

Gideon Richards' Response to the Ofgem MCS Equivalence Consultation

1 Introduction

This response is being provided by Gideon Richards as an individual and CEO of Consulting With Purpose Ltd. and separate to any collective views of the MCS.

I would like to highlight that while these views are my own, they are provided from experience and expertise through the following activities

- Chair of the MCS Steering Group and Interim CEO;
- Having been an assessor for UKAS;
- Director of IRECO (International Renewable Energy Certification Organisation);
- Member of the ISO Strategic Advisory Group on Energy Efficiency and Renewable Energy (SAG-E); and
- Lecturing on the subjects of the integration of legislation, regulation, accreditation and certification and standardisation internationally.

I believe it will be very important to have a good barometer of the understanding of Accreditation, Certification and MCS by those reviewing the responses. This will be essential given the varying degrees of understand and the potential conflicts of interest from those responding. This response will highlight some of the complexities that will be faced by Ofgem in evaluating the consultation and developing the criteria going forward.

If the evaluators cannot separate accurate comments from others, the development of any equivalence may end up being flawed and discredited, a barrier to providing 'or equivalent', distorting the market or creating added red tape and confusion.

It is also my view that the timescales given in the consultation document are unrealistic for processes to be established that are robust enough not to be challengeable. Given the potential risks and liabilities that this approach is taking, I would urge Ofgem to slow the process down and ensure that any organisation that does want to provide an equivalence (or specific aspects as equivalent) is providing a scheme robust enough that does not water down the offering to the consumer.

While it is appreciated that Ofgem have a requirement to accept equivalent schemes through the regulatory framework established by DECC, the consultation illustrates that a key question has not been considered within the consultation. It may be considered by Ofgem that it isn't its role to challenge the government's thinking on setting the legislation and regulation. However, on this occasion, it appears that Ofgem, if they carry on with the MCS equivalence development in the way it is laid out, may create more problems than it is solving by establishing the documented equivalence route.

Perhaps the first fundamental question should have been - does there actually need to be an equivalent route to MCS? Closely following that question should be (if the answer is there needs to be), then what is MCS's role in certification going forward?

The quick and easy answer is 'yes' to the first question, if the legislation and regulation is to remain, given the way the regulations are written.

The question for the government is how to ensure that incentives provided by government and consumer protection are not victim to barriers to trade in the UK? Hence the "or equivalent" was established to allow those with products already certified the opportunity to enter the market (e.g. Solar Keymark).

However, there are a number of additional certification models and schemes looking to be established in Europe and more widely.

MCS has been asked on occasion what it considers would be its equivalent and has always stated that it would be inappropriate for it to propose how a competing organisation should be considered. That said it is an important question given this consultation and the new entrants wanting to enter the most developed regulated market for microgeneration installations.

For consistency, given Ofgem are the regulator for both RHI (Domestic and Non-Domestic) and FIT, and given the 'or equivalence' is a requirement of all the regulation, it seems surprising that this consultation only covers one aspect of the microgeneration sector. It would have been better to consider the issue in its broadest sense and come to one cohesive way forward.

There are still many unquantifiable statements in the consultation document, which in are acceptable, but the devil is always in the detail (e.g. Section 4, para 4.4 (e) produce similar outcomes?). What does that mean and how is it measured?

2 General Remarks

MCS operates as a scheme owner for microgeneration technologies and installation companies. MCS was established under the guidelines of ISO/IEC Guide 67 (now EN ISO/IEC 17067:2013) and

provides scheme rules to be assessed against through a *system 5* (now *type 5*) 'product'¹ conformity assessment.

It is critical to understand these relationships and the nuances that this creates. Para 2.10 states that MCS is accredited by UKAS, this is not the case. UKAS (or their equivalent bodies across the world) accredit the certification bodies against the MCS scheme requirements. Certification bodies certify the products and installer companies. This is a significant fact as MCS nor any other 3rd party certification scheme does not have the power and authority to withdraw certification of the products or installer companies under the current governance structure.

As a certification scheme owner, MCS expects and requires certification bodies to issue certificates to those products and installation companies that not only provide confidence that they can deliver the requirements in the field on the day they are certified (or during the surveillance), but also continuously between conformity assessment visits.

The relationship between the scheme and legislation and regulation are government induced and as the lead scheme being pointed at for incentives, it has also become a ***de jure or de facto technical regulator***². This relationship provides an additional layer of complexity and requirements that are not normally seen by voluntary certification scheme owners.

Given the requirements above, the consultation documentation on MCS Equivalence have, in my opinion, been poorly thought through on a number of significant basis. In particular MCS is being left as a technical regulator, while creating competition to it.

We have categorised the areas to be discussed as:

1. What MCS is and its relationship to government, legislation and regulation;
2. What 3rd Party Certification can and cannot provide;
3. Equality in an open market; and
4. Operational functionality in an open market.

3 Categorised Responses

3.1 What MCS is and its relationship to government, legislation and regulation

¹ ISO/IEC 17000:2004 Conformity assessment - Vocabulary and general principles - conformity assessment - demonstration that specified requirements (3.1) relating to a product (3.3), process, system, person or body are fulfilled.

² EC Directive 98/34/EC: guide to the procedure for the provision of information in the field of technical standards and regulations and the rules on Information Society services, 2005 - Page 29

The critical point within the consultation, in my opinion, is that MCS is being left as the *de facto technical regulator* that provides the basis for all other schemes to be measured against.

While it is understandable that this is a good starting point at the beginning of the 'or equivalent' process, the consultation continues to use this premise going forward. This lead role will create an imbalanced and inequitable position for MCS.

While MCS is effectively a voluntary scheme, no one is forced to comply with it. *That is not the case in reality, due to the nature of trading and market incentives!* Therefore, MCS is perceived and in many cases is the gatekeeper to government subsidises.

MCS provides much of the regulatory management against which the legislation and regulations sits for all microgeneration products and those installing the products. MCS has a significant amount of experience developing the IPR and managing standards and scheme requirements over the past 9 years.

A common thread in a lot of government requirements is the ability to have good stakeholder engagement. MCS and other scheme owners will also requires this to meet the ISO/IEC 17067 guidance and for it to be accepted as accreditable under the MLA/ILAC guidance which requires robust stakeholder involvement in the scheme. This is why the working groups are a key part of standards and scheme document setting.

What would be interesting to understand is what Ofgem would see as equivalence stakeholder engagement, to ensure it was compatible to the MCS process?

My question would be how do all the schemes develop and maintain themselves with the appropriate stakeholder engagement?

MCS has to remain as the lead scheme that all the others are measured against? This would require a large amount of stakeholder engagement duplication. There is likely to be only limited free time available by stakeholders. Will the engagement process across schemes be diminished with this requirement or will other schemes have less stakeholder engagement?

It should not be underestimated how much support MCS provides the government by being the delivery partner for RHI and FiT. If there are multiple schemes, the government engagement process will need to be across all schemes.

Another aspect of government under the past and present administrations is the *Red Tape Challenge*. MCS is already accused as providing to much red tape.

MCS is already challenged on a regular basis against its perceived bureaucracy, will more scheme options create a perception of more bureaucracy. While this is not directly Ofgem's issue, the way

the 'or equivalence' is being structured could lead to added bureaucracy as each scheme appears to require a full scope.

While this helps create a barrier to competition for MCS, on the basis of full scope accredited certification, it does mean that the entry level for those wanting to offer just product or specific technology certification, will not be an option. Given we already know that the European Heat Pump Association (EHPA) is developing a product certification scheme at present, this may be a problem in the near future.

MCS states that it uses the European and international standards wherever possible. However, this does not cover many aspects of system integration. Standards also do not cover the competencies required to demonstrate how an organisation will be able to install products that operate effectively and efficiently. Any scheme that is stating it is equivalent, will need to demonstrate what its competency criteria is and show how it matches the MCS requirements. This is potentially going to cause confusion with those offering training against the criteria and may even mean that the training will have to be tailored for each certification schemes' requirements, creating more bureaucracy and added cost. To go with this there may be barriers of acceptance across schemes when it comes to changing certification body.

The MCS will be on the one hand a competitor to new entrants within an increasingly competitive market, and on the other, still have the restrictions, costs, risks and liabilities of being the organisation that all the other schemes have to maintain equivalence to (Exec. Summary – Maintaining recognition, Section 2, Para 2.15, Section 6, Para 6.8).

As a de facto technical regulator, MCS provides scheme documents to BIS via DECC for Notification to the Commission for new or changes to product standards. Will each scheme be required to do the same process? Given the consultation states that the schemes need to be equivalent to MCS, is it anticipated that the de facto technical regulations are also effectively transferred to all the scheme owners offering certification of products in the UK?

MCS at the present time is considering the European Construction Products Regulations (CPR) (EU) No 305/2011 and the implications of this for the scheme. Would Ofgem consider CPR as equivalent to MCS and if so how would the equivalence be measured? If it isn't equivalent, who will make the decision on the standing of CPR within the schemes?

As with all documentation, there is considerable scope for interpretation within standards and scheme documents. How will the schemes determine their equivalence when they are establishing or reviewing themselves against MCS, legislation, regulation and European Directives? Who will be the arbiter if there is reasonable doubt?

The government have recently implemented the Alternative Dispute Resolution (ADR) directive 2013/11/EU. MCS are establishing a framework that ADR providers would need to meet as a

minimum for recognition by MCS. MCS will not be providing an ADR service, however, it is expected that MCS, as part of the licensing agreements between certification bodies and installation companies (or on a similar basis to be determined) will require mandatory acceptance of installers to enter ADR if requested by the consumer. Will this be considered as a requirement for other schemes to maintain their equivalence?

3.2 What 3rd Party Certification can and cannot provide?

3rd Party Certification provides independent conformity assessment against a set of criteria. In the case of MCS, the criteria is established by the various committees and on behalf of the scheme by the administrator, all under the authority of the MCS Steering Group.

MCS as a scheme is not accredited by UKAS or any other accreditation body. Therefore Section 5, para 5.1 is not an accurate statement of how any new scheme should be recognised. This distinction is important because while the MCS scheme has for many years stated it is an EN45011 or latterly a EN ISO/IEC 17065 scheme, it would be more accurate to say it operates within the boundaries of EN ISO/IEC 17067 (formerly ISO/IEC Guide 67). While this guidance is not mandatory for any 'product conformity assessment scheme' it does provide the foundations on which the accreditation bodies would have confidence that the scheme could have 3rd Party Accreditation and Certification conformity assessed.

ISO/IEC 17065 is a standard for certification bodies and not scheme owners, in terms of conformity assessment requirements. Many of the clauses within the international standards provide a framework of what the scheme owner (ISO/IEC17067) and certification bodies (ISO/IEC 17065) need to establish in terms of compliance.

The above two standards are not specific in how the certification body delivers its conformity assessment. For instance, ISO/IEC 17065:2013 requires the Certification body to have a complaints handling procedure, however, it will not specify the detail as to how much review has to be carried out. This is the responsibility of the certification body, unless it is specified within the scheme rules. An example of a clause relating to this could be:

7.13.4 The certification body shall be responsible for gathering and verifying all necessary information (as far as possible) to progress the complaint or appeal to a decision. ISO/IEC 17065:2012

It should also be highlighted that the above standards have nothing to do with the 'performance standards' relating to the technology or installation requirements developed by the European and international standardisation bodies. Therefore the statement in Section 5, para 5.9 is not accurate. The term 'Product' in EN45011 conformity assessment covered 'product', 'process' and

‘service’. These have now been separated in the new ISO/IEC 17065 but the distinction and understanding is important.

MCS, as the scheme owner, does not certify any product or installation directly, that is left to the certification bodies to carry out.

Subject to the requirements of the various potential new schemes, the certification bodies will if the scheme is not carefully documented be able to interpret the scheme requirements’ as they feel fit. While some flexibility is helpful, it also has a downside, in as much as the consistency of the deliverable can vary from certification body to certification body. For Ofgem as the regulator this may mean that not only is there potential inconsistency between certification bodies carrying out MCS conformity assessment, there may also be inconsistencies between policing different schemes. Who will be the arbiter and provide governance for Ofgem?

UKAS are often proposed as the arbiter of all certification issues, however, as MCS has discovered, UKAS’ role is to test the robustness of the certification bodies’ processes and procedures against the documentation provided by the scheme. If there is ambiguity or interpretability within the scheme documents then UKAS expects the scheme to provide clarification. This is essentially fine when there is one scheme, however, even then MCS has found that what it thought was clear is interpreted very differently between certification bodies.

UKAS are also the verifiers and auditor of the certification bodies’ delivery for the various scheme owners. It will be important (given the appropriate documentation is in place) that UKAS remain in charge of this process. If this is not the case, the reputation of accreditation within the sector may be diminished further than it appears to be at the moment. UKAS are an integral part of the delivery mechanism for government’s legislations and regulations when linked to certification and standards. To undermine that would be inappropriate.

The proposed requirements of Ofgem to keep MCS as the lead organisation for others to be equivalent to, then adds an additional complexity, which needs managing by some organisation. It is not clear at present which organisation would do that? Given the fact that equivalent organisations would effectively be competitors to MCS, why would MCS want to put the effort into maintaining the consistency for other organisations, and how would it do this in an open and transparent way?

While MCS is a 3rd Party Independent Certification Scheme there are other models entering the market that may provide another degree of independence of the certification process, such as Peer to Peer certification by accredited certification bodies. IEC already uses this type of certification and ILAC and the conformity assessment bodies have an understanding of how this is managed. Would Ofgem understand a scheme established on this basis to be a 3rd Party Certification Scheme?

3.3 Equality in an open market

From the consultation documentation (para 3 Why do we need this consultation, Section 4, para 4.1), it would appear that Ofgem are potentially going to introduce inequalities between scheme owners' requirements, due to the fact that Ofgem are not anticipating a 'full set of criteria' at the beginning of the process. If that is the case, how can any other scheme be equivalence to MCS? Does this approach create an imbalance in the offerings of the schemes and the potential for a price wars, which could have the consequences of actually reducing the robustness and confidence and trust in the sector? As much as there has to be equivalence, it will also be important that the requirements by the regulator are equitable.

As the potential defacto technical regulator, MCS remains in a strong but difficult position. The Ofgem proposal effectively could leave MCS at risk when it makes any changes or additional scheme requirements, if those in other schemes believe MCS is being unreasonable. This does not have to be rational or accurate, because the risk and liabilities may mean it is not practical for MCS to operate in the competing market on the basis that is being proposed.

Given MCS' role as the gatekeeper to incentives and given what has already been stated above about the pressure on the MCS to reduce bureaucracy and with it costs to those products and installation companies being certified, is it equitable for Ofgem to allow other scheme owners a less rigorous entry into the certification market for microgeneration products and installer companies?

Also how will Ofgem review and consider schemes that are so similar that they have effectively lifted the public requirements of MCS and transposed them into their own scheme? While it is appreciated that MCS will have to protect its intellectual property once it is novated across from DECC, how will Ofgem consider the implications of potential new entrants using this information?

The consultation document proposes that Ofgem works with stakeholders to decide the criteria for a scheme to claim that it is MCS equivalent (Para 2.20) and that Ofgem are looking at what discretion it would have in administering the Domestic RHI against that criteria. How will the consistency between schemes be maintained by Ofgem? Have Ofgem considered who will provide the competencies to develop a consistent approach to the criteria and also carry out the assessment processes or do Ofgem believe they have the competencies in-house?

There could be many different agendas being brought to the table when the consideration of criteria is being discussed. How do Ofgem propose to manage these potential conflicts of interest and agendas?

3.4 Operational functionality in an open market

There is much predicated on other schemes having *'identical'* outcomes (e.g. Section 5, para 5.9 c)) or *'the same as'* MCS. Does this not provide multiple MCS's? What will actually make a sustainable market for all the schemes? How will they differentiate themselves?

MCS at present provides all its documentation free to those wanting to use the scheme. It does not however, change the IPR and copyright ownership of the documentation. Would MCS still be able to carry on offering free documentation?

If the other schemes plagiarises the MCS documentation (as has been already suggested) and they are competitors, will it be incumbent on the MCS to look at protecting its IPR in the courts.

Many aspects of the 'or equivalence' will require effective duplication of processes, procedures and in some instances products or services (e.g. the requirement of each certification scheme owner to maintain a database of registered installations). MCS already has a database which Ofgem link to.

Does Ofgem want to have to maintain links with multiple databases? Could this aspect of data collection be centralised? Would that provide a better consistency of access for Ofgem and the other scheme owners?

If MCS is to remain a competitor to other schemes, then it may be inappropriate to use the MCS database as the central point. Also there would be unfair cost implications for MCS if it were to be required to be the central point. What other duplications will this 'or equivalence' create if others decide to take up certification schemes?

There is a potential that the 'or equivalence' take-up may cause a *'watering down of the resources'* to achieve robust certification. This may have cost and quality implications for all parties. While this is the choice of the new entrants and a commercial decision, if MCS maintains its de facto technical regulator status, it may create funding issues for MCS as well.

There is a potential that the 'or equivalence' take-up may cause a *'watering down of the monies within certification for each scheme'*. It will be important to ensure that the financial resources are maintained in each scheme to ensure that it can provide the appropriate levels of due diligence expected.

There will be pressure to streamline the accreditation process for certification bodies that certify against more than one certification scheme owners' requirements. Given the costs from the accreditation process, will the certification bodies be prepared to pay the costs and operate multiple certification processes for smaller multiple (almost identical) schemes?

If limited scope was to be acceptable to Ofgem (e.g. one scheme does heat pump product certification, while another does installer certification), then a strong consideration will be required about whether there needs to be a centralised point for data collection and management.

If each scheme has its own datasets and selection lists, then there will need to be a way of managing access across the schemes so an installer of one scheme can access a product from another. If this is not achieved then there is a danger that the consumer will have limited access to some combinations of installer companies and products. This may follow the natural market process, however, it may also create perceived barriers by the regulator.

It is unlikely that competing scheme will want to pay the costs of linking between each other, especially as this could be quite complex.

Will Ofgem have the resources and competencies to manage the complexities of initial entry to the market and also the maintenance of the schemes approval going forward? It appears that Ofgem or someone on Ofgem's behalf will have to spend a considerable amount of resource and money managing the complexities of a multi-scheme owner process. Who and how will that be paid for? Will the consumers have the additional cost allocated to them?

It will also be important that entrants are not unduly restricted due to the time it takes Ofgem to approve schemes. This has already been highlighted to DECC with regards to Consumer Code Sponsors and the TSI process.

For information, MCS currently does not hold liability protection of £10m. At present this is £5m.

Additionally, the scheme owners will need to have the ability to allow market access to new and innovative products. In a rapidly growing market, access to incentives is very important to new entrants and the criticism of MCS early on was that this process restricted new entrants.

4 Conclusion

While it is understood why this consultation has taken place, it also highlights the complexities and potential issues that will come with multiple schemes for microgeneration.

I therefore urge Ofgem to consider these issues very carefully to avoid creating more confusion and potential costs for consumers, industry and the market.

The market for microgeneration is on the cusp of taking off and subject to the new governments' approach to the industry, it is crucial that the consumer still receives a good installation and service.

I am at your service, if you would like to discuss the points raised.

Gideon Richards, CEO, Consulting With Purpose Ltd.