

# Ofgem – Non-domestic market review: Findings and Policy consultation – Energy UK Response

6 September 2023

## Introduction

Energy UK is the trade association for the energy industry with over 100 members - from established FTSE 100 companies right through to new, growing suppliers, generators and service providers across energy, transport, heat and technology.

Our members deliver nearly 80% of the UK's power generation and over 95% of the energy supply for 28 million UK homes as well as businesses.

The sector invests £13bn annually and delivers nearly £30bn in gross value - on top of the nearly £100bn in economic activity through its supply chain and interaction with other sectors, and supports over 700,000 jobs in every corner of the country. The energy industry is key to delivering growth and plans to invest £100bn over the course of this decade in new energy sources.

This is a high-level industry view and this response is not intended to be confidential. Energy UK's members may hold different views on particular aspects of the consultation and 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 welcomes Ofgem's review of the non-domestic supply market. We are very aware that the last few years have been extremely challenging for customers. They have also presented extreme challenges to suppliers. While this has inevitably resulted in some frictions, we are pleased that following the regulator's most extensive review to date, the overall findings suggest a well-functioning and competitive market with little evidence of ongoing systemic issues.

Of course, Energy UK supports the regulator's role in enforcement where rules are not followed. And, we advocate for Ofgem's focus to remain on enforcing existing rules effectively, rather than adding an overlay of new regulations as the first resort to managing instances of non-compliance.

We consider Ofgem's consultation here to be broadly proportionate, however, we do not fully support all proposals and are concerned some of the guidance creates prescription in the absence of due regulatory process. We have reservations over certain proposals, such as those concerning newly defining the rules around deemed contract rates (including the potential for unintended consequences caused by extending this guidance to the domestic market); the lack of a holistic published impact assessment; the potential to introduce new categories of non-domestic consumers; and the potential over-extension of non-domestic customer access to ombudsmen.

A matter causing particular concern is that after a period of considerable market uncertainty, this consultation, following Ofgem's extensive review, leaves many pertinent issues open-ended and

unresolved. Ofgem must resist the urge to create processes which result in ongoing uncertainty; which do not deliver value for consumers; and risks undermining investment, innovation and efficiency in the market.

We note that Ofgem is raising a request for information (RFI) for suppliers to provide them with information that may help provide evidence to support some of the proposals put forward here in this consultation. While suppliers are happy to cooperate with Ofgem, we are concerned that this is an inverted approach to creating regulatory policy. We urge Ofgem to acquire and follow actual data before making policy. We acknowledge that Ofgem should listen to the qualitative information it receives, but we caution that they beware of taking action purely on this basis. We also encourage Ofgem to share their findings as a published impact assessment alongside any future work in this space. This will help suppliers to collaborate better with Ofgem to improve the customer experience and the state of the market.

Further, as regards the content of RFI queries, we would like to help foster in Ofgem and The Department for Energy Security and Net Zero (DESNZ) realistic expectations of suppliers. Sometimes, in practice, although they support a policy intention and want to help, suppliers will not hold the information requested about their customers as this is not generally required for the transaction or relationship. This includes information about what is occurring within a customer's business outside of consumption levels and other contractual relationships customers might have e.g. having a domestic consumer on the non-domestic supply or customer-appointment of third party meter operators.

We note the timing of this consultation release (in the same week as numerous other publications from Ofgem and DESNZ) and the relatively short response deadline. This seems misjudged, as it creates a significant amount of work to be undertaken by regulatory and wider business teams. These teams are already working at maximum capacity on the prompt delivery of several Government support schemes, as well as significant industry change projects (Market-wide Half-Hourly Settlement, the Review of Electricity Market Arrangements and Financial Resilience). While we recognise the need to consult on these highly important matters, we believe the timing of the release may mean Ofgem may not receive the optimum level of feedback required.

We also encourage that where guidance is used, Ofgem creates and maintains a log of all of the guidance that is currently in force and that this contains mapping against the specific rules off which the guidance hangs. We also urge Ofgem to update its licence guides so that they are current and accurate, and so are able to be of benefit to customers and wider industry stakeholders.

Energy UK supports Ofgem's calls for Government intervention on issues such as the direct regulation of Third Party Intermediaries (TPIs) and support for businesses which may be struggling with securing contracts as well as meeting their energy costs. Affordability remains a matter for the Government to address. We are fully supportive as long-term advocates of direct regulation of TPIs by Ofgem and not suppliers. We believe the proposed draft voluntary Retail Energy Code Company TPIs Code of Practice (RECCo TPIs CoP) is unlikely to be any more effective than previous voluntary CoPs administered by some organisations, and that it is important that the Government progresses legislation to formalise enduring arrangements as soon as possible.

## **Pricing and contracts**

### Securing energy contracts

Energy UK acknowledges Ofgem's appreciation that as market conditions normalise, customers are likely to see more opportunities to contract with suppliers as well as more competitive offerings. As regards the challenges faced by sectors which may continue to see more limited contracting opportunities, Energy UK agrees with Ofgem on the role that the Government can play.

Government can play a key role in supporting non-domestic energy customers, in particular those who continue to face challenges in securing contracts. The Government may wish to consider its options for continuing to support businesses in these sectors. These options include loans or credit facilities along the lines used by the Government during the COVID-19 pandemic. Such support could in turn reduce the risk to energy suppliers, reducing costs, and therefore being able to present more contracting opportunities and pass through cheaper prices to the customer.

## Prices

We consider that proposals on price transparency are appropriate, but should be targeted rather than delivered through a prescriptive blanket approach (e.g. for microbusinesses). This is because at the upper end of the market, particularly where large industrial and commercial (I&C) customers are on pass-through or flexible style contracts, customers already have visibility of the drivers behind pricing movements and are better engaged with the market in order to be able to understand this.

Equally, it would not be appropriate to require suppliers to publish information that may be considered to be commercially confidential or sensitive – any requirements around pricing transparency should relate to information being provided on pricing changing as a result of market movements, policy and the like but not pricing changes due to the commercial considerations of supplier businesses. A principles-based approach driven by suppliers would be more appropriate. This would allow suppliers to better target the messaging to the relevant type of customer and increase engagement. For example, a menu of options such as bills, invoices, newsletters, website content etc. may be appropriate to different cohorts without stifling innovation and introducing onerous prescription.

While we acknowledge Ofgem's considerations around whether the bill is an appropriate place for additional information on price, we think ultimately this is best determined by suppliers and there are a range of options. Options include doing something via supplier websites, access to webinars, newsletters and such.

Energy UK suggests that there is also a role for Ofgem to play in providing customers with clear and accessible information so they can understand the impact of policy costs and charging reform on the price of their energy. Overall, any development should not hinder or impact competition, innovation and require the disclosure (in part or whole) of commercially sensitive information.

## Security deposits

Energy UK has worked with Ofgem on the production of the Security Deposits Guide, on the basis that this information can help customers to understand how security deposits work generally and what they can expect in some instances. Due to the large variety of non-domestic customers and the potential complexity of how risk management works, some of the expectations will not be practicable in all cases. However, efforts will be made to work as closely to its intention as possible.

While the guide is a voluntary piece not intended to be taken for firm rules, we hope that it brings some further clarity to customers and proves helpful as they have discussions with suppliers where the topic of security deposits arise. Suppliers will continue to work with Ofgem to support customers as best they can.

## Energy Bill Relief Scheme (EBRS)

The EBRS was important for business customers and it helped support the UK economy. If wholesale market conditions materially worsen during the winter, then the much lower level of Government support under the Energy Bills Discount Scheme (EBDS) may need to be revisited by HM Treasury. We would expect Ofgem to make clear representations to Government about the limits of regulation and supplier actions in tackling affordability in support of this position.

## Deemed contract rates guidance

Energy UK urges caution as we consider that the use of this guide to introduce new measures and definitions, not reasonably within the sight of the current supply licence conditions, is an inappropriate use of guidance. We consider further that in their approach to the production of this guide, Ofgem engages in a measure of over-prescription. Additionally, while being mindful of customer needs in pricing, we warn that there is a real risk of creating longer term unintended consequences due to a large volume of customers being encouraged to opt for deemed rates contracts.

We note that this guide seeks to introduce measures that are, in fact, new rules. These include an effective requirement for quarterly reviews of the deemed rates themselves. We consider that it would be more appropriate within guidance for Ofgem to put forward an expectation that suppliers put in place a methodology that identifies their classes of customers (for their supply book); sets out how they

calculate deemed pricing; and how that supplier considers/verifies that they are not significantly exceeding the licensee's costs as per Supply Licence Condition (SLC) 7. Regarding the frequency of reviews, if Ofgem is minded to pursue this, simply legislating for "quarterly" is likely to create problems for suppliers' ability to hedge for these customers which aren't committed to contracts – suppliers have to respond to their actual costs. "At least quarterly" would offer more flexibility while meeting Ofgem's intent.

Ofgem also introduces via this proposed binding guidance new terms and definitions which do not currently exist in the supply licence conditions. These include a definition of "significantly exceeds" for SLC 7 which includes the terms "much higher", "equivalent contracted rate" and "relevant class of customer". While we appreciate the value of the regulator's clarification of how the licence conditions should be interpreted, we consider that the deemed rates guidance goes beyond this. As this guidance effectively creates rules, we consider that these measures should be consulted on in a more formal way and added to licence conditions, if needed.

Further, we are concerned that the guidance is extended to domestic customers, which creates further risk of unintended consequences – including rule-making in the absence of due regulatory process – should the existing domestic price control regime change in the near future. For example, should Government proceed with removing the domestic price cap and move to a 'social tariff' for certain cohorts of customers only, it is not clear whether suppliers would then be obligated to follow the deemed rates guidance for all other customers. If so, we are concerned this would involve a significant amount of work and lead to material market impacts – neither of which have so far been assessed or consulted on by Ofgem. We urge further clarity on this as soon as possible. We also urge Ofgem to engage with domestic energy suppliers to ensure that the full impact across supply of such an expansion is considered in good time.

## **Competition in the market and customer service**

### Change of Tenancy (CoT)/Change of Occupancy (CoO)

We see value in these proposals and believe some standardisation may assist in this area. Business rates documents, public liability insurance policies, property deeds and lease documentation are all examples of the kinds of documents that could help demonstrate a CoT/CoO situation. That being said, we would caution Ofgem and the RECCo to ensure that any work in this area does not create over-prescription.

Further, careful consideration should be given to not only the types of documents but the quality and veracity of documentation that would be deemed as acceptable. For example, where the incoming tenant/occupier has purchased the property then land registry records may prove definitive. However, where the incoming tenant is leasing or renting the property then it may not be appropriate to accept the lease/tenancy agreement document in isolation due to the ease with which such documents can be falsified. There is a need to either have that documentation verified (e.g. through notarisation by a relevant official) or accompanied by supporting information (e.g. business rates documents).

Even where an agreed suite of supportive verification documents is provided by the customer, for fraud prevention reasons, these themselves would need to be checked by suppliers and this is where customers may have a lengthened experience due to the iterative interactions needed to give the reassurance that allows suppliers to proceed securely.

### Debt and disconnection processes

We consider that Ofgem holds sufficient power in this area and no expansion is justified. We consider that this is an area for Ofgem to monitor and, where needed, take compliance and enforcement action.

### Complaints handling and resolution

We welcome Ofgem's acknowledgement that there is no need to change the rules on suppliers' displays of their complaint handling processes. We suggest further that where Ofgem considers there may be an awareness gap for customers, Ofgem can also play a direct role in helping to communicate this information to customers especially as customers look to the regulator as a trusted source of information.

We consider as a practical consideration, Ofgem should afford a realistic amount of time for suppliers to make changes to their communications, systems and processes throughout the complaint process. This would be particularly so for new measures such as signposting to the Ombudsman becoming required for non-microbusiness.

We note that Ofgem has not set out any details of proposals for an obligation requiring recording, handling and processing of complaints in accordance with consistent rules, but has asked whether this is needed and what the costs as benefits are likely to be, we suggest that Ofgem should consider cost implications and publish these as part of an impact assessment that can be considered by industry.

As regards thresholds for business size for complaints handling requirements, we have strong reservations about creating any new thresholds or classes of customer. Doing so would be costly and complex for suppliers to implement and manage with no clear benefit given there will always be customers who fall just outside any given threshold.

A fundamental practical consideration is defining “complaint”. Due to stark differences between the two markets, this is an area where what occurs in the domestic market does not read across directly to the non-domestic customer, and so regulatory domestic complaint-handling measures cannot just be overlaid. The definition of “complaint” as set out currently in the Consumer Complaints Handling Standards Regulations 2008 is wide and would capture matters that I&C customers themselves would not consider to be complaints. In I&C contracts these customers typically have complex arrangements and account managers with whom they talk regularly, so complaints are unlikely to form in the same way as in the domestic market. In these types of cases, applying complaint-handling requirements may serve to slow down the complaint resolution and therefore have a negative impact on customers.

If Ofgem is minded to pursue the imposition of thresholds, any customer threshold should be kept relatively low, as that then allows space for Ofgem to review and increase incrementally should the need arise. Setting the threshold too high would negatively impact the non-domestic market. Any threshold employed should be subject to exclusions, for example customers who are FTSE-listed are unlikely to require additional protections.

#### Expansion of non-domestic customer access to an ombudsman

Energy UK considers that the question of the expansion of access to ombudsmen’s services is a matter which requires its own, separate consultation as it is a substantial matter bearing the potential for high-impact unintended consequences which may include customer detriment. Ahead of such consultation, we can make some high level points for Ofgem’s (and the Government’s) consideration.

Energy UK suggests that where Ofgem and the Government are minded to consider any expansion of services, a study should be performed covering how the current ombudsman scheme operates as well as what that organisation believes would be required were their reach to be expanded. The latter question should also enquire into cost and resource requirement, including potential knock-on impacts for existing services and the overall benefits identified. Such a study should also review I&C complaints and resolutions to consider whether resolutions offered by suppliers (and accepted by customers) would have fallen short of what the Ombudsman may have offered – this gap (or perceived gap) should help drive policy development in this area.

We are broadly supportive of allowing more non-domestic customers to access the redress scheme as there are cases which may benefit from this support. However, identifying an appropriate threshold or creating a new class of customer would be complex and costly with no clear benefit given that any threshold/definition would be arbitrary and the occurrence of edge-cases would persist where customers fall on the wrong side of an eligibility line.

Requiring an ombudsman to accept all complaints from a larger group of customers would also require it to expand and adapt its activities and likely impact its cost base, particularly given the typical complexity of large customer contracts. In that vein, it would be much simpler and more practical, while still delivering support for more customers, for the ombudsman to be encouraged to make greater use of its incumbent discretion to take on disputes from non-microbusiness customers given it is clearly best placed to evaluate its own bandwidth and capability.

We consider that any expansion should be limited in order to be of the best value and help, in particular, those who can benefit most. The largest of businesses are more likely to use other resolution routes than the ombudsman so may not benefit from access to this service, while the cost of making it available to them remains. Such businesses may also bring a level of dispute complexity which is likely to drive up the cost of the ombudsman service, and is probably better handled by the courts.

As regards thresholds determining which customers potentially get access in the expansion, we consider expansion should be limited to maximum size of the entire business. We suggest that a very simple and clear metric is used which can be understood by customers, suppliers and ombudsman case-handlers. In a sector with such a large variety of customers, classification by nature or characteristics is likely to throw up problematic ambiguities such as differences in interpretation and a reliance on obscure information.

If Ofgem is minded to pursue an ombudsman expansion, we suggest that the metric is a simple limit attached to an element of supply and consumption that is universal to all non-domestic customers, such as level of consumption at customer level. Any threshold employed should be subject to exclusions, such as customers who are FTSE-listed are unlikely to require additional protections.

#### Expansion of Supply Licence Condition (SLC) 0A (Treating Microbusiness Consumers Fairly)

While we support the intention behind this proposal, we have concerns. The proposal is to “expand the Standards of Conduct (SoC) to apply to more non-domestic consumers”. We consider SLC 0A requirements would need to be revised to reflect that the SoC would operate differently for different types of customers. For example, while SLC 0A.3(b)(iii) requires suppliers, in providing information on products and services, to have due regard “to the Micro Business Consumer to whom it is directed”, the same flexibility for tailoring for the audience is not allowed for under SLC 0A.3(b)(ii) which requires information to be communicated in plain and intelligible language. The latter, is inappropriate for, for example, customers with flexible contracts who are well versed in the energy market and have a comprehensive understanding of their chosen product or service. Therefore, SLC 0A would need to be amended to make it clearer that the concept of ‘plain and intelligible’ would vary for different audiences.

Where Ofgem is minded to make this change, we urge consideration of the need for suppliers to have a lead time which could be 6-9 months depending on the reviews that would have to be done with their customer communications.

#### Improved monitoring

While we appreciate the value of the regulator having better information so that it can improve its ways of working and meet its objectives, we urge care.

This begins with urging that Ofgem must ensure it makes full use of existing reports before placing additional demands on suppliers.

In any expansion of monitoring, Ofgem must exercise the discipline of this being targeted, proportionate and reasonable. Behaviours we would welcome from Ofgem include: not conflicting with existing reporting deadlines; their monitoring requests being purposeful; improving transparency by aggregated and/or anonymised returns being published and/or shared with suppliers as appropriate; and following a process agreed upon with suppliers. We are interested in hearing more about Ofgem’s approach to compliance, and what checks will be carried out. In order to preserve a fair and level playing field, it is vital that all parties are held to the same standards and operate in a consistent and transparent manner.

#### **Focused customer support**

##### Domestic consumers’ non-receipt of consumer protections due to being on non-domestic supply

We welcome Ofgem’s proposal to explore with the Distribution Network Operators access to the Priority Services Register; ways in which support can be provided for these domestic customers in power cuts and emergencies; as well as Ofgem’s offer of their providing tailored advice to these customers.

We note that DESNZ, in its current Call for Evidence, “Domestic consumers with non-domestic energy supply contracts”, has asked suppliers for information that can improve their understanding of these

customers. We think it is important for the Government to recognise that in the majority of instances suppliers are not aware of, or party to, any formal or informal contractual relationships that their customers may have with domestic consumers. Therefore, creating measures for suppliers to apply additional protections to these customers may prove extremely challenging to deliver against in practice.

We also support Ofgem's proposal to work with the Department for Levelling Up, Housing and Communities to promote compliance and censure of non-compliance with the Maximum Resale Price.

#### Extending microbusiness protections to other non-domestic consumers

As regards TPI commission disclosure, we consider that disclosure is not an answer on its own, and we support Ofgem's request for the Government to intervene to provide legislative powers to regulate the TPI market directly.

Regarding benefits for customers, we consider that this proposal would increase transparency for a wider group of customers, giving greater understanding of the impact of commission on prices.

In terms of what suppliers may need to implement this policy, we suggest 6-9 months lead time to deliver the relevant process and system changes and to reflect them in suppliers' TPI agreements. Ofgem gave suppliers 6 months to implement this for microbusinesses so we believe there is no reason the lead time should be any shorter for non-microbusinesses. For ease of interpretation, the same presentation for commissions should be employed, i.e. annualised £amount, although we suggest that suppliers could be able to opt to present in an alternative format, e.g. £/p per unit of energy alongside the prescribed format. If Ofgem were to change the existing statutory presentation mechanism this would require additional implementation time.

We strongly believe that the question of implementing cooling off periods needs careful consideration to scope out the unintended consequences of introducing the policy and weighing these up against the harms anecdotally observed by Ofgem. For example, due to the materially higher hedge needed to serve non-domestic customers, introducing cooling off periods may result in suppliers pricing in higher risk premiums to factor in the potential of losses should a customer change their mind. This would be adverse as customers would likely experience higher bills. We would welcome the opportunity to discuss this workstream with Ofgem as it develops its thinking.

**If you would like to discuss the above or any other related matters, please contact me directly on 020 7747 2964 or at [candice.orr@energy-uk.org.uk](mailto:candice.orr@energy-uk.org.uk).**