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Licensing Frameworks
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Dear Vlada,

Re: Supplier Licensing Review: Ongoing requirements and exit arrangements

Thank you for the opportunity to comment on the above consultation. Utilita welcomes the actions of Ofgem in undertaking this work. We believe it is extremely important that as well as entry to the industry, ongoing requirements and exit are fully considered.

Utilita has been selected as a Supplier of Last Resort (SoLR) twice following our successful submissions. In order to assist Ofgem in its review, we have supplied a confidential appendix to this submission which addresses points from those two SoLR experiences. This main document is not confidential.

Utilita is a smart prepayment specialist, offering high quality, prepay services to the prepay sector. This is an area of particular concern during a SoLR, where data issues as well as industry process can create difficulties.

We are supportive of most of the proposals in the document. However, we do oppose some of the proposals and suggest alternative approaches. We do have some concerns over the Impact Assessment (IA). The assessments of impacts on matters such as credit balances are based, we believe, on SoLR data, which by definition is not robust.

Our experience indicates that the quality and accuracy of data provided in a SoLR is very variable, and we do not consider it sufficiently robust to use in an IA. Equally, we are not convinced by parts of the IA that assess potential costs for production of credit balances. The percentages indicated may be achievable for some suppliers, but not all, and where the industry as a whole seeks such cover through various routes, the overall cost will rise.

Moving to the proposals which seek to constrain the activity of Administrators, it is not clear that these are viable. Administrators have clearly defined legal duties. We consider that compelling suppliers to include explicit clauses in their terms and conditions, which may prove ineffective without a change to insolvency law, will be at best misleading for consumers. We would welcome Ofgem sharing any available legal advice on whether the approach could be efficacious, and if not, what outcomes may be expected for consumers.

Consultation questions

Overarching question:

Question 1: Do you think the proposed package of reforms will help to reduce the likelihood of disorderly market exits, and the disruption caused for consumers and the wider market when suppliers fail? Are there other actions you consider we should take to help achieve these aims?

We believe that the overall package of reforms, if amended as proposed in this submission, would help reduce the likelihood of disorderly market exits in the longer run. It is however important to note that in the short run, the proposals may drive additional market exit. The proposals will add costs of operation for all suppliers, including the most efficient. On this basis it is essential to ensure that prior to implementation, the extra costs have been factored into the price caps.

The current price caps do include a small amount of headroom, but that is not sufficient to accommodate such costs and is not intended to meet this purpose.

In considering the proposals, Ofgem notes it is important not to impose an undue burden on new entrants. This is true, but the same requirement must also be applied to existing suppliers. It is useful that the application framework has been updated, to include some of the principles which were previously incorporated.

The new requirements to be followed in updating the framework must be proportionate, simple to apply and cost effective. Wherever possible they should be standardized, and potentially verifiable by external data – for example the datasnaps proposed later.

We support the approach of open, co-operative engagement with the regulator. However, for the full benefit of the approach to be realized, this must also be constructive and two-way engagement. For example, suppliers disclosing minor infractions or issues (especially on a first occurrence) need to be confident that a constructive and proportionate approach will be taken where possible. This is an important tenet of principles-based regulation.

Questions for the impact assessment:

Question 2: Do you agree with the outputs of our impact assessment?
We agree with the approach of taking no change as the counterfactual. However as above, we are concerned that Ofgem may rely on the SoLR data to a greater degree than is wise.

Overall, the costs appear to understate the expected impact on suppliers. This is not to say that the actions should not be taken, however, all such costs must be properly calculated before folding into the price caps. If this is not completed properly, there is a serious risk the proposals will drive more exit.

Ofgem suggests that the costs of supplier failure may be borne by other consumers. This is not the case; such costs will be borne by other consumers one way or another. This includes whether costs are borne via the cost of protection or through a less organised route.

Question 3: What further quantitative data can industry provide to inform the costs and benefits of the impact assessment, particularly for cost mutualisation protections?

We suggest that Ofgem may need to make a relevant information request in this area. Ofgem will have information about mutualization of schemes or unpaid capacity mechanism invoices. Information on credit balances on out-turn can only be achieved after the fact and will vary widely in our experience both between SoLRs and at the more granular customer level according to the data available.

It would be appreciated if Ofgem were to schedule such a request so as not to clash with pre-existing requests. In addition, timelines may need to be varied or data updated later.

Question 4: Do you agree with the assumptions used to calculate the costs and benefits in our impact assessment? Please provide evidence to support further refinement.

Please see above

Promoting better risk management:

Question 5: Do you agree with our proposed option to cost mutualisation protections? Are there other methods of implementing this proposed option? Please provide an explanation, and if possible, any evidence, to support your position.

We are generally supportive of the principle of a degree of cost mutualisation protection. However, there is a significant amount of work to be undertaken before this could be executed. Ofgem will need to research and propose clear guidelines, information on reporting, monitoring and enforcement. This will all need to be clear at least 3-6 months in advance of the proposals coming in to effect.

Certain schemes should not be mutualised as the burden falls unfairly – for example the capacity market. It is completely inequitable that where generators receive the benefit, suppliers bear 100% of the bad debt risk and generators bear none. Equally, where schemes are mutualised, the mutualisation must apply to all suppliers, large and small, or the distribution of the impact on customers will further distort the market.

As set out above, all costs must be fully costed, accurately calculated and fed into the price caps in advance of application. We suggest all proposals with an associated cost should take effect from the start of the first cap period in which the costs are included, with a 3-6 month lead time.

In terms of the customer credit balances, as well as the individual approaches suggested by Ofgem, we would prefer to see detailed research and analysis to see whether an ABTA type scheme would be both more equitable and more cost effective.

Question 6: Do you agree with our proposal to introduce new milestone assessments for suppliers? Do you think the milestones we have proposed and the factors we intend to assess are the right ones? Are there additional factors we should consider to help us to identify where suppliers' may be in financial difficulty?

We are generally in agreement with this proposal. We also suggest that for larger suppliers above the proposed 800,000 boundary, a further assessment should be considered for example at times of merger, takeovers or change in ownership.

We would like to see further information on how Ofgem expects this to operate, be monitored and enforced. All such information should be consulted upon and published prior to the implementation date.

While we do not oppose a principle-based requirement on operational capability, we can only offer qualified support without further information on how the proposals would operate, be evidenced and enforced.

In both cases above, while we agree a long period outside the statutory consultation should not be needed, we believe that implementation period should start once the statutory consultation period has expired.

More responsible governance and increased accountability:
Question 7: Do you agree with our proposal to introduce an ongoing fit and proper requirement? Are there additional factors, other than the ones we have outlined, you believe suppliers should assess in conducting checks?

We are generally in agreement with the proposal, however either additional guidance on supplier discretion is needed, or more clarity on the proposed definitions would be helpful.

We agree that this activity should not be carried out by Ofgem, but some level of standardisation may be helpful, for example periods of barring associated with a supplier failure.

Increased market oversight:
Question 8: Do you agree with our proposal to require suppliers to produce living wills? What do you think we should include as minimum criteria for living will content?

No, we oppose the requirement to produce living wills. The concept is difficult to manage and while it may be helpful to a new supplier to carry out the exercise, we believe the value at the time of failure will be very limited.

It is not clear how often such documents should be updated, filed or evidenced, or the consequences of poor quality in the document preparation given the producer would no longer exist.

All suppliers should have a duty to be able to produce the basic information required for a SoLR at any time, but this would be limited to a minimal set of half a dozen fields of data.

An alternative approach would be for Ofgem to require a 'SoLR Base Data' RFI to be submitted every [6] months. These snapshots could form a standard pack with standard formats. Suppliers using service providers for systems could commission a standard pack, which could be the same for those using own systems.

Question 9: Do you agree with our proposed scope for independent audits? Please provide rationale to support your view.

We are reluctant to support enforced audits; the cost and supplier burden may be significant. In addition, such audits cannot substitute for appropriate and effective regulation.

However, if the approach is taken forward, this needs to be within clear boundaries, and within the context of a properly structured investigatory activity. Before requesting an independent audit, Ofgem should expect to have clear evidence of a concern, and this evidence should be presented to the supplier and the supplier given an opportunity to respond.

The resulting audit should be scoped to address the issue which has been evidenced and only clearly associated and substantiated concerns should be added. This will provide a proportionate and well evidenced framework in which necessary audits can be operated with the confidence of both the supplier and Ofgem.

Exit arrangements:

Question 10: Do you agree with the near-term steps we propose to take to improve consumers' experience of supplier failures? Are there other steps you think we should be taking?

As set out above, we have serious concerns on this proposal. Given Administrators have clearly defined legal duties, it is not clear a constraint applied via licence conditions would have legal effect on a party not covered by the licence.

We believe that to bind Administrators will require a change to the law. Suppliers cannot be held responsible for the actions of a third party. We would welcome sight of any legal advice Ofgem can share on this matter, and a review by BEIS on how this approach might reasonably be effected.

If the approach can be legally applied and have effect, we suggest adjustments may be required to certain principles – such as back billing. Given observed issues, and Administrator duties, we suggest consideration to whether the 12 months limit on back billing should, in this case, start from the date of the SoLR. This may strike a reasonable balance between customers and creditors of the business and allow time for data issues to be addressed and accurate bills calculated.

If a bill has not been issued, the customer is likely to have consumed significant energy without paying. We believe that customers should be required to pay for energy they have consumed. Where energy is billable and collectible, creditors may be more willing to allow time to pay.

Question 11: Do you think there is merit in taking forward further actions in relation to portfolio splitting or trade sales? What are your views of the benefits of these options? Are there any potential difficulties you can foresee?

Yes. The SoLR process must be capable of splitting a portfolio. If a large supplier were to enter special administration, such concepts would be helpful, and as competition develops, this is a wider range of active suppliers with varying focus. The ability to split and target a SoLR would be a benefit to customers, allowing customers with specific

requirements to potentially move to suppliers best placed to support them – e.g. Vulnerable customers with special needs.
We do not oppose Trade Sale or all or part of the portfolio prior to SoLR. This may be in the best interest of Creditors and Shareholders even if not in best interests of the industry, or Ofgem might prefer an alternative approach. Directors have fiduciary duties and they must be allowed to fulfil such duties responsibly.

Appendix 1

Question 12. Do you think our draft supply licence conditions reflect policy intent?

We have concerns with several the clauses. These are set out below in the order of the Appendix. Where a section is not referenced, we have no comments.

Ongoing fit & proper requirement

1.1 & 1.2 – require an 'All Reasonable Steps' (ARS) provision. At the moment, the requirement is absolute and may not be capable of being met. An ARS provision to be applied an evidenced would may this practical to apply.

1.3 – this is too broad to be implemented without additional guidance.

1.4d – this needs to depend on the actual role and whether they had influence over the cause of failure or not.

1.4e – there must be provision for issues such as these to expire at some point – please see comments below.

The definition of **Significant Managerial Responsibility or Influence** – is very broad. While the definition is reasonable in terms of responsibility or decision makers, the first line broadens this to 'plays a role' which may unreasonably capture much more junior staff which are not actual decision makers. This might prevent reasonable attempts to responsibly manage rehabilitation of offenders' policies.

Greater clarity is required on the terms 'have regard to' and 'take into account'.

Principle to be open and cooperative with the regulator

While 1.1 may be practical, subject to the regulator imposing on itself a requirement to engage appropriately and proportionately with a disclosing party, we believe 1.2 is too broad.

We believe additional information and guidance is required before drafting of this type could fairly be implemented into the licence. The level of regulatory risk inherent in 1.2 is very high, and without guidance may leave a supplier unfairly exposed. The requirement on a supplier to judge what the regulator might reasonably expect is not sufficiently objective.

Independent Audits

While we do not oppose the outline drafting, we believe it requires a section to provide for the supplier to request or be provided with the basis for the request to conduct an independent audit.

In addition, we suggest it would be appropriate for the Authority's consent to a supplier's selection of an auditor to be bounded with 'such consent not to be unreasonably withheld'.

As set out above, we have also included a confidential Appendix 1 which gives additional, specific, information on Utilita's experience of undertaking the role of a SoLR.

We hope this submission has been helpful and we would be happy to discuss any points in more detail. We would be happy to arrange a call or meeting.

Kind regards

Alison Russell
Director of Policy & Regulatory Affairs