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for energy consumers

To all interested stakeholders

Email: EUExit@ofgem.gov.uk

Date: 6 July 2018

Dear colleagues,

Follow-up letter- Preparing for EU exit: licence and industry code modifications

We would like to thank everyone who responded to our 8 February letter and analysis, 'Preparing for EU exit: licence and industry code modifications'.¹

In that publication, we explained the work we had begun to identify where amendments may be required in the gas and electricity licences as we prepare to exit the European Union (EU). Since then, we have received feedback from 16 stakeholders on both our initial analysis, and on the approach we and industry should take to ensure that licences and industry codes remain fit for purpose on the day the UK leaves the EU.

The feedback we received welcomed this initiative and broadly agreed with our initial conclusions. In relation to our preferred approach on how the modifications to the licences and industry codes should proceed, many stakeholders supported our approach, but others wanted us to consider alternative approaches for undertaking any necessary changes to industry codes, such as using the Significant Code Review (SCR) process.

This letter sets out our response to the comments that we received and our planned next steps.

Summary of our February publication

In our February publication, we identified licence provisions which may need to be amended in the light of the principles set out in the European Union (Withdrawal) Bill, and without prejudice to the outcome of the negotiation on any implementation period or the future relationship with the EU. Our initial conclusion was that we had found nothing in the current licence conditions that would appear to become inoperable on exit day, although a number of areas may require modification to make them as clear as they can be. Industry code administrators reached a similar conclusion in relation to their respective codes. We included cross-references to these initial findings of the industry codes in our analysis in the

¹ <https://www.ofgem.gov.uk/publications-and-updates/preparing-eu-exit-implications-licences-and-industry-codes>

The Office of Gas and Electricity Markets

10 South Colonnade, Canary Wharf, London, E14 4PU Tel 020 7901 7000 Fax 020 7901 7066

www.ofgem.gov.uk The Office of Gas and Electricity Markets

Commonwealth House, 32 Albion Street, Glasgow, G1 1LH Tel 0141 331 2678

www.ofgem.gov.uk The Office of Gas and Electricity Markets

The Maltings, East Tyndall Street, Cardiff, CF24 5EA4DQ Tel 029 2044 4042

www.ofgem.gov.uk

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annex to this letter, identifying industry codes provisions which are linked to EU legislation and, where relevant, licences conditions.

We also acknowledged the uncertainties surrounding the specific changes that will be required, and explained that it would be premature to undertake the licence modifications as the specific changes are dependent on the outcome of the negotiations. This remains the case today.

One significant change since the publication of our February letter is that the European Union (Withdrawal) Act 2018 has now received Royal Assent. However, there are a number of further pieces of legislation (Statutory Instruments) that require to be finalised and made law in order to complete the framework of GB domestic energy law after the date on which the UK exits the EU. The terms of those Statutory Instruments depend on the outcome of the UK-EU negotiations. Those Statutory Instruments will amend the law that governs the regulation of our licences and so the specific changes to our licences cannot be finalised until it is clear how the law that they operate under is changed.

For changes to industry codes, we said we expected industry to lead the process, including via the self-governance route where appropriate. We anticipated that industry code changes might have to take place in parallel to the licence modification process to ensure that the regulatory framework remains fit for purpose after exit day i.e. that industry should raise changes to the relevant industry codes at the same time as the licence modification process is ongoing.

Summary of stakeholders' feedback

Respondents were generally satisfied that there were no significant gaps in our initial analysis identifying (i) links between EU law and the licence conditions and (ii) licence provisions which may need amending to reflect the changes to the regulatory framework following EU exit.²

Furthermore, stakeholders broadly supported our conclusion that none of the EU law references identified in both the licences' and codes' provisions would appear to make these provisions inoperable as a consequence of the UK leaving the EU. We will keep this analysis under review and encourage anyone who reaches a different conclusion to tell us as soon as possible.

Stakeholders also provided feedback on our approach to the modification process in relation to industry codes, and we noted differences between the views expressed by different stakeholders.

A group of stakeholders supported using the standard code modification process, including the self-governance route where appropriate.

Other stakeholders provided feedback on the timing for undertaking any necessary modifications to industry codes, including extending the timetable for modification beyond EU exit day and adopting a sequential modification process, i.e. that any necessary modifications to licences are undertaken before modifications to industry codes.

² We also included findings made by code administrators in respect of industry code provisions.

Another group of stakeholders were in favour of using the SCR process³, expressing concerns that code administrators may not be able to deliver the industry code modifications in time for exit day through an industry-led approach if there were delays resulting from, for example, alternative modifications being raised, and in the light of the short timescales for implementing changes to the regulatory framework.

Some stakeholders noted concerns about the uncertainty over our future relationship with the EU, which falls outside the scope of this particular analysis.

Our position

We acknowledge stakeholders' concern that modifications to our regulatory framework may not be in place immediately after EU exit day. We anticipate, however, that these modifications will be largely technical and straightforward (e.g. updating an EU reference to refer to domestic legislation). We also note stakeholders' confirmation that the licence and code provisions as currently drafted should not become inoperable on exit day, even if there were unforeseen delays in implementing the changes to the legislative and regulatory framework.

As we stated in our previous publication, any necessary licence and industry code modifications can only be fully implemented once the changes to retained EU legislation have taken effect in GB law. We will strive to take a pragmatic approach and to work with industry parties to address any unforeseen issue that could arise in that respect.

We also consider that industry has the relevant expertise and is best placed to raise and deliver appropriate industry code changes in the most efficient way possible. At this stage, we do not agree that launching an SCR is appropriate. SCRs are holistic reviews of a code-based issue used to provide a top-down solution for any major policy change and/or complex and significant cross-code issue. Experience also demonstrates that the use of an SCR has not been conducive to modifications of industry codes over a short timescale, nor is that its aim.

We consider that the potential changes identified in our initial analysis are likely to be straightforward, seeking to remedy any technical deficiencies arising from EU exit, and as such would not justify the use of an SCR.

Next steps

Our objective is to ensure that the regulatory framework for the electricity and gas markets continues to operate after exit day, and we will continue with our preparations to that effect, liaising with and supporting government and stakeholders.

We will initiate the licence modifications when we have more clarity on the outcome of negotiations on an implementation period and our future relationship with the EU.

We encourage industry to continue making preparations so that industry code modifications can be raised as soon as there is more clarity, and to work closely with stakeholders during this period. More generally, we continue to encourage all stakeholders whose activities may be impacted by EU exit to pursue their preparations and to plan ahead.

³ Further information on the SCR process is available at:
https://www.ofgem.gov.uk/system/files/docs/2016/06/scr_guidance.pdf

We are keeping our analysis of EU references in the licences under review, and in particular, whether any provisions may become inoperable. For this reason, we invite any stakeholders who have specific concerns on the operability of our regulatory framework after EU exit to email us at EUExit@ofgem.gov.uk.

Yours faithfully,

Natasha Zoe Smith
Head of European Markets