

Laura Nell  
Code Governance Remedies  
Ofgem  
9 Millbank  
London SW1P 3GE

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**By email to: [CodeGovRemedies@ofgem.gov.uk](mailto:CodeGovRemedies@ofgem.gov.uk)**

Dear Laura

**Industry Code Governance: Initial consultation on implementing the Competition and Markets Authority's recommendations**

Thank you for the opportunity to comment on *Industry Code Governance: Initial consultation on implementing the Competition and Markets Authority's recommendations*, published on 9 November 2016, and for the chance to hear about the proposals and provide views at the stakeholder workshop on 12 January 2017, which we attended. We set out our initial views below.

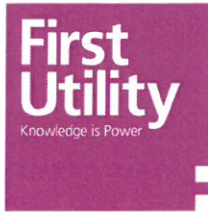
Given the potential scale of the changes that would need to be effected even for a phased change to code management and delivery, we agree with Ofgem's early consultation on this area and in advance of any formal position on the legislative arrangements.

***Scope of the new arrangements***

We think that all codes and industry arrangements should potentially be within the scope of the new arrangements for the *strategic direction and the consultative body*. We do not think that all the codes and areas identified by Ofgem should necessarily come within the scope of the *licensing arrangements*.

We agree overall with the approach to considering code management and delivery effectively as separate potentially licensable functions. However, we have material concerns around the principle of licensing and the many practical, structural and financial changes that may be required. Taking these into account, we remain highly sceptical that this remedy of itself can address the adverse effect on competition on code governance that the Competition and Markets Authority (**CMA**) identified.

Overall, our concerns are that this approach will increase complexity and cost for industry participants – and their customers – without actually delivering greater effective accountability, better coordination or more speedy system-based strategic change. As the proposals are at an early stage, we have not considered funding issues in detail in this response, other than on a high level basis. These are critical however and ideally, we would like to see simplification of the myriad fee and cost arrangements, e.g. MRA



and SPAA, SMICoP, TRAS and DCUSA, BSC and (for us forthcoming charges to Xoserve) that pertain: this would greatly assist all players with tariff setting, cost management and cash flow as applicable.

As we noted in our CMA response, we are concerned that the licensing remedy is cast for scale system-based change which is being carried out now (the Smart programme, Faster Switching and elective and subsequently mandatory half hourly settlement, as well as the additional areas Ofgem highlights at paragraph 6.2), and that complex new governance arrangements cannot be implemented in sufficient time realistically to bear on the structural and behavioural issues that frustrate timely system change. We are not convinced that of itself, it can facilitate or support innovative change to industry arrangements. We do think that a licensing structure can place obligations on code managers or delivery bodies to consider consumer interests (and here, the issue and challenges briefly described at paragraph 5.2 are helpful as background against which to structure such obligations, and defined outcomes) but the challenge for any arrangements actually underpinning this is that such bodies cannot themselves deliver the end-to-end change that is needed, making effective incentive arrangements difficult.

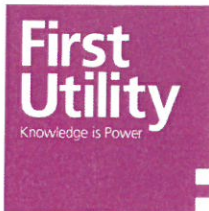
We are also concerned as to the scope of the changes given the number of codes, bodies and functions Ofgem considers could in principle be included. If this remedy is to be effective, the licensing regime must be targeted at those functions or elements that have failed or contributed to the failure of timely and efficient system change, where it is likely that further scale is needed or that continuous development is likely and where ongoing scale change is not in mid-flight.

### ***Scale and approach to governance changes***

Our concerns are also around the sheer scale of potential governance change, and the potential cost, reinforcing the need for a targeted and proportionate approach. A consequence of the FGO changes highlighted by Ofgem is likely to be for some players at least, a greater financial and resource commitment initially and potentially on an ongoing basis. Whilst we agree with these changes in broad terms, we do not think that these outcomes are workable across all the codes identified, given the increasing network and industry costs industry - and customers – are even now incurring and taking account of the actual structure of the industry.

These concerns are not addressed entirely by the early considerations around phasing of the competitions (paragraph 6.13 *et seq* refer). If a targeted approach yields fewer functions to render licensable, some of the questions (e.g. how many competitions a year) may be re-cast in any event. Perhaps a more important point about phasing relating to the consideration of the functions themselves, and any consequential changes that may also need to be made in order to effect a smooth transition (e.g. potentially a statutory scheme for on-going rights and liabilities such as contracts with suppliers and others, leases and licenses, etc., including but not limited for corporate code bodies such as SPAA Ltd and DCUSA Ltd).





This may also be an area that could usefully await a clearer steer on and even the outcome and conclusion of discussions around the single EU energy market more generally, in terms of phasing.

### **Efficiency**

In the interests of efficiency and better targeting of the changes, it would be worth revisiting the CMA's views around code consolidation, which we think should not be discounted prior to any licensing regime being put in place. As the consultation document points out, there are a range of views on code consolidation but given the scale of the changes to governance that licensing will bring, this could be an ongoing agenda item at the consultative board and potentially included with the Faster Switching programme on the retail-facing codes side, for example.

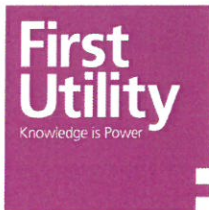
We do not think that contestability of code management or code delivery is the aim or purpose of these changes. In other areas, this has led to a fragmented sub-industry or set of functions and entities, adding to complexity and itself rendering change harder both structurally and behaviourally. Choice in code administrator or contractor is beneficial but not an end in itself and not of itself a criterion for success.

We also think that Ofgem has too readily discounted codes or arrangements (paragraph 2.36 *et seq* refer) the inclusion of which merits further consideration. This is because the impact on the industry, its arrangements, costs and underlying processes is such that they should be re-cast within a licensing (or equivalent) framework for the management and delivery of these key services, namely the Data Transfer Service (**DTS**), the Theft Risk Assessment Service (**TRAS**), ECOES, and MPAS. We accept that these services or systems (or both) have different ownership and governance arrangements and involved entities. It is likely that a one-size-fits-all approach may not be workable but we consider that this may be the case along function lines (management and delivery) in any event so consideration of other specific functions (systems operation or data handling) could be considered, and may even aid consolidation by specialisation (although please see our later comments on consolidation).

### **Summary**

In broad terms, we agree with Ofgem's proposals for the strategic direction and consultative board. We look forward to engaging with the development work for the initial strategic direction (the outline of which we agree with) and the consultative body. We are aware that Ofgem is considering innovative ways to engage non-incumbent industry participants and we welcome this. However, at the heart of a fully functioning strategic prioritisation, coordination, and assurance is as full a range of views as possible and this has always been a challenge. This challenge has to be met so as to effect real change to the range and depth of industry responses to these governance changes. We would also observe that:

- It will be important to try and think beyond specific programmes or areas here, although these programmes are a key part of coordinated governance, to first



principles, which may lead to cross-industry input at certain boards (e.g. from the FCA around its trials programmes and Ofgem's own innovation work); and

- Credible prioritisation must mean that some changes are not progressed if overall, the costs or risks to timely change of key system changes are too great and put at risk so consumer interest will need to be considered within and across all changes.

Ofgem rightly raises the CMA's wider governance remedies recommendations, and notes the context of BEIS's policy development and any draft legislative text, which presumably would also need to take into account the CMA's recommended changes to Ofgem's duties given the key aim of this remedy is to effect changes to code governance for the benefit of customers and competition.

As mentioned, we look forward to engaging with you on this important implementation work. If you would like any further information or would like to discuss anything raised in this response, please let us know.

Yours sincerely



**Natasha Hobday**  
**Group Policy and Regulation Director**