

Guidance

Self-governance modification appeals process

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This guidance document sets out our approach to discharging appeals brought to Ofgem¹ against self-governance modification decisions.² It provides an overview of the procedure that such appeals will follow, however, appeals will be dealt with on a case by case basis.

¹ The terms 'Authority', 'Ofgem', 'we' and 'our' are used interchangeably in this document. The Authority refers to GEMA, the Gas and Electricity Markets Authority. The Office of Gas and Electricity Markets (Ofgem) supports GEMA in its day-to-day work.

² Self-governance modification 'decisions' for the purpose of this document refer to self-governance determinations as described in the relevant codes and licence conditions.

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What is a self-governance modification decision?

The industry codes are the various commercial, operational and technical arrangements that underpin the electricity and gas wholesale and retail markets, and carbon dioxide transport and storage networks. The codes set out the processes for making modifications, including the circumstances in which modification proposals can be progressed under a 'self-governance' procedure. Code modification proposals can only be determined by self-governance where they have met the self-governance criteria set out in respect of that particular code. In most cases this involves a test of materiality whereby the modification proposal, if implemented, is unlikely to have a material effect on specified matters, including competition and consumers, and is unlikely to discriminate between different classes of code party.³

When a modification proposal is determined under a code's self-governance process, the relevant code panel (or in some cases, code parties) will take the final decision on whether or not that modification is made. The Authority's approval is not required.

Who is eligible to appeal a self-governance decision?

Code parties (and, where specified in the licence or code, third parties that would be allowed to raise a code modification proposal under the relevant code) are eligible to appeal a self-governance modification decision.

On what grounds can an appeal be made?

The grounds for appeal are set out in the relevant code and/or licence.

The following are, in most cases, the eligible grounds for an appeal against a self-governance modification decision:

- The appellant is, or is likely to be, unfairly prejudiced by the implementation or non- implementation of the self-governance modification proposal or
- The appeal is raised because the appealing party reasonably believes that:
 - a self-governance modification proposal which is to be implemented may not better facilitate achievement of at least one of the applicable code objectives or

³ Self-governance criteria for each code is set out in the relevant licence and/or code.

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- a self-governance modification proposal which is not to be implemented may better facilitate achievement of at least one of the applicable code objectives and
- The appeal is not raised for reasons which are trivial or vexatious, and the appeal has a reasonable prospect of success.

How does an eligible party make an appeal?

The existing code rules may provide that the panel (or in some case, parties) can review and re-take the decision, eg through an interim forum which suspends the original decision and hears an appeal. The appellant should always exhaust any alternative appeal, complaint or dispute resolution processes within the relevant code before appealing the self-governance decision to the Authority.⁴

To make an appeal to the Authority the appellant should complete the 'Self-Governance Decision Appeal Form' providing as much detail as possible and submitting all relevant documentary evidence with the form in support of its case.⁵

The appellant **must** provide the following details on the form:

- the name of the appellant, including the contact details of a designated representative of the appellant for the purpose of the appeal. An alternate representative's details are also required
- the name/reference of the self-governance modification decision against which the appellant is appealing and a copy of that decision
- the ground(s) on which the appeal is being made, by reference to the eligible grounds for appeal
- the reasons for the appeal in as much detail as possible along with any supporting evidence. This is important because it will inform the Authority in deciding whether the appeal should proceed
- an explanation of the impact on the appellant of the self-governance decision and how a successful appeal would resolve the matter
- the date on which the form is submitted.

⁴ For the Retail Energy Code (REC), if the decision in respect of a Self-Governance Change differs from the recommendation of the Code Manager, then the decision may automatically be appealed to the Authority.

⁵ The form is attached to this guidance.

In signing the form, the appellant verifies that it believes that the facts stated in the form are true.

When can an eligible party make an appeal?

The appeal form and relevant documentary evidence must be submitted to us by email to industrycodes@ofgem.gov.uk within the appeal window. The appellant should inform the relevant code administrator⁶ that they have submitted an appeal to us. The appeal window is set out in the applicable code.

What is the process after an appeal is made?

We aim to acknowledge the appeal and confirm whether we consider it to be valid within 10 working days of the appeal window closing. If the appeal is to proceed, we may request further information from the appellant, code panel, or any other party.

We will decide on a case by case basis if we require further information in order to progress an appeal and will aim to seek this information in a timely manner. When requesting further information, we will take into account the urgency of the appeal and the information initially submitted on the appeal form and, where appropriate, we will set out specific questions.

The timetable for the appeal process may vary depending upon the individual circumstances of the appeal. If we confirm that an appeal is to proceed, next steps and an indicative timeframe will be outlined in the acknowledgement letter.

If an appeal is refused, ie we consider that the appeal does not meet the grounds for appeal, we will explain why.

In the case that more than one appeal is made against the same decision, these appeals will initially be assessed on their own merits. If allowed to proceed, these appeals may be dealt with together as one matter.

⁶ This may be alternatively described as a Code Manager or Secretariat within a given code.

Will the appeal form and information submitted in relation to an appeal be published?

All documents submitted in relation to an appeal will be published on the Ofgem website (unless clearly marked as confidential). The documents submitted should be relevant to the appeal and, where appropriate, respond to the specific questions raised by the Authority.

Any confidential material submitted in relation to an appeal must be clearly marked as such and a non-confidential summary also provided for publication.

When would the Authority be able to make a decision?

We will aim to issue our decision in a timely manner. The timetable will be dependent upon the circumstances of the appeal and whether further information is required.

When a decision is made it will be issued as an open letter and will state the reasons why the Authority has reached its decision and, where appropriate, direct further action to be taken.

What are the appeal outcomes?

The following outcomes may result from an Authority decision of a valid appeal:⁷

1. The Authority rejects the appeal and upholds the self-governance decision:

- a) if the decision was that the proposed modification be made, the modification will proceed to implementation
- b) if the decision was that the proposed modification should not be made, the modification proposal lapses immediately.

As the Authority agrees with the original decision, there will be no further appeal of the Authority's decision.

⁷ The possible outcomes resulting from a self-governance appeal are outlined in the relevant licence and/or code.

2. The Authority upholds the appeal and quashes the self-governance decision

In this case the Authority may:

- a) send back the modification proposal for reconsideration and redetermination
- b) remove self-governance and determine that the proposed modification should be made
- c) remove self-governance and determine that the proposed modification should not be made.

Where the Authority quashes the self-governance decision and takes the decision itself, under certain codes the Authority's decision on the proposal may be appealable to the Competition and Markets Authority.

Your feedback

We believe that consultation is at the heart of good policy development. We are keen to receive your comments about this guidance. We'd also like to get your answers to these questions:

- Do you have any comments about the overall quality of this guidance?
- Do you have any comments about its tone and content?
- Was it easy to read and understand? Or could it have been better written?
- Any further comments?

Please send any general feedback comments to industrycodes@ofgem.gov.uk

Appendices

Appendix 1 – Self-Governance Decision Appeal Form

Self-Governance Decision Appeal Form
Name and reference of the decision which you are appealing (please provide a copy of the decision with this form):
Date on which the decision was taken/published:
On which ground(s) are you appealing the self-governance decision? (The grounds on which an appeal can be raised are set out in the individual codes):
Please provide detailed facts and reason(s) in support of your appeal:
Please explain the impact on you of this decision and how a successful appeal would resolve this matter. Please indicate if you consider there to be any other persons affected by this decision.

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Details of Appellant: Organisation's Name:	
Capacity in which the Appeal is raised: (eg code party, non-code party with right to raise an appeal)	
Details of the Appellant's Representative: Name: Organisation: Address: Telephone Number: Email Address:	
Details of the Representative's Alternate: Name: Organisation: Telephone Number: Email Address:	
Are you supplying attachments to this form? (see Notes) Yes / No *delete as appropriate If 'Yes' Please provide the title and number of pages of each attachment and whether it is confidential or not:	

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Statement of truth

The appellant believes that the facts stated in this form are true.

Name:

Position:

Signature:

Date:

Notes:

You should attach relevant detailed documentary evidence only for appeal purposes. If you wish to submit evidence which is confidential, please mark this accordingly and provide a non-confidential summary with it. Confidentiality is subject to any obligations to disclose information, for example, under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004. If the information you give us contains personal data under the Data Protection Act 1998, the Gas and Electricity Markets Authority will be the data controller. We use the information in performing our statutory functions and in accordance with section 105 of the Utilities Act 2000.

Completed appeal forms should be submitted to industrycodes@ofgem.gov.uk.