
CITY OF LONDON LAW SOCIETY – ENERGY LAW COMMITTEE
SUBMISSIONS TO DESNZ’S REVIEW OF OFGEM: CALL FOR EVIDENCE

Call for evidence published 19 December 2024

CLLS response dated 28 February 2025

1. INTRODUCTION

- 1.1 The Energy Law Committee of the City of London Law Society (“**CLLS**”) welcomes the opportunity to submit evidence to Department for Energy Security and Net Zero with regards to the review of Ofgem.
- 1.2 The CLLS represents approximately 21,000 City lawyers through its individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients, from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.
- 1.3 The CLLS responds to a variety of consultations on issues of importance to its members through its 22 specialist committees, one of which is the Energy Law Committee (the “**Committee**”). This Committee comprises leading solicitors specialising in energy law in the City of London, which act for UK and international businesses, financial institutions and government bodies. References to “we” in this response refers to the Committee. We have provided responses to the questions which are most relevant to us and our practice.
- 1.4 Please note that the Committee comprises a variety of views and this response does not reflect the views of all of the Committee members. Further, given their roles and client relationships in the sector, the response did not involve all members of the Committee. The response should therefore be read as a generic response from the CLLS, rather than representing the views of any firm or individual lawyer represented on the Committee.
- 1.5 If there are any questions for the CLLS in relation to this response, please contact either or both of:
- 1.5.1 Kevin Hart of the City of London Law Society, at e-mail address kevin.hart@clls.org; and
- 1.5.2 Munir Hassan, Chairman of the Energy Law Committee, at email address munir.hassan@cms-cmno.com.
- 1.6 The Committee would like to thank Phillip Ashley, Leontine Mathew, Conor Rodgers and Edward Longden (Secretary to the Committee) for their assistance with preparing this response.

2. GENERAL COMMENT

- 2.1 There has always been a tension between a truly competitive energy retail market and the consumer protection regulation required. It is important to recognise, now more than ever,

that there are numerous and often competing factors at play in the energy market. Balancing these factors is incredibly difficult, making Ofgem's decision making ever-more complex.

- 2.2 We consider that a review of Ofgem's regulatory and enforcement powers and of the avenues for challenging Ofgem's exercise of its powers must be a critical component of the broader effort to modernize the regulator, increase consumer confidence and ensure Ofgem is equipped to handle the challenges of the evolving energy market. In our view as lawyers tasked with helping to guide clients through often uncertain legal situations, all industry participants, Ofgem, and Government are best served by regulation that is clear, consistent and proportionate, and our submissions below are provided in this context.

3. LEGAL MANDATE

We are seeking views on what Ofgem's mandate should be.

- 3.1 Ofgem's mandate to protect the interests of consumers, wherever appropriate by promoting competition, is a cornerstone of the energy market. It is important, in our view, for Ofgem to retain a clarity of purpose in order to facilitate effective competition, which is a proven method to reduce costs of products and services, and to boost innovation (by, for example, focusing players' efforts on finding ways to make processes more efficient).
- 3.2 There are various risks with diversifying Ofgem's mandate, for example by adding factors (such as "*driving innovation*" and "*robust standards*"¹) or giving equal or increased weight to the promotion of effective competition as part of Ofgem's mandate.
- 3.3 First, requiring Ofgem to make increasingly polycentric decisions creates uncertainty for industry players, who find it difficult to know which factors will be prioritised in any instance. This can in turn increase the costs of regulatory compliance and harm competition by deterring new or smaller market entrants.
- 3.4 Second, increasing the mandate may result in Ofgem being increasingly required, when making decisions, to make judgements that require the consideration of factors that are inherently political (in that, for example, they directly favour one group of market participants over another, or impose additional benefits on one group and not on another). Such decisions may be better made by Ministers, who are more directly answerable to Parliament.
- 3.5 Third, adding additional mandates such as "*driving innovation*" might presuppose that the competition mandate is not sufficient to achieve innovation. That would not be consistent with the architecture of the current regulatory regime, which seeks to achieve innovation through protecting and promoting competition.
- 3.6 In light of these principles and risks, we consider that careful thought should be given to any increase of Ofgem's mandate, particularly on the scope of any new factors forming part of this mandate and on whether any such factors would result in Ofgem making decisions that would be more appropriate for a Minister to make and/or might undermine competition.

¹ See page 10 of the Call for Evidence on "A Review of Ofgem" (December 2024).

4. DUTIES

We are seeking views on whether Ofgem's duties should be streamlined, and if they should, views on which goals might be prioritised.

- 4.1 We re-emphasise our suggesting that Government should be mindful of the scope and number of duties sitting with Ofgem. Where Ofgem holds a wide range of duties of unclear scope, this creates uncertainty for industry participants on Ofgem's role, and adds a potentially significant regulatory burden. As noted above, a lack of clarity can also create a barrier to competition by deterring investment in the sector and raising the cost of regulatory compliance.

5. TRANSPARENCY AND ACCOUNTABILITY

(1) We are seeking views on Ofgem making more detailed information available about energy company performance and behaviour, and how this might assist other licensees and consumers.

- 5.1 As noted by the Government, it is expected that greater transparency and the sharing of more information by Ofgem will allow market participants to learn from others' past experiences, and will allow customers to make more informed choices based on a better knowledge of energy company performance.
- 5.2 This should be carefully managed against any burden imposed on the market participants by requiring them to collate and provide more information. Again, and as stated above, the added cost of compliance with such requirements can create a barrier to entry for new or smaller entrants in the market. In our view, careful thought should be given as to achieving an appropriate balance, and any additional obligations on licensees should be imposed consistently and proportionately to the benefit that they will provide to consumers.

(2) We are inviting views on Ofgem's annual report and the KPIs it reports against, and how to strengthen Parliamentary scrutiny of Ofgem's performance.

- 5.3 No response.

6. SKILLS AND CAPABILITY

We are seeking views on the capabilities Ofgem needs to be an effective regulator in a more digital, fast-moving sector.

- 6.1 No response.

7. OFGEM'S REGULATORY REMIT

(1) Does Ofgem have the right regulatory remit? Have you observed harms caused by uncertainty over Ofgem's remit, or by gaps in what is currently regulated in the energy sector?

- 7.1 As lawyers, we have observed that the distinction between the roles of the CMA and that of the High Court in reviewing the actions of Ofgem has created some uncertainty for market participants.

- 7.2 There are different appeal regimes for the review of (a) a decision by Ofgem to proceed with modifications to electricity and gas licences (which can be appealed to the CMA) and (b) other decisions made by Ofgem (which are generally subject to judicial review in the High Court).
- 7.3 There are a number of unfortunate consequences when it comes to Ofgem's regulatory remit:
- 7.3.1 **Uncertainty:** the complexity relating to whether an issue is subject to appeal to the CMA or judicial review in the High Court creates uncertainty and has the propensity to result in procedural debates with no substantive value.
- 7.3.2 **Impact on Ofgem remit:** at the point of reforming the conditions of a licence it has increasingly resulted in stale debates over what should be in a licence and what should be left to Ofgem future discretion, as a change to the licence would be appealable to the CMA but a decision by Ofgem under a new licence condition amenable only to judicial review. There is a perception, rightly or wrongly, that Ofgem may be seeking to grant itself additional discretion (and remit) under licences so as to circumvent draft licence changes that would be amenable to review by the CMA.

Where Ofgem is acting as an economic regulator in order to promote and facilitate competition in the energy sector, we would suggest that consideration should be given to expanding the role and oversight of the CMA in this regard, such that its role would apply both to decisions under licences as well as to decisions to amend licences. This is expected to result in a more consistent approach to reviews of Ofgem decisions, by a body that will be able to rely on its specialism supported by its increased role. It would also prevent stale debates over Ofgem's remit under new licence modifications.

(2) We are seeking views on Ofgem's role in an energy system that is now, in part, driven by strategic planning following the creation of NESO, in particular, how should regulatory strategy be aligned with strategic energy plans.

- 7.4 NESO's recently-acquired role as licensed Independent System Operator and Planner ("ISOP") has created a lack of clarity between NESO's roles and Ofgem's role as regulator.
- 7.5 We note that Ofgem's regulatory strategy is expected to be aligned with the outcome of NESO's strategic planning, and Ofgem is also responsible for regulating NESO (as the regulator for the purposes of NESO's licence). This creates the potential for uncertainty for Ofgem as to how it approaches enforcing compliance in line with its objectives, and therefore ultimately uncertainty for industry participants
- 7.6 We would recommend the interface between NESO and Ofgem should be part of this review, and may require better definition by DESNZ so that NESO, Ofgem, and ultimately industry participants are clear about the role Ofgem has in overseeing and enforcing NESO compliance with its multiple roles. In particular, where NESO is assuming particular policy positions, it would be helpful for there to be a clear process for buy-in from Government on those aspects, so that industry participants have confidence in those assumptions.
- 7.7 As lawyers we also note that additional clarity would be welcome with respect to the extent to which NESO's obligation as ISOP not to "unduly discriminate" applies to its strategic planning role, so as to ensure a consistent approach that will give industry participants and their investors confidence in the GB regulatory framework during a time of significant reform.

8. DELIVERING INVESTMENT AND INNOVATION IN THE TRANSITION

(1) We are seeking views on the role Ofgem should play to support growth and the government's industrial strategy.

- 8.1 As the primary regulator of a large and critical sector, Ofgem has a significant role in supporting economic growth. Ofgem's focus on competition is particularly significant here. As a specialist regulator it is uniquely placed to monitor and identify areas in which competition is lacking, whether through any elements of regulation that discourage investment and innovation or through concentrations of market power, and advise Government as to how these issues might be addressed in a way that supports the Government's industrial strategy and growth ambitions as a whole.

(2) What can Ofgem do to increase investment and innovation in the sector?

- 8.2 From our perspective as lawyers regularly supporting clients who are seeking to invest in the energy sector, we have found that investment and innovation are supported by regulation that is clear, consistently applied, and proportionate. Maintaining a predictable and stable regulatory environment will give confidence to investors, and will allow industry participants and their backers to more quickly and effectively deploy their capital by making it easier to assess, model and mitigate risks. Ofgem's role and the data it collects from its licensees puts it in a unique position to highlight to Government any issues being faced by the energy sector, and ensure that the sector's views are being heard and competition is working effectively.

(3) What might Ofgem do to support an environment of falling energy prices?

- 8.3 No response.

(4) What else might Ofgem do differently to support higher growth in the energy sector and wider economy?

- 8.4 No response.

(5) Are Ofgem's regulatory processes sufficiently fast, effective and user friendly?

- 8.5 No response.

9. LOW CARBON TECHNOLOGIES

We are seeking views on Ofgem's remit in enforcing consumer law in respect of low carbon technologies, such as heat pumps and solar panels, and what the appropriate boundaries might be.

- 9.1 No response.

10. BETTER OUTCOMES FOR CONSUMERS AND MORE ACCOUNTABILITY

This "better outcomes for consumers and more accountability" section therefore seeks views around increasing accountability and consumer standards in the sector.

- 10.1 Any additional powers for Ofgem to require accountability of suppliers to their consumers should be carefully considered from a policy perspective, not least in the light of recent supplier failures and the need to ensure both (i) the financial resilience of suppliers to ensure minimal disruption to consumers, and (ii) the continued confidence in the sector for investors

into supply businesses. The scope and application of any such increased powers would need to be clearly defined, to avoid regulatory uncertainty and risk driving behaviour to comply with regulation, rather than to generally improve service standards in a way that is appropriate for each supplier based on their business model. The Government should also be mindful that increasing regulation in this respect would also impose an additional regulatory burden on companies that may create a barrier for the entry of new innovative suppliers. It is anticipated that, by focusing on promoting competition, consumers have greater choice and market participants are encouraged to improve their service standards. In addition, by publishing more information on suppliers' standards of performance (for example, call waiting times, numbers of complaints, and numbers of upheld complaints by the Ombudsman), shortcomings in standards are exposed, which is also expected to drive better behaviour over time.

- 10.2 In our view, this is a more effective and more appropriate way to address service standards than to give Ofgem increased powers to take action against suppliers for low service standards.

11. ENHANCED INVESTIGATORY & ENFORCEMENT POWERS TO PROTECT CONSUMERS

(1) We are seeking views on Ofgem having enhanced investigatory powers.

- 11.1 As we have stated above, any investigatory powers exercised by Ofgem can have significant effects on market participants. Government should give the utmost consideration to ensuring that these powers are crafted and exercised with a view to ensuring that they are clear, consistent and proportionate to avoid placing an unnecessary burden on industry participants and stymieing the investment that Government's plans require.

(2) We are seeking views on Ofgem being granted enhanced enforcement powers similar to the CMA.

- 11.2 The principles of better regulation, set out in the Electricity and Gas Acts,² state that Ofgem's functions should be carried out in a way which is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.
- 11.3 Whilst it is understandable why Government is considering broadening Ofgem's powers and ensuring that non-compliance can be dealt with appropriately, it must always be balanced with appropriate oversight and bounds on Ofgem, particularly given the fact that appeal rights of market participants have a high bar. For minor offences and smaller penalties, the current avenues of challenge are likely to be disproportionately expensive for an industry participant to utilise if they feel aggrieved. Therefore, an appropriate appeal mechanism will need to be considered alongside any broadening of Ofgem's powers and / or reduction in thresholds for Ofgem exercising its powers. One mechanism that may be considered in this regard is to expand the types of decisions made by Ofgem in respect of which an appeal may be brought to the CMA. The CMA may be better equipped than Courts to consider the kinds of issues that would be the subject of such appeals.
- 11.4 Further, there must be a mechanism that ensures clear information, guidance and advice is available to help industry participants understand their responsibilities in the context of any enhanced enforcement powers by Ofgem.

² Section 3A (5A) of the Electricity Act 1989, and Section 4AA (5A) of the Gas Act 1986.

12. APPROACH TO PENALTIES AND COMPLIANCE ORDERS

We are seeking views on whether the scope and scale of Ofgem's current penalties are set at the right level.

- 12.1 The current penalty framework is focussed on larger scale instances of non-compliance and bad practice. Ofgem will always be resource constrained and has to prioritise its allocation of resources to cases that will deliver the greatest benefit to consumers overall. We understand Government is considering changing the penalties framework to make it easier for Ofgem to impose lower-level penalties for straightforward or minor cases where there is an objective indication that a breach has occurred. This is intended to ensure that repeat low-level non-compliance does not slip through the net.
- 12.2 Whilst understandable, careful design will be required to ensure market participants are afforded the right level of protection and appeal rights to challenge any decisions that they consider have been made incorrectly. Currently the main avenue of challenge is judicial review, which has a high bar both in terms of cost and process, which may not be appropriate for lower scale infringements.
- 12.3 Such careful design is particularly important in circumstances where the Government is proposing to relax, in any way, the requirement on Ofgem to conduct a proper investigation and ensure it is reasonable in all circumstances of the case to impose a penalty.

13. INCREASING THE COSTS OF BAD PRACTICE

We are seeking views on the current system of a maximum fine of 10% and whether it should change?

- 13.1 No response.

14. QUICKER RESPONSE TO EMERGING ISSUES

(1) We are seeking views around whether this process should change to make it easier for Ofgem to create new rules to respond to emerging challenges

- 14.1 We appreciate that creating new regulation to respond to an emergency or a fast-emerging issue may take time, and that giving Ofgem increased powers is a potential method to obtain a quicker response. However, giving Ofgem the power to make “urgent rule changes” (as suggested in the Call for Evidence) has the potential to increase regulatory uncertainty for market participants, and assigns powers to Ofgem that may be more suitably held by the Government. In our view, the industry is better served by Ofgem having a well-defined role and enforcement powers, with Government being encouraged to expedite the process of amending rules that Ofgem is responsible for enforcing.
- 14.2 *(2) We are seeking views on how Ofgem might better respond, or be better equipped to respond, to emerging issues, especially for which there is not already a clear precedent*
- 14.3 No response.

15. SUPPLIER FAILURE

We are seeking views on how Ofgem might be better equipped to protect consumer interests in cases of (predicted or actual) supplier insolvency and/or financial distress.

- 15.1 It is important to consider that a free market requires innovation, which could lead to both success and failure. A system designed to, for example, prevent the failure of certain suppliers might hinder the emergence of other better suppliers and may not always protect consumer interests or result in the best outcomes for consumers.
- 15.2 Consideration should be given to how Ofgem may distinguish between varying levels of failure, including “acceptable” levels of failure, and systemic failures, that could potentially endanger the market. Ofgem’s primary concern should be with the latter.
- 15.3 Ofgem is equipped to protect consumer interests in cases of supplier insolvency, through use of the SoLR process. The statutory “Energy Transfer Scheme” process has also been successfully deployed for the first time, proving this to be an effective way to manage supplier insolvency.³
- 15.4 In the context of the above, regulation as it currently stands may be sufficient. Over-regulation may, instead of increasing efficiency, lead to increasing cost burden on suppliers which may in, in turn, be passed onto consumers. It is also necessary to have a clear and defined scope for any new powers introduced.
- 16. AUTOMATIC COMPENSATION AND ENERGY OMBUDSMAN**
- 16.1 We have no response to the questions in these sections.

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Chair, Energy Law Committee

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<https://ells.org/committees/energy>

³ <https://www.ft.com/content/d4f4eebf-bbf7-498a-bb36-5d5a0e75e1b2>