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Dear Neil

Re: Addressing unfair price differentials consultation

Which? is grateful for the opportunity to respond to the unfair price differentials consultation. The paper has raised a number of questions and concerns; and due to the nature of these it has not been possible for Which? to develop firm recommendations as to which of the options presented in the paper is most appropriate. However, as it is important that Ofgem receive a balance of views, from consumer representatives and energy suppliers, we have provided comments on the options presented.

Timeframe

The six week timeframe given to stakeholders to respond to the proposals set out in this consultation paper was not adequate. The code of practice on Consultation issued by the department for Business and Regulatory Reform¹ states that consultation periods should normally last at least 12 weeks, which this consultation clearly does not. We strongly believe that Ofgem should work on a best practice basis when consulting, and when it is necessary for a consultation to be undertaken that it should include a 12 week period.

The Competition Act (1998)

In July 2000 Ofgem published a document 'Gas and Electricity Supply Licenses-Proposals for Standard Non-discrimination License Conditions'. The paper proposed to remove the non-discrimination conditions from the gas and electricity supply

¹ Code of Practice on Consultation, Department for Business and Regulatory Reform, July 2008

licenses, and that any anti-competitive behaviour that may cause appreciable harm to customers and competitors could be addressed using the Competition Act 1998. The non-discrimination clause was subsequently removed from the license conditions.

This consultation paper clearly states that Ofgem believes that ‘a significant number of consumers remain disadvantaged by persistent unfair price differentials’. In light of this assessment we believe that Ofgem should set out the reasons for its apparent change in policy from its stated intent to apply the Competition Act 1998 to introducing new license conditions to address discriminatory pricing behaviour.

Addressing unfair price differentials consultation paper

Implementation of reforms

We believe that prior to implementing any changes to the current arrangements a thorough analysis of the implications needs to be undertaken. This should include examining the impact on the following issues:

- > The impact on vulnerable consumers who are not currently on PPM.
 - Following the ‘balancing’ of pricing what will be the impact of the total number of consumer who could be classed as fuel poor?
 - Will the degree of fuel poverty increase and by what extent?
- > Impact on consumer engagement.
 - What impact will the introduction of price controls have on switching behaviour?
- > Impact on competition.
 - What impact will price regulation have on the number of new entrants?
 - Will price regulation discourage the development of loss leading products?

Prohibition of undue discrimination

This consultation paper does not clarify what outcomes Ofgem ultimately wish to achieve, which of the options Ofgem prefers or why it is that the current arrangements have in Ofgem’s view failed. Consequently, it has not been possible for Which? to reach a firm conclusion which of the options presented would be most appropriate.

However, of the options presented Which? would likely be most supportive of the introduction of a prohibition on undue price discrimination. This arrangement would appear to provide protections most in line with those that the Competition Act (1998) provides and may therefore be least distortionary to competition.

Enforcement

Which? strongly believes that in order for a regulator to fulfil its statutory obligations it must have enforcement practices that are targeted, proportionate and timely. We do not believe that the proposals in 2.13 fulfil these criteria, for example, it is difficult to see how Ofgem would be able to act in a timely fashion, and paragraph 2.14 states that even Ofgem also believe that the proposals undermine any incentive for supplier compliance. If Ofgem feel that a different enforcement process than usually applied to standard license conditions is appropriate then we believe that Ofgem should clarify why, and how they will differ.

Duration

The proposals in this paper include a provision that any amendment to the license conditions would 'become inactive after a predetermined period' as it is supposed that the energy market will become 'fully effective' and these conditions will no longer be required. We do not believe that a timeframe is relevant, what is important is a shift in the market conditions such that it is 'fully effective'. We recommend that Ofgem clearly set out what they understand as an effective market and the criteria against which a decision would be made to remove any licence conditions.

If you require clarification on any of our comments please feel free to contact me.

Yours sincerely,

Dr Fiona Cochrane
Senior Policy Researcher