

8 December 2009

Mr Mark Cox
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Dear Mark

Codes Governance Review Initial proposals – Illustrative Licence Modification Drafting

Thank you for the opportunity to comment on the proposed illustrative licence drafting which will enable implementation of changes being considered under Ofgem's Industry Codes Governance Review.

Consumer Focus is broadly supportive of the proposed licence drafting, however we have some comments and concerns which are set out below.

Major Policy Reviews and Self Governance

Notwithstanding the legal nature of licence conditions, some of the proposed text seems confusing and we are concerned may not allow for the intended actions for the conduct of major policy reviews. For example in paragraph 4A it is unclear under what circumstances parties can or cannot raise modifications proposals during a major policy review.

We are also concerned about the proposed definition of a Major Policy Reviews' end date. By their nature, concepts that are subject to a Major Policy Review are likely to be those that have the most profound impacts on consumers and market participants. These are likely to coincide with those areas with the greatest potential to create winners and losers among market participants. As a consequence modification proposals prompted by Major Policy Reviews are disproportionately likely to (a) trigger the statutory obligations on the Authority to conduct an Impact Assessment before reaching a decision and (b) be subject to legal challenge (whether through a legitimate perception that an affected party has been wronged, or through its tactical consideration that such challenge may delay, or water down, the impacts).

It is therefore inherently likely that there may be lag time of (at best) many months and (at worst) a number of years between Ofgem commencing a Major Policy Review and its end date. The legal text only guarantees a right for stakeholders to raise modification proposals within the first two months of this review (ie through the definition of the 'Major Policy Review proposal period'). The definition of 'Major Policy Review end date' is such that appeals have to be heard and their outcomes implemented before any new proposal could be raised outside that two month period. This could result in stakeholders being 'locked out' from raising proposals in relation to a specific part(s) of the code for a number of years if Ofgem does not exercise its discretionary right under 4A(b) to allow new proposals to be raised.

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While 'locking' parts of codes for a number of years may have benefits in terms of ensuring stable signals, it could well be a cause of legitimate anxiety to stakeholders. We would encourage Ofgem to consider whether this definition is too severe and if new proposals should be allowed after Ofgem has published the conclusions on its Major Policy Review, rather than once the decision, appeal and implementation period has ended.

In any event, once a Major Policy Review is triggered, we consider that it will be necessary for Ofgem to provide clarity to all stakeholders on its likely decision making timetables and what exactly is or is not within its scope (and by implication, what parts of the codes stakeholders are 'locked out' of). We appreciate that this probably cannot be easily captured in legal drafting and would encourage you to consider whether a guidance document or statement of intent would help to provide this clarity.

We have some concern about how parties and panels will properly assess modifications under the self governance route. This concern rises from the use of the term 'trivial effect', given there is no definition of the term, panels and parties may find it difficult to assess modifications using this criteria (refer to paragraph 13A). We accept that panels over time will be better able to assess the modifications, however some guidance for panels on the definition of 'trivial effect' might be useful.

Code Administrators and Small Participants/Consumer Initiatives

It is important that the definitions of small generators/distributors/suppliers allow for genuine small participants to receive help from code administrators acting as a critical friend (refer to paragraph 14). In our previous response on the Code Governance Review we support the definition of small participant as any with fewer than 250,000 customers and supported Ofgem's definition in the 2008 consultation document of small generators and distributors.

On a related point, we note that many of the Big 6 suppliers hold multiple supplier licences. We would encourage you to apply the definition of small based on the number of customers served by the overall group of connected companies rather than individual licensees, in order to avoid the perverse outcome whereby parts of the Big 6 could potentially be considered to be small players.

We support the proposed licence change to support a consumer representative on the UNC panel with voting rights. However, we would find it impossible to support the notion that the Authority has the right to veto the appointment of a Consumer Focus representative. Words similar to that used in other Codes (such as the BSC) should be used. This is important to maintain our role as an independent and unfettered consumer champion.

Charging Methodologies

In our October 2009 consultation response on charging methodologies we preferred option 3 where charging methodologies would sit under the governance arrangements for the relevant industry code. We believe that this option has advantages in terms of use of existing processes and governance, would see greater accountability and it would facilitate engagement because of better stakeholder familiarity and would allow coordination of charging and code changes. We do not have any specific concerns with the proposed text for the proposed licence changes in this area.

If you have any questions or would like further information about our response please contact Abigail Hall, Senior Policy Advocate, Regulated Industries Team by telephone on 0207 799 7934 or via email: abigail.hall@consumerfocus.org.uk

Yours sincerely



Robert Hammond
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