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for energy consumers

Electricity suppliers, gas
suppliers, consumers and other
interested stakeholders

Date: 13 June 2016

Dear stakeholders,

Consultation: our proposed approach to dealing with supplier insolvency and its consequences for consumers

We are seeking your views by 29 July 2016 on our approach to dealing with supplier insolvency and its consequences for consumers**.**

Insolvency in the energy sector

Electricity and gas is supplied in Great Britain through a competitive process. Competition benefits consumers, but it can lead to suppliers to fail in the same way as companies can fail in other markets. We are committed to keeping under review our approach to ensure we can deal with supplier insolvencies, even though they have been very infrequent in the past. It is not our responsibility to intervene to prevent suppliers from becoming insolvent[1] but we think it is important to have protections in place for consumers given that electricity and gas are essential services.

When a supplier fails our focus is to ensure continuity of supply for its customers and avoid wider negative effects on the market. We can do this through the Supplier of Last Resort (**SoLR**) process or, where this is not feasible, through use of powers to seek the appointment of an energy supply company administrator (an **energy administrator**).

Under the SoLR process, we are able to nominate another supplier to take on the customers of the failed supplier, whereas under the energy administration we can, subject to the Secretary of State's consent, ask the court to appoint an administrator with the express purpose of the continued operation of the supplier[2].

Implications for consumers

In the event of insolvency, there may however be financial implications for the failed supplier's customers. Some customers' accounts are likely to have a credit balance at this time. These customers may be an unsecured creditor. Without regulatory intervention, they are unlikely to receive all (or possibly any of) this money back from the failed supplier. This, or similar, issues arise in many other markets and is the subject of consideration by other government bodies. This issue is considered further in Part 1 of the Appendix.

[1] Although we do consider carefully the implications of our regulatory interventions on suppliers' abilities to finance their activities.
[2] The regime provides the ability for financial support to be provided for the special administrator by the Government in appropriate circumstances.

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Our proposals

Our existing SoLR powers can be used to give some protection to consumers' credit balances in the event of a supplier's failure. We are seeking views on our draft revised guidance to clarify this.

The guidance clarifies two specific points. These relate to 1) the selection of a SoLR and 2) our approach to considering claims for funds to be provided to the SoLR via the industry arrangement (or "levy").

The guidance states that, alongside other factors, we would take into account (in our SoLR appointment process) any measures offered by a potential SoLR to address the loss of consumer credit balances. Claims under the industry levy will continue to be considered on a case-by-case basis. We have however clarified that claims made in support of measures to address the loss of balances may fall into the circumstances in which we would approve a claim.

We are also seeking views on whether alternative approaches, such as ring-fencing credit balances, or insurance arrangements, may be better ways to provide such protection. This is considered further in Part 2 of the Appendix.

Updates to our guidance

Finally, we are considering further updates to the guidance, which was last published in 2008, to reflect the extension of the energy company administration regime to suppliers which took place in 2011 and other changes to the industry. This is considered in more detail in Part 3 of the Appendix and in our draft revised guidance.

How to respond

We would like to hear the views of interested parties in relation to any of the issues set out in this document. There are specific questions in Part 4 of the Appendix.

Please send your responses to us by 29 July 2016, by email to Giulia Branzi (giulia.branzi@ofgem.gov.uk) and Mark Mills (mark.mills@ofgem.gov.uk), or by post to

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Unless marked confidential, all responses will be published by placing them in the Ofgem library and on its website www.ofgem.gov.uk. Respondents may request that their response is kept confidential. We shall respect this request, subject to any obligations to disclose information, for example, under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004.

Please mark clearly any information which you would like to remain confidential and provide us with reasons in support of this. You may wish to provide a separate annex of confidential material.

Next steps

We hope to publish our proposed next steps in autumn of this year.

Yours faithfully

Rob Salter-Church
Partner, Consumers and Competition

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APPENDIX

Part 1: Background on supplier failure and customer balances

Customer balances

1. Whether a customer is in credit and the extent of that credit balance will depend on a number of factors. These include:

    1.1. the customer's payment method;

    1.2. the time of year;

    1.3. the reconciliation of actual to estimated meter readings; and

    1.4. the terms and conditions of the customer's contract.

2. We expect suppliers to comply with licence conditions relating to the calculation of direct debit amounts[3] and to act consistently with commitments made to refund credit balances automatically. We would also encourage customers to read their meters where possible and to consider whether to make a request for a refund of balances.[4] These steps reduce the chance of an excessive credit balances building up.

3. Even if these steps are taken, it is likely that at any time many consumers will have credit balances with their supplier. This is because many customers have fixed-term tariffs paying by monthly direct debits. The amounts of these are based on estimated annual consumption whereas actual consumption will change from month to month.

4. We estimate that for a brief period following the summer, it would not be unusual for a customer with average levels of demand to peak at a little over £100 in credit.[5]This is because of lower consumption in the warmer and lighter summer months, followed by above-average consumption during the colder and darker winter months, when the credit balance would reduce.

5. Given the range of factors which affect balances and others such as seasonal weather variations, this figure will vary in practice. This figure will be higher for some customer groups and lower for others.

Supplier insolvency: implications for customer balances

6. A customer credit balance is a debt owed by the energy supplier to the customer. This makes the customer a creditor of the energy supplier. Like any business, an energy supplier is likely to owe money to a number of creditors. These are likely to include both secured and unsecured creditors.

7. For example, an energy supplier may owe money to bank, secured by a mortgage, in relation to its offices. A supplier may also owe money to other industry parties from purchasing energy on wholesale energy markets. Such debts are a normal business practice and are not, in themselves, problematic while the energy supplier is healthy: creditors will continue to be paid or, in the case of customers with credit balances, receive the energy to which that credit balance relates.

8. Experience has shown that energy suppliers, like any business in a competitive market, may fail for a number of reasons. For example, inappropriate hedging strategies can lead to significant losses which cause the supplier to fail as can financial problems in the supplier's wider group. In situations where an energy company fails and enters into a

[3] Standard conditions 27.14-27.16 of each of the gas and electricity supply licences.
[4]https://www.ofgem.gov.uk/sites/default/files/docs/2014/12/direct_debit_factsheet_jan_2015_english_web_2_0.pdf
[5] Based on fixed-term tariff customers paying by fixed direct debit. We expect these customers to build up credit balances due to having fixed payments set against varying seasonal consumption. Figure assumes customer joining tariff at start of summer and conforming to seasonal consumption trends found in publicly available data. Price determined from simple average of all dual fuel fixed term tariffs priced using Ofgem's medium Typical Domestic Consumption Values (TDCVs) averaged across UK as of 2nd March 2016.

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formal insolvency process there are unlikely to be sufficient funds available to repay all creditors.

9. Insolvency law provides that some types of creditor should be paid before and in preference to other types of creditors. A key distinction is between "secured creditors" and "unsecured creditors"; secured creditors are generally paid before and in preference to unsecured creditors.

10. A customer is likely to be treated as an unsecured creditor of the failed supplier in a formal insolvency process. The default position is that the customer is unlikely to receive all (or possibly any of) this money back from the failed supplier. The amounts which are likely to be lost by individual consumers in these circumstances are difficult to estimate.

11. The loss of monies accrued as a credit balance with suppliers will affect customer groups in different ways, with some customer groups more affected than others. For example, we would anticipate that vulnerable and in particular fuel poor domestic customers may be particularly affected and less able to absorb the potential loss.

12. It is not our responsibility to intervene to prevent suppliers from becoming insolvent[6] but we think it is important to have protections in place for consumers given that electricity and gas are essential services. We have been considering the options available to us to protect consumers and their balances.

13. We have considered both the current position and options for further protection of consumers' credit balances. We are aware that interventions in this area need to take into account factors such as the fostering of competition and innovative business models which lead to lower costs for consumers as well as protecting individual customers from the costs of supplier failure. These need to be considered alongside other factors such as proportionality and regulatory burdens.

<u>Steps taken by SoLRs on credit balances and use of industry levy</u>

14. The SoLR arrangements are described fully in the guidance (see appendix 3) alongside details of our approach to energy administration powers. In summary, the SoLR arrangements involve two steps. The first is the decision to revoke a failed supplier's licence to supply gas or electricity. The second is to appoint another supplier (the SoLR) to take over the failed supplier's customers.

15. The method of appointing the SoLR is flexible and there are a wide range of factors which we may take into account in deciding who is to be a SoLR. In practice, suppliers have volunteered to perform this role in the past. There is also the possibility of SoLRs claiming certain costs for performing this role through industry arrangements, referred to as the industry levy.

16. Through these arrangements we consider it is possible, in appropriate cases, to provide protection for consumers and their credit balances. Protection for every customer through this arrangement may not be appropriate or possible in every case. Any protection which is given would not necessarily cover the entire amount lost on the supplier's failure. Decisions to do so would need to be taken on a case by case basis reflecting the circumstances. For example we would be less likely to act to protect balances if the extra time it may take to secure these protections created risks to the wider market or if we assessed that the amounts involved were likely to be low.

17. We are proposing to update our SoLR guidance to provide more clarity that in appropriate circumstances we will use our SoLR powers to ensure consumer credit balances are protected when a new supplier is appointed. This is explained further below.

[6] Although we do consider the implications of our regulatory interventions on suppliers' abilities to finance their activities carefully.

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Part 2: options

Introduction

18. The default position across a range of sectors is that prepayments and credit balances are unsecured debts which are unlikely to be repaid on insolvency. The arrangements under SoLR are an exception to this. Some sectors provide protection for prepayments or credit balances either through compulsory or self-regulation. These include:

    18.1. *Financial Services Compensation Scheme[7].* The Financial Services Compensation Scheme (FSCS) is a statutory compensation scheme for customers of authorised financial services firms. The FSCS can pay compensation if a firm is unable, or likely to be unable, to pay claims against it. FSCS is funded by a levy on authorized financial services firms and does not charge individual consumers for using its service.

    18.2. *ABTA financial protection scheme[8].* This is a scheme provided by the travel industry. If a customer purchases a holiday through a scheme member and that member subsequently pays, refunds will provided from the scheme. The scheme is funded through a bond on members.

19. The Law Commission has recently been working on issues associated with consumer prepayments on retailer insolvency in a range of sectors.[9] You may wish to consider this work when considering the issues in this letter. We note that the Commission envisages publishing a final report later this year.

20. Approaches in other sectors have been considered in our initial thinking on options for further protection. Before explaining these options, we have explained below the assessment framework which we consider is relevant. This includes the following factors:

    20.1. *Implications on competition and market dynamics*. This would include for example the following matters: potential market bias, innovation constraints, pass through effects and loss redistribution, increased regulatory burden to suppliers, barriers to entry, impact on customer behaviour.

    20.2. *Effectiveness in protecting consumers, including vulnerable consumers.*

    20.3. *Regulatory burden*. As well as burdens on suppliers, this includes the burden on us to implement and monitor any proposal.

    20.4. *Proportionality*. This would include considering whether to make any of the options subject to a threshold, such as a cap or collar.

21. As we acknowledged above, interventions in this area require a careful balancing exercise to be performed. This is not a straightforward exercise and may involve trade-offs between different interests.

22. Our assessment is at an early stage and we would welcome your views on both the relevant factors and our assessment of them.

Option 1 – no further action, i.e. case by case use of SoLR powers

23. This involves continuing the arrangements set out in our draft guidance. These are explained further below. A key strength of this option is its flexible nature. The approach allows us to take appropriate steps to protect consumers on a case by case basis.

24. We do not perceive that competition and market dynamics are likely to be significantly affected by this option. It does not appear restrict suppliers' business models nor does it impose any upfront costs.

[7] Further details of the scheme may be found at: http://www.fscs.org.uk.
[8] Further details may be found on http://www.abta.com
[9] Consumer Prepayments on Retailer Insolvency" – see: http://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency

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25. The distributional impacts of any decision to allow the SoLR to recover the costs of compensating consumers from industry through the levy arrangements need to be considered on a case by case basis. In particular we would need to consider the nature of the consumers (including whether they were vulnerable consumers) who would otherwise lose their credit balances along with the nature of consumers who would ultimately be funding this action.

26. The flexible nature of the approach also means that it is uncertain. For example, the individual customer's level of protection and the likelihood that claims will be made through the levy arrangements on other industry parties. Such costs may be expected to be significantly less than the other options below but we note that the uncertainty may itself carry an additional cost for suppliers and consumers: in the latter case costs of not knowing in advance the extent to which they would receive compensation for credit balances.

27. Implementation of, and monitoring associated with, this option is not likely to be resources intensive for us. But it could be resource-intensive when we are called upon to exercise the power.

28. On balance, the flexibility of this approach and the cost implications makes it our preferred option going forwards.

29. We could, as a variation of this option, commit to providing funding through the levy arrangements in all circumstances in which a claim was made. We are minded not to do this as we consider it is important to consider the distributional impacts on different customer groups on a case by case basis. In addition, providing protection through the use of the levy in all circumstances may have some additional unintended consequences in terms of undue influence on consumers' behaviour.

<u>Option 2- Ring-fencing or trust arrangements for consumer balances / prepayments.</u>

30. We could introduce clear requirements to separate the assets of the consumer (ie the prepaid amount/credit balance) from those of the company, along with rules governing the transfer of funds from the consumer's account to the company's as energy for which the consumer had prepaid is used. It is similar to the use of client accounts in professional services firms including solicitors.

31. These balances would not therefore be included in the company's assets for the purposes of insolvency and would not be available to repay the company's debts. This would greatly increase the likelihood that the consumer would receive a repayment of their balance on insolvency.

32. Customer prepayments are likely to be an important source of working capital in the energy sector, as they are in other sectors. Introducing a requirement that tied up suppliers' working capital would likely affect small and independent suppliers more significantly and make them less able to compete. Obtaining this finance from alternative sources (such as from banks or other credit providers) is likely to be at higher cost. By limiting the scope to innovate in finance and funding models, this option may dampen competition. It could also act as a barrier to entry. This option would therefore be expected to have potentially significant negative impact on competition and market dynamics and outcomes for consumers.

33. In addition, introducing this option may lead some suppliers to fail or exit the market. This would occur if the supplier was unable to find an appropriate alternative form of funding working capital requirements or decided to exit the business due to reduced profitability.

34. This option would be likely to increase burdens on Ofgem as compared to the preferred option. Its effectiveness relies on strict compliance with the rules, particularly those relating to the transfer of money between consumer and supplier accounts. Any failure to comply with the rules (for example by not allocating money appropriately to the consumer account) in promptly would substantially undermine the effectiveness of the

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regime. If the supplier became insolvent at a point when money was incorrectly allocated it would not be available to repay balances.

35. Further work would be needed to design the appropriate monitoring and compliance framework. While some targeting of resources could occur, we would likely need to take significant steps to monitor this including the engagement of specific accountancy expertise. This would lead us to incur additional costs.

36. It might be possible to alter the scope or extent of protection to address concerns about proportionality. Protection could be restricted to a category of customers' credit balances (for instance, vulnerable customers only) or could be made subject to a threshold requirement. For example we could make this subject to a "collar". This means that amounts below a certain threshold could continue to be used for working capital requirements. The level would need to be set appropriately (as protection would not be given for this amount) but it may reduce the overall costs for suppliers and therefore reduce some of the negative consequences.

<u>Option 3 - Insurance or bonding arrangements.</u>

37. These can protect balances as occurs in the financial services and travel industries. Where the supplier became insolvent and was unable to repay the balances, the third party such as the insurance company would provide compensation to the consumer.

38. This involves very similar considerations to option 2 in our opinion. It should be noted that this was considered as an alternative option to an energy administration regime but was ultimately not taken forwards.

39. The key difference between options 2 and 3 relates to the assessment of risk of insolvency and the distortionary effects of it on competition. The Law Commission has acknowledged the difficulties of assessing this risk in other sectors, primarily due to lack of appropriate information. Insurers have tended to perceive the risk of insolvency to be higher than it is in reality. The possible variations in the risk assessment across industry could create significantly wider distortion of competition.

40. This would likely be a particular issue in the short term which may affect smaller suppliers disproportionately. It may be expected to improve over time.

41. All suppliers would incur additional costs with this option which would impact on their pricing and profitability. This could impact on competition and may also affect consumers' behaviour.

42. This option would be likely to increase burdens on Ofgem. Its effectiveness would depend on compliance with the relevant rules, particularly those about the amount of cover required. More work would need to be put into designing the appropriate monitoring and compliance framework. While some prioritisation could occur, we would expect to have to take significant steps to monitor this, leading us to incur additional costs.

43. It might be possible to alter the scope or extent of protection to address concerns about proportionality. A restricted category of customers' credit balances could be protected (for instance, vulnerable customers only) or this could be made subject to a threshold requirement. The latter could be made subject to what is known as an "excess" in other contexts. This is where the consumer is responsible for self-insuring up to a certain amount above which the insurance applies. Alternatively, the overall level of protection could be capped similar to the approach of the FSCS. The level of the threshold would need to be set appropriately but it could reduce the overall costs for suppliers and the negative consequences.

<u>Other options</u>

44. There are other options which we have considered: the possibility of improving information for consumers or creating a preference for credit balances within the

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insolvency regime. We do not consider either of these options warrant further consideration at this stage.

45. *Not protecting customer credit balances but requiring suppliers to provide information on key communications with consumers (eg customer bills) relating to the effect and risk of insolvency and maintaining a credit balance.* In principle, a comprehensive system could be created which includes both a requirement to remind consumers that their credit balances are not protected and an indication of the company's financial health. This would allow consumers to take actions to protect their balances by seeking a refund when the consumer considered the risk of loss to be too great.

46. We think it would be difficult to design requirements which were effective in practice. In particular, the second aspect – the provision of information on the risks of insolvency – carries a significant risk of misinterpreting suppliers' financial viability. In order to make robust conclusions on the risk of insolvency, a wide range of information would need to be gathered from suppliers and complex modelling would need to be undertaken. Any messaging would need to be easy for customers to understand and be provided promptly to enable customers to act before the supplier became insolvent. The design of such a scheme needs to be approached cautiously due to the risk of unintended consequences in consumer behaviour. This would include the risk of inadvertently encouraging consumers to over-estimate the risk of insolvency which may cause them to switch away from competitive tariffs.

47. *Giving a preference to customer credit balances in the energy sector on insolvency.* This would require amendments to primary legislation and is therefore beyond our powers to implement alone. The implications of this would need to be considered carefully in any event. If such measure were only introduced in the energy sector it might increase the perceived risks associated with lending. This would increase lending costs and ultimately increased costs for consumers.

<u>Part 3: guidance on supplier of last resort and energy supply company administration orders</u>

<u>Background</u>

48. We last published guidance on our approach to the appointment of a SoLR in 2008. At that time, our only power to deal with supplier failure was the SoLR regime. Since then there have been legislative changes which have given us additional powers to deal with supplier failures. These were given to us in recognition of the limitations of the SoLR regime, particularly on insolvency of a large supplier.

49. The Energy Act 2011 expanded the scope of energy company administration to energy suppliers. This framework had existed previously for certain energy network companies only. The framework for energy suppliers is based on that pre-existing framework.

50. The purpose of the draft guidance is to give greater clarity on our approach to use of these sets of powers. This is important given the relationship between these powers. The document gives a general guide to our approach and is not intended to be definitive. This reflects the flexible approach we need to adopt to supplier insolvencies.

51. Other public bodies have roles in relation to energy company administration, particularly the Department for Energy and Climate Change (**DECC**), Her Majesty's Treasury (**HMT**) and the courts. This guidance should not be taken to indicate how those bodies might approach particular issues. We intend to cooperate closely with DECC and HMT on supplier failures which may require the use of the energy company administration orders.

52. Additionally, the guidance has been updated to reflect other changes in the energy industry since the last version of the guidance was published. This includes the ongoing process of smart meter roll-out.

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Overview of the draft guidance

53. The draft guidance explains the legal and regulatory framework relevant to supplier failure scenarios. It considers issues such as the circumstances in which we may grant a licence, revoke a licence, and appoint a SoLR; it discusses the circumstances in which energy supply companies or their creditors are required to give us and DECC 14 days' notice before entering into certain insolvency processes. In addition, it considers the operation of the energy administration regime, including when it may be appropriate to make an application for a energy administration order.

54. The guidance explains the process for deciding whether to appoint a SoLR. This includes an indication of the information we would seek from industry parties in a supplier failure situation. We also summarise our likely approach to the selection and appointment of SoLRs. It also addresses issues which arise after the appointment of a SoLR.

Approach to choosing the appropriate power

55. The current regime gives us discretion on a number of key decisions including when we revoke a licence, and how we select and appoint a SoLR. It also gives us the ability to decide to seek the Secretary of State's consent to apply for an energy administration order. As a general principle, we consider that trade sales are more desirable than regulatory intervention and that applications will only be made for an energy administration order where use of our SoLR powers is not feasible.

56. It is likely that we will need to decide on the appropriate approach very quickly. This will normally involve assessing whether use of our SoLR powers would be feasible. This is because we can only appoint a supplier as a SoLR where we are consider that this would not significantly prejudice their ability to continue to supply their existing customers.

57. Where we decide not to apply for an energy administration order we will not necessarily revoke that supplier's licence and appoint a SoLR. The draft guidance sets out a number of factors which we will take into account in making these decisions.

Credit balances and claims through the industry levy

58. The draft Guidance explains that we will seek information on the proposed steps to be taken in relation to customers holding credit balances with the failed supplier. Those balances are unlikely to be recovered in full following the supplier's failure, without a further intervention.

59. The guidance clarifies that we would consider (as part of our selection criteria) steps proposed by potential SoLRs to address the loss of this balance, such as the application of a credit to the customer's account.

60. The guidance notes that while we prefer, as a general rule, that a SoLR does not claim via the industry arrangements (or "levy") for costs it has incurred carrying out its role, we also recognise that circumstances exist which would justify a departure from this. This is because every supplier failure is different and there may be some where a SoLR incurs costs which would not otherwise be recoverable.

61. Following appointment of a SoLR that had not waived its right to make a claim, we will continue to decide on a case-by-case basis whether it might be appropriate to approve a claim for a levy payment - and whether the amount was reasonable. We have noted that we may consider it appropriate to approve the claim where it relates to costs associated with the protection of customers who have lost a credit balance.

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Part 4: questions and further information on balances

Questions

62. While we are interested in views on any aspect of the matters set out in this guidance we would particularly welcome your views on the following questions:

Q1: Do you agree with the approach to SoLR and energy administration set out in our revised guidance?

Q2: Do you agree with our preferred approach (option 1 - no further action, i.e. case by case use of SoLR powers) to protect consumer credit balances?

We would be particularly interested in hearing your views on the following factors in relation to each option: effects on innovation and potential barriers to entry, increased regulatory burdens, impact on customer behaviour, proportionality.

Q3: Do you consider that there is other information which would help you decide whether to volunteer to be a SoLR and on specific terms? If so, what is this information and from whom should it be sought?

Further information

63. We are considering whether to make use of our formal powers to request data on the level and extent of consumer credit balances from suppliers. We will be in contact with suppliers if we decide to make a request.

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