

Ruben Pastor-Vicedo  
Domestic Retail Market Policy  
Ofgem  
9 Millbank  
London  
SW1P 3GE

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Dear Ruben

#### **White label providers in the domestic market**

Thank you for the opportunity to respond to your consultation on white label providers (WLPs). We are pleased that Ofgem has recognised the importance of WLPs to the domestic energy market and are broadly supportive of the substantive outcome of Ofgem's proposals, with one major exception noted below. We agree with Ofgem that WLPs should be treated as possessing a separate brand identity and therefore should receive 4 separate tariffs as well as their own bundles and discounts. We strongly support this principle of protecting the separate identity of WLPs, which is also of fundamental importance to Sainsbury's.

By extension, we do not support any proposal that deviates from the principle of separate identity and believe Ofgem's proposal to broaden the alternative cheapest tariff messaging (CTM) to cover both the partner supplier and WLP undermines this principle. We also believe Ofgem's proposed approach will lead to poor customer experience, the provision of inconsistent customer information and prove operationally challenging to implement. We do not believe that Ofgem has provided sufficient justification as to why WLPs should be treated differently to any other supplier and the proposals do not fulfil the task that Ofgem set for itself in June 2013 to '*understand different types of white label business models, how each type of model may contribute to improving competition and add value for consumers*'<sup>1</sup>. Instead, Ofgem's proposals risk damaging the important distinction between the WLP and the partner supplier, which could have a negative impact on competition in the retail market.

While we provide a more detailed response in Appendix A, we highlight the following concerns:

**Focusing on price means that other tariff features are given less weight and risks customer dissatisfaction.** To differentiate in a competitive market, the WLP and partner supplier may have different bundles, discounts, reward point schemes, and service offerings. Some customers choose their supplier based on the quality of service or to secure certain offers. If a WLP was required to use

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<sup>1</sup> Ofgem RMR June 2013 consultation

the CTM to promote a tariff offered by the partner supplier (or vice versa), the customer may incorrectly assume that the non-price elements of supply will remain the same. If the customer made this assumption, the CTM may encourage a customer to switch to a slightly cheaper tariff without being aware that, in doing so, they may lose features they enjoy with their current supplier. Alternatively, as we believe it is unlikely that suppliers will voluntarily discuss the tariffs of another supplier during a sales call, customers may only become aware of cheaper WLP tariffs, if such tariffs exist, once they receive their first bill or statement of account. Either situation could lead to significant customer dissatisfaction. Owing to space restrictions on the bill, it would be difficult for suppliers to fully explain to customers what benefits they may lose by switching.

**Ofgem's CTM proposals risk stifling innovation.** Although Ofgem states that their aim is to promote consumer choice and deliver consumer protection "through innovative business models", the effect of their proposals will be to curtail innovation and limit customer choice. Sainsbury's Energy is an innovative business model, currently offering price competitive tariffs which appeal to a particular group of customers, e.g. dual fuel customers interested in fixed term contracts and looking for a new entrant with a known brand. Ofgem's proposals will undermine the business model of Sainsbury's Energy by diluting their separate brand identity. We do not understand what objectives Ofgem are seeking to achieve that would justify this detrimental outcome.

**Ofgem has failed to meet the objective it set for itself in June 2013 to understand WLPs and how WLPs improve competition or add value for consumers.** We are surprised that Ofgem has provided no quantitative analysis or qualitative evidence to support their CTM proposals. For instance, Ofgem do not seem to have considered the positive impact of WLPs on price, features-based or branded competition or the benefits WLPs bring to the market in terms of addressing customer needs. We also note that Ofgem has not reviewed comparable arrangements in other markets, such as the relationship between First Direct and HSBC in banking or between Giff Gaff and O2 in mobile telephony. Left unaddressed, these issues could leave Ofgem's proposals open to challenge. Further considerations on this matter are set out in Appendix B to this response.

**If Ofgem's proposals are introduced in their current form, they would have knock-on impacts for a variety of customer journeys.** While we have not yet fully explored the potential impacts, we expect these changes would require significant resource and time and it is not clear what, if any, benefits associated with Ofgem's proposal justify this.

Based on the above, Ofgem must now undertake a thorough impact assessment of their WLP proposals, taking into account the likely effect on competition, innovation and customer choice. We believe that such an analysis will demonstrate that WLPs are good for competition and consumers and conclude that Ofgem's current CTM proposals weaken the rationale for WLPs to participate in the market. We would expect Ofgem to reconsider their proposals in light of the impact assessment and the concerns raised.

If you would like to discuss this response further, please contact me (07789 570 250) or Thomas Lowe (07769 548 906).

Yours sincerely

Sharon Johnson  
Director of Regulatory Affairs  
British Gas

## Appendix A

**Question 1:** Do you agree with our current assessment of white labels? If not, please provide any evidence you have to support your views.

We are pleased that Ofgem recognise the important role that WLPs play in the domestic energy market. We believe that the participation of well-known retail brands such as Marks and Spencer and Sainsbury's increases consumer trust in the energy sector as a whole. These providers also increase customer choice, both in terms of tariffs and customer service levels.

We note with surprise Ofgem's suggestion that WLPs have a limited effect on price competition. As no evidence is provided to support the claim, it is difficult to understand how Ofgem reached this conclusion. We believe that a more detailed assessment would show that, if a WLP offers distinctly priced tariffs from the partner supplier, then these tariffs could have an effect on the competitive dynamic, including a downward pressure on prices. Only if the WLP and partner supplier offered identically priced tariffs<sup>2</sup> would there be no such effect. We would expect Ofgem to have considered the benefits that WLPs bring in other markets, for example First Direct and HSBC in banking or Giff Gaff and O2 in mobile telephony. We believe Ofgem should publish any analysis they have conducted to support their claim and, as set out in Appendix B, we believe Ofgem has not yet met its statutory duties.

Looking to the future, WLPs may prove a simple and effective route to supporting the government's community energy strategy. For instance, energy suppliers could partner with a local community by forming a WLP. By working with the partner supplier in this way, the WLP could use a distinct brand identity to offer bespoke energy tariffs, innovative products and customer service offerings to that community.

**Question 2:** What are your views on our tariff proposals? If you do not support our proposals on either the tariff cap or the other RMR tariff rules, please explain your reasoning.

We support Ofgem's proposals to allow WLPs to offer distinctive tariffs, bundles and discounts. This aligns with Ofgem's principle of separate identity whereby the WLP is clearly distinct from the partner supplier, though appropriately references the relationship, for instance in the Tariff Information Label. We believe that brand, product and service differentiation is essential for WLPs to distinguish themselves in the market and for consumers to understand they are being supplied by a distinct brand with its own customer service ethos and style.

**Question 3:** What are your views on our CTM proposals? If you do not support our CTM proposals, please explain your reasoning.

We do not support Ofgem's proposal for the alternative CTM to include both WLP and partner supplier tariffs. Most of Ofgem's proposals, including those on tariffs, bundles and discounts, promote the fact that WLPs are distinct and separate from the partner supplier. The CTM proposal adopts an entirely contrary approach, namely undermining the principle of separate identity in pursuit of transparency. We are aware that Sainsbury's places great importance on being seen as an energy challenger brand in its own right and, while being transparent about the partnership with British Gas, values its propositional differentiation from British Gas. We therefore believe that the CTM rules should be applied in the same way as the tariff and bundling rules, which avoid a supplier having to advertise other brands. We provide more detail on the drawbacks of the proposal below.

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<sup>2</sup> As we note is the case with some WLPs

To differentiate in a competitive market, the WLP and partner supplier may have different bundles, discounts, reward point schemes, and service offerings. Some customers choose their supplier based on the quality of service offered or to secure certain bundles or offers. Focusing on price means that other product or service features are given less weight and risks leading to customer dissatisfaction, as well as the reduction of WLPs' ability to differentiate themselves, and thus the attractiveness of market entry via this route. If a WLP were required to use the CTM to promote a tariff offered by the partner supplier (or vice versa), the customer may incorrectly assume that the non-price elements of supply will remain the same. We would note, for instance, that the details of optional bundles are not included in the Tariff Information Label or provided as part of the Principal Terms. If the customer made this assumption, the CTM may encourage a customer to switch to a slightly cheaper tariff without being aware that, in doing so, they may lose benefits they enjoy with their current supplier. Alternatively, as we believe it is unlikely that suppliers will voluntarily discuss the tariffs of another supplier during a sales call, customers may only become aware of cheaper WLP tariffs, if such tariffs exist, once they receive their first bill or statement of account. Either situation could lead to significant customer dissatisfaction. Owing to space restrictions on the bill, it would be difficult for suppliers to explain in full to customers that they may lose these benefits by switching.

If Ofgem's CTM proposals are introduced in their current form, then it is possible that WLPs will examine their continued participation in the market. If WLP arrangements continue despite these proposals, suppliers and WLPs will need to review and possibly amend a number of customer journeys. We expect this will require significant resource and time and it is not clear what, if any, benefits associated with Ofgem's proposal justify this.

Customer confusion is also likely for the fundamental reason that providing information on bills about another supplier's tariffs is unexpected. As established during the RMR discussions on the Market Cheapest Deal, customers do not expect to see competitors' tariffs promoted on their bills and annual summaries. The inclusion of a competitor's tariffs on the bill would cause confusion and undermine the separate identity of the WLP. Even though a supplier would not, and should not, be expected to voluntarily discuss the tariffs of another provider during a sales call, the incorporation of CTM information on bills may lead customers to question why they were not informed about the alternative tariff, if it existed, at point of sale. Even greater confusion would result where the partner supplier has partnerships with more than one WLP. In this scenario, Ofgem's proposals mean that one WLP will not need to promote the tariffs of another WLP but may promote the tariffs of the partner supplier. This seems to be inconsistent with the rationale for Ofgem's proposals and leads to further unnecessary complexity. We do not believe that customer confusion is a good basis for engaging consumers to explore alternative deals.

**Question 4:** If you are a partner supplier or a white label, how long do you envisage it will take you to implement our CTM proposals? Please explain the activities and timescales for implementation.

As we expect that, in the event of Ofgem's CTM proposals being introduced, WLPs may decide to leave the market, we have only conducted a limited review of the implementation question. While we are still impact assessing Ofgem's proposals, early indications are that the proposals are complex and would require changes to billing systems, a redesign of the bill, annual summary and Fixed Term Contract roll-off letters, and the delivery of training to agents in a variety of call centres. We also note that additional changes may be required to ensure that customers can move from one brand to another.

Suppliers currently face a significant amount of regulatory-driven system change. For instance, DECC and Ofgem are calling for a variety of system-dependent changes that will impact the bill, including midata and QR Codes. Delivering multiple objectives simultaneously is putting a strain on resources and, as Ofgem is aware, British Gas recently pulled out from a trial with Ofgem and the

Behavioural Insights Team which required further changes to the bill. These multiple initiatives will limit our ability to make changes quickly.

**Question 5:** Do you think that we should require white labels to publish information setting out the value that they deliver to consumers? If you think so, please outline what information you think white labels should provide.

As noted above, we are pleased that Ofgem recognise the value that WLPs bring to the energy market. However, we are unsure whether WLP customers require distinct information from the customers of other suppliers and believe this would add to the barriers to entry faced by WLPs. We are not clear that customers are seeking or would welcome bespoke communications explaining the value provided by their supplier.

**Question 6:** Do you have any comments on our draft of proposed supply licence condition changes in Appendix 3?

The proposed amendments to SLC 31D are complex. An alternative and potentially simpler approach would be for suppliers to notify Ofgem that they intend to establish or continue a WLP partnership and for Ofgem to provide a standardised derogation from the relevant rules. Once the new regulatory framework has been agreed, this derogation should be granted automatically and published on the Ofgem website.

## Appendix B: Legal analysis

- **Executive summary**

British Gas welcomes the opportunity to provide comments upon the legal framework governing Ofgem's proposals for the treatment of white labels within the sector-specific regulatory regime.

In 2013, Ofgem, in concluding the RMR, stated that it would be deferring consideration of the appropriate regulatory treatment of white labels to a future date so that it could investigate the issue more thoroughly before adopting any particular course of action. British Gas would strongly endorse that approach as being entirely consistent with Ofgem's legal duty to undertake a prospective analysis with a high degree of rigour<sup>3</sup>; however, the consultation document issued by Ofgem does not demonstrate that it has undertaken the type of detailed analysis of the relevant wider, regulatory, commercial and competitive landscape contemplated in 2013. Specifically:

- (i) Ofgem neglects to consider how its proposed approach to the application of the cheaper tariff messaging rules is consistent with the wider objectives of the RMR, in particular those relating to how consumers are able to make well-informed purchasing and switching decisions. In particular, the analysis of whether Ofgem's proposals will result in increased confusion and uncertainty for consumers (or particular groups of consumers) – which the RMR remedies were designed to address – is negligible;
- (ii) There is no substantive consideration of potential implications for the intensity of existing competition in the retail supply market and accordingly for the welfare of energy consumers if Ofgem's proposed approach remains unchanged. These concerns are dismissed by Ofgem through a number of unsubstantiated assertions about the limited competitive constraint that white labels exert in the market. It is therefore critical that Ofgem turns its mind to whether its proposed course of action will significantly diminish the incentive for suppliers and their partners to operate white labels in future. Were this outcome to arise, there is a clear consumer welfare loss that arises that Ofgem is obliged to consider as part of its analysis. Until such time as Ofgem has considered this risk more fully, it is not in a position to proceed safely.
- (iii) Given the potential risks to energy consumers resulting from Ofgem's intervention, the need for Ofgem to articulate the policy objective that it is seeking to achieve or the particular harm that it seeks to remedy becomes all the more important. The consultation document fails to do so to any degree of detail, beyond a broad statement of Ofgem's objective to promote the interests of consumers.

Many of the limitations in Ofgem's analysis identified above arise from a failure to gather relevant evidence from industry stakeholders about the operation of the market and the role played by white labels in that market. Given that Ofgem is undertaking a prospective analysis with implications for the development of the retail market, it is all the more critical that Ofgem is equipped with reliable evidence before it proceeds with any particular course of action.

The most appropriate way for Ofgem to address the aforementioned issues would be via an impact assessment that sought to identify the potential benefits and risks for competition and different consumer groups and quantify the overall welfare loss or gain for consumers arising from its proposed course of action.

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<sup>3</sup> See for example *H3G v Ofcom* [2005] CAT 39 paragraph 33, which endorsed the finding of the Irish Electronic Communications Appeal Panel in Decision 02/05: *"To put it another way, because the likelihood of error is greater in a prospective analysis, the prospective analysis must be proportionately more rigorous to account for this possibility."*

That impact assessment would also consider a range of regulatory options and thus act as a useful aid to assist Ofgem in determining whether its planned intervention is consistent with the principle of proportionality.

However, there is no evidence that this impact assessment, which is a critical input to Ofgem's decision making process has been undertaken. Ofgem is therefore not able to articulate the extent of any consequences of its proposed changes to the regulatory regime, nor whether less intrusive or burdensome forms of intervention are appropriate.

As things stand, Ofgem's analysis in the consultation document does not meet the standard that industry stakeholders and the courts would reasonably expect of a regulator engaged in prospective analysis of the potential material effects of a policy proposal on market players and consumers. Accordingly, Ofgem is not in a position to conclude that its proposed course of action, if adopted, would attain its primary duties to promote the interests of energy consumers; as such, any decision by Ofgem to proceed upon the current basis would be liable to be set aside upon legal challenge.

In the circumstances, the most appropriate way forward would be for Ofgem to undertake a fresh policy analysis that includes relevant evidence about consumer preferences and experiences as well as the role played by white labels in driving competition. The outcome of that review and any new proposals could then be subject to further industry consultation before any final decision is adopted.

- **Legal framework governing Ofgem's analysis**

Ofgem's principal objective is to act in the manner best calculated to protect the interests of existing and future consumers. The interests of consumers are their interests as a whole, including their interests in the reduction of greenhouse gases, the security of supply of electricity to them and fulfilment of the objectives of the Third Package.<sup>4</sup>

In carrying out its functions, Ofgem must have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed and any other principles appearing to it to represent the best regulatory practice.<sup>5</sup> In simple terms, these obligations govern *how* Ofgem should seek to attain its primary duties and obligations.

Ofgem has a duty to undertake an impact assessment in relation to any proposals relating to a range of consumer protection and licensed supply arrangements for energy markets (other than in limited circumstances).<sup>6</sup> Impact assessments have rightly been described by Ofgem as 'a vital part of the decision-making process'<sup>7</sup> given that they are a critical input to a well-informed policy making process. In other words, Ofgem cannot be satisfied about the compatibility of its proposed intervention with its overarching duties in the absence of a credible assessment of the effects of that intervention.

This vital part is missing in relation to Ofgem's proposals for regulating white labels. Those proposals are 'important' and an IA is required since there is plainly a lot at stake in terms of competition and consumer welfare<sup>8</sup>:

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<sup>4</sup> On 19 September 2007, the European Commission (EC) adopted the third package of legislative proposals for electricity and gas markets (known as the 'Third Package'). Details of the Third Package can be found at [http://ec.europa.eu/energy/gas\\_electricity/legislation/third\\_legislative\\_package\\_en.htm](http://ec.europa.eu/energy/gas_electricity/legislation/third_legislative_package_en.htm). The objectives are set out in Article 40(a) to (h) of the Gas Directive and Article 36(a) to (h) of the Electricity Directive. They are transposed into UK law by section 4AA of the Gas Act 1986 ('GA86') and section 3A of the Electricity Act 1989 ('EA89').

<sup>5</sup> EA89, section 3A(5A); GA86, section 4AA(5A).

<sup>6</sup> This duty is imposed by section 5A of the Utilities Act 2000 and applies when Ofgem is 'proposing to do anything for the purposes of, or in connection with, the carrying out of any function exercisable by it under or by virtue of Part 1 of [GA86] or Part 1 of [EA89]'.  
<sup>7</sup> Ofgem's Impact Assessment Guidance, at 1.4.

<sup>8</sup> Ofgem's IA guidelines provide at 2.13 that proposals that are important include those 'where the implementation of a proposal significantly affects: security and/or diversity of energy supplies; ... gas or electricity prices; competition in British markets; sustainable economic growth and productivity; a sustainable energy system,

- Ofgem’s assessment appears to be uncertain about the degree of competitive pressure exerted by white labels. This is a matter that requires further investigation. Ofgem’s proposals could reduce or even remove that competitive pressure altogether.
- There is a lot at stake for white labels and their supplier partners.<sup>9</sup> It is clear that one plausible impact of Ofgem’s review could mean extinguishing white label supply as it is currently understood, forcing all such arrangements to be under the umbrella of the partner supplier’s offer.<sup>10</sup> Alternatively, white label brand-owners would incur what Ofgem recognises are the significant costs of becoming a licensee (with no identified benefit resulting), which may cause them to re-consider their interest in operating a white label service. Thus there is a clear risk that Ofgem’s approach may have the effect of weakening the incentive to operate a white label and in so doing reintroduce a barrier to market entry that white labels operators were created to avoid.<sup>11</sup>

In order to undertake an impact assessment, it is necessary to assess who might be affected by the proposals, and then to assess what the impacts might be on each of the affected stakeholders. As the Competition Commission has noted, these types of assessments and the benefits identified should be, wherever possible, properly quantified.<sup>12</sup> Ofgem’s consultation does not undertake this analysis in any systematic or transparent way, although it makes reference to the impacts on different groups in passing.

Whatever the legal standard of review to be applied to any final decision adopted by Ofgem, there is little doubt that burden is on Ofgem to provide a credible justification for its proposed regulatory intervention and to be rigorous in assessing the possible consequences of that intervention. The Competition Appeal Tribunal (CAT) has provided instructive guidance as to nature of the obligation upon a regulator engaged in a prospective analysis:

*124. The important point is that **an assumption, which the Commission now says underpinned its recommendation of the competition test (see paragraph 110 of the Defence), but which is by no means self-evidently correct, has not been articulated let alone properly analysed and considered in the Report itself, whether generally or as a reason why the risk of welfare losses for consumers could safely be discounted without further consideration.***<sup>13</sup>

Elsewhere, the CAT has noted that, in the context of undertaking an impact assessment, it is incumbent upon a regulator to:

*‘conduct their assessment with appropriate care, attention and accuracy so that their results are soundly based and can withstand the profound and rigorous scrutiny’* applied by an appeal body.<sup>14</sup>

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*energy efficiency, quality of service, social impacts including effects on fuel poverty, people with disabilities<sup>11</sup> and/or with protected characteristics’.*

<sup>9</sup> Ofgem’s IA guidelines provide at 2.13 that proposals that are important include those which ‘are likely to result in “significant impacts” ... for example, those where the implementation of the proposal would have significant costs for industry participants and/or persons engaged in connected commercial activities or those where the implementation of the proposal would affect the ability of industry participants to choose the price, quality, range or location of their gas and/or electricity or associated services.’

<sup>10</sup> See, for example, the WL consultation at 2.2.

<sup>11</sup> None of the exemptions to the requirement to produce an IA (for example, extreme urgency) are applicable in this case.

<sup>12</sup> *E.ON UK Plc v Gas and Electricity Markets Authority* at paragraph 6.157

<sup>13</sup> *Tesco v Competition Commission* [2009] CAT 6 at 124. Emphasis added.

<sup>14</sup> *Vodafone v Ofcom* [2008] CAT 22 (MNP). In that case, the CAT noted that ‘the essential question for the Tribunal is whether Ofcom equipped itself with a sufficiently cogent and accurate set of inputs to enable it to perform a reliable and soundly-based CBA’ and that ‘[t]here may be a variety of entirely legitimate reasons why the amendment of the current system of number portability in the UK is a desirable aim in pursuance of OFCOM’s statutory duties ... [and] there were a number of approaches open to OFCOM in arriving at the Decision. However it is still incumbent on OFCOM, in light of their obligations under section 3 of the CA 2003, to



The need for Ofgem to proceed with caution in this case is all the more compelling given that its proposed intervention may well result in changes to market structure and the intensity of competition in the retail market.

- **The Retail Market Review's treatment of white labels**

The RMR forms important context for Ofgem's proposals on white labels. As the RMR developed, it became clear that the presence of white labels raised particular issues.

In the June 2013 consultation, Ofgem emphasised the risk that the diversity of approaches amongst white labels might warrant different approaches for different models. However, Ofgem did not deal with those questions in the final RMR decision, instead opting for a 'temporary exemption' which froze the number of white labels. The rationale for that temporary exemption was to enable Ofgem to undertake the type of rigorous analysis contemplated by the Competition Appeal Tribunal (and described earlier in this submission):

*Executive summary*

*We think it is in consumers' interests to give further consideration to the right regulatory framework for these alternative business models, which have the potential to deliver greater competition.*

*4.12. The aim in providing a temporary exemption for existing white labels and the reason why we are extending it now is **to provide further time for us and industry to understand different types of white label business models, how each type of model may contribute to improving competition and add value for consumers and to consider whether the proposed regulatory framework for white labels provides the appropriate balance between:***

- ***Maintaining the focus on simpler tariff choices and a robust tariff cap.***
- ***Facilitating different types of white labels according to the value that they add by improving competition in the energy retail market.***
- ***Maintaining robust consumer protection safeguards.***<sup>15</sup>

This analysis in the June 2013 consultation sets the scene for Ofgem's proposals. It makes clear that:

- The white labels project is part of the RMR – it was only delayed in order to prioritize other elements of the RMR and to provide a window of opportunity for Ofgem to gather evidence and consider the questions noted above. That means, that for example, the decisions taken in relation to white labels need to be consistent with the RMR, and draw on a common body of evidence and principle;
- The treatment of white labels is not an adjunct or ancillary exercise, but is in fact a critical element of the RMR, since the outcome could alter the effectiveness of the tariff cap (one of the most important regulatory changes to emerge from the RMR);
- To complete this element of the RMR, it is vital that Ofgem understands the diversity of business models used by white labels and their partner suppliers. This is the key to understanding the value offered to consumers by white labels, and that this, in turn, should determine Ofgem's approach to white labels. As Ofgem itself realised at the time

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**conduct their assessment with appropriate care, attention and accuracy so that their results are soundly based and can withstand the profound and rigorous scrutiny that the Tribunal will apply on an appeal on the merits under section 192 of the CA 2003.'**

<sup>15</sup> Ofgem RMR June 2013 consultation.

of the RMR, it needed to strike a balance between facilitating competition and preserving consumer protection.

- **Ofgem’s approach to white labels**

As we explain in further detail below , Ofgem’s policy proposals do not fulfil the task that Ofgem set for itself in June 2013 ‘to understand different types of white label business models, how each type of model may contribute to improving competition and add value for consumers’. Nor is there any evidence of the balancing exercise that Ofgem rightly identified would be necessary to inform the appropriate course of action.

As a general observation, Ofgem have not fulfilled their duty (under established principles of public administrative law) to make enquiries and inform themselves adequately before developing their proposals.<sup>16</sup> For instance, Ofgem’s information-gathering on critical questions relating to both costs and benefits of their proposals (including risks to consumers) is framed in wholly passive terms.<sup>17</sup> This type of approach results in a number of claims or statements about white labels (notably those relating to the competitive pressure on prices exerted by white labels stated at the outset of the document) where views seem to be based on a general sense of how things work (without transparency of the evidence of the basis for that view) and, perhaps, some general comments in a workshop.<sup>18</sup> This is not simply a matter of procedure; in this case, the failure to obtain relevant information from stakeholders directly affects Ofgem’s ability to reach an informed decision.

As a result, Ofgem rely entirely on the responses they have received to their ‘call for evidence’. Ofgem does not appear to have identified the type of specific data or information that would be highly salient to its analysis and there is no indication that it has exercised its information gathering powers under the various licence conditions to require evidence to be provided to them. We identify below some examples of data or information that should be considered to be important inputs to Ofgem’s analysis. We note Ofgem’s proposal to gather some of this information after they have decided what the rules on white labels should be as part of their monitoring program.<sup>19</sup> British Gas would question such an approach given that that the provision of such information at this stage of the process may well be too late insofar as it is information that would potentially have determined or influenced the substance and thrust of Ofgem’s policy proposal.

- **Ofgem’s proposals for white labels**

*Inconsistency between the application of the Tariff Cap Rule and Cheaper Tariff Messaging Rule*

Taking the ‘tariff cap’ and ‘CTM’ proposals in turn, Ofgem concludes (provisionally) that a white label is able, in its own right, to offer 4 separate tariffs. In so doing, Ofgem appears to recognise that in commercial terms and from the perspective of the end user customer, the white label is distinct from the partner supplier (whatever the wholesale commercial model agreed between the partner supplier and the white label) and accordingly that there is a clear consumer benefit to preserving that distinction:

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<sup>16</sup> See for example *R (DF) v Chief Constable of Norfolk Police* [2002] EWHC 1738 (Admin) paragraph 45: “a decision-maker has an obligation to equip himself with the information necessary to take an informed decision.”

<sup>17</sup> For example, revealed in its statement that ‘Attendees did not raise significant concerns with our assessment. Furthermore, we have not been provided with arguments or evidence to think that white labels are operating in a way that might be detrimental to the market’

<sup>18</sup> The minutes of the workshop are set out at <https://www.ofgem.gov.uk/ofgem-publications/89298/stakeholdereventminutes.pdf>.

<sup>19</sup> WL consultation at p16.

3.11. *If white label tariffs were included in the tariff cap of the partner supplier, suppliers might choose not to have any white labels. White labels have potential benefits to consumers, so we want to facilitate their existence by excluding white labels tariffs from the tariff cap of the partner supplier.*

Once the premise inherent in the above statement, namely that suppliers and their white label partners should be distinct from an end user perspective, is accepted, it should logically follow that rules on cheaper tariff messaging should treat suppliers and their white labels as being distinct. But this is not how Ofgem approaches the issue; instead, it proposes a contradictory approach in which white labels and their partner should be considered as one economic entity. Accordingly, Ofgem proposes that the CTM rules should apply so that suppliers and white labels should expressly refer to one another's tariffs when complying with the CTM requirements.

*Failure to consider whether greater transparency achieves the wider objectives of the RMR*

Ofgem dismisses concerns about the effects of this approach on consumers (through increased confusion, or an increase in tariffs or even the withdrawal of white labels) with a cursory analysis, concluding that suppliers and white labels should be capable of addressing these concerns. That statement misses the point. It is precisely because Ofgem's investigation of the wider commercial and competitive environment in which white labels operate is absent from the consultation document that Ofgem is unable to assess whether there is a risk of consumer harm through the provision of information about two or more brands that may well have no association from the perspective of the end user.

Closer scrutiny of the commercial and market context would provide Ofgem with important information about why some segments of the consumer base elect to take their supply from a white label provider and not from a partner supplier, whilst other segments will not be attracted to do so. Had it been engaged in this analysis, it would have been able to identify that these particular consumer segments may not welcome, value or understand additional information about the linkage between suppliers and white labels; consequently, for these customers, the additional information may serve as a distraction or confuse rather than inform subscription decisions. Such an outcome would plainly sit uncomfortably with the wider objective of the RMR and the accompanying remedies, which were expressly designed to provide clarity and simplicity for customers when making tariff subscription decisions.<sup>20</sup>

*Failure to assess risks to competition and consumer welfare*

The failure to appreciate the wider customer experience is not the only consequence of Ofgem's decision not to undertake a more thorough investigation of the market, demand conditions and consumer preferences. The other obvious corollary is the absence of a robust or credible assessment of the competitive effects of Ofgem's proposed regulatory change. Given Ofgem's recognition in 2013 of the potential contribution made by white labels to competition in the retail market, the need for such a robust assessment is plainly necessary. Specifically:

- (i) Ofgem explicitly recognises that white labels provide benefits to consumers in terms of greater choice, service and engagement. Having reached this preliminary conclusion, it should logically ask the question as to whether the incentive for suppliers to retain white label relationships or white labels to enter into commercial partnerships with suppliers is so diminished through Ofgem's CTM information rules proposal so as to trigger exit of some existing white labels from the market. The most obvious lines of

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<sup>20</sup> Ofgem's purpose is clear from the opening sentence of its consultation document of June 2013 "This document sets out Ofgem's updated Retail Market Review (RMR) proposals for domestic consumers to create a simpler, clearer, fairer energy market."

enquiry to be pursued are the strategic rationale underpinning the creation of white labels and whether that rationale might be undermined by Ofgem's proposed intervention. This is precisely the question to which Ofgem turned its mind when considering the application of the tariff cap rule (albeit in a limited way). The central question to be answered is why Ofgem fails to address the same question when considering the application of the information rules to white labels;

- (ii) Ofgem is plainly on notice (confirmed at paragraph 2.2 of the consultation document) that its approach could cause suppliers to withdraw from entering into white label arrangements with third parties; as Ofgem itself recognises, white labels do generate benefits for consumers. It is therefore incumbent upon Ofgem to understand in much greater detail whether the proposed approach to the application of the information rules would similarly diminish or significantly weaken current incentives to operate white labels. If its proposed action raises such a risk, the question that Ofgem must address is the extent to which the welfare loss resulting from the exit of a number of white labels will be outweighed by the putative benefit of extending the scope of the CTM rules. There is no evidence that this type of balancing exercise has been undertaken;
- (iii) Ofgem's competition analysis ignores the possibility that a white label may bring value to a supplier, by making that supplier's services more attractive to particular retail consumers than it would otherwise be. As a result of that effect, a prospective white label provider can benefit from competition *between* suppliers. This effect is likely to mean that, far from being able to dictate terms to their white labels on any terms, the suppliers are likely to have a range of commercial relationships, in which some white labels are extremely *valuable* sources of competitive advantage and some are less important. Equally, Ofgem also does not consider the possibility that a white label might seek to source services for its customers from more than one supplier, changing the competitive dynamic still further;
- (iv) Ofgem's claim that any rebalancing of tariffs by partner suppliers following the adoption of the CTM proposal will be of minimal impact because of the lack of constraint on price currently exerted by white labels is not borne out by any evidence. To be able to make this assertion, Ofgem must, as a minimum, undertake a pricing benchmark analysis that includes the tariffs of white labels as well as an analysis of the customer groups switching to white labels (and in particular the identity of the provider from whom they have switched away). Both of these datasets would provide revealing insights into the nature of the constraint exercised by white labels in the market. Moreover, the outputs of such an analysis naturally inform whether Ofgem can in fact be sanguine that consumers will not be worse off following its proposed intervention. In this regard, Ofgem's preference for how suppliers *should* react to the introduction of the cheaper tariff messaging rule is immaterial to the welfare analysis. What Ofgem must grapple with is the economic question of the incentive properties of its proposed intervention and what is the most likely form of commercial mitigation that a supplier is likely to adopt to protect its position.

#### *The need for a proportionality assessment*

Ofgem document the objections of industry stakeholders to their proposal. They respond with reasoning that is *prima facie* inadequate ('*We recognise that there are alternatives to our proposals*'). This is the beginnings of a proportionality assessment, which would involve Ofgem examining a range of different options to attain its stated policy objective and, consistent with principles of established Community law, identifying the solution that would be the least onerous for those subject to the obligation. However, there is no indication that Ofgem has identified what form these other proposals might take and which are more or less apt to attain their policy objective in this case. Until Ofgem has undertaken this analysis, it is clearly difficult

for Ofgem to be satisfied that its preferred course of action is compatible with its primary overarching duty to ensure that its intervention is appropriately targeted and consistent with the principles of proportionality.

### **Conclusion**

In light of the facts and omissions highlighted above, the need for Ofgem to revisit its analysis and proposed form of intervention is clear. Specifically, any new analysis should:

- (i) Define clearly the policy objective or concern that Ofgem is seeking to address and seek views from stakeholders about the validity of that concern;
- (ii) Develop a more detailed understanding of the competitive dynamics of the market based on empirical evidence and the possible effects of particular regulatory intervention upon the incentives to operate a white label;;
- (iii) Develop a clear picture of consumer preferences and experiences of dealing with white labels;
- (iv) Develop a range of alternative proposals that might attain Ofgem's policy objectives and establish which is the least onerous for industry stakeholders to implement.

Were Ofgem to proceed to final decision on the basis of the reasoning in its current consultation document, it must recognise that its actions create a real risk of consumer detriment that is entirely avoidable.

