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20 March 2015

Dear Adhir

Final proposals on the treatment of white label providers in the domestic retail market

Thank you for the opportunity to respond to Ofgem's Statutory Consultation on the treatment of white label providers (WLPs). We agree with Ofgem's conclusion that WLPs make a positive contribution to consumer choice and engagement. We also believe 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. We agree with Ofgem's proposals to apply the tariff cap for each white label separately, and allow white labels to differentiate themselves from their partner supplier in the other RMR tariff rules. These proposals reflect Ofgem's recognition that WLPs are attractive to customers and increase competition because of their differences to other suppliers, including a distinct brand identity.

In our response to Ofgem's last consultation on WLPs, British Gas raised concerns about Ofgem's proposal to oblige WLPs to cross-promote the tariffs of their partner supplier via the wide Cheapest Tariff Message (CTM), and vice versa. We also raised concerns about the adequacy of Ofgem's cost-benefit analysis and, in particular, the absence of robust evidence underpinning it. Whilst British Gas continues to have such concerns in light of the content of the Statutory Consultation, including the ongoing inconsistency between agreeing the importance of brand differentiation and requiring cross-brand CTM on written communications, we do not believe that it is necessary to repeat them in detail here. Rather, this response focuses on developments that have emerged since the last consultation.

1. Proportionality and targeting – there is an inconsistency between Ofgem's observations on the potential for future change and the materiality of its current change proposals.

In its draft Forward Work Programme, Ofgem stated that it is "*unlikely to launch any major initiatives*" in areas encompassed by the CMA Market Investigation. In its Statutory Consultation on WLPs, Ofgem stated that the impact of RMR is "*being considered by the Competition and Markets Authority (CMA) in the context of their ongoing market investigation*" and that "*these white label arrangements may be revised*" following this review.

These two statements raise the question as to why Ofgem is proposing to make any changes to WLP arrangements if it believes that they might be changed again in the near future, and it therefore cannot be certain of the effect that its changes will have. Certainly, Ofgem has not undertaken the in-depth analysis, contemplated by the CMA's enquiry, of the role played by WLPs in driving competition in the retail market and the potential reduction in consumer welfare if its proposed regulatory regime for WLPs were to diminish the incentive for parties to enter into White Label arrangements.

Ofgem explains in the Statutory Consultation why it is proposing to make changes to WLP arrangements despite such uncertainties, where it states:

"*The temporary arrangements that are in place only provide flexibility to white labels that existed on 1 March 2013 and do not apply to new white labels. We want to correct this at the earliest possible date. This is why we have developed our proposals while the CMA investigation is ongoing.*"

Given that Ofgem is uncertain about the stability of its change proposal but wishes to equalise the application of WLP arrangements across all suppliers, it is unclear why Ofgem is proposing to make more significant changes than would be required in order to achieve this. Rather than applying the temporary arrangements to all suppliers, Ofgem is proposing to overhaul the arrangements. The extent of the proposed change is troubling given that Ofgem has failed to properly understand the costs and benefits for energy consumers of its change proposals via a statutory Impact Assessment. Such an assessment is central to any analysis of whether Ofgem's proposals are consistent with the principle of proportionality, which requires that interventions do not go beyond what is necessary to achieve the stated objective.

Extending the temporary arrangements would provide Ofgem with the time and ability to investigate and assess the validity of a number of assertions in the Statutory Consultation, notably about the extent of the role played by white labels in the competitive process (and the way in which they are operated by supplier partners). To the extent that any of these assertions can be substantiated following an in-depth analysis, it is then open to Ofgem to revisit the matter and propose proportionate remedies. We would invite Ofgem to consider this course of action in light of the concerns articulated above.

In the circumstances, Ofgem has currently failed to pay sufficient regard to its primary duties and obligations to promote the interests of energy consumers, as well as the Principles of Better Regulation and specifically its statutory duties to ensure that action is proportionate and targeted prior to arriving at its final change proposal.

Our previous view that Ofgem is not in a position to assert safely that its proposed approach will be likely to enhance the welfare of consumers remains unaltered in light of the Statutory Consultation.

2. <u>Ensuring that the new definition of a white label tariff does not unintentionally constrain commercial and operational arrangements that WLPs are able to use</u>.

Ofgem has introduced a new change proposal in its Statutory Consultation, which is to amend the definition of a White Label Tariff. Whilst British Gas is not aware of any supplier utilising white labels to circumvent the tariff cap, such as by advertising both white label tariffs and its own on the same website, we understand Ofgem's reasons for proposing the change.

If Ofgem proceeds with amending the definition of a white label tariff, it should ensure that the drafting does not unintentionally constrain the commercial and operational arrangements that WLPs might deploy to serve its existing customers and engage with potential new customers. For instance, WLPs may choose to outsource some of its customer service functions to a licensed supplier. So as not to prevent such arrangements, we would urge Ofgem to consider how the use of the phrase "*in respect of which the <u>licensee</u> does not engage in activities...*" (British Gas' emphasis) might do so, and therefore whether it should be amended or supplementary guidance be provided.

3. <u>Implementation timescales are tight and should be extended.</u>

Ofgem has stated that it "envisage(s) the (new) arrangements applying from July 2015". Ofgem has also recognised that full implementation of its proposals will involve IT system changes for existing partner suppliers. British Gas is concerned that the minimum 56-day implementation timescale is extremely tight and should be extended to allow suppliers sufficient time to make these IT system changes and test them properly to ensure that the information is accurate and easily understood by customers. We and our partner supplier will also need time to brief our customer service agents.

An important reason why implementation time needs to be extended is that suppliers' change programmes are already crowded with regulatory requirements. For instance, QR codes that contain customer account information in a machine-readable format need to be added to energy bills from the

end of June 2015. This is a complex and challenging project, well illustrated by the question of how to handle multi-tier consumption. We are also replacing and reforming the UK Link System for energy settlements for the GB gas market.

Ofgem may argue that suppliers have known about the potential for cross-brand CTM requirements to be introduced. Whilst we have scoped the requirements, Ofgem cannot expect suppliers to start making changes to their systems until a final decision is made. In this regard, and as we elaborate further, we are keen to highlight that a Statutory Consultation is not a decision, and should not be construed as such. Given Ofgem's statement about the uncertainty of the longevity of any decision it makes, it would not be proportionate to impose such changes in such a short timescale that will result in unnecessary costs and disruption to existing change programmes.

4. Failure to carry out an Impact Assessment (IA) in accordance with its statutory duties.

As Ofgem notes in its consultation, Ofgem has a statutory duty to carry out an IA for proposals that it considers to be "important" within the meaning of section 5A of the Utilities Act 2000. Ofgem's approach to determining what is "important" within the meaning of section 5A is set out in its Impact Assessment Guidance.

We find Ofgem's statement that this particular case does not trigger the threshold for an IA to carried out to be questionable given the absence of real-world commercial evidence obtained about significance of white labels to the intensity of competition and the welfare of energy consumers. However, having decided to undertake an IA in this case, we believe that Ofgem is obliged to undertake a thorough and rigorous IA to enable it to act in accordance with the principle of best regulatory practice.

It is only by understanding the rationale for the creation of white labels, the different customer groups attracted by a range white labels and the competitive pressure exerted by white labels that Ofgem can be in a position to determine that its proposals would generate a net welfare gain for consumers.

5. Procedural concerns

We note Ofgem's statement at the outset of the Statutory Consultation that it is consulting upon the terms of the proposed supply licences as well as its expectation that that any changes would take effect in July 2015. Such an approach would deprive the Statutory Consultation of any meaning since it implies that Ofgem would not be seeking to receive or to take into account any comments on its substantive analysis. That would be particularly troubling since Ofgem has advanced new reasoning and arguments in support of its proposed approach in this latest consultation document. We would highlight that if this is indeed the approach contemplated, any final decision to adopt the proposed changes to supply licence conditions would be characterised by a procedural irregularity.

6. Conclusion

At a high-level, we believe that Ofgem is right to conclude that WLPs bring important benefits to consumers and competition, enabled by the ability to differentiate and maintain a distinct brand identity. To ensure maximum benefits from their participation in the market and ensure that any regulatory decision is proportionate, there are some final changes that Ofgem should make to reflect our points above and those submitted in response to the last consultation.

If you have any questions, please do not hesitate to contact me on 07557 619 674.

Yours sincerely

Alun Rees
Head of Market Design and Reform

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