

Rachel Reeves MP  
Chair, Business, Energy and Industrial Strategy Committee  
House of Commons  
London  
SW1A 0AA

29 January 2018

Sent via email to:

Dear Ms Reeves,

### **Pre-legislative scrutiny of the draft Domestic Gas and Electricity (Tariff Cap) Bill inquiry**

I wanted to follow up on Dermot Nolan's letter to the Committee dated 22 January 2018.

Energy UK has a wide range of membership including larger, medium and smaller suppliers, with differing views on the proposed cap. This letter is not about the principle of a cap. This is about good governance. The draft legislation proposes to place a duty on Ofgem to set a price cap for standard variable and default tariffs without the ability to refer the level at which the cap is set to independent experts – the Competition and Markets Authority (CMA). We believe the absence of an ability to refer Ofgem's decision to an independent expert body sets a dangerous precedent for independent economic regulation which could be detrimental to consumers and competition.

Mr. Nolan, in his 22 January letter, argues that Ofgem decisions are regularly subject to legal challenge by Judicial Review (JR) and that this has proved to be an adequate means of ensuring Ofgem decisions are scrutinised. Whilst it is true that JR is available and has been used to review some Ofgem decisions, that statement does not disclose the fact that CMA reviews are provided as an additional appeals route against most Ofgem decisions, including all Ofgem decisions on price controls.

The fact that JR is available does not mean that JR alone is sufficient to ensure that a decision is right. JR is designed to ensure that a decision by Ofgem is legal (i.e. within its powers and having followed proper procedure) – it is not a substantive appeal. Appeals to the CMA are designed to ensure that Ofgem's decision is correct in its substance (e.g. economic implications and use or assessment of the facts), as well as its legality. As is currently the case, Parliament should ensure those impacted by legislation are protected against decisions that are illegal or substantively incorrect, not just the former.

Government and Parliament cannot assume that when discharging its duties, despite all parties' best intentions, Ofgem will deliver the best outcomes for consumers. For example, despite Ofgem carrying out extensive consultation, Ofgem's 2013/14 Retail Market Review (RMR) reforms resulted in some sub-optimal policy outcomes for consumers, as demonstrated by the findings and remedies published by the CMA in summer 2016. The need for effective appeal rights for regulatory decisions, particularly with regards to price controls, is widely accepted. The CMA is the arbiter on price control in electricity and gas network and in all other utility sectors (water companies, OpenReach, mobile operators) and as the competent expert body it should also be the arbiter for price controls for retail energy supply.

In addition, Mr Nolan's letter also argues that *"if an appeal on the level of the cap to the CMA was possible, this could have implications for the timing of when the cap would take effect."* This statement

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gives a misleading impression that CMA appeals are more likely than JR to delay a price cap: this is not the case.

It is true that the CMA has six months to determine an appeal against a price control decision. JRs, however, take place at the discretion of the court, have no maximum time limit, and typically take nine plus months to secure a judgement, before then being remitted to Ofgem to take a new decision (if the original decision is found to be flawed).

Furthermore, Mr. Nolan does not point out that, for both CMA appeals and JR, appellants have to apply separately to get the original decision suspended pending the outcome of an appeal. In each case, suspension of a decision pending appeal is rare. We note that the Competition Commission / CMA website lists 24 regulatory references and appeals. Of these, 11 were closed in the last five years (i.e. in 2013 or later). None of them resulted in implementation of the new price control being delayed.

Overall, we believe that appeals rights to an independent expert body like the CMA is a fairer, faster and more effective appeal mechanism than JR and will mean that any potential appeals are treated in a consistent manner with other price controls. This is a matter of good governance. It is about having the right checks and balances in place as are customary and conventional.

We hope you find our comments helpful. If you have any questions, we would welcome the opportunity to discuss any of the points made further and you can contact me directly on 0207 747 2966 or at [lawrence.slade@energy-uk.org.uk](mailto:lawrence.slade@energy-uk.org.uk).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'L Slade', written in a cursive style.

Lawrence Slade  
Chief Executive