

Domestic Gas and Electricity (Tariff Cap) Bill: Memorandum concerning the Delegated Powers in the Bill

Energy UK evidence

14 May 2018

Energy UK is the trade association for the GB energy industry with a membership of over 100 suppliers, generators, and stakeholders with a business interest in the production and supply of electricity and gas for domestic and business consumers. Our membership covers over 90% of both UK power generation and the energy supply market for UK homes. We represent the diverse nature of the UK's energy industry – from established FTSE 100 companies right through to new, growing suppliers and generators, which now make up over half of our membership.

Our members turn renewable energy sources as well as nuclear, gas and coal into electricity for over 27 million homes and every business in Britain. Over 730,000 people in every corner of the country rely on the sector for their jobs, with many of our members providing long-term employment as well as quality apprenticeships and training for those starting their careers. The energy industry invests £12bn annually, delivers £88bn in economic activity through its supply chain and interaction with other sectors and pays £6bn in tax to HMT.

Energy UK has 24 retail members. This includes the following domestic suppliers: Bristol Energy, Centrica, Co-op Energy, Ecotricity, EDF Energy, Engie, E.ON, ESB, Extra Energy, Flow Energy, Good Energy, Green Star Energy, Npower, Octopus Energy, Ovo Energy, Scottish Power, Spark Energy, SSE, Utilita, and Utility Warehouse. There are differing views on the proposed cap within our membership, therefore, we do not take a view on the principle of a cap.

Summary

While Energy UK does not take a specific position on the implementation of a price cap we do believe any cap should be introduced in a way that does not impede competition or switching in the market. It is also vital that any cap is set in a way that reflects suppliers' costs including, for example, the costs of undertaking the smart metering programme.

With this in mind, we think the Bill could be strengthened in a number of areas to protect the interests of current and future consumers. In particular, the Bills should allow for a Competition and Markets Authority (CMA) appeals process, rather than just a Judicial Review (JR) provision.

Specific comments

Clause 1, Clause 3(2)(a) and Clause 3(2)(b)

The government notes in its justification for the procedures in relation to each Delegated Power that it does not consider it appropriate to change Ofgem's current approach for licence modifications. This, however, ignores that the licence modification process set out in this Bill differs significantly from that set out in the Gas Act 1986 and Electricity Act 1989 in one important way.

Under both the 1986 and 1989 Acts interested parties have the opportunity to refer Ofgem decisions on licence modifications to the CMA. The Domestic Gas and Electricity (Tariff Cap) Bill does not have such a provision.

Energy UK¹ is concerned the Bill does not allow for appeals to the CMA on how Ofgem sets the cap and instead only makes provision for appeals via JR. The fact that JR is available does not mean that it alone is sufficient to ensure that any decision made by Ofgem in constructing and setting a cap 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 decisions are correct in substance (e.g. economic implications and use or assessment of the facts), as well as their legality. A CMA appeals process would also allow other interested parties, such as consumer groups, to appeal Ofgem’s decision on substantive grounds.

The need for effective appeal rights for regulatory decisions, particularly with regards to price controls, is widely accepted. The CMA is the arbiter on all other gas and electricity supply licence modifications, all price controls in electricity and gas networks and in all other utility sectors (water companies, Openreach, mobile operators). As the competent expert body, it should also be the arbiter for price controls for retail energy supply.

Our aim in looking for changes to the appeals process in the Bill is not to undermine or delay the implementation of a price cap. Instead it is about the regulatory process and the checks and balances that need to exist to ensure a transparent and fair process - and that customers and competition are adequately protected. Any appeal to the CMA does not need to delay or stop the implementation of the cap as it could run co-currently with its implementation and could be quicker than the JR process.

Clause 9

The Bill gives Ofgem powers to make amendments to the energy supply licence following the removal of the cap. Energy UK is concerned that the proposed powers are very broad and could be used more widely by Ofgem than originally intended over their lifetime. It is important Ofgem follows standard process should they look to make any modifications which are not directly and specifically necessitated by the removal of the cap.

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¹ One of Energy UK’s members, Octopus Energy, does not agree with the need for CMA appeals rights.