

Marion Quinn
Industry Codes & Licensing
Ofgem
9 Millbank
London
SW1P 3GE

23rd December 2015

By email: industrycodes@ofgem.gov.uk

Dear Marion

Re: Code Governance Review (Phase 3): Initial Proposals

Thank you for the opportunity to respond to the Code Governance Review (Phase 3): Initial Proposals, published on 23 October 2015 (**CGR 3**) and for the extension to the deadline for doing so.

As we noted in our letter of 13th August 2015, we have a small team that provides a central code change, governance and compliance coordination function, with management of and responsibility for the industry processes and functions themselves falling to specific functional teams. Whilst we have recently been able to engage more actively across more industry codes, it remains the case that we do not have as wide experience or a frame of reference as that of other market participants. With this in mind, we have focused this further response on those areas where we can make suggestions based on our experience. We have not therefore commented on the proposed changes to the process for modifying the charging methodologies in this response. We refer to the general comments on such modifications made previously.¹

We have the following general comments:

- We agree with the continuing need to assist with and support the participation of independent and smaller market participants within code governance. These participants do not form a homogeneous community. This makes a constituency-type approach to representation challenging but not impossible. As recognised, it also makes it important that the views of such participants can be heard as part of the code governance processes and part of the modification processes;
- This need has been highlighted recently given the substantial number of consultations, programmes and changes being undertaken or just starting, in particular alongside the CMA energy market investigation. The impact of large-scale and parallel change is resource intensive for all market participants but is disproportionately greater on smaller market participants. There is also a risk that the finite amount of resource available across the industry to work on major change programmes is reaching its limits;

¹ Please see our 29th June response at page 4.

- It may be that the concept of large and small participants in terms of governance body representation (where retained) or participation will become unduly binary, preventing contributions from those participants too large to be small, and too small still to have the same resources as the larger players. A category of participants reflecting the growing mid-tier of suppliers, recognised by the CMA, and albeit that there are differences of business model, approach and scale, could potentially bring an important perspective of scale growth which is different to that of new entrants and smaller players: incumbent, intermediate and new participants all have an important role to play in and perspective on industry governance;
- These initial proposals (in particular around the Significant Code Review, and modification proposal aspects) represent a material change to the way in which code modifications occur/are progressed, which if taken forward should in our view be accompanied by a review of the code modification representation, consultation, review and appeal processes to ensure that the substantive and process rights of all participants are appropriately protected;
- In specific cases, it appears that Ofgem is to be the proposer, manager, drafter and approver of changes. We are concerned that Ofgem remains the regulator, and as a result, may not be best placed to undertake all such roles and be appropriately accountable for decisions taken pursuant to these different roles or resourced for these roles.

We set out below our response to specific questions.

Chapter 2: Significant Code Review (SCR)

Question 1: Do you agree that Ofgem should have the ability to lead an end-to-end SCR process, including the development of code change and legal text?

Our concerns on this proposal relate to the following broad areas: (i) the nature of the “lead” anticipated over an end-to-end SCR process; (ii) the resources to lead large-scale programmes (or to manage the outsourcing of any external of resources); and (iii) the impact of an actual and perceived lack of detailed knowledge and experience of all industry processes, and participants’ own systems and processes.

As noted above in our general comments, we have some concerns with this proposal. Whilst we share the frustrations expressed by Ofgem around the longevity of some consultation and modification processes, it is not clear that lack of overall lead by Ofgem has led to these situations. It follows that having the ability to lead the process would not, of itself, address this concern. As Ofgem notes, other factors than incorrect expectations for timescales may be attributed to actual time taken for effecting change.² As the causes for the various delays, subsequent changes and programme challenges to ongoing change differ, providing for a one-size fits all approach also risks being too broad to deal with specific concerns.

² See for example paragraph 2.8 of CGR 3.

Ofgem is the sector regulator, subject to specific statutory duties for its general and specific activities, and accountable in a number of ways for all the decisions that it takes, including but not limited to statutory appeal and judicial review. Even where Ofgem takes on private law functions such as letting contracts, it is subject to specific public law duties and rules. Taking on specific change-related roles, in addition to the final decision-making role, risks a lack of appropriate accountability due in part to the nature of the decisions being taken, or risks being unclear as to the nature of those decisions, and thus unclear on the appropriate substantive and procedural rights of participants who consider that they may be adversely affected. These rights may vary from the right to be heard on the myriad elements that could constitute decisions within the overall “leadership” of the SCR change process to the ability to appeal decisions.

As noted, it is therefore appropriate to consider afresh those decisions that are included and excluded from the statutory appeal route to ensure that any decision on change to specific types of modification can be appropriately reviewed. Uncertainty of review or appeal itself causes further uncertainty and can drive specific behaviours as participants work out what this means for them, including resort to review and appeal as boundaries and principles are explored. Thus a lack of clarity or a perceived failure of appropriate due process can cause or otherwise lead to additional delays and uncertainties.

It is also likely that in certain cases where change could be perceived to be delayed, the initial scope and scale for change was underestimated and the complexity underestimated. With greater experience of major change, including changes being developed and addressed in parallel across codes, it is concerning that the assumption is that change can in principle occur more quickly, even though the pace of change is not lessened and indeed is increasing over the short to medium term. We have seen a number of instances within larger programmes of contingency and periods allocated for testing being eroded by the delays in decision-making, or decisions being rushed and requiring subsequent review and modification. As potential delays come up, of whatever cause, re-planning and allocation of resource and risk is needed, which itself erodes contingency and takes up resource. This is not to say that an overarching authority for appropriate projects is not needed, nor that credible timetables should not be imposed, but it does highlight that there are no ready answers to the complexity of large-scale change and that one size may not fit all.

Question 2: Do you agree it is appropriate to clarify that Ofgem may set timetables for the code change process under an SCR, when the existing, industry-led code development route is used?

In principle we agree that setting a credible timeframe for industry-led code development, within an SCR, would be helpful. However, it is also potentially detrimental to the overall efficacy of this – or any - process to set a timetable that few have

confidence in. This makes it difficult for participants to commit resource to such changes in the face of scepticism as to the delivery date. Further, the setting of too early a delivery date can also drive instability into a programme, as changes emerge subsequently that have to be accommodated at greater overall risk. Project Nexus has experienced some of these issues: arguably due in part to having a Go Live date determined before Xoserve had produced a project plan.

We would therefore be concerned if this proposal led to the ability to set timescales without the ability to review and amend these in order to mitigate the risk of setting of rigid timetables at the start of a process, when it may not be clear exactly what the change is and what the transition arrangements might look like. As with the SCR-led process, we would expect to see appropriate checks and balances applicable to the process for and decision around timetable(s) and the ability appropriately to review it where there is objective justification for doing so.

Question 3: Do you have any comments on the licence drafting set out in Appendix 3?

We have not commented on the detailed drafting given the underlying concerns that we have on the proposals themselves.

As a general point, we think that the proposed amendments add complexity to an already complex condition, including detailed and confusing cross-referencing which makes it hard to understand the requirements for each type of change. The final changes would benefit from an overall review of the drafting approach for the whole condition (noting that the changes to C3 are themselves illustrative for all code-related conditions).

Question 4: Should Ofgem be able to directly raise a modification proposal under the standard process (option 2A)?

We do not think that the issues being experienced within code governance would be addressed by Ofgem being able to raise a modification proposal under the standard process. This seems to create, without more, a conflict between the function of proposer and that of approver (or not) of such modifications. We note that Ofgem has considered the appeal issue in the context of any final decision under Option 3.³ This section does not cover the wider question of whether other decisions could and should be ones against which a statutory appeal could lie or if not, the potential impact of any right judicially to review such decisions.⁴

³ Paragraph 2.31, CGR 3.

⁴ Section 173 (2), Energy Act 2004, sets out four elements for an appealable decision, the first being whether it is a decision relating to a document addressed in a licence condition (sub-section (a)); a further element is whether it is the giving or refusing of consent. Without a detailed consideration of the intent behind this at EU and national level, it follows that adding to Ofgem's code-related decision-making ability in a manner that adversely impacts on the process overall should be accompanied by a consideration of the impact of the appeals mechanism overall, and any ability judicially to review those decisions not within the statutory appeal mechanism.

Paragraph 2.33 does not describe any prior process for development of a modification proposal by Ofgem and in particular, whether any prior consultation or the ability for affected participants to make representations is intended. We consider that this would be a vital element of any such change.

Question 5: Do you have any other proposals for changes to the SCR process?

We note Ofgem's reference to the Switching SCR process.⁵ In some respects it is difficult to comment on the proposal for Ofgem to lead the SCR process end-to-end as the adaptations evident in the Switching SCR approach have not yet started.

Whilst we have concerns around Ofgem being able itself to generate and lead code changes, we do think it would be useful to have a mechanism for Ofgem's indicative views on an industry-led or other change to be made known at appropriate phases of any change process that participants can consider if changes may be needed. There are challenges to giving views, including whether these are binding, but the development of a more collaborative process between all participants would assist with change, including early indications that Ofgem may have different view or additional concerns to those being addressed in working groups by participants. Clarity around due process and review will support this collaborative process.

Chapter 3: Self Governance

Question 1: Do you agree that requiring a positive identification of why Authority consent is needed (rather than why it is not) could result in additional modifications being developed under self-governance?

In principle, requiring a positive identification of why Authority consent is needed could result in more modifications being consciously developed under self-governance. It is currently easier to default to an Authority consent process and we agree that requiring justification as to why consent is needed is likely to foster that behavioural change.

The panel decision should be capable of review, albeit on an expedited basis. The outcome of any review process can and should be incorporated into any guidance around materiality.

Questions 2 and 3: Do you agree that guidance on the materiality criteria may assist industry in its assessment of whether a modification should be self-governance or require Authority consent? Do you agree that any potential guidance is something that panels and code administrators should develop, based on experience to date of using self governance?

⁵ Paragraph 2.22, CGR 3.

We agree that guidance on the materiality criteria would assist industry and that it could be developed by code administrators and panels. Ideally, the form and substance of the guidance should, so far as possible between the different codes, be the same. This initiative represents an opportunity to rationalise an important input to and aspect of the code modification processes across codes.

Question 4: Do you have any other proposals that may improve the self-governance processes under the codes?

It would be useful to provide for a review point during any self-governance modification process to check that participants continue to see the proposed modification as not being material and therefore not of the type requiring Ofgem consent.

Chapter 4: Code Administration

Question 1: Do you agree that updating the guidance in CACoP and ensuring best practice across all codes would enhance the role of the Critical Friend?

This important support mechanism is only helpful if participants are aware of it. We agree that the Critical Friend guidance in CACoP should usefully be updated and that the Critical Friend role could be enhanced by doing this.

As a participant who has recently had call to rely upon this support mechanism, we would be happy to provide specific comments to code administrators and panels on what we found useful at the start and how this changed as our requirements did in order to assist with enhancing this function.

Question 2: Please provide your suggestions as to how the Critical Friend role could be better advertised and what information each code administrator should include on its website.

We would suggest the following for advertising the Critical Friend role: (i) that Ofgem promote and refer to CACoP and the Critical Friend role in relevant communications, e.g. during licence application processes, and in modification assessment decision letters; (ii) that all code administrators include a prominent reference to and contact details for the Critical Friend role. This reference should make it clear that this is part of the CACoP (and in response to **Question 5**, we agree that a dedicated CACoP page would be useful), to which a link to the CACoP and/or the dedicated web page, would be provided.

Question 3: Could a self-governance process be introduced for the CACoP?

We are not convinced that self-governance is appropriate for the CACoP for non-material or housekeeping changes. At the current time and as rationalisation is

considered (in our view within programmes rather than as an additional programme), all changes to CACoP should be subject to Authority approval.

Question 4: How often should the CACoP be reviewed?

This depends on the aims for and purpose of any review but regular and transparent reporting, availability of status reports against KPIs and an annual review would seem reasonable.

Question 6: How could the quantitative metrics be improved?

CACoP currently does not include a quantitative metric to measure the makeup of respondents to consultations and working group membership. This would be a very useful metric to determine how effectively the CACoP might be working and the level of engagement of different industry participants over a measurement period. If for example few independent suppliers were responding to consultations associated with a particular code, then this should be identified and action taken to resolve it.

We would also welcome consistency in the reporting of the metrics. Short, identical surveys should be conducted by each code administrator at roughly the same time each year. The results of these surveys should be published in a league table format so that healthy competition is fostered amongst the code administrators.

Question 7: Should a single body send out one qualitative survey across all codes? If so, who would be best placed to undertake this role?

We support this suggestion, but would recommend widening the survey to being both qualitative and quantitative.

Question 8: Do you agree that the modification process and template should be standardised across all codes?

As we noted in our letter of 13th August 2015 in our response to question 7, we are less concerned about the format of code changes than accessibility of those changes, any related information needed to assess them and any inter-dependencies.

We do think that rationalisation overall would be helpful but would be concerned should any such exercise be launched at the current time in addition to the ongoing large-scale change programmes and the forthcoming Switching SCR, mandatory domestic half hourly settlement and voluntary settlement. At the current time, we do not consider rationalisation of modification processes *per se* is a priority. Should the opportunity arise in the context of e.g. the Switching SCR to review those processes applicable to relevant codes and for those changes to be made, we would be supportive of that approach.

Question 9: Is it appropriate that all panel chairs be completely independent of industry?

In principle, we agree with the concept of independent panel chairs. However, specifically, this depends on what is actually meant by “independent of industry”. If what is meant is independence from any industry participant, this approach could deprive the panel overall of important experience. Previous work for an industry participant, retention as an external adviser to or holding e.g. a non-executive position with, such a participant should not *per se* prevent appointment as an independent panel chair. Those seeking appointment or appointed should be able to show how any actual or perceived conflicts can be addressed and independence achieved within an appropriate framework for management of potential issues around conflicts of interest.

Question 10: Is it appropriate that all panel members are required to be impartial, i.e. not to represent the interests of their company?

As noted by Ofgem, the current arrangements in the BSC require that panel members act impartially rather than represent the organisations they are employed by. We would support all code decision-making body members being required to act impartially otherwise the likelihood of bias increases, whether actual bias or the perception of it.

Question 11: Should DCUSA voting be undertaken by panel, rather than all parties?

We agree that voting should as far as possible be impartial rather than representative. To an extent, this future-proofs the panels, which do not need to ensure that as new constituencies are formed, representatives are found. We note too that impartiality will not be taken to mean “independence from industry”. We would also be concerned if impartiality meant that members could not draw on their experiences of market entry, system change, etc. These vary between participants and of necessity provide a filter through which proposals are considered: having input from all participants is important to ensure that all potential effects and any unintended effects are as fully understood and explored as possible, albeit with such participants looking beyond this filter to consider the requirements for the industry as a whole.

It is also the case that in order to avoid the perception of bias, panels should aim for a balance of member experience, so that no specific experience can outweigh others.

Question 12: Should code administrators provide a chair for workgroups?

To date, we have had a positive experience of working groups chaired by code administrators. We would therefore support further consideration of this proposal, noting that (i) that there are resource and potentially financial implications to extending requirements in this regard, which may vary between codes, and (ii) that there should



be a default position where it does not prove possible to resource a code administrator chair for a particular group or groups.

Question 13: Would including a consumer impacts section on each change proposal form help to ensure consumer interests are discussed and published?

We support amendments to the change proposal process that make it quicker and easier to understand its impact on consumers. We would advocate going a step further to assess these impacts against categories of industry parties. Please see below a matrix that could be added to the front page of all change modification forms. The impacts should be reviewed at major checkpoints for example at the end of each workgroup meeting. The illustrative table looks at impacts on the end-customers of the supplier categories: different codes and changes may include e.g. generators, distributors, transporters, etc.

	<i>I & C Suppliers</i>	<i>Large Domestic Suppliers</i>	<i>Independent Suppliers</i>
<i>Commercial Impact</i>	<i>High</i>	<i>Medium</i>	<i>Low</i>
<i>Operational Impact</i>	<i>Medium</i>	<i>Low</i>	<i>High</i>
<i>End-customer Impact</i>	<i>High</i>	<i>None</i>	<i>None</i>

Question 14: Do you agree with the housekeeping changes we have proposed?

We agree in principle with these proposed changes.

We would be happy to provide further views or information if that would be useful. If so, or if you have any comments or queries on this or any of our previous CGR responses, please let me know.

Yours sincerely

[not signed]

Natasha Hobday
Head of Policy and Regulation