In financial services, some senior managers only require to be certified (i.e. as per Ofgem's current rules). This proposal could create a scenario where senior managers in energy may be subject to higher standards than banking without Ofgem having followed a proper consultation and engagement process that sets out clearly its evidence and justification for change.

We believe that, due to the lack of engagement with industry prior to Ofgem proceeding straight to Statutory Consultation on these proposals, significant questions remain unanswered in the document regarding Ofgem's intentions and the potential for unintended consequences. For example, the requirement to take 'all reasonable steps' places a burden on suppliers to ensure they do everything reasonable to prevent a change in senior management team, but does not explain what a reasonable step to take would be when a member of the senior management team is leaving.

In addition, when recruiting senior managers, it would seem that appointments would need to be made subject to the outcome of Ofgem's assessment. Ofgem's proposal to undertake a '30-60 day' assessment means that suppliers would need to include this period within their recruitment processes (including for short-term secondments to cover occurrences such as maternity leave). The impact of this requirement in a competitive market would potentially see viable candidates deciding to work in another sector, depriving market participants (and the market as a whole) of talented and well-qualified individuals for no justified or evidence reason.

Trade Sales

Many of the points raised above regarding Ofgem's proposals for additional reporting of personnel changes also apply to its proposals for additional reporting in advance of trade sales. There is a lack of robust evidence justifying the regulatory change, a lack of explanation as to how the proposed change would have improved market conditions or customer impacts had it been in effect during the ongoing crisis, and insufficient details about what information would be required of suppliers.

Commercial developments, such as trade sales, can happen very quickly, with decisions needing to be made on a very short time scale. We are concerned that adding in this lengthy assessment period may deter some market participants from undertaking a trade sale/purchase that would otherwise be beneficial, undermining Ofgem's previously stated view of trade sales being preferable to disorderly market exits, and its encouragement of suppliers wishing to exit to seek such routes. The existing notification requirements were only introduced through Ofgem's Supplier Licensing Review in 2021, and Ofgem's consultation provides no evidence that the pre-existing rules have failed to work, or that its new proposals would have improved any situation seen in the market since their introduction.

Way Forward

We recognise and welcome that Ofgem is seeking to ensure that it learns from and takes actions to urgently address any deficiencies in retail market regulation that may have contributed to the ongoing crisis. However, as outlined above, Energy UK has significant concerns with Ofgem's approach to, and the content of these proposed regulatory changes. We, therefore, urge Ofgem to commit to not implementing these proposals without engagement with market participants to address these concerns, putting forward a robust evidence base and justification for the additional regulatory/compliance burden, and further consulting on any final licence changes.

For further information or to discuss our response in more detail please contact Steve Kirkwood on 0207 747 2931 or Steve.Kirkwood@Energy-UK.org.uk.