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Sent by email to: Retailpriceregulation@ofgem.gov.uk

Dear Anna

Reviewing smart metering costs in the default tariff cap: comments on draft undertakings

Further to our response of 13 September 2019, setting out Centrica's views on Response Papers 1, 3 and 4, we now set out our comments on the draft virtual disclosure room (VDR) / confidentiality ring undertakings.

Restrictions must be necessary and proportionate

As an overarching comment, the *BMI Healthcare v Competition Commission* [2013] CAT 24 case demonstrates that regulators must start from a presumption of transparency, and do not have carte blanche to impose restrictions that are unnecessary or unjustified. We remind Ofgem that in the BMI case, the confidentiality restrictions were struck down because they imposed restrictions which were not properly justified. There is already a widely accepted and applied form of confidentiality undertaking in these circumstances – namely, the CMA precedent undertakings which are widely viewed as proportionate. This is the appropriate starting point where information is truly confidential. We are concerned that Ofgem has instead used the CMA precedent as a 'base' on which a number of additional requirements have been applied:

- Without providing any explanation as to why the CMA precedent is inadequate; and
- Without explaining why the additional restrictions are necessary or proportionate.

As one of the most concerning examples of unnecessary restrictions, the "Permitted Purpose" restriction would prevent suppliers using the Confidential Information in connection with legal obligations which Ofgem itself has imposed on them or to exercise their legal rights to appeal. This is not a plausible approach. It is not credible that Ofgem has decided information can be disclosed to use in one consultation, but it is prohibited to be used for any other consultation, even if the information is highly relevant. Ofgem needs to consider carefully whether its purpose for imposing this type of restriction is legitimate and proper.

We are also concerned that Ofgem is also imposing restrictions additional to those which applied when Ofgem disclosed similar information during the default tariff cap consultation process. That process already imposed disproportionate constraints on supplier, and no explanation has been provided for Ofgem using an inconsistent and even more severe approach in this case. A key example is the requirement to produce a "compliance document" signed by a member of the Board. Ofgem has pointed to no previous case where any UK regulator has required any similar document, nor any previous breach or circumstance that would justify such an extraordinary requirement.

Clarifications are required about the VDR technical solution

In order to properly respond to the appropriateness of the undertakings, we also require clarification from Ofgem of the functionality of any VDR. In particular, please can Ofgem clarify whether the VDR will allow for:

- Full execution, manipulation and alteration of the excel model within the VDR environment;
- Individuals within or acting for the same Relevant Party to collaborate within the VDR environment; and
- For the operation of suitable software packages within the VDR environment, which will include Excel but also a add ins or alternative software to allow for the model to be reviewed efficiently.

If the VDR does not allow this functionality, it could be very cumbersome to work with and will seriously constrain Relevant Parties' ability to comment intelligently. For example, if Relevant Parties are not able to use suitable software packages within the VDR environment, then Ofgem would need to send relevant content directly to Relevant Parties in order to allow proper scrutiny – which is both uncertain (because it is only allowed at Ofgem's discretion) and could undermine the very purpose of the VDR.

Similarly, if individuals within the VDR environment cannot work collaboratively then this effectively requires all Authorised Attendees to be co-located, which again undermines the benefit of a VDR. Indeed, if content cannot be shared across VDR accounts, this situation could be especially constraining.

Conclusion

Our full set of drafting comments is included in the annex to this letter. As many of the clauses are replicated across the different undertakings, we have generally only set out our comments on any particular clause or issue the first time it appears. However, those comments should be taken to apply to the same clause or issue across all undertakings. For example, nearly all comments set out in relation to the Virtual Disclosure Room (VDR) – Relevant Party undertakings are more broadly applicable to both the VDR and the confidentiality ring undertakings, and to both the relevant party and the authorised attendee undertakings. Furthermore, nothing in this submission is intended to narrow the points made in our response of 13 September 2019, in particular our concern that Ofgem is proposing to unlawfully restrict access to information which is not confidential.

We hope that this supplementary response on the undertakings is helpful as Ofgem seeks to ensure its approach is proportionate and legally robust. However, I must emphasise that we consider many of Ofgem's proposed restrictions to be serious limitations, which unreasonably impact our ability to intelligently respond, and which Ofgem has not properly justified. The fact that we were prepared (under protest, and in light of Ofgem's commitment to later reviewing smart costs) not to challenge the confidentiality restrictions during the default tariff cap process, should

not indicate that we are prepared to accept unjustified restrictions in this review. The BMI case clearly sets out that it is unlawful for Ofgem to make it "unreasonably difficult" to provide an informed response and that the full extent of any restriction must be justified.

We therefore hope to see significant changes to these undertakings. We also hope to see a transparent and consistent explanation of each of the restrictions, including a clear and specific explanation of why any information is confidential to BEIS and/or subject to section 105 of the Utilities Act 2000.

Yours sincerely

Tim Dewhurst
Regulatory Affairs Director

Para	Text	Concern
Virtual disclosure room – relevant party		
Recital 4 / Recital 11	"*The Disclosed Material contains information that is confidential to BEIS and is provided by BEIS for disclosure as part of the Consultation on the basis that appropriate protections are put in place to ensure the continued confidentiality of the material* *…* *[The Authority considers that the Disclosed Material may also include information caught by the prohibition on disclosure in section 105 Utilities Act 2000 ("UA 2000").* *…* "*[The Authority considers that the Disclosed Material may also include information caught by the prohibition on disclosure in section 105 Utilities Act 2000 ("UA 2000"). The Authority may disclose such information in a manner consistent with the 'disclosure gateways' contained in section 105 UA 2000.]*"	The consultation paper is inconsistent with the undertakings themselves: - Confidentiality restrictions imposed by BEIS are listed in the undertakings but are not mentioned in the consultation paper. - Section 105 of the Utilities Act is referred to in the undertakings but is not mentioned in the consultation paper. - Impacts on competition are referred to in the consultation paper but do not appear in the undertakings. Ofgem cannot be in a position to determine whether the confidentiality requirements are necessary and proportionate, unless it has reached a clear, final, consistent and unambiguous view about why confidentiality requirements are necessary. It must clarify this with stakeholders immediately, and will likely need to consult again, so that stakeholders properly understand the basis for Ofgem's proposed approach. Furthermore: - When Ofgem disclosed similar information during the consultation process for the default tariff cap, this information was not said to be confidential to BEIS or that there were potential competition impacts. Ofgem must properly explain why this situation has now changed. - Ofgem has not set out the efforts it has made to request that BEIS release the information (or part of it) without these restrictions. - Ofgem has not set out the specific confidentiality restrictions which were imposed by BEIS in these circumstances and therefore why the restrictions below are necessary. - Ofgem has provided no reasoning as to why section 105 is engaged at all, nor why the restrictions imposed in the undertakings are all necessary to enable disclosure to consultees.

Recital 5 / para 7	"*Access is provided for the sole purpose of allowing the Authorised Attendees of a Relevant Party, on behalf of the Relevant Party, to review and understand the Disclosed Material in order to prepare submissions and representations to the Consultation*" … *"We will not make use of the Disclosed Material for any purpose other than the Permitted Purpose. For the avoidance of doubt, we will not use the Disclosed Material to make submissions to the Authority or BEIS on other matters related to smart meters or otherwise."*	As explained in Centrica's response of 13 September, Ofgem has not explained why a "Permitted Purpose" restriction is legally necessary. It is unlikely to be necessary or appropriate. At the very least, the restriction must be widened to include the following: (i) use for purposes in connection with suppliers' legal obligations; and (ii) use for the purpose of exercising their legal rights, including appealing or seeking judicial review of any Ofgem decision dependent on use of the Disclosed Material, and in any other submissions where the information is relevant. There can be *no basis whatsoever* for Ofgem to deprive suppliers of the opportunity to use relevant information where necessary in connection with legal obligations and to ensure suppliers can properly exercise their legal rights. There is no plausible basis on which Ofgem could determine, for example, that it is "proportionate" to disclose confidential information only for one consultation, but then prohibit suppliers from using it to respond to any other consultation where the information is relevant. It is not reasonable that suppliers are put in a position where important specific information is available about the smart allowance (where that information is not confidential in any meaningful sense) but where Ofgem refuses to allow suppliers to use that information to plan their roll-out. We also note that the "purpose" restrictions in the CMA undertakings expressly allow the use of information in appeals.
Recital 6	"(d) *in accordance with the arrangements in recital (8) (each such Attendee being an "Authorised Attendee")*"	These words should not be under a new paragraph (d). This implies that it is a separate and independent requirement from requirements (a)-(c), when in fact these words merely explain how requirements (a)-(c) are met.
Recital 7	"*The number of Authorised Attendees is limited to six for each Relevant Party.*"	Ofgem has provided no basis or reason for imposing this restriction. Given different parts of the data and model will require assessment by subject matter specialists (including suppliers representatives, legal advisers, economists and technical advisers), it is likely to impose real constraints on how effectively consultees can respond. In the Energy Market Investigation, for example, the CMA allowed 10 advisors per supplier to access the data room. If there are contractual or licensing restrictions which justify this requirement where a Virtual Data Room is used, then there should be opportunity for a Relevant Party to elect additional Authorised Attendees who should be allowed to view information extracted from the virtual disclosure room even if they are not allowed to access it directly. Being able to discuss the contents of the

		disclosure room with a wider group of named individuals is not unreasonable, not least given Ofgem's admission that there is no information that is confidential to suppliers contained within it. As set out in our 13 September 2019 submission, either: - The number of Authorised Attendees should be expanded (but limiting the number access the portal at any one time to six if necessary); or - A new class of Authorized Person should be created – who are entitled to be made aware of and discuss the contents of the VDR, but without being able to access it.
Recital 8(a) paras 16-17	"*the Relevant Party must provide to the Authority in writing a compliance document*"	We are aware of no comparable incidence where stakeholders have been required to disclose a "confidentiality plan" which is required to be signed off by a company director. It would be both proportionate and effective to rely on the existing Relevant Party undertakings. Consultees are already familiar with managing highly sensitive information. Ofgem has provided no explanation of why this unprecedented approach is necessary in this case – e.g. there is no explanation of why this information is more sensitive than other information disclosed in similar circumstances, or why the compliant document would reduce the risk of a data breach. Furthermore, the requirement for sign off by a Board member is especially onerous and unnecessary.
Para 1	"*We will be liable for the actions or omissions of our Authorised Attendees or Non-Authorised Persons in relation to the Disclosed Material as if they were our actions or omissions*."	This specific requirement is not a feature of either the CMA precedent, or the undertakings Ofgem previously imposed on Relevant Parties. Ofgem has provided no justification for this requirement. The undertakings already require Relevant Parties to take all steps to ensure compliance.
Paras 4-9	Please refer to these paragraphs in full.	We query whether it is appropriate to include all of the obligations which are currently set out in the Relevant Party undertakings, since in practice Access Details, Disclosed Material, requests for disclosure to non-Authorised Persons, will all be managed by the individuals who have themselves given undertakings. The Relevant Party undertakings should be concerned primarily with ensuring others comply with their confidentiality undertakings. This is the approach adopted by Ofgem in the default tariff cap consultation process and is also consistent with the CMA precedent undertakings.
(Summaries of reports)	N/A (the draft does not currently deal with this issue, and it should therefore be added to the undertakings)	There is currently no provision allowing Authorised Attendees to produce summaries which can be shared more broadly within the Relevant Party and their advisers. This is a feature of the CMA undertakings, and Ofgem's previous undertakings in the default tariff cap consultation. No explanation has been provided as to why this provision has been removed. It ought to be reinstated in order to give the Relevant Party as much oversight as possible over the submissions being made on their behalf.

(Treatment of material by Ofgem)	N/A (the draft does not currently deal with this issue, and it should therefore be added to the undertakings)	If a Virtual Data Room is adopted and reports must be produced within the Virtual Data Room environment, then the undertakings ought to set out clearly the visibility Ofgem will have over documents produced and how Ofgem will protect confidentiality. In particular, it is essential that Ofgem provides assurance that legal privilege will be maintained, and that Ofgem will not use or retain any information which is not formally submitted to Ofgem.
Virtual disclosure ring – authorised attendee		
Para 4	"*I will not make any disclosure to the Non-Authorised Person until such consent has been obtained from the Authority*."	This is a redundant clause, as para 2 already prohibits disclosure of Disclosed Material to Non-Authorised persons without Ofgem consent. This clause is also unduly broad because it should apply only to Disclosed Material.
Confidentiality ring – relevant party		
Recital 7	"*The number of Authorised Attendees is limited to six for each Relevant Party*."	We have commented on why this restriction is inappropriate above. However, we note that if there is no Virtual Data Room, then there should be no contractual/licensing restrictions that justify the limitation, and so it is especially unclear why Ofgem would limit Authorised Attendees to six.
Recital 10	"*The Authorised Attendees … shall use a privacy screen on their monitor at all times*"	This may be unnecessary. There are a variety of ways in which confidentiality can be assured and a privacy screen is unnecessary in many cases – for example, where the Secure Computer is in a private office, or where it is in a multi-person office but all people in the office are Authorised Attendees. The requirement for a "private environment" is sufficient, because it recognises that the appropriate steps to ensure confidentiality will depend on the circumstances.
Recital 10	"*The Authorised Attendees will be permitted to download the Disclosed Material onto a maximum of six Secure Computers (each permitted download resulting in a 'Permitted Copy'). Each Secure Computer must have the following specifications: a) It must be password-protected; b) It may be networked to the other Secure Computers but shall not in any event be connected to the internet*."	These requirements appear likely to make collaboration very difficult: - As noted above, the requirement that only six computers are allowed is inappropriate. - It is not technically feasible to have Secure Computers networked to each other but not connected to the internet, in circumstances where Ofgem is specifically contemplating that external advisers (such as third party economics advisers and law firms) along with the Relevant Party itself should be able to participate and therefore the Secure Computers may be in different locations. This would require all advisers to be on the same premises, which defeats the purpose of having a <u>virtual</u> disclosure room.