



Consultation on the Design and Delivery of the Energy Industry Code Reform

Response form

The consultation is available at:

<https://www.gov.uk/government/consultations/energy-code-reform-governance-framework>

The closing date for responses is 28 September 2021.

Please return completed forms to:

BEIS

Team: Code Reform – Electricity Systems Team
Department for Business, Energy and Industrial Strategy
Postal address: Code Reform - Electricity Systems Team
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Abbey 1, 3rd Floor,
1 Victoria Street
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Ofgem

Team: Industry Code and Licensing Team
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E14 4PU

Email: codereform@beis.gov.uk and industrycodes@ofgem.gov.uk

BEIS and Ofgem will share with each other all responses that are received.

When responding, please state whether you are responding as an individual or representing the views of an organisation.

Personal / Confidential information

Please be aware that we intend to publish [a summary of] all responses to this consultation.

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If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

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Comments: [Click here to enter text.](#)

About You

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	Respondent type
<input type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Central government
<input type="checkbox"/>	Charity or social enterprise
<input type="checkbox"/>	Individual
<input checked="" type="checkbox"/>	Large business (over 250 staff)
<input type="checkbox"/>	Legal representative
<input type="checkbox"/>	Local government
<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)
<input type="checkbox"/>	Trade union or staff association
<input type="checkbox"/>	Other (please describe)

Questions

Question 1

This question refers to chapter 2 – Scope of reform.

To what extent do you agree with our proposals on the licensing of a code manager for engineering standards, and why?

☐ Strongly agree ☒ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☐ Disagree ☐ Not sure

Comments: We agree with the proposal for code managers to manage engineering standards. However, Ofgem must ensure that the code managers have sufficient, clearly demonstrated technical expertise and that they are held properly accountable via licence. We believe the IGEM gas quality standard should be kept under review for future inclusion in scope due to the direct interaction it will have with decarbonisation policy goals. We note that National Grid's current work to produce a whole system technical code seems incompatible with the outline implementation plan set out in the consultation.

We agree that licensed code managers should be responsible for in-scope engineering standards. These engineering standards are integral to achieving net zero ambitions and facilitating innovation and should therefore be included in this package of reforms. It is vital that the code managers are properly held to account to motivate them to develop and implement required changes in a timely manner.

Code managers must have sufficient technical expertise to carry out their role effectively. The selection process to appoint them must address this issue clearly. If a tender process is used to select code managers, technical expertise must be given a strong weighting as a selection criterion. If engineering standards are merged into other codes, it will be important to ensure that the code managers give these more technical areas of work adequate expert resource and priority. The skills and experience needed to manage engineering standards are specialised, so the benefits of licensing an expert code manager could be lost if the code remit is broader.

We disagree that the future IGEM gas quality standard will “*not have a direct impact on the delivery of the strategic direction*” and therefore does not warrant inclusion. The adoption of a more dynamic gas quality standard has been promoted as a way to deliver the UK's decarbonisation policy, including through eventual introduction of hydrogen. We welcome that the scope of standards for inclusion will be kept under review, and suggest that the IGEM gas quality standard should be kept under consideration.

We note that National Grid ESO has recently publicised its intention to create a whole system technical code, and is beginning stakeholder engagement and plans to consult on its proposals. It is not clear how this plan aligns or is compatible with the aims of the current consultation. For example, the outline implementation plan includes the appointment of tendered code managers ahead of code consolidation (see p. 85: “*Once code managers have been licensed, we would expect them to deliver the consolidation of codes under the leadership of the strategic body based on the review of options carried out earlier by Ofgem. As part of this process, we expect industry to be involved in any work*”).

to develop the details of the consolidated codes.”). If consolidation activity has already started, this could jeopardise a fair, competitive tender process, or lead to sub-optimal outcomes (e.g. duplication of effort, rework).

Question 2

This question refers to chapter 2 – Scope of reform.

What are your initial views on how central system delivery bodies should be regulated (including their relationship or integration with code managers and the extent to which licensing may be appropriate), bearing in mind this will be the subject of future consultation?

Comments: In principle, we agree that central system delivery bodies should be licensed. However, it is vital that the scope and content of the licence is carefully considered. While licensing is an established tool for accountability in the UK energy market, and can provide transparency and opportunities for challenge, implementation has at times been suboptimal with poorly structured terms and incentives, and reluctance to change. Lessons must be learnt from existing central service provider performance and accountability regimes.

Appropriate licensing would allow the central system delivery bodies to be properly held to account. It would ensure transparency of the requirements, obligations and standards expected from these bodies, and give Ofgem clear powers to take action if performance issues were identified. Licensing also benefits from being well-established and well understood in the energy industry, with established processes for consulting on proposed licence changes. The proposed reforms would provide for a direct line of accountability via licence to the strategic body and strategic policy direction, which could ensure a level of coordination across code managers and system providers.

There are several risks associated with the implementation of a licensing regime for central system delivery bodies. Our concerns stem from our past experience of the licensing of similar bodies in the energy sector, which has at times been poorly implemented and managed. In part due to information asymmetry and the speed of market development, licence terms can become outdated or inappropriate. They may also be or become overly complex and lengthy. The general reluctance of the regulator to review and make licence changes, particularly in response to industry suggestion, exacerbates this situation. In this context, the lack of direct accountability to industry is a weakness from an industry party perspective.

The design of incentives is a particular concern, as there have been several examples of unintended consequences caused by poorly thought out incentives in recent years. When licences have included poorly constructed incentives for innovation, for instance, this has resulted in central bodies carrying out unnecessary work on inefficient and irrelevant developments that do not serve the needs of industry and which are costly to consumers. A poorly constructed incentive can lead to behaviours that were not intended when the licence was drafted. An entity licensed to provide a unique service in the market will not provide consumer benefit through undertaking innovation or developments outside of its remit. Once established, there will not be competitive tensions to improve, which could lead to subpar products or services.

Innovation incentives lead to the potential for conflicts of interest between licensable and non-licensable activities. Also, the funding model and lack of budgetary flexibility and responsiveness could lead to difficulty in managing expenditure effectively. We recommend that funding should be based on agreed scope of work, which is scrutinised by stakeholders in advance.

In our view it is important that the licensee is a not for profit organisation and that industry has extensive input to its performance drivers. There must be transparency in budget and performance monitoring, including the ability to challenge. For-profit central bodies which are effectively in a monopoly position would not be acceptable.

Lessons must be learnt from the DCC experience, and we welcome the concepts discussed separately to this consultation to move the DCC to a not for profit basis. For example, we observe DCC prioritising system and process changes that aid their service providers and themselves rather than those needed by their direct customers or end consumers. We also note the triple margin 'earned' from self-procuring services already covered in Capita overheads, such as cultural change advice and office IT. Innovation initiatives have also been mis-targeted and ineffective. At times they appear to have been designed more to qualify for improved margin rather than to address industry or consumer need.

Examples of poor central system provider outcomes from other providers also exist. In the case of NGESO, which is a licensed party and code administrator, its procurement and systems implementation has been repeatedly ineffective. Xoserve's lack of alignment with industry change requirements has sometimes derailed change at late stages in the process. Their lack of accountability on budget has shown failings that reform should address through licensing and could potentially be met through integration of code managers and system providers.

While our preference is for code manager and central systems providers to be separate bodies, we believe there should be clear distinction between code manager and the central system provider should the two roles sit with the same party. This separation is needed to avoid cross-subsidisation and conflict of interests arising. We look forward to further consultation on this matter.

Question 3

This question refers to chapter 3.1 – Setting the strategic direction, chapter 3.2.4 - Detailed roles and responsibilities of the strategic body, and chapter 3.2.7 – How would our proposals differ under option 2?

To what extent do you agree with the detailed roles and responsibilities of the **strategic function** as set out above, and why?

☐ Strongly agree ☒ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☐ Disagree ☐ Not sure

Comments: Under the proposals the strategic function would be responsible for:

- Developing the strategic direction for the codes and,
- Holding the code manager(s) to account.

We support the proposal to create a strategic function that provides a strategic direction to the codes. We note that the consultation proposes two measures the government could use to articulate its strategic vision to the strategic function. These are the Strategy and Policy Statement (SPS) and placing an obligation on the strategic function to “keep under review” relevant developments in the energy sector.

Under the first option the SPS would become core for future policy direction and decision making and whilst we fully support and recognise the importance of achieving net zero, we would want to ensure that objectives such as promoting effective competition and providing value for money to consumers are also considered. We expect that the principal objectives of the strategic body, and therefore the code managers, will continue to be as set out in the Gas and Electricity Acts, in the protection of current and future consumers through the promotion of competition. We would not want the absence of a SPS, Government or Parliamentary process to lead to a slowdown or halt to energy industry change progression. Neither would we want the five-year interval between SPSs to result in ineffective and irrelevant annual planning processes, which must be completed to comply with legislation, nor paralysis to develop from a constant cycle of cascade and planning. Ofgem and other governance bodies are able to function currently, incorporating decarbonisation goals into their decisions without further explicit policy statements. The strategic body should be able to take a pragmatic and independent view of policy in protecting the interests of consumers, taking into account input from industry. The potential for conflict of interest to develop between economic regulator and strategic function may be an area for further consideration prior to decision.

In terms of the annual strategic direction planning, we believe that industry and wider consultation should be conducted ahead of delivery. Review of the suitability of the plan and the extent to which delivery has been achieved should be completed against results. It must be robust and transparent to ensure the process has value.

In principle we support the role of the strategic body in holding code managers to account via licensing due to the transparency and levers this provides to industry. The strategic body should itself have real accountability to Government as its appointee, which should also provide for accountability to industry via transparent process. We have reservations about Ofgem’s ability at present to appoint and hold code managers to account in practice due to lacking skills, experience and operational industry expertise. This is also an area of concern in relation to review and response to code manager decisions and appeals to the strategic body (appeals are addressed in more detail in response to questions 6 to 8).

Question 4

This question refers to chapter 3.2.3 - Detailed roles and responsibilities of the code managers, and chapter 3.2.7 – How would our proposals differ under option 2?

To what extent do you agree with the proposed roles and responsibilities of the **code manager function** as set out above, and why?

☐ Strongly agree ☒ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☐ Disagree ☐ Not sure

Comments: In principle, we support the proposed code manager roles and responsibilities, although this support is heavily caveated due to the lack of detail on how this will be implemented in practice. The lack of clarity about industry engagement, grounds for decision-making and the case for change are key concerns. It would be extremely disappointing if the proposed change led to a loss of the efficiency from industry-led decision-making previously highlighted by the CMA.

We are in broad agreement with the following roles and responsibilities of the code manager:

- Consulting on and publishing code delivery plans
- Raising code changes
- Prioritising codes changes
- Managing the code change process
- Facilitating cross code co-ordination
- Making decisions on code changes where those decisions are currently taken by panels
- Managing system changes

We would expect the criteria for decisions to be made by the code manager to mirror the current criteria included in the majority of existing codes. For example, we would expect Ofgem still to be responsible for deciding on changes that:

- (a) are likely to have a material impact on existing or future Energy Consumers;
- (b) are likely to have a material impact on competition in the supply of gas or electricity in Great Britain;
- (c) are likely to discriminate in their effects between one Party (or class of Parties) and another Party (or class of Parties); or
- (d) have been raised by the Authority or as a result of a direction by the Authority.

We note that our high-level support is heavily caveated, as much is left undefined in this area and subject to further consultation. In particular clarity is needed on the criteria and method that will be used by code managers to prioritise changes, and the role of industry in inputting to these decisions as well as appeal routes. Industry engagement overall, including Stakeholder Advisory Groups, is critical to the ability of the industry change process to provide efficient and effective outcomes for consumers. Code managers will not have the experience and operational understanding that those working in industry have, simply because their day job is managing codes rather than providing services to energy consumers. It is a key concern that without direct industry involvement in decision making, poor decisions will be made by code managers. It is essential that sufficient measures and monitoring are in place for assurance of code manager performance, specifically on paying due regard to industry input.

The justification for disbanding industry panels is not clear in the consultation document. If there is a perception of lack of representation of some parties on panels, then change in this area may be a faster and simpler solution. Furthermore, any lack of consistency between codes in terms of representation, independence, expert nature of decision-making or process could be addressed if these were the causes for disbandment. A

hybrid concept of industry and code manager representation on decision making boards would appear to be a viable option to explore in the future consultation on the details of this reform area. It would be very disappointing if the efficiencies for consumers from self-governance by industry highlighted by the CMA in 2016 were lost through shifting this decision-making power to code managers.

Code manager delivery plans must receive scrutiny by the industry and the strategic body, and be subject to consultation and monitoring. Above all the content must be relevant to the real change that is needed for the industry to develop to meet the needs of the UK energy market. The planning and coordination approach needs to be pragmatic and agile; there should be no paralysis from cascading of strategic direction, planning cycles and coordination across code managers. Within-year changes and decisions which were not included in the planning cycle must not be deprioritised on the basis of prior inclusion in the delivery plan. The criteria for progression of change needs to include competition and consumer benefit, as well as the strategic direction.

Question 5

This question refers to chapter 3.1 – Setting the strategic direction, chapter 3.2.5 - Roles and responsibilities of other stakeholders, including code parties, and chapter 3.2.7 – How would our proposals differ under option 2?

To what extent do you agree with the proposed roles and responsibilities of **stakeholders** as set out above, including the role of the stakeholder advisory forum, and why?

☐ Strongly agree ☐ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☒ Disagree ☐ Not sure

Comments: We are unable to agree with the proposals on stakeholder engagement as they are entirely unclear. If they result in a reduction in the level of input industry can contribute to change, we are concerned that participation will drop dramatically – which appears counter to the intentions of the reform and will lead to suboptimal outcomes. We note the CMA's analysis that direct industry engagement leads to efficiencies which benefit consumers.

We note the proposal to disband all code panels and boards and to replace these with the strategic function and code managers. We believe that this approach could create a cliff edge for industry participation in the code change processes. If parties have little influence in code change matters this could discourage parties from participating at all. Outcomes would necessarily be suboptimal as change would progress without the required expert input. Appeals of code manager decisions to the strategic body are more likely to take place in this instance, as appeal would become effectively the main route for industry direct input.

The consultation proposes to create stakeholder advisory forums that would be consulted by code managers before making decisions. We are concerned however that these forums would only be advisory and not binding and that the code manager would have only to demonstrate that they had taken "due regard" to the forums. We believe this aspect needs further consideration. Currently under the Retail Energy Code specific committees have been set up to deal with specific topics such as industry change and metering. These

committees are made up of key party constituents and have delegated powers to decide on self-governance changes and make recommendations on changes that require Ofgem approval. We believe this is a better model to follow as it maintains industry participation in the decision process and maintains access to industry knowledge and expertise.

The structure and other detail of stakeholder advisory groups is not clear in the consultation document (their constitution, role, ability to input, frequency, number, representation, etc.). Neither is the continuation of or future role of industry workgroups, which have been extremely helpful in identifying issues and solutions for code change over many years. The lack of open industry discussion leads to incomplete and flawed proposals being released for consultation or implemented. For example, in the recent consultation process on disapplication of the 15 month notice period for electricity distribution charges, Ofgem discussed options for review only with network companies prior to publication. These options failed to incorporate the solution that had been arrived at previously through stakeholder consultation for the start of the previous price control and failed to identify an issue with code and licence alignment. It is essential that day to day operational expertise and understanding is incorporated directly into industry change processes and decision-making.

Question 6

This question refers to chapter 3.3 - Appeals process and compliance.

In relation to option 1, where Ofgem would be the strategic body, to what extent do you agree with our proposals on how **decisions by the code manager** would be overseen by the strategic body with, as a minimum, existing appeal routes retained and moved to the strategic body

☐ Strongly agree ☒ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☐ Disagree ☐ Not sure

Comments: It is in consumers' interests that an independent body with the appropriate level of expertise should oversee code managers' decisions. It is important that the governance structure delivers sound, consistent and transparent decisions. In order to ensure that changes made are in the long-term interest of consumers, there needs to be an appropriate level of accountability for both the code managers and Ofgem.

The proposals for the strategic body/Ofgem to provide an internal review of code managers' decisions is welcomed in principle. This review route needs to be transparent, prompt and accessible in order to be effective. The slow pace of change is highlighted as an issue to be addressed by reform, which is often due to the decision process being slow and opaque. The Ofgem review process needs to be timebound and supported by clear rules, particularly in relation to what constitutes a material change and a non-material change.

Two key issues need to have an automatic right of appeal to Ofgem. The first is questions about whether a decision by a code manager was correctly classed as a non-material change. There should also be an automatic right of appeal where an affected industry

participant disagrees with a budget decision made by a code manager.

Appeals of code manager decisions to the strategic body are likely to be required more frequently if stakeholder expertise is removed or distanced from decision-making. This is connected to the day to day, contemporaneous operational understanding of the industry that will be lacking in code managers, even if they are experienced individuals. The gap in knowledge and experience currently between code administrators/Ofgem and industry is addressed through workgroups and decision-making panels collaborating with the code experts.

Section 3.3.2 of the consultation proposes to give Ofgem the “*option to overrule certain code manager decisions where it does not agree with the decision of the code manager*”. We would welcome clarity on the circumstances for overrule and role of industry input or appeal in these cases.

Question 7

This question refers to chapter 3.3 - Appeals process and compliance.

In relation to option 2, where the FSO would take on the role of the IRMB, to what extent do you agree with our proposals on how relevant **decisions by the code manager function** would be appealable to Ofgem, with a potential prior review route via an internal body?

☐ Strongly agree ☐ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☒ Disagree ☐ Not sure

Comments: If the FSO were to take on the role of the IRMB, we believe it would be highly unlikely that any section of the FSO could be structured in a way to guarantee that it had sufficient independence to allow it properly to carry out initial reviews of FSO code manager decisions. If option 2 is selected we believe decisions of the code manager should be appealable directly to Ofgem in the same way as proposed for option 1, subject to the amendments we have proposed in our response to question 6.

Question 8

This question refers to chapter 3.3 - Appeals process and compliance.

Do you have any views on the two proposed options for appealing **decisions made by Ofgem on material code changes** in option 1 (with Ofgem as the strategic body) and option 2 (with the FSO as the IRMB)?

Comments: The strategic body will have wide-ranging powers to make decisions that have significant consequences for companies operating in energy markets as well as consumers. An appeals regime which allows parties to challenge important decisions of the strategic body in front of a specialist body like the CMA, is central to driving better code decisions and ensuring that initial code decisions are well founded.

Holding the strategic body to account in this way is vital as code decisions often have real consequences for consumers, such as increasing the cost of energy bills.

An effective appeals regime also provides investors with confidence in the energy market – which is critical given the need for further investment in new technologies to meet the UK's current climate change goals.

An appeals regime which includes appeals to the CMA rather than simply Judicial Review would be better on every important measure:

(a) The CMA is an expert appeals body with specialist panels, equipped with the necessary resources, who are set up to deal with the complexity of energy code appeals. This is in contrast to the High Court, where (often deeply technical) energy code issues would be assessed by a judge with no specialist expertise or resources;

(b) A judge in the High Court would be mainly interested in the process through which the strategic body made a decision. Judicial Review is therefore not the appropriate standard for reviewing material code change decisions which have a significant effect on energy market participants and the interests of energy consumers;

(c) Overall, CMA appeals would be much quicker than a process based on Judicial Review at the High Court. This is partly because if Judicial Reviews are successful, the matter is “remitted” back to the regulatory body to review its original decision. The CMA, on the other hand, imposes its own solution, reducing the overall time frame by many months.

Centrica believes it would be proper and in the interests of consumers that all decisions by Ofgem on Code matters (not just those where they take a different view from the code manager) should in principle be subject to appeal rights.

Judicial review will not provide the appropriate level of scrutiny

Judicial review alone does not provide an appropriate appeals mechanism. It is essentially concerned with errors in the process. It is not an appropriate oversight mechanism in technical areas like energy industry codes. It also does not provide a regulator with any greater shield from challenge, as the Default Tariff Cap Judicial Review shows. It just leads to different kinds of challenge.

As judicial review is only concerned with whether a public body has acted lawfully and only examines whether their decision is procedurally correct. This is likely to lead to appeals being taken on process rather than substance, which does not benefit the effected business, regulators, the courts – and most importantly consumers.

It also leads to two problems:

(a) The strategic body could become focussed on box ticking rather than reaching the right decision; and

- (b) Decisions which are fundamentally correct are overturned because of a procedural mistake.

Neither of these is a desirable outcome; but they are the inevitable outcome of applying a judicial review standard to all code appeals. As a result, it is vital that the availability of CMA appeals is retained.

CMA decisions in contrast are heard by expert panels, with their own individual commercial and regulatory expertise which means that they are uniquely well suited to code decision appeals given their ability to deal with complex, technical issues.

Judicial review is not subject to statutory deadlines – this makes it a slower process

Judicial reviews are also slower and not subject to statutory timescales, unlike CMA appeals - on average a Judicial Review takes over 11 months to be completed. This time period also does not factor in the consequences of having to refer matters back to the decision maker where a Judicial Review is successful. Take the above example, the British Gas Judicial Review which despite being pushed as urgent by the British Gas - still took over a year from the decision date. This is much too long for regulatory certainty.

In contrast the recent SSE code modifications appeal (which was heard during the coronavirus pandemic) was completed in under three months, according to the CMA schedule transparently outlined.

CMA appeals provide a faster, more focussed route to appeal

CMA appeals are prompt: in most normal cases, the CMA is required to determine an appeal within 12 weeks of GEMA making its decision.

CMA appeals are also flexible: despite the 12-week statutory deadline in most cases, the CMA can grant an extension to the statutory deadline, for example in the RIIO2 appeals, the CMA granted an extension requested by Ofgem.

The CMA also has the power to prioritise appeals in a way which the courts do not. The CMA sets out its prioritisation principles which outline the approach that the CMA will take to prioritising work. This would not be an option for the High Court as even 'fast tracked' appeals can take over a year – for example the Default Tariff cap Judicial Review took over a year to be decided.

Maintaining the availability of CMA appeals would be simple to implement

The consultation states that making all decisions subject to Judicial Review will be simple to implement, however this would require a modification to the current system. There are some important considerations that are not discussed in the consultation. For example, whether the consultation envisages the CMA to continue to hear appeals but on a Judicial Review standard, or whether this function would be transferred to the High Court.

There is also in place existing guidance from the CMA in energy code modification cases, that could be adapted to suit the new proposals. This would be simple to effect and ensure

that regulators remain accountable and there is an effective appeal mechanism in place.

The consultation also raises the point that the route of appeal to the CMA for decisions made by the strategic body would need to be delivered by primary legislation. However, this should not be unduly burdensome given that many of the proposals put forward in this consultation would require amendments to primary legislation in any case.

Question 9

This question refers to chapter 3.3 - Appeals process and compliance.

Do you have any thoughts on other potential appeal routes?

Comments: No further comment.

Question 10

This question refers to chapter 4.1 - Proposed operating model and accountability (for option 1).

To what extent do you agree with the proposed operating model and accountability structure for Ofgem as the strategic body, and why?

☐ Strongly agree ☒ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☐ Disagree ☐ Not sure

Comments: We support the proposed operating model and accountability structure in principle. Flexibility in designation and delegation of roles could prove beneficial so long as adequate measures and consultation are taken to ensure the change of provider is appropriate and the funding approach reopened. We believe that the skills and experience gap between today's Ofgem and a strategic body requirement is seriously underestimated.

The intention is for Ofgem to be designated as the strategic body by the Secretary of State initially, with the possibility for another party being designated subsequently. Flexibility provided by legislation on this point could be valuable should Ofgem under-perform. However significant consideration should be given to the designation of another party, as well as stringent checks and balances in order to ensure that the positive grounds listed for Ofgem to take up this role are not diminished or lost altogether. While it is clear how it is intended to fund Ofgem through continuation of current practice, should another body be appointed, this issue will need to be reopened.

We support tight allocation of funds for Ofgem's new roles, as referenced in 4.1.2. We also believe that the skills and experience gap between the current and future Ofgem capability is underestimated, especially in relation to industry codes, appeals, implementation and tendering, as well as real day to day operational and commercial industry experience, which will become more essential for both code managers and strategic body should industry's role in decision making be diluted as proposed. Strategy formation and delivery is not mentioned as one of Ofgem's current strengths and roles in this area will be crucial to the interpretation of policy, analysis and forward planning of industry change. We also note that data and digitalisation is a growing priority across the

entire economy, not just the energy industry or energy regulation, and therefore the employment market is extremely competitive.

Question 11

This question refers to chapter 4.2 - Monitoring and evaluation (for option 1).

To what extent do you agree with the monitoring and evaluation approach for Ofgem's performance as strategic body, and why?

☐ Strongly agree ☒ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☐ Disagree ☐ Not sure

Comments: We agree with the proposals for monitoring and evaluation, which should provide transparency of plans and performance. The framework must be robust, and facilitate critique and challenge, including on expenditure. We expect accountability to Government to mean that Ofgem is also accountable to industry stakeholders and consumers through transparent process.

We support proposals to ensure effective monitoring and evaluation for Ofgem's performance as the strategic body is put in place. We agree that there needs to be clear responsibility placed on Ofgem to inform government of its progress in helping to achieve government policy objectives, and that Ofgem should produce an annual report about its activities and also to publish an annual forward work programme on upcoming direction and activity, which must be scrutinised by government.

We agree that there should be statutory duties imposed on Ofgem in primary legislation in relation to any SPS. We also agree with the proposals that Ofgem would need to provide a statement in its annual forward work programme setting out its strategy for delivering the policy outcomes in the SPS, what it will do to implement its strategy, and how it has had regard to the strategic priorities in the SPS.

We also agree that it will be important that Ofgem is required to report annually on how it has performed against its forward programme and carried out its duties in relation to any SPS. Ofgem should further report on its performance of its work to keep relevant policy initiatives and developments under review, for example in its annual report and forward work programme. This should form the basis of the formal monitoring and evaluation of the strategic body by Government. It is essential that there is real accountability to Government, which should also provide for accountability to industry via transparent process. We agree that stakeholder input and criticism of performance will be very important and suggest that this should be provided directly to those to whom Ofgem is accountable, rather than to Ofgem. To support an assessment framework, clear and relevant KPIs should be set on performance, with stakeholder input, and must be used to address performance issues. Reporting and transparency activities should also feature budget plans and actual expenditure.

Question 12

This question refers to chapter 5.2 - Establishing code managers.

To what extent do you agree with the ways we propose that the strategic body select code managers, and why?

☐ Strongly agree ☒ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☐ Disagree ☐ Not sure

Comments: We support a robust and well-run competitive tender to select code managers, with appropriate pre-qualification and selection criteria. In the interests of all stakeholders, expertise and capability must rank highly; price must not be the only driver. We have concerns about the shell company approach, which can be viewed as outsourced procurement when Ofgem has failed in the first instance. This could lead to duplication of effort and inefficient cost.

We fully support competitive tendering as the preferred option for selecting code managers. We agree that the competitive pressures brought through tendering will achieve the aim of selecting code managers with the right expertise and experience, and place pressure on costs. Expertise and ability to deliver must be considered as key criteria. A stringent pre-qualification exercise will support this.

The tendering process will be a major exercise due to its complexity and scale, especially to cover the appointment of several code managers and potentially options for code managers to bid for multiple codes. If Ofgem is chosen to fulfil the role of the strategic function, then any procurement exercise it runs will be subject to government procurement rules, which means that it will be necessary to inform bidders of the approximate value of the contracts being let. The assessment of this value will be extremely difficult as the code manager roles will be newly created. We are concerned that Ofgem does not currently have the skills and experience to run these tenders and adequately assess value. There is potential for sub-optimal outcomes that will not secure best value for money for consumers. This issue needs to be considered when selecting the best contracting model for selecting code managers.

The shell company option seems less transparent than direct tendering and could result in reduced accountability. The description suggests an outsourced procurement process by the strategic body, with Ofgem appointing a board to subcontract for code manager services if it fails to conduct a successful procurement process itself. It would clearly be helpful to decide early in the implementation process if Ofgem is to develop the tendering and procurement skills required for a successful tender. Adequate skilled resource would help mitigate the risk of tender failure and duplicated efforts. Several areas of this proposal appear uncertain and would need to be consulted on further and refined.

Question 13

This question refers to chapter 5.3 – Budget and funding.

To what extent do you agree with our proposed approach to code manager funding, and why?

☐ Strongly agree ☒ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☐ Disagree ☐ Not sure

☐ Not sure

Comments: We support the proposal that code managers should be funded through charges levied on code parties in accordance with a charging methodology set out in the relevant code(s). We also support “User pays” funding principles where parties who wish to purchase discretionary services from code managers can. These services and core services need to be clearly defined.

We look forward to contributing to future consultation on this issue as outlined.

Question 14

This question refers to chapter 5.3 - Budget and funding.

To what extent do you agree with our proposal that the strategic body should be accountable for code manager budgets, and why?

☐ Strongly agree ☒ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree
☐ Disagree ☐ Not sure

Comments: We broadly agree with the proposals, which recognise that code parties must have rights to challenge on budgets. We believe that industry code parties must have the ability to scrutinise and if appropriate appeal code manager budgets through clearly established processes. Parties to the codes are responsible for paying for code manager costs and these are ultimately borne by all consumers. Fully transparent consultation on proposed budgets must be carried out on a regular basis, with ex-ante and ex-post scrutiny. Challenge by industry and other stakeholders are a necessity.

We look forward to contributing to future consultation on this issue as outlined.

Question 15

This question refers to chapter 6.1 - Proposed operating model and accountability (for option 2).

To what extent do you agree with the proposed operating model and accountability structure for option 2, where the FSO takes on the role of the IRMB, and why?

☐ Strongly agree ☐ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree
☒ Disagree ☐ Not sure

Comments: We do not support option 2 where the FSO takes on the role of the IRMB. We agree with the initial analysis in the consultation which suggests that:

- The proposal under option 2 is more complex as the strategic function responsibilities would be split between Ofgem and the IRMB and may make it less possible to deliver strategic change in a timely manner
- The timescales for delivering option 2 will be longer

- Ofgem is an existing organisation whereas the proposals for the FSO are still subject to consultation

Question 16

This question refers to chapter 7.1 - Options analysis

Overall, which of the two options do you think would be best placed to reform code governance, and why?

☒ Option 1, where Ofgem is designated as the strategic body with the power to licence separate code managers

☐ Option 2, where the FSO takes on the role of an IRMB, which combines the strategic and code manager functions

☐ Not sure

Comments: Overall, we support option 1 where Ofgem is appointed as the strategic function. We agree that this option is more straightforward and therefore would be quicker and less complex to deliver.

However, we have serious concerns over the current skills and competencies in place within Ofgem and suggest that these would need to be significantly enhanced if Ofgem is to perform the strategic function well. Our experience of Ofgem over many years is that Ofgem resourcing of the code governance space is lacking. This manifests itself in slow decision making, unwillingness to provide direction, which results in industry time wasted on ill thought through change proposals, and an inability to field representatives to attend working groups to develop code modifications. The strategic body will need experience, skilled, empowered and engaged representatives involved in processes and must give sufficient priority to industry change.

The following three questions relate to the impact assessment on the code reform that is published along with this consultation. Please only answer the questions below if you have read the Impact Assessment.

Question 17

To what extent do you agree with our estimated costs for the new code manager function set out in the impact assessment, and why?

☐ Strongly agree ☐ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☒ Disagree ☐ Not sure

Comments: Strongly disagree. The impact assessment suggests that costs to industry would increase by £35m p.a. if option 1 is selected. This has been estimated by applying a multiplier of 110% to the current industry costs of code administration, derived from limited code administrator inputs. This figure would appear to be low based on the current

capabilities of existing code administrators. Currently nearly all significant industry change is developed by code parties through industry working groups. There would need to be a significant transfer of knowledge and experience from code parties to enable significant change to be delivered largely through code managers.

The cost of industry participation in future stakeholder activities (and appeals) has not been estimated, in large part because the activities are yet to be defined and will be subject to further consultation.

The impact assessment is incomplete in detail, depth of analysis and input data.

Question 18

To what extent do you agree that the case studies included in the impact assessment are indicative of the major barriers facing code changes under the current system, and why?

☐ Strongly agree ☐ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☒ Disagree ☐ Not sure

Comments:

Case study 1 – P272

P272 Lessons learned: The modification was dependent on the implementation of changes to the half-hourly distribution use of system (DUoS) charging regime being completed before April 2014. As such P272 may have been proposed too early. More strategic oversight across all codes could have led to better alignment between P272 and related changes in the market and this modification may have been proposed at a more appropriate time.

We agree that more strategic oversight across all the codes would have led to better alignment between P272 and related changes. A strategic function giving instruction to code managers could overcome this problem.

Further along the modification process, workgroups twice recommended rejecting the modification, but Ofgem requested further modelling. This suggests Ofgem and the workgroups were working from different objectives. More alignment between Ofgem and the workgroup could have led to fewer consultations.

Non quantifiable benefits have often been used to justify changes to industry codes where pure quantifiable financial benefits cases do not provide the justification. We are not aware of any post implementation review of P272 being carried out to support its implementation in the first place.

The current system of constrained self-regulation of the industry codes is likely to inhibit change when modifications are not in the financial interests of larger parties, despite being in the interest of consumers and the market as a whole

We do not agree with the characterisation noted above in respect of P272. Out of 13 parties that responded to the final modification report 10 agreed with the BSC Panel recommendation that the modification should be rejected. Of the three parties that supported the change one was the proposer and one was an agent who would financially benefit from the implementation of P272 due to increased data collection costs.

Case study 2 – Gas Transmission Charging Review (GTCR):

Lessons learned: There is no filter to prevent clearly non-compliant modifications from being proposed and an incentive for industry to propose unjustified proposals to further their vested interests and lay the burden on Ofgem, the code administrator, or wider industry. In addition, Ofgem is unable to incentivise industry to develop and raise proposals when deemed necessary for consumers; power is limited to instructing Gas Transporters, but this does not necessarily result in proposals of appropriate quality.

Charging regime modifications are complex, contentious and important changes to industry rules. They are different in nature to most code changes. This has been recognised by many regulators, including Ofgem in setting up the two electricity charging Significant Code Reviews (the Targeted Charging Review and Access and Forward Looking Charges SCRs). SCRs allow for broader industry engagement in exploration of the issues, early independent analysis from experts, impact assessments on proposals and for the regulator to direct or raise code modifications.

Regulators in other markets approached gas transmission charging reform outside of the regular industry rule change processes. For example, in Ireland gas charging reform was led by the regulator and was approached by establishing a specific, inclusive and timebound forum with clear milestones, appointing independent experts to advise throughout the process, establishing at the start what the key questions should be in the local context and what would and would not meet the compliance threshold for the EU Tariff Harmonisation Network Code (TAR NC). In the Netherlands, interpretation of TAR NC compliance was a core early part of the charging review process led by the regulator. The code modification process, and industry participation in it, should not be blamed for poor outcomes when alternative approaches were available.

The lack of early clarity on TAR NC compliance proved pivotal in this case. Different interpretations of the EU Regulation could be made and were provided, however, Ofgem's legal advice on points of compliance trumps all other views. As Ofgem's assessment of compliance was only made available with its decision, at the very end of the process with no guidance during the development stages, it was impossible for industry parties to know whether their views on compliance were likely to be correct in Ofgem's view or not.

Considerable time pressures were placed by Ofgem on National Grid and industry participants' work to attempt to meet the EU compliance deadline. This meant that resourcing and analysis were inadequate in developing the change proposals. The rushed workgroup stage resulted in the lack of identification of significant changes in National Grid cashflows which have resulted in further change proposals, and the launch of a second round of gas charging reform within a year of implementation of 0678A. This causes unneeded disruption to the gas market. Having expedited the industry process, Ofgem then spent several months making its decision on both of the main UNC charging modifications.

Can you provide further examples of when current code governance has resulted in either optimal or sub-optimal outcomes?

Comments:

SEC modification MP093/CRP535

An issue was raised in 2017 to address devices' ability to re-join a communications hub they had previously been connected to. It was subsequently progressed to a Change Request Proposal (CRP535) and SEC modification (MP093). Key assumptions were

made by DCC and the data service provider CGI without input and challenge from operational industry experts. This led to the change design not reflecting the modification that code parties voted on. The outcome has been repeated error messages for smart meter installations, leading to delays, aborted installations and inefficient use of resource and consumer time.

Lessons learnt prioritise greater engagement with industry stakeholders to validate assumptions about meter behaviour and supplier operational practices. More attention needs to be paid to how a solution will be implemented and the consequences, whereas this change focused on what needed to be done and simply getting a change put in place. It is also recommended that complex changes are identified for additional stakeholder engagement, including with manufacturers, suppliers and other relevant experts, during the design and impact assessment stages.

It is a concern that the aim of the proposed reforms is for code managers and service providers to make decisions without direct industry stakeholder input, and also that future industry expert engagement levels are uncertain. Without the correct checks on assumptions before changing design, code or processes, we will see a significant increase in defects being rectified after go-live, impacting consumers and wasting valuable time and resources.

Question 19

To what extent do you agree with the scale and type of benefits to industry estimated in the impact assessment?

☐ Strongly agree ☐ Agree ☐ Neither agree nor disagree ☐ Somewhat disagree ☒ Disagree ☐ Not sure

Comments: The proposed savings to industry estimated at £1.6m per year appear low to justify this reform and the analysis is inadequate.

The cost of industry participation in future stakeholder activities (and appeals) has not been estimated, in large part because the activities are yet to be defined.

The large scale of unmonetized benefits is a concern in providing justification for major reform of this nature.

The impact assessment is incomplete in detail, depth of analysis and input data.

Are there further cost savings to industry that should be included?

Comments: None identified.

Question 20

This question refers to chapter 8.1 – Context and wider industry developments

Are there any other wider industry developments we should consider in relation to the implementation timeline?

☒ Yes ☐ No ☐ Not sure

Please provide details of any industry developments you believe should be considered in the implementation timeline and how they could impact on code reform.

There are several major change and review programmes ongoing and about to commence. This work puts pressure on resources in industry, Ofgem and code administrators. Significant changes to the governance framework could cause disruption, rework or failure for these programmes.

There are two significant industry developments already in progress namely Faster and More Reliable Switching and Market Wide Half Hourly Settlement. Any proposals for code reform would need to take these into consideration particularly as these involve large central system deployments over the next few years.

There are clear interactions with the creation of a Future System Operator, in option 1 as well as more clearly under option 2. ESO business separation demonstrated that major structural change can have a wide impact in terms of delay to required systems developments and other change processes, as resource is constrained and parties reprioritise focus. The potential introduction of a FSO would have a similar effect to pressurise ESO, industry and authority resources required for code reform.

Ofgem has recently announced delayed work on electricity distribution charging and a call for evidence to begin new work on electricity transmission charging. Implementation of the outcomes of these major programmes of work is estimated for after 2023.

A wide review of the energy retail market appears likely to take place following the supplier failures second half 2021.

Question 21

This question refers to chapter 8 – Implementation approach

Are there any implementation issues, risks or transition considerations we should take into account?

Comments: There are many implementation issues and risks to consider, including:

- Capability and competence of Ofgem
- Availability of experienced and knowledgeable staff to recruit to code manager
- Lack of competition and suitable parties for code manager tenders
- Disengagement of industry parties as a result of disbanding of boards and panels
- Increased burden of code manager decision appeals on authorities and industry

parties, which could also result in a specific lack of engagement of smaller parties

- If many codes are transitioned together there is a risk of loss of knowledge and experience in transfer from code administrators to code managers
- The timeline for reform suggests that the newly tendered code managers will lead code consolidation. It is unclear how this will work with newly contracted code managers, as consolidation may change the scope of their work versus that tendered, and potentially present an existential conflict of interest

How do you think these could impact on code reform?

Comments: These issues could cause the reform to be delayed, fail and/or achieve suboptimal outcomes.

Question 22

This question does not refer to any specific chapter.

We invite respondents' views on whether our proposals may have any potential impact on people who share a protected characteristic (age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation), in different ways from people who do not share them. Please provide any evidence that may be useful to assist with our analysis of policy impacts.

Comments: None identified.

Question 23

This question does not refer to any specific chapter. Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Do you have any other comments that might aid the consultation process as a whole?

Overall, we believe the problem statement needs to be revisited, given changes in the market, accelerated change (e.g. wider access to the BM, introduction of REC), and most importantly Net Zero entering legislation and related policy. Consideration is needed of whether other solutions could be deployed faster and more simply to address some of the aims of the reform. For example:

- Aligning code objectives to Net Zero objectives
- Aligning code rules and processes (on appeal, consultation)
- Addressing Panel representation (if it is perceived to be an issue)
- Consolidation of codes
- Digitisation, digitalisation of codes

The consultation suggests putting in place the strategic function and code managers before any further code consolidation is considered. This will mean no further code consolidation could take place before 2024 at the earliest. In our view code consolidation

could commence now by using the learnings from the Retail Energy Code and putting together logical code groupings. For example, the CUSC, DCUSA, Grid Code, DCode and STC could all be managed by one code manager.

The proforma includes multiple choice boxes for indication of views – there is no “strongly disagree” option.

The consultation has included greater scope without full explanation (e.g. disbandment of panels, central system providers).

The consultation options are restrictive so as to reduce the consultative benefit of the process – option 2 is not viable (per the consultation itself), option 1 has only Ofgem as the possible strategic body. Ofgem may be the convenient and pragmatic option, but is it the *right* option? The consultation may produce confirmatory responses for the proposals due to the absence of other viable options being considered.

Lack of clarity and later consultation on many points makes it difficult for respondents to provide a view, or views require heavy caveat.

The impact assessment is basic and flawed, and in light of the above should be revised to incorporate the outcomes of the consultation.

As highlighted by respondents in 2019, codes form multilateral contracts for industry that must be acceded to and followed by parties in order to function in the market. It is essential that industry has full and timely involvement in change and operation of codes; code managers cannot be expected to have the day to day operational knowledge and experience required.

Thank you for your views on this consultation.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☐

At BEIS we carry out our research on many different topics and consultations, and your views are valuable to us. Would you be happy for us to contact you again from time to time either for research or about other consultations?

☒ Yes

☐ No