

Ofgem guidance – self-governance modification appeals process

Introduction

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.

What is a self-governance modification decision?

The industry codes are the contractual arrangements that underpin the electricity and gas wholesale and retail markets. 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-

¹ The terms 'Authority', 'Ofgem' and 'we' are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority.

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.

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

- 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
 - 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.

To make an appeal to the Authority the appellant should complete the 'Self-Governance Decision Appeal Form'⁴ providing as much detail as possible and submitting all relevant documentary evidence with the form in support of its case.

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; and
- the date on which the form is submitted.

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 the Authority by email to industrycodes@ofgem.gov.uk and copied to the relevant code administrator within the appeal window. The appeal window is set out in the applicable code.

⁴ The form is attached to this guidance and available on the websites of the code administrators.

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, Ofgem may request further information from the appellant, code panel, or any other party as may be applicable to determining the appeal.

We will decide on a case by case basis if we require further information in order to progress an appeal. We will aim to seek any further information in a timely manner, and typically expect this process to take up to 4 weeks. We will take into account 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.

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 website⁵ (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. Typically we will aim to publish our decision within 25 working days of either:

- a) the date of our acknowledgement letter confirming that the appeal is considered valid, in cases where we consider that no further information is required; or,
- b) the date at which our final request for further information closes.

⁵ Electricity codes: <https://www.ofgem.gov.uk/licences-codes-and-standards/codes/electricity-codes>, Gas codes: <https://www.ofgem.gov.uk/licences-codes-and-standards/codes/gas-codes>

When a decision is made it will be issued as an open letter and 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 an appeal:

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; or
- 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.

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; or
- b) remove self-governance and determine that the proposed modification should be made; or
- 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, the Authority's decision on the proposal may be appealable to the Competition Commission where it is contrary to the original decision (as that decision is treated as a recommendation under the code modification rules) or the recommendation in any revised report.

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?:

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.

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:	
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.

Completed appeal forms should be submitted to industrycodes@ofgem.gov.uk and copied to the relevant code administrator.