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

Dear Moritz

Prepayment meters installed under warrant - statutory consultation

This is the British Gas response to Ofgem's Statutory Consultation on prepayment meters (PPMs) installed under warrant, dated 3 July. This response is not confidential and may be published on the Ofgem website.

As we have set out in our previous responses to this matter, including our response dated 11 November 2016, we agree and are fully supportive of the intended policy outcome that Ofgem is aiming to achieve through this Statutory Consultation, i.e. that consumers do not face disproportionate or inappropriate actions or charges throughout the debt recovery process. We also believe that specific groups of consumers (such as those in certain vulnerable circumstances) should and already do benefit from additional protections against warrant usage and charges.

However, we continue to have concerns – some of them legal – regarding Ofgem's specific policy proposals. We have clearly set these out on a number of occasions including in bilateral meetings and in our confidential response to the Final Proposals.

Our position on the proposals within the Statutory Consultation has not changed. Ofgem has appeared to make no attempt to address the points of concern we have previously raised, and has failed to comment or respond to our most significant concerns directly.

Ofgem has disregarded without explanation the points made in responses by both other suppliers and the collective industry wide supplier response submitted by the sector's Trade Association, Energy UK (EUK). We believe that Ofgem has failed to properly address these points in the Statutory Consultation.

We note that Ofgem has claimed there to be unanimous support for a cap from the consumer groups. However, the consumer groups have not fully considered the effect of the redistribution (and increase) of costs onto the bills of those consumers who honestly pay each month / quarter – many of whom will be vulnerable themselves, and who, after Ofgem implements these changes, will be effectively paying the costs

incurred by those consumers who have actively decided to avoid paying for their energy consumption.

We do not propose to set out all of our concerns in detail again in this response; however, we remain concerned about the following specific areas:

The existing regime already protects vulnerable customers from the fitting of a prepayment meter under warrant

We believe that under the existing regime, it would be highly unlikely for a supplier to succeed in obtaining a warrant for vulnerable customers or those customers who are at risk from trauma. This is because (i) the power to install has to be exercised reasonably; (ii) the magistrates must be satisfied that it is appropriate to install a PPM; and (iii) the magistrate would not grant the warrant if it would be severely traumatic for the customer.

The level of the cap

By setting the level of the cap at £150, Ofgem has firstly set the cap below its own indicative cost of £210 (as identified in Ofgem's Impact Assessment), and secondly has appeared to have ignored the true actual costs to suppliers which in our case is significantly above £210. Under Ofgem's proposals, these efficiently incurred costs will now fall to be recouped from or be passed through to other energy consumers.

To be clear, by lowering the amount of the cap to well below the minimum actual incurred cost to the supplier, the (knowingly) won't pay / non-paying consumer will be the only beneficiary from these Ofgem proposals. This strikes us as being a highly questionable policy position, i.e. to allow this type of cross-subsidy and there is little indication that Ofgem has given due consideration to this issue.

Additionally, Ofgem has not fully considered the unintended consequence that the cap may encourage some customers to reduce their engagement with their supplier, leading to an actual increase in their level of debt.

Call for suppliers to pursue other more suitable debt recovery methods

The Statutory Consultation claims that its proposals will have the effect of directing and incentivising suppliers to 'pursue other, more suitable debt recovery methods'¹. However, Ofgem has failed to provide any detail as to what it considers a suitable alternative method to be.

Before a warrant is issued by a magistrate and executed by a supplier, that supplier will have made multiple attempts, exhausting every available, reasonable and feasible channel (including site visits) to make contact with its customer. Only once these channels are exhausted does a supplier seek a warrant, which is used only as a last resort where a customer chooses not to engage.

Ahead of a material policy intervention such as this, we would have expected Ofgem to outline what it considers as 'suitable alternatives to debt recovery'. Having consulted widely across the industry over many years (and looked at other sectors), we do not believe any further suitable alternatives exist.

We believe that the existing regime has suitable safeguarding protections already built within it, including that of the courts in granting a warrant; the obligations not to install a

¹ For example, see p5 and p6 of the Statutory Consultation
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prepayment meter unless it is safe and reasonably practicable; the Ability to Pay Licence Condition and Ofgem's 6 key principles; Standards of conduct, including the new vulnerability Standard of Conduct which will be in force as of 1 October 2017.

Legal concerns

In our response to the Final Proposals consultation, we provided Ofgem with a legal opinion on the validity of proposals from External Counsel. We have also sought a supplementary opinion from the same Queen's Counsel following the publication of Ofgem's Statutory Consultation. Counsel's opinion is unchanged and he remains of the view that he would be surprised if Ofgem's proposals were upheld as lawful.

In summary, the legal basis upon which Ofgem can introduce Licence Conditions in line with its proposals is questionable on the grounds that:

1. Ofgem would be acting beyond its power, because the proposals cut across a statutory entitlement to indemnification in respect of legitimately incurred expenses, within a regime that already includes safeguarding protections including that of the courts in granting a warrant. (Ofgem itself acknowledges this fundamental statutory right in its Impact Assessment in paragraph 1.6); and,
2. The proposals would not be able to withstand scrutiny on the grounds of proportionality. Specifically:
 - a. The final proposals are a disproportionate remedy to the potential harm that Ofgem purports to have identified.
 - b. Ofgem has failed to justify that current supplier costs are an unreasonable penalty.
 - c. Ofgem is proposing a compulsory redistribution of all or part of the costs of the warrant to the general customer base even though fitting the PPM under warrant is legitimate; there has been maximum possible customer engagement and a fully informed customer is choosing not to engage.
 - d. Ofgem has not considered alternative, less onerous approaches, such as standards relating to customer engagement measures, that would achieve the same aim. A number of respondents to Ofgem's Final Proposals gave several options for Ofgem to consider to avoid implementing a blunt cap / prohibition. Again, we note that Ofgem has ignored these.
 - e. Likewise, the Impact Assessment, which accompanies the Statutory Consultation, is deficient in that it makes no assessment of the costs or benefits of alternative approaches, including those put forward by suppliers.

In relation to Ofgem's suggestion for EUK to work with the Magistrates' Associations (England and Wales) and The Scottish Justices Association, we would support standardising procedures.

As we have stated throughout consultation on this matter, given the material level of concern that we continue to have with these proposals and without prejudice to our legal position, we would request that Ofgem, even at this late stage, re-considers the proportionality and lawfulness of the proposed intervention.

This reconsideration should include, (i) responding to the specific legal concerns we have raised, (ii) examining the extent to which less onerous approaches might deliver the desired policy outcome (which we would be keen to work with Ofgem on); and (iii) considering how a cost-reflectivity principle might operate in practice if Ofgem is

satisfied that current warrant charges set by suppliers do not reflect costs incurred by suppliers.

We would welcome the opportunity to discuss this response with you in more detail.

Yours sincerely

A handwritten signature in black ink, appearing to read 'N. Howard'.

Nigel Howard
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Centrica, Legal & Regulatory Affairs, UK & Ireland

CC: Anthony Pygram, Partner, Consumers and Competition, Ofgem
Meghna Tewari, Head of Retail Market Policy, Ofgem