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Code Governance Review – Role of Code Administrators

Dear Jon

We are disappointed that the majority of the suggestions for the reform of the industry code administrators put forward by the industry in the previous consultations on this issue and in the CAWG seem to have been ignored.

The Code Governance Review by Ofgem offered an opportunity to resolve some of the fundamental structural issues that have reduced the effectiveness of the governance regime of the UNC and BSC (e.g. the make up of the Elexon Board, the role of gas transporters on the UNC Panel, the establishment of company/service contracts for the UNC and BSC). It is therefore disappointing that although these developments are recognised by Ofgem as potentially delivering improvements for the industry there appears to be a lack of appetite to progress these any further.

Critical friend role for code administrators

We believe that a 'critical friend role' for code administrators is useful for the industry and for the successful working of the industry codes. We have outlined our views on the activities suggested within the potential critical friend obligations on code administrators below. We do not however, believe that any suggested secondary services should be provided to a limited number of industry participants by the code administrator. Instead these services should be provided to all parties who would all equally benefit from them.

In drafting modification proposals E.ON UK often has discussions with code administrators to use their knowledge and expertise. Placing a formal obligation on code administrators to provide 'critical friend' services could therefore be helpful, but

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not if we were excluded. Clearly smaller users and new entrants will tend to avail themselves of these services more than the established larger players but limiting the services to small players is unwarranted and clearly discriminatory.

Primary activity of a code administrator:

- *To provide input into the terms of reference set by the panel for workgroups*

This is a sensible suggestion and one which an experienced code administrator should be able to deliver.

- *To provide input into the working group's analysis*

It is unlikely that a code administrator will have access to much of the relevant information that would be useful for a working group to undertake any analysis.

Information to assess the competitive impact of changes is more likely to be held by industry participants. It would perhaps be better to require the code administrators to 'provide input into the working group's debate'. In this way they could be required to provide more general information that may be pertinent to the debate about a change, e.g. Elexon is clearly able to provide information obtained from the BSC central settlement systems that they oversee¹.

- *To provide input into the panel members' conclusions*

This risks placing the administrator of a code in the position where they are accused of attempting to manipulate or persuade the voting of panel members. Panel members should be competent and knowledgeable about the industry and not require this level of support.

- *To judge if Ofgem is likely to reject a modification due to a lack of analytical support and seek to prevent this occurring*

Whilst the code administrator may recall and advise the panel of similar instances and Ofgem's response, it is unlikely that such a requirement could be successfully achieved. It would be better for Ofgem to utilise the proposed 'Call In / Send Back' powers rather than trying to get the code administrator to second guess Ofgem views.

¹ This was of particular relevance in the case of cash-out modifications, but for many other BSC modifications Elexon does not have such uniquely relevant knowledge or expertise.

- *Unsubstantiated assumptions or assertions by parties do not go unchallenged*

This in practice would be impossible for a code administrator to achieve as parties may be unwilling to provide commercially sensitive information to the level of detail required.

- *All arguments for and against a modification are adequately discussed at workgroup*

We agree that the facilitation of debate should be a primary objective of the code administrator in a workgroup.

- *Arguments for and against a change are reflected in the modification documents*

We agree and believe that this tends to happen already in the code change process.

- *Highlight any previous discussions or decisions that may be relevant to the modification being considered*

We agree and believe that this does sometimes happen already in the code change process.

- *To assess modification proposals to determine whether they were likely to have a significant impact on smaller participants and/or consumers*

This would be impossible for a code administrator to undertake as they would need to have a detailed understanding of all small participant businesses.

It would also risk duplicating and contradicting the role of Ofgem in determining upon a change where there are already requirements to consider the impact of a change on the competitive market and safe guarding consumer interests.

They could however help facilitate the collection of commercially confidential data (that market participants may wish to provide). This could be suitably anonymised and provided to the relevant panel and Ofgem to assist in their deliberations on the merits of particular proposals.

- *Alert other code administrators when a proposed modification was likely to have consequential effects for other codes*

We would support this initiative as we do not believe it happens in a sufficiently robust manner at present.

Secondary role of the code administrator:

- *include providing assistance to smaller participants/consumer representatives (where applicable) with the drafting of modification proposals (particularly with regard to legal text)*

This would be of significant benefit to all participants and would also help ensuring that code changes were robust. Recently several UNC modifications that we have raised have suffered from inappropriate legal text being provided by the gas transporters. This has led to subsequent modifications needing to be raised. Requiring the code administrator to undertake this role would ensure unbiased legal text is presented along with a modification.

- *providing small participants/consumer representatives with clarifications as to the operation of part of the relevant code*

This would be beneficial to all industry code parties and should be a requirement not restricted to small participants.

- *ensure that the views of smaller market participants and consumers are both heard and effectively debated at work-group and panel meetings*

The code administrator should be required to ensure that ALL participants' views and consumers' views are heard and effectively debated at work groups and panel meetings.

If there is to be a specific obligation to assist particular players we think it should be focused on classes of users and customers that may from time to time be inadequately represented.

This would not relate to an arbitrary definition of size but would instead seek to address gaps in representation, e.g. wind farm developers in the South West of England may have difficulty being heard compared to the views of the Scottish Renewables Forum. This is a matter of ensuring balance.

Obligations to assist small participants and consumer groups

The obligations on code administrators that are being suggested, we believe, should be applied to all participants and not simply a certain selective few. Without this industry debate certain changes may be adversely affected and the interests of consumers harmed.

Our views on the proposals for code administrators:

- *Contact relevant small participant/consumer representatives when a proposal raises issues that may impact on their group*

This should apply to any group affected by a change proposal that is raised to an industry code to ensure that appropriate debate is had by all involved parties. Without a debate involving all parties there is a risk that the competitive market and consumers may be adversely affected by an industry change.

- *helping small participant/consumer representatives effectively frame and develop modification proposals*

This support should be provided by the code administrator to all industry parties.

- *ensuring that small participant/consumer representatives' viewpoints can be articulated and debated at workgroup and panel meetings and that other workgroup members or panellists do not seek to stifle or prevent such debate*

There should simply be a requirement for the code administrator to effectively chair and manage workgroup and panel meetings.

- *holding remote rather than 'live' meetings if this is more convenient for them*

This reform would be welcomed by all participants and is used widely already in industry code meetings.

- *Better scheduling of meetings that enable small participants to obtain updates on all code modifications at one meeting*

Although a laudable ambition this in practice would be unlikely to be viable for the code administrators due to time constraints. It would be better to task the code administrators with making information about code changes easily and readily accessible to all interested parties.

- *raising codes issues that are relevant to small participants at appropriate industry meetings, for example at Ofgem's Demand Side Working Group;*

We see the value of requiring the code administrator to attend meetings not associated specifically with that code and for them to represent the interests of all the parties to that code and the interests of the code (this already happens with code administrator for the SPAA attending some of the UNC meetings).

Requiring them to specifically represent the interest of certain participants would widen

the scope of their role beyond an impartial code administrator. We do not believe that the mixture of these roles would be useful and would undermine their role in delivering code administrative services.

- *establishing web-based forums and improving websites to provide easy access to information on code modifications*

This initiative could potentially be of use to all industry participants and should not be restrictive in who can utilise the service.

- *ensuring that the views of small participants/consumer representatives are effectively articulated in workgroup and code modification reports and that impacts on small participants/consumers are specifically described*

There should be a requirement for ALL participants' views to be articulated in the code modification reports. The usefulness of these reports will be undermined if they only include the views of small participants. It would be better if code administrators were obliged to reflect the views of all classes of users and customers that are likely to be affected by a proposal.

The proposal to define small suppliers and shippers as those with less than 1 million customers in the gas market effectively creates a division between those active in the domestic market and those only involved in supplying business customers.

There would appear to be little justification or evidence that this is warranted in the UNC. The UNC panel is made up of a significant number of representatives from the proposed 'small supplier' constituencies and their representatives attend all of the UNC workstreams. The number of UNC modifications raised to date by these parties is significant. Based upon these facts it is unclear as to what justification there is for introducing a split solely on the number of customers serviced.

Providing additional support for these organisations over those active in the supply of gas to domestic customers discriminates against these companies and will potentially harm the interests of the consumers that they serve.

The reference within the consultation to SPAA classifications of different industry participant (e.g. small transporter, large transporter) is misleading. These classifications are not used within SPAA for the purposes of deciding discriminatory service levels provided by the code administrator. They are in fact used as reference with regard to different industry processes that may be applicable to specific types of industry participant.

Consumer representation on UNC panel

We can see the merit of extending the voting membership of the UNC Panel to include a consumer representative.

Independent panel chairs – CUSC and UNC panel

We are puzzled as to why Ofgem has put forward this proposal at this time particularly as respondents to previous consultations had not generally raised concerns about the ‘independence’ of the CUSC and UNC panel chairs.

It is unacceptable in the context of major policy reform (MPR) proposals for Ofgem to appoint ‘independent’ panel chairs especially if such chairs were to have a casting vote on modification decisions. Ofgem appointment of chairs would clearly expose them to criticism that they would use such appointment to indirectly influence the running of panels. At worst the casting of the vote of such Ofgem appointed ‘independent’ chairs could affect individual rights of affected parties to appeal proposals to the Competition Commission.

Call in and send back powers

Powers to ‘call in’ and ‘send back’ modifications could be useful if used sparingly and in cases where there is a clear failure of the modification process. It should not be used simply for the administrative convenience of Ofgem or as a mechanism for Ofgem to seek to choreograph a particular outcome.

We believe that in most cases² active engagement by Ofgem in the industry codes process would avoid the need for ‘call in’ and ‘send back’ powers as timetables for assessment, and the scope of any industry analysis could be altered in the light of an ongoing dialogue with Ofgem.

We agree that specific powers would need to be defined within the individual code change rules. If the powers set out in the consultation namely;

1. issue directions/instructions to code panels on timetables for modification development
2. issue directions/instructions on the analysis that should be undertaken on a proposal before it is submitted to the Authority
3. issue directions to the panel to revise the terms of reference for the assessment of the modification

² An example where formal ‘call-in’ or ‘send-back’ powers may have proved useful include UNC088 where assessment of the competitive impact proved particularly difficult.

4. require a panel to report to the Authority on the progress of a modification and the analysis being undertaken on the proposal

Were to be applied they should be considered as reserve powers used by Ofgem only in exceptional circumstances. Ofgem would necessarily have to exercise these powers reasonably and not routinely override panel decision. Particular care would have to be exercised to ensure that Ofgem did not act in a way that might be perceived to pre-judge a particular outcome³.

Panels to provide reasons⁴ for decisions

The suggestion that Panel members should be able to justify their decisions is sensible and already has been adopted by some codes such as the IGT UNC and CUSC.

Formalising this requirement for all codes would therefore be sensible. In this regard we consider the CUSC panel procedures that record individual detailed reasons for recommending approval or rejection of a modification proposal represent best practice and should be adopted by the BSC and UNC panels.

Performance scorecards for Code Administrators

We are not convinced that the introduction of performance scorecards or the requirement for ISO accreditation will have a significant impact upon the service standards of code administrators, only increasing their costs.

Only the introduction of a service company structure for industry codes with tendered administration services for defined periods has proved to date to succeed in the ambition of improving administrator performance. We continue to believe that this is the best approach for the delivery of good code administration services.

Yours sincerely

Alex Travell
Retail Energy Policy and Regulation

³ Directing analysis for a particular proposal and not for others that Ofgem do not favour may be an example of Ofgem seeking to choreograph a particular outcome.

⁴ The CAWG also considered the importance of ensuring greater visibility and timeliness in the Authority/Ofgem decision making processes. In this regard, it was felt that the high standards Ofgem expects of industry code panels and the code modification procedures should also be applied to Ofgem/the Authority. In our view this should include the following in respect of modification business; (a) published timetables for modification decisions, (b) Authority minutes to record detailed views expressed and votes cast, (c) publication of Ofgem papers and presentations made to the Authority, and (d) Authority modification business to be conducted in open session.