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27 September 2019

By email to: CDconsultations@ofgem.gov.uk

Dear Arina

Proposals to improve outcomes for consumers who experience self-disconnection and self-rationing

I am writing in response to the above Ofgem consultation, dated 23 August, on improving outcomes for consumers who experience self-disconnection and self-rationing.

This response is not confidential and may be published on your website.

Executive Summary

- As previously flagged in our letter dated 30 August, Centrica has serious concerns with the consultation process that Ofgem has undertaken for these proposals. As currently proposed, we believe that Ofgem will neither comply with its own consultation guidelines nor meet the required legal standards of due process. Our concerns relate to:
    - the insufficient period of consultation;
    - the inadequate assessment of impact on affected suppliers;
    - the absence of a Data Protection Impact Assessment; and
    - the lack of any acknowledgement, or analysis, as to how these newly proposed obligations will interact with the two prevailing price caps, and more specifically, how they are consistent with the "bottom up" analysis on which the Default Tariff Cap was based.

- As we have clearly set out in previous responses to Ofgem consultations, we believe Ofgem has a critical role to play in engaging with the Government, specifically the Department for Work and Pensions (DWP), in relation to the circumstances that can lead to customers self-disconnecting or self-rationing. For example, the delay in payments being made to consumers transitioning to Universal Credit from legacy benefits causes instances where consumers have not received payment for several weeks. We urge Ofgem to work with the DWP to analyse and improve this transition period, rather than simply imposing onerous new obligations on energy suppliers, which will further drive up operating costs – leading in turn to higher prices for customers.

- We agree that appropriate support should be offered to consumers self-disconnecting, but believe that the focus of the proposals should be on vulnerable consumers and not the entire consumer base. Focusing on vulnerable consumers will allow suppliers to provide appropriate support and assistance to those customers who are most in need to get back on supply and manage their future usage. The proposals, as currently drafted, have a very wide remit introducing measures to monitor consumer usage that will be both costly and unnecessary for consumers who do not need this level of support.

- Furthermore, in terms of its policy objectives, Ofgem must be much clearer in identifying which particular subset of vulnerable customers it is seeking to give further protection to. As we have

previously noted, society is changing and concepts of vulnerability and vulnerable customers are themselves fluid. For example, the need for any specific priority action or treatment to protect a healthy, well-off, digitally-savvy 70-year old is far less clear today than when the regulations were originally drafted. As such, Ofgem has a critical role to play in pressing Government to enable proper data sharing and data matching by using, for example, DWP data which would enable suppliers to more effectively identify the customers who require support.

- We do not agree with the proposed policy or draft licence conditions to monitor self-rationing. Additionally, the definitions / proposals are currently drafted far too widely to enable coherent interpretation and practical implementation. The proposed definition will capture any reduction in consumer consumption - which could include energy efficiency steps taken by the consumer, vacant premises or a consumer self-rationing for budgeting purposes. Ofgem has not provided sufficient evidence that self-rationing is causing a significant harm that requires specific licence condition changes, relying instead on two limited external reports that looked at a small number of customers in specific circumstances. We believe that introducing steps to monitor self-rationing across the entire customer base would be expensive and an inefficient way to engage consumers experiencing financial difficulty. We also believe that Ofgem must undertake a Data Protection Impact Assessment, as required under the General Data Protection Regulations (GDPR).

- We believe that Discretionary Credit must remain at the discretion of the supplier as to when this is provided to a customer. Discretionary Credit can be a useful tool to help some customers, but if it is used incorrectly, it can lead to more financial difficulties for that customer resulting in an ongoing / enduring cycle of debt or an accumulation of debt.

- We are broadly supportive of the intention to introduce the Ability to Pay (ATP) principles into licence as they are currently drafted. However, we will require Ofgem to consult properly and give much more clarity on how the principles will be amended (and operate in practice) before we can properly assess Ofgem's proposals.

- The consultation does not make reference to the Default Tariff Price Cap (DTC), the Competition and Markets Authority's (CMA) Prepayment Charge Restriction (PCR) and the possibility of enduring price protection for vulnerable customers. Therefore, it does not explicitly consider how (potentially substantial) additional costs that may result from Ofgem's proposals will be funded in the context of the DTC or any successor price cap (or, indeed, in the absence of any further cap). This is a <u>serious omission</u> which must be addressed and rectified before the proposals are finalised.

Introduction

Centrica recognises that self-disconnection and self-rationing are priority areas for Ofgem and to date we have provided a substantial amount of data in response to both the Call for Evidence (December 2018) and to the Request for Information (February 2019).

As Ofgem will be aware, Centrica has provided levels of support that have gone well beyond what is required in licence over many years, seeking to ensure that vulnerable customers are able to get back on supply should they self-disconnect. We have also embedded the ATP principles into our training, processes, policies and systems to ensure that customers can have an ATP conversation whenever it is required or appropriate.

However, we flag to Ofgem the following concerns:

Inadequate consultation process

As previously flagged to Ofgem, Centrica has concerns about the process Ofgem has followed in relation to this consultation. We do not believe that Ofgem will meet its consultation guidelines or the legal standards of due process if it proceeds as planned.

Rather than being a technical legal concern, we consider this process flaw is so <u>fundamental and serious</u> that it would result in Ofgem being poorly equipped to formulate the appropriate policy in relation to an important issue, should Ofgem proceed as proposed. Indeed, if Ofgem proceeds without addressing these

substantive policy arguments and adopts its position unchanged, we consider that decision would almost certainly be flawed and as such be legally defective.

Our primary concerns relate to:

- the inadequate assessment of the impact on affected parties (i.e. the lack of a formal Regulatory Impact Assessment);
- the lack of a Data Protection Impact Assessment; and
- the absence of any analysis on the potential interaction with the Default Tarff Price Cap and the Prepayment Price Cap.

As such, we have set out in Annex 1, a paper from Frontier Economics on the evaluation of Ofgem's decision not to undertake an Impact Assessment. The paper sets out six requirements that Ofgem should follow when undertaking a formal Impact Assessment of any policy interventions. Specifically:

- Requirement 1: Clear articulation of the rationale for intervention and the objectives that it is seeking to meet;
- Requirement 2: Identify a long list of options for meeting the objective;
- Requirement 3: Explicitly identify, and justify, distributional considerations;
- Requirement 4: Undertake a rigorous competition assessment;
- Requirement 5: Consider the impact of the price cap; and
- Requirement 6: Undertake cost benefit assessment with an appropriate counterfactual and a data set that is fit for purpose.

We do not believe that Ofgem has met these requirements.

The Towerhouse LLP paper in Annex 2 sets out the law as it applies to Ofgem's proposals. The paper makes clear that Ofgem's consultation inadequately assesses the impact of its proposals in relation to the highly intrusive data scrutiny and profiling that is expected of a supplier's customer data. And, that as a very minimum, Ofgem should have carried out an Impact Assessment including a Data Protection Impact Assessment in accordance with GDPR to properly understand the impacts of its decisions and whether better, or narrower alternatives, would result in the same benefits to consumers.

We also consider that Ofgem has failed to allow adequate time for stakeholders to respond to this consultation. The absolute minimum timeframe has been given in this instance for responses to the consultation (i.e. four weeks). This is not consistent with Ofgem's own guidelines. Ofgem is not consulting on relatively minor policy (as envisaged in the guidelines for short consultation periods); it is instead proposing significant new licence obligations that require full and careful consideration by all stakeholders.

Lack of an Impact Assessment

Although Ofgem has previously conducted a Call for Evidence and a Request for Information in this policy area, the proposals outlined by Ofgem in this consultation document assume that suppliers have maintained practices that were in place prior to the implementation of the Default Tariff Price Cap. As highlighted in our responses to previous requests for evidence, Centrica (and we believe other suppliers too) will be reviewing any voluntary practices undertaken today to understand if we can continue to undertake them in the current price cap environment. It is therefore entirely unsafe to assume that evidence from 2018 provides an accurate representation of current practice.

In the absence of any Impact Assessment or due process in line with Ofgem's own Consultation Guidelines[1], we have serious concerns about Ofgem's intention to create a new set of supply licence conditions. Specifically, we also have concerns about whether suppliers can realistically develop the required processes, policies, training and procedures in such a short timescale and whether the additional costs are recoverable (or not) under the Default Tariff and Prepayment Price Caps.

We also find Ofgem's own logic for proposing not to undertake an IA unclear; if Ofgem believes an Impact Assessment is unnecessary because suppliers are already effectively complying with the ATP principles

[1] https://www.ofgem.gov.uk/consultations/our-consultation-policy

on a voluntary basis, this would appear to negate the need to make licence condition changes. However, Ofgem also appears to concede that suppliers are not voluntarily undertaking monitoring of self-rationing for customers with credit meters. It would therefore appear that Ofgem offers no arguments to support the absence of an impact assessment for these specific proposals.

Lack of a Data Protection Impact Assessment

We have concerns relating to the legal process relating to customer privacy, and the absence of a Data Protection Impact Assessment (DPIA) and associated Legitimate Interests Assessment.

Some of Ofgem's proposals (notably those relating to monitoring of self-rationing) would entail the processing, at a large scale, of our customers' personal data, profiling them to make inferences about their behaviours.

Article 35 of the GDPR sets out the framework for data protection impact assessments, and the Information Commissioner's Office (ICO) has published a list of situations, in accordance with Article 35(4), in which a DPIA is required. This includes "profiling individuals on a large scale".

Profiling customers to understand their consumption patterns, determine when they are and are not consuming energy, looking at how much they spend on energy, and making comparisons and drawing conclusions based on these data points (which in itself is also personal data) — are the types of areas that suppliers will need to consider if applying Ofgem's proposed draft licence conditions. This will also entail the processing of highly personal activity and fall firmly within the ICO's requirement for a DPIA.

Proceeding without a DPIA would be inconsistent with the requirements of the GDPR and, just as importantly, would fail to protect consumers, given that a DPIA may identify less intrusive and lower risk processing options available that will achieve Ofgem's objectives.

Conducting a DPIA at the outset of policy proposals is not a new requirement. The ICO said in response to Ofgem's Call for Evidence on the potential impacts on consumers following market wide settlement reform, *"The DPIA process is an integral part of data protection by design and by default and can help in identifying the type of technical and organisational measures needed to ensure the intended processing complies with the requirements of GDPR."* Whilst this is not related to the same proposals, it is a helpful reminder to Ofgem as to why DPIAs should be conducted.

We therefore urge Ofgem to conduct and publish a DPIA, in conjunction with industry, to ensure that the likely processing activities necessary to fulfil any obligation are properly taken into account and robustly assessed, and we would welcome further discussion on these matters.

Self-disconnection and self-rationing monitoring

Ofgem's policy objective is to reduce the number of customers who are self-disconnecting each year and to reduce the detriment caused by self-disconnection and self-rationing. The basis of the harm that Ofgem is trying to avoid for self-disconnection is in relation to vulnerable customers and not, for example, a vacant property where a landlord has chosen to disconnect as no energy is being used. Due to the policy intent, we believe the proposal for self-disconnection and self-rationing should only focus on monitoring vulnerable customers to improve customer outcomes. Outside of this monitoring, all customers will receive appropriate treatment through the Ability To Pay principles, and as such, we do not believe the monitoring of all customers is required.

The current definition of self-rationing where a consumer 'deliberately limits their energy use to save money for other areas' is too broad, highly subjective and, as a consequence, woefully inadequate. As currently drafted, the draft licence condition could capture any reduction in consumption for any reason. If Ofgem is intent on suppliers monitoring self-rationing, it must clearly define the specific criteria that it feels will identify where self-rationing is occurring because of a specific customer detriment related to paying for their energy costs. Self-rationing is a completely personal matter and as such, without direct interaction with the consumer or their representative, a supplier cannot provide the intended level of support. It is also not clear to us whether consumers would welcome (or even accept) this level of highly personal and intrusive monitoring of / into their day to day lives and private business.

Emergency and Friendly Credit provision

We are supportive of the proposal to provide Emergency and Friendly Credit.

However, we do not agree with the definitions in the proposed SLCs (including for Discretionary Credit) which refer to "an interest free loan of credit". This is not correct. The credit allocated to the meter is not a loan. Rather, as stated, it is a credit provided to the meter, that the customer then pays back when they next top up.

Discretionary Credit Provision

We fundamentally believe that Discretionary Credit should remain at the discretion of the supplier.

It can be a useful tool in specific and limited cases to help avoid some customers self-disconnecting when they are in short term financial vulnerability. However, it is not always the most appropriate method of resolving a consumer's self-disconnection, as there are customers who repeatedly call back for help and build up further debt. Simply giving another Discretionary Credit payment does not always provide the customer with the sustainable support needed and can potentially lead to more debt being built up and an ever-increasing cycle of debt. Providing Discretionary Credits may also allow the consumer to hide or obfuscate from other measures and steps that would be more sustainable and appropriate.

Ability to Pay Principles

We are broadly supportive of the intention to introduce the Ability to Pay (ATP) principles into licence as they are currently drafted. However, we will require Ofgem to consult properly and give much more clarity on how the principles will be amended (and operate in practice) before we can properly assess Ofgem's proposals.

The consultation document does not provide us with sufficient information as to whether they will be integrated in full (as set out on page 35 of the consultation document) or how the principles will be amended prior to being embedded into licence.

We have outlined more comprehensively in Annex 3 our responses to each of the specific questions raised by Ofgem in the consultation document. And, in Annex 4, we have made suggested drafting changes to the proposed Supply Licence Conditions.

Finally, we expect Ofgem to take into account the serious questions we have raised above and fully address them before moving on to the next stage of its process.

Please do not hesitate to contact me if you would like to discuss any aspect of our response further.

Your sincerely

Nigel Howard
Head of Consumer Policy
Centrica Legal & Regulatory

Annex 1 – Frontier Economics Paper

24 September 2019

SELF-DISCONNECTION AND SELF-RATIONING POLICY PROPOSALS

An evaluation of Ofgem's decision not to undertake an Impact Assessment

1 Frontier Economics has previously prepared a framework for evaluating alternative policy options to deliver Ofgem's vulnerable customer strategy.[2] Ofgem has now issued a set of policy proposals with the aim of improving outcomes for consumers who experience self-disconnection and self-rationing.[3] However, Ofgem has decided not to carry out a formal Impact Assessment (IA) of these proposals for the purposes of section 5A of the Utilities Act 2000. We have been asked to evaluate this decision and to assess whether Ofgem's position is justified.

2 The role of appraisal is to provide objective analysis to support decision making. Ofgem recognises this in its own IA Guidance:

> *"Whilst IAs do not determine a final decision, they form a vital part of the decision-making process and provide a structured framework for understanding the impacts associated with important proposals."*[4]

3 Indeed, such guidance is there to enable policy makers to "develop transparent, objective and evidence-based advice for decision making".[5] Ofgem's position seems to treat such an assessment as an impediment to its policy making, rather than something that is designed to improve it.

4 Ofgem provides three reasons for reaching its decision not to carry out a formal IA.

- The proposals are "based on the spirit of the existing voluntary requirements and existing minimum standards."[6]
- It gave the costs "some consideration"[7] and this led to its conclusion that the benefits would exceed the costs.
- There is a need to act quickly to ensure that there are consistent protections for customers who are self-disconnecting and self-rationing.

5 None of these reasons stand up to scrutiny. Further, they ignore many other important issues that a proper IA would be expected to expose. Ofgem also misses an opportunity for it to determine the benefit it expects a supplier to take into account when that supplier determines whether its actions can be expected to comply with a responsibility to "take all reasonable steps" to meet the

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2 "Framework for assessing actions to support Ofgem's vulnerability strategy", Frontier Economics (2019).
3 "Proposals to improve outcomes for consumers who experience self-disconnection and self-rationing", Ofgem (2019).
4 Ofgem website: https://www.ofgem.gov.uk/publications-and-updates/impact-assessment-guidance
5 HM Treasury (2018) para 1.5.
6 Ofgem (2019) para 1.6.
7 Ofgem (2019) para 1.6.

obligation. Instead suppliers will have to estimate what this would be to determine if the actions it is planning to take are reasonable in the circumstances.

6 In this Annex we consider the validity of these stated reasons against our framework for evaluating Ofgem's vulnerable customer strategy. This framework was based on six requirements that Ofgem should follow when undertaking a formal IA of any policy interventions.

- Requirement 1: Clear articulation of the rationale for intervention and the objectives that it is seeking to meet;
- Requirement 2: Identify a long list of options for meeting the objective;
- Requirement 3: Explicitly identify, and justify, distributional considerations;
- Requirement 4: Undertake a rigorous competition assessment;
- Requirement 5: Consider the impact of the price cap; and
- Requirement 6: Undertake cost benefit assessment with an appropriate counterfactual and a data set that is fit for purpose.

7 All three of the reasons that Ofgem has provided for not undertaking a formal IA fall under requirement 6. We therefore start with consideration of this requirement, before looking at where else Ofgem's approach falls short.

Requirement 6: Undertake cost benefit assessment with an appropriate counterfactual and a data set that is fit for purpose

8 Ofgem has chosen not to undertake a cost benefit assessment of the proposed policies, despite this being at odds with what would be expected in the circumstances. We assess each of Ofgem's stated reasons for its stance.

Definition of the counterfactual

9 Ofgem's primary reason for not undertaking a formal IA is that the proposals are "based on the spirit of the existing voluntary requirements and existing minimum standards."[8] What Ofgem seems to be arguing is that, if it were to undertake an IA, the counterfactual that it would be considering the proposal against would essentially be the same as the proposal itself.

10 Our framework recognised that an inappropriately specified counterfactual would be likely to compromise any evaluation. Ofgem's approach to determining the counterfactual certainly fails this test.

- It contradicts what Ofgem says is currently happening. Often Ofgem makes clear that suppliers are not currently undertaking the activity that the proposal is designed to achieve. Indeed, if all suppliers were already doing the activity there would seem little benefit to Ofgem's intervention. By way of five examples, Ofgem states:

> *"We are concerned by the lack of consistency across suppliers when supporting customers who are self-disconnecting or self-rationing."*[9]
>
> *"Our RFI showed that not all suppliers are currently monitoring self-disconnection and the monitoring of self-rationing is even less established. It also revealed that the utilisation of smart meter data is still at the planning or early stage for a significant number of suppliers."*[10]

8 Ofgem (2019) para 1.6.
9 Ofgem (2019) para 2.45.
10 Ofgem (2019) para 3.6.

> *"Our findings show that no supplier is currently actively monitoring self-rationing."*[11]
>
> *"Having reviewed the existing Ability to Pay principles, we are proposing to update these to better reflect recent changes in supplier debt recovery practices."*[12]
>
> *"we note there may be suppliers who are not fully applying the principles and we would expect them to incur additional implementation costs."*[13]

If suppliers are not currently undertaking the activity then Ofgem's primary reason for not undertaking the IA falls away. Of particular concern is that for one activity (monitoring self-rationing) Ofgem has recognised that no supplier is currently undertaking the activity. Ofgem also seems to be proposing that the Ability to Pay principles are updated to include potentially new obligations.

- Ofgem's information about what suppliers are doing may not be up to date. Both the Call for Evidence in 2018 and the information that was captured through the RFI in early 2019 were looking at a period before the introduction of the price cap. The price cap was a major intervention into the market that would be expected to have led to a reappraisal of what a supplier's discretionary activities would be. In other words, absent the policy intervention, there may be changes to the current landscape that need to be taken into account. These changes should be factored into the specification of the counterfactual.
- Even if suppliers are currently continuing with the policies, there is an important distinction between a situation where a supplier chooses to undertake a policy and where it is compelled to do so. This is particularly the case where there are ongoing costs associated with meeting that policy.

Estimation of costs and benefits

11 Ofgem states that it "gave cost implications some consideration"[14] as part of its work. It provides no detail of what this involved, although its conclusion was that the policy proposals would not result "in a significant cost for industry participants overall."[15] Against a purely qualitative consideration of the wider benefits of reductions in self-disconnection and self-rationing, it deems the new policies to have a positive business case.

12 This approach is highly unsatisfactory and falls very far short of best practice for a cost benefit analysis. Ofgem has failed to disclose its cost assumptions and is relying on an inadequate qualitative estimate of the benefits. Even in cases where there is an expectation that the benefits will far outweigh the costs, it helps to set this out: the analysis may uncover issues with the policy that would otherwise go unchecked; alternative options may be discovered that offer superior benefits; and it can help in the development of a consistent framework for assessing interventions. In this instance it misses an opportunity to develop an approach to benefit calculation in this challenging area, something that will be required as Ofgem continues to develop its consumer vulnerability strategy.

13 There are a number of steps that Ofgem will need to undertake to make its assessment fit for purpose.

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11 Ofgem (2019) para 3.23.
12 Ofgem (2019) para 5.11.
13 Ofgem (2019) para 5.12.
14 Ofgem (2019) para 1.6.
15 Ofgem (2019) para 1.6.

- **Benefit estimation:** Ofgem presents a qualitative assessment of the difficulties that particular vulnerable consumers are facing through self-disconnection and self-rationing. However, to turn this into a useful policy assessment tool, it needs to develop this further.
  - Ofgem needs to better link the policy with the change in benefit that it is expecting the policy to deliver. This is important given that many of the detriments that Ofgem allude to will, at best, only be expected to be partially alleviated by the policy interventions. This is because they often result from much more fundamental issues associated with poverty. In its assessment, Ofgem correctly identifies a significant difference between those experiencing self-disconnection on an ongoing basis and those who self-disconnect as a one-off. Unfortunately, Ofgem fails to carry this through to its assessment of how this will impact on the level of benefits associated with the different policies.
  - On a similar theme, the response to Ofgem's Consumer Vulnerability Strategy paper by the Centre for Competition Policy (CCP) at UEA[16] noted further difficulties associated with assessing the benefit of reduced self-disconnection. In this response, CCP notes the important link between length of disconnection and harm and also the difficult trade-offs faced by households with affordability issues which mean that economies on heating may be less harmful than other ways of saving money. It is important that Ofgem engages fully with these complex issues.
  - While Ofgem provides a high level qualitative assessment of the benefits it expects to result from the policies, it needs to go further and seek to quantify these benefits. While this may not be straightforward, it is important that Ofgem grapples with this issue as it will be required to ensure policies are evaluated on a consistent basis across its consumer vulnerability strategy. Further, while there are challenges associated with estimation, there is policy guidance available to assist with it.[17]
- **Cost estimation:** Ofgem has indicated that it has considered costs, but it provides no evidence to disclose what assumptions it has made. As well as exposing its analysis, it should consider the following points.
  - The assessment needs to identify the actions required to comply with the introduction of the new policy. While suppliers may choose to meet the obligation in different ways, there has to be a basis to determine what the expected costs will be. This is a particular issue where no supplier is currently undertaking the activity, as is the case for identification of self-rationing.
  - It provides a discipline for identification of some of the side effects that the policy may have. For example, a policy that requires identification of self-disconnection or self-rationing will inevitably result in some consumers being erroneously identified. The cost that would come from this, for example from consumer concern about privacy breaches, should be reflected in the IA.

Requirement to act quickly

14 Ofgem's third stated reason for not undertaking a formal IA is that it must act quickly. Again, this does not seem to provide a valid justification.

- Haste rarely leads to good policy decisions. Once a policy is put in place, it becomes very hard to remove it. This is even if there is a superior policy intervention available.

16 "Response to Ofgem's Draft Consumer Vulnerability Strategy 2025" CCP UEA (2nd August 2019).

17 For example, "Quantifying health impacts of government policies" the Department of Health (2010) provides guidance on how to value policies that impact on health.

- However, in this case, Ofgem received the RFI responses in February 2019. It has therefore had over 6 months to undertake this analysis, which should have provided ample time to undertake an assessment of this nature.

15 On this basis, none of Ofgem's reasons appear to stand up to scrutiny. In addition, when we evaluate Ofgem's approach against the five other requirements that form the basis of our evaluation framework, other concerns arise.

Requirement 1: Clear articulation of the rationale for intervention and the objectives that it is seeking to meet

16 Ofgem does clearly state its overall objective for policy intervention in this space:

> *"Our overarching policy objective is to reduce the number of customers self-disconnecting and self-rationing each year and to reduce the detriment caused by self-disconnection and self-rationing. We want to see this reduction across the market."*[18] *(para 1.1)*

17 This is elaborated further when Ofgem sets out the outcomes that it wants gas and electricity customers to experience:

- *"All customers in vulnerable circumstances who are self-disconnecting or self-rationing are quickly identified and provided with the support needed depending on their circumstance.*
- *Customers who are self-disconnecting and/or self-rationing as a result of a short-term situation are able to quickly get back on supply to limit any physical and/or emotional impacts. Customers in temporary vulnerable circumstances are able to receive appropriate short-term support, and all customers are provided with the necessary information to access short-term support where needed.*
- *Customers who are self-disconnecting and/or self-rationing because of ongoing vulnerable circumstances are not only able to quickly get back on supply to limit any physical and/or emotional impacts but also receive sustainable support to avoid self-disconnection in the future."*[19]

18 This clarity is helpful. However, there was a missed opportunity to make the objectives SMART[20] and then tie these back to the policies that Ofgem is proposing to make.

Requirement 2: Identify a long list of options for meeting the objective

19 Ofgem hasn't produced a long list of potential policy options that could be expected to meet its objectives. Instead it focusses almost exclusively on the five new requirements on suppliers to:

- identify prepayment self-disconnection;
- identify self-rationing;
- offer emergency and friendly credit functions for all customers;
- offer discretionary credit for customers in vulnerable circumstances; and
- update Ability to Pay principles and incorporate them in the supply licence.

20 Having a longer list that is then shortened down to a set of policies that is subject to a formal IA would be expected to result in better policy development. A robust evaluation should be taken of all options that provide a credible way of delivering the policy objective.

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18 Ofgem (2019) para 1.1.
19 Ofgem (2019) para 2.48.
20 Specific, Measurable, Achievable, Realistic and Time-limited.

21 Despite this, it is encouraging that Ofgem does identify that the best policy response to meet certain objectives may lie outside of the remit of energy suppliers. This is particularly in the case of those experiencing self-disconnection on an ongoing basis. In this context, Ofgem references the breathing space scheme and a statutory debt repayment plan in England and Wales to help people in problem debt that the Government is looking at.[21] It is also encouraging to see that it is Ofgem's "intention to work with government on the wider affordability issues faced by energy customers."[22]

22 However, a formal IA would help clarify which entity is best able to meet the different objectives. While suppliers may be best able to identify consumers who are self-disconnecting, they may not be best placed to deliver the help that is then required. To assist this process, we referenced the guidance included in the Green Book to construct the alternative options around the five facets in its "Strategic Options Framework Filter".[23]

23 It is particularly important to ensure a range of policy options is considered in the event that there is a risk that one of the favoured options can be expected to have an adverse impact on competition, as is the case here. As the CMA notes in its Guidance, "Ideally, alternative policy proposals should be identified that have a less adverse effect on competition but still enable policy objectives to be achieved."[24] We discuss this further below.

Requirement 3: Explicitly identify, and justify, distributional considerations

24 Ofgem makes no mention of distributional considerations within this consultation. Since Ofgem has recently set out in its strategic narrative that, absent a change in Government policy, its role is not to "drive further cross-subsidy between consumer groups",[25] this would imply that any new policy intervention would need to either be self-funded through cost reflective charges or replace an existing policy where the cross-subsidy is already in place.

25 However, it is not clear from the consultation that Ofgem expects these costs to be funded from those customers that will benefit – indeed anything that raises costs to a set of consumers where the cause of their issues is linked to affordability is evidently problematic.

26 It is therefore important that Ofgem makes its intentions clear. If it is intending that the additional costs are financed through cross-subsidies, this needs to be assessed by the use of distributional analysis involving the application of welfare weights – such as that carried out to justify the Warm Home Discount.[26]

Requirement 4: Undertake a rigorous competition assessment

27 Our framework highlighted the particular challenges that are associated with making a policy intervention in an area that will impact on a non-monopoly part of the energy market. In these cases, it is imperative to undertake a full assessment of any risks of distortions to this market arising from it. This should be seen as being of at least equal importance to any static assessment of costs and benefits that an appraisal involves. We set out what is involved in such an assessment in our framework.[27]

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21 Ofgem (2019) para 5.13.
22 Ofgem (2019) para 5.14.
23 See Figure 1 in Frontier Economics (2019).
24 "Competition impact assessment – Part 1: overview", CMA (2015) para 2.11.
25 Ofgem (2019) p16.
26 "Warm Home Discount Scheme 2018/19 - Final Stage Impact Assessment", BEIS (2018).
27 Frontier Economics (2019).

28 While it may be the case that imposing an industry-wide requirement on suppliers in this area may actually even-up the competitive landscape (given that the evidence that Ofgem provides shows that it is often the smaller or newer suppliers that are doing less in this space at present[28]) this does not negate the need to look more broadly at the policy. This is because suppliers have different numbers of customers with vulnerable characteristics. Therefore, a policy intervention that increases the costs of suppliers with a disproportionate number of vulnerable customers is likely to distort competition and lead to consumer detriment.

29 An additional potential competition concern will also need to be looked at if the requirement to meet the proposals differs between suppliers. This is raised as an issue in the Ability to Pay proposal where Ofgem states that it may require a supplier to ensure "all available information is taken into account for setting repayment rates in situations where customers are remotely switched to prepayment meters".[29] If the available information differs between suppliers, then so will the costs of meeting this requirement.

Requirement 5: Consider the impact of the price cap

30 Given that there are price caps in place, Ofgem should have considered the impact that these new policy obligations will be expected to have. To the extent that there is a cost associated with delivering a new policy, consideration of how this will be treated in the cap will be required: it will not be possible to assume that any additional activity can be financed through headroom or margin.

[28] Ofgem references the fact that newer suppliers may not know that they are expected to offer discretionary credit (Ofgem (2019) para 4.30) and that smaller suppliers have a higher proportion of customers in the >£15 repayment bracket (para 5.4).

[29] Ofgem (2019) para 5.11.

Annex 2 – Ofgem's legal and regulatory duties – prepared by Towerhouse LLP

1. This annex explains the law as it applies to Ofgem's proposals.
2. In summary:
   (a) Ofgem's consultation fails to have due regard to its public and statutory law duties. The consultation inadequately assesses the impact of its proposals in relation to the highly intrusive data scrutiny and profiling that is expected of a supplier's customer data. This is a fundamental error.
   (b) Ofgem also fails properly to assess the costs of the proposals to suppliers.
   (c) At a very minimum, Ofgem should have carried out an impact assessment (including a data protection impact assessment), so that it could properly understand the impacts of its decisions and whether better, or narrower alternatives, would result in the same benefits to consumers. This is vital, not just to fulfil its statutory duties but also to ensure a fair procedure.
   (d) Given the intrusive nature of the data profiling in question, Ofgem's proposals should be limited to vulnerable customers (rather than giving "due consideration" to vulnerable customers, as set out at draft condition 27A.1 regarding self-disconnection) who may have a more urgent need for help and assistance than all prepayment customers as a whole. Wider processing of all prepayment meter customers is unlikely to be proportionate and measures which impose an obligation to undertake such wider processing are likely to be unlawful.
   (e) Other options, not involving such invasive data profiling and monitoring, should be considered for customers who are not considered vulnerable, such as reliance on the formalisation of the Ability to Pay Principles into the licence conditions (subject to the clarifications requested above) through which all customers could receive appropriate treatment.
3. In the rest of this Annex we deal in turn with:
   (a) Ofgem's public law duties (paragraphs 4 to 16);
   (b) Ofgem's statutory duty to carry out an impact assessment (paragraphs 17 to 26);
   (c) Ofgem's statutory duties when modifying licence conditions (paragraphs 27 to 33); and
   (d) Ofgem's statutory duties under the GDPR (paragraphs 34 to 45).

Ofgem's public law duties

4. All public authorities in the UK, including Ofgem, have a public law duty to act fairly when exercising their functions. Failure to adopt a fair procedure, which gives relevant parties sufficient time to provide an informed response, can amount to procedural unfairness. Beyond the procedures described in legislation (looked at further below), the steer a public authority should look to, in order to conduct a fair procedure, is set out in case law.

5. Ofgem's process in this case is not consistent with its own guidance and breaches wider requirements of public law.

6. Ofgem recognises on its website that "*when we do consult, we must consult fairly*"[30] and lists the four basic principles, known as the 'Gunning principles' or the 'Sedley requirements',[31] that it should comply with:

   (a) Ofgem must consult when proposals are still at a formative stage (i.e. when the responses to the consultation can still influence the outcome).

   (b) Ofgem must give sufficient reasons for particular proposals.

   (c) Ofgem must give adequate time for parties to consider and respond to the proposals.

   (d) Ofgem must conscientiously consider the responses they receive.

7. **Consult at a formative stage**: to be at a 'formative stage', a consultation should be held at a stage when there is still the ability to choose an option and reject others. A preference or provisional decision can be put forward, but it should have the ability to change.[32]

8. **Give sufficient reasons**: sufficient information should be given by the public authority "*to allow those consulted to give intelligent consideration and an intelligent response*".[33] Sufficient reasons allow parties responding to the consultation to raise points that the decision maker may have missed:

   > *'…one of the principal purposes, if not the principal purpose, of any consultation exercise is to enable consultees to identify and draw to the attention of the decision maker relevant factors which the decision maker may, either by accident or design, have overlooked when deciding upon a preferred option for consultation.'*[34]

9. **Allowing adequate time to respond:** adequate time to respond will depend on the context of the consultation. Ofgem's consultation policy says that its consultations "*last for varying amounts of time depending on the kind of issues they cover*."

10. For "major issues of wide interest", Ofgem says it will consult for a maximum of 12 weeks; for issues with a "narrower impact and of more specific interest" eight weeks; and for "urgent issues, or minor changes to existing policy, or if we're following another organisation's timetable, licence, or other regulatory or statutory requirement" four weeks.

11. Ofgem's policy also adds that: "If a consultation period straddles a holiday period such as Christmas, we might extend it so that people have reasonable time to respond."[35]

12. **Conscientiously consider responses**: a public authority's decision has been considered flawed if it does not consider a consultation response's "*main and biggest point*" in the final

[30] https://www.ofgem.gov.uk/consultations/our-consultation-policy
[31] *R v North and East Devon HA ex parte Coughlan* [2001] 108 QB 213, citing *R v Brent London Borough Council, ex parte Gunning* [1985] 84 LGR 168.
[32] *Sardar and Others v Watford Borough Council* [2006] EWHC 1590 (Admin).
[33] *R v North and East Devon HA ex parte Coughlan* [2001] 108 QB 213, citing *R v Brent London Borough Council, ex parte Gunning* [1985] 84 LGR 168.
[34] *R (Baird) v Environment Agency* [2011] 41 EWHC 939 (Admin).
[35] https://www.ofgem.gov.uk/consultations/our-consultation-policy.

stages of the decision-making process.[36] Conscientiously considering responses means that the public authority should be "*prepared to change course, if persuaded by it to do so".*[37]

13. It is startling that the absolute minimum timeframe has been given in this instance for responses to the consultation. This is not consistent with the guidelines; the case here is not one to which the minimum timescale applies. Ofgem is not just consulting on minor licence modifications; it is also proposing significant and new changes to the way in which customer data is to be monitored and profiled. This is recognised by Ofgem in its consultation when it observes that "*Our findings show that no supplier is currently actively monitoring self-rationing*."[38] We believe that Ofgem's current proposals on self-rationing are intrusive and require much greater scrutiny and careful consideration than they have been given, both in the level of analysis that should have been provided by Ofgem and the time allowed so that consultees can provide an intelligent consideration and response.

14. In addition, the consultation was published the day before a bank holiday weekend and during a time when many people tend to take annual leave, yet this does not seem to have been taken into account in setting the timeframe for responses.

15. Based on Ofgem's guidance, the timeframe for responding to the consultation should have been longer, as we believe that the increased scrutiny of all prepayment customer behaviour to identify self-disconnection, and all vulnerable customer behaviour to identify self-rationing, should be considered a "major issue of wide interest", or at least an issue with a "narrower impact and of more specific interest". As such, 28 days is insufficient, particularly in the absence of an impact assessment, which would have enabled Centrica to have fuller information to hand in formulating its response.

16. Ofgem's failure to follow its own guidance is indicative of a broader fairness breach. It is also likely to be unlawful in and of itself. As the Supreme Court[39] has put it:

> *"a decision-maker must follow his published policy… unless there are good reasons for not doing so."*

Ofgem's duty to carry out an impact assessment

17. Ofgem has decided not to conduct an impact assessment as part of this consultation. Ofgem says it has reached this view "*because our proposals are based on the spirit of the existing voluntary requirements and existing minimum standards… we also consider that there is a need to act quickly*".[40]

18. Under Section 5A of the Utilities Act 2000, Ofgem has a duty to carry out an impact assessment where:

    (a) Ofgem is proposing to do anything for the purposes of, or in connection with, the carrying out of any function exercisable by it under or by virtue of Part 1 of the Gas Act 1986 or Part 1 of the Electricity Act 1989; and

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[36] *R (Morris) v Newport City Council* [2009] 38 EWHC 3051 (Admin).
[37] *R v London Borough of Barnet, ex parte B* [1994] 1 FLR 609.
[38] Para 3.23 of the consultation.
[39] *Walumba Lumba (previously referred to as WL) (Congo) v Secretary of State for the Home Department* [2011] UKSC 12, 2011 WL 806813.
[40] Para 1.6 of the consultation.

(b) it appears to it that the proposal is important;

but this section does not apply if it appears to Ofgem that the urgency of the matter makes it impracticable or inappropriate for Ofgem to comply with the requirements of this section.[41]

19. The first requirement of Section 5A is satisfied as modifications to licence conditions fall under Part 1 of both the Gas Act 1986 and the Electricity Act 1989. The second part of Section 5A is fulfilled if the proposal is important, unless the matter is so urgent that it makes it impracticable or inappropriate for Ofgem to comply.

20. Under Section 5A(2) of the Utilities Act 2000, a proposal is important if its implementation would be likely to do one or more of the following:

(a) involve a major change in the activities carried on by Ofgem;

(b) have a significant impact on persons engaged in the shipping, transportation or supply of gas conveyed through pipes or in the generation, transmission, distribution or supply of electricity, or in the provision of smart meter communication services (in respect of electricity meters or gas meters);

(c) have a significant impact on persons engaged in commercial activities connected with the shipping, transportation or supply of gas conveyed through pipes or with the generation, transmission, distribution or supply of electricity;

(d) have a significant impact on the general public in Great Britain or in a part of Great Britain; or

(e) have significant effects on the environment.[42]

21. Centrica considers that the proposals set out in the consultation will have a significant impact both on suppliers and on the general public. The proposals are not all based on "*existing voluntary requirements and existing minimum standards*", as Ofgem acknowledges itself in the consultation. Under the proposals, all suppliers will be expected to identify self-rationing, which Ofgem recognises is not something undertaken by any supplier today.[43] Ofgem also identified that "*our RFI showed that not all suppliers are currently monitoring self-disconnection*".[44]

22. In addition, before implementing proposals, the Utilities Act 2000 provides that Ofgem must either:

(a) carry out and publish an assessment of the likely impact of implementing the proposal; or

(b) publish a statement setting out its reasons for thinking that it is unnecessary for it to carry out an assessment.[45]

23. Ofgem's '*statement setting out its reasons*' is set out at paragraph 1.6 in the consultation.[46] It is not clear, from this short paragraph, why Ofgem considers that this is a case where '*the*

[41] s.5A(1) Utilities Act 2000.
[42] s.5A(2) Utilities Act 2000.
[43] Para 3.23 of the consultation.
[44] Para 3.6 of the consultation.
[45] s.5A(3) Utilities Act 2000.
[46] Paragraph 1.6 of the Consultation.

urgency of the matter makes it impracticable or inappropriate'[47] to carry out an impact assessment, despite Ofgem's Impact Assessment guidelines saying that it "*will clearly state our reasons if this is the case*".[48] It does not appear to be impracticable or inappropriate for Ofgem to carry out an impact assessment in this case as self-disconnection/self-rationing are not new issues that require *urgent* attention.

24. Instead, they are important issues that deserve due consideration to be given to them through an appropriate impact assessment. As Ofgem recognises in its own guidance, an impact assessment *"forms a vital part of the decision-making process and provides a structured way to understand the impacts of important proposals".*[49]

25. An impact assessment is done so that Ofgem's "*analysis is based on defensible evidence and reflects a responsive approach to proposal development*".[50] In failing to conduct to an Impact Assessment, Ofgem has neglected other important considerations when formulating its proposals, such as: (i) weighing up options; (ii) a clear quantification of the costs and benefits; (iii) any distributional effects; (iv) competition impacts; (v) burdens on businesses, especially small businesses.[51]

26. Ofgem's failure to carry out full impact assessments is an obvious breach of its obligations in this regard.

The steps Ofgem must take to modify licence conditions (Gas and Electricity)

27. Ofgem plans to give legal effect to its proposals by modifying the current licence conditions. Under the current proposals, there will be a new Condition 27A on self-disconnection and self-rationing and an addition to Condition 28.1 (Information about Prepayment Meters).

28. Under section 23 of the Gas Act 1986 and section 11A of the Electricity Act 1989, Ofgem may make modifications to the conditions of a particular licence, or the standard conditions of licences.[52]

29. Before making any modifications, Ofgem must give notice:

    (a) stating that it proposes to make modifications;

    (b) setting out the proposed modifications and their effect;

    (c) stating the reasons why it proposes to make the modifications; and

    (d) specifying the time within which representations with respect to the proposed modifications may be made. The time specified may not be less than 28 days from the date of the publication of the notice.[53]

30. Such a notice must be given:

[47] s.5A(1) Utilities Act 2000.
[48] https://www.ofgem.gov.uk/system/files/docs/2016/10/impact_assessment_guidance_0.pdf, page 13.
[49] Ibid, page 1.
[50] Ibid, page 14.
[51] Ibid, see "Key factors to consider when conducting IAs" section (paras 3.9-3.48).
[52] s.23(1) Gas Act 1986, s.11A(1) Electricity Act 1989.
[53] s.23(2) and (3) Gas Act 1986, s.11A(2) and (3) Electricity Act 1989.

(a) by publishing the notice in such manner as Ofgem considers appropriate for the purpose of bringing the notice to the attention of persons likely to be affected by the making of the modifications, and

(b) by sending a copy of the notice to:

i. each relevant licence holder,

ii. the Secretary of State,

iii. Citizens Advice,

iv. Citizens Advice Scotland; and

v. for gas licence modifications, the Health and Safety Executive.[54]

31. We do not think that Ofgem has sufficiently considered the *effect* that the proposed modifications to the licence could have, as it has decided not to carry out an impact assessment. Instead, Ofgem uses language such as "we expect" and "we believe", even for simple facts that could have been easy to verify, such as those suppliers currently applying the Ability to Pay principles.[55]

32. Ofgem must consider any representations which are duly made.[56] But in this case, Ofgem has only given the absolute minimum statutory requirement of 28 days to respond. For a change of this magnitude, suppliers and other interested parties should be given more time to properly consider and evaluate Ofgem's proposals. In turn, Ofgem would then have better prepared responses to consider. Giving interested parties only 28 days to respond, particularly over a bank holiday weekend and at a very popular time for annual leave, seems to directly conflict with Ofgem's own consultation policy to provide parties with adequate time to respond.

33. It is likely, therefore, that Ofgem's approach would be a breach of its statutory obligations.

General Data Protection Regulation

34. Fundamentally, Ofgem has not considered the data protection impacts of its proposals at all. As set out earlier in this consultation response, Centrica considers that at least some of the proposals will require an assessment of any data protection impact, particularly those that would place an all reasonable steps obligation on suppliers to monitor self-rationing by customers identified as vulnerable.

35. The GDPR is directly applicable in the UK and Article 6(1)(c) provides that processing of data is lawful if it is necessary for compliance with a legal obligation to which the controller is subject. Article 6(4) further provides that Member State law should '*constitute a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 23(1)…'*.[57]

[54] s.23(4) Gas Act 1986, s.11A(4) Electricity Act 1989.

[55] See paragraph 5.12 which says: '*We do not anticipate our proposal to have significant impacts on existing industry participants, as we expect the majority of suppliers are already applying the principles…''*

[56] s.23(4A) Gas Act 1986, s.11A(4A) Electricity Act 1989.

[57] Article 6(4) GDPR.

36. Article 23(1) GDPR provides that Member State law may restrict the obligations and rights set out in the GDPR where *'such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society'.*[58]

37. Article 23(2) continues that:

> *"In particular, any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to:*
>
> 1. *the purposes of the processing or categories of processing;*
> 2. *the categories of personal data;*
> 3. *the scope of the restrictions introduced;*
> 4. *the safeguards to prevent abuse or unlawful access or transfer;*
> 5. *the specification of the controller or categories of controllers;*
> 6. *the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing;*
> 7. *the risks to the rights and freedoms of data subjects; and*
> 8. *the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction."*

38. Article 35(1) provides that: "*Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks"* (emphasis added).

39. A controller is defined as *"the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law"* (emphasis added).

40. Such an assessment carried out by the controller shall contain at least:

    (a) a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller;

    (b) an assessment of the necessity and proportionality of the processing operations in relation to the purposes;

    (c) an assessment of the risks to the rights and freedoms of data subjects referred to in Article 35(1); and

    (d) the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with the GDPR taking into account the rights and legitimate interests of data subjects and other persons concerned.[59]

[58] Article 23(1)(i) GDPR.
[59] Article 35(7) GDPR.

41. The GDPR states that "*Where processing pursuant to point (c) or (e) of Article 6(1) has a legal basis in Union law or in the law of the Member State to which the controller is subject, that law regulates the specific processing operation or set of operations in question, and a data protection impact assessment has already been carried out as part of a general impact assessment in the context of the adoption of that legal basis, paragraphs 1 to 7 [of Article 35] shall not apply unless Member States deem it to be necessary to carry out such an assessment prior to processing activities*"[60] (emphasis added).

42. However, in this case, a '*general impact assessment*' has not been carried out.

43. Centrica supports Ofgem's proposals to introduce additional measures for consumers who experience self-disconnection and self-rationing, but as explained previously to Ofgem, Centrica has experienced complaints from customers who were self-disconnecting in the past, and we have fundamental concerns that customer dissatisfaction will only increase in light of these new and more invasive proposals by Ofgem to monitor and profile customer data to identify self-disconnection and self-rationing.

44. Centrica has severe concerns that Ofgem has not in any way assessed the proposed licence modifications with the level of caution that is appropriate when Member States think about affecting the rights set out in the GDPR. In fact, Ofgem appears to have given no consideration to the impact that its proposals will have to the rights in the GDPR at all. This falls short of Ofgem's legal and procedural requirements. At the very least, Ofgem should carry out an impact assessment (which includes a data protection impact assessment), which would allow it to assess the relevant considerations and safeguard '*the rights and freedoms of data subjects*' as set out in the GDPR.

45. The proposals as they stand would, if implemented, fly in the face of the requirements of the GDPR; and are likely to be vulnerable to challenge on that basis. This is not some arid point. Ofgem is well aware that many customers do not want their data processed in this way. It is incumbent on Ofgem to consider the GDPR issues with far more circumspection and in far more detail.

[60] Article 35(10) GDPR.

Annex 3 - Responses to Ofgem's questions

Question 1 Do you agree with our proposal to require suppliers to identify prepayment self-disconnection and the associated proposed licence conditions?

Ofgem's policy objective is to reduce the number of customers who are self-disconnecting each year and to reduce the detriment caused by self-disconnection and self-rationing. It is our understanding that one of the factors leading to self-disconnection and / or self - rationing is the Government's roll out of Universal Credit, including potential sanctions and / or general waiting time to receive monies awarded by the Department for Work and Pensions (DWP) to its clients. Given this process is not one which can be affected in any way by energy suppliers, we once again, urge Ofgem to work with the relevant government departments to address the root cause. Suggesting changes to the energy licence conditions is not going to solve the underlying reasons why customers are disconnecting or reducing their consumption. If anything, creating additional burden and costs on energy suppliers, and ultimately customers, is likely to have adverse consequences.

By Ofgem's failure to properly tackle this issue with Government, this only further increases the negative perception and trust in the energy industry. It creates a 'fault' culture which is not of suppliers' making.

Similarly, we once again urge Ofgem to address the misalignment of its Standard Supply Licence Conditions (SLCs) relating to Third Party Deductions and DWP's own policy on Third Party deductions. DWP insists that Third Party deductions (previously Fuel Direct) as a payment option – is only available as a method for debt repayment and when there is the threat of disconnection. We have repeatedly asked Ofgem to act on this matter (as has Citizens Advice and our external auditors KPMG). It is not clear to us why Ofgem wilfully continues to ignore this request.

Upscaling proactive monitoring to cover all customers (and not only those who are in specific vulnerable situations or at risk of self-disconnection) will be a significant and costly exercise, involving the management of massive data sets and intensive resource and training efforts which we do not believe is included in the Price Cap methodology. However, we continue to reactively address some customers who may be self-disconnecting on a case by case basis, addressing their individual circumstances and in line with the ATP principles.

The current ATP principles and the existing Standards of Conduct do in fact already create a framework for suppliers to consider the consumer's needs should they be at risk of self-disconnection. We believe this should be at each individual supplier's discretion, based on learnings and best practice associated with cost effective and successful targeting of customers for whom this type of support is appropriate. The basis of the harm that Ofgem is trying to avoid for self-disconnection is in relation to vulnerable customers and not, for example, a vacant property where a landlord has chosen to self-disconnect as no energy is being used.

Question 2 Do you agree with our proposal to require suppliers to identify self-rationing and the associated proposed licence conditions?

No, we do not agree with the current proposal to identify self-rationing or the associated proposed licence conditions.

The definition of self-rationing where a consumer 'deliberately limits their energy use to save money for other areas' is too broad to be able to operationalise adequately and it fails to identify consumer detriment, as per Ofgem's intention. For suppliers to correctly identify when a consumer is self-rationing because they cannot afford to pay for their energy, Ofgem must clearly define the specific criteria that it feels will identify these consumers. Self-rationing is a completely subjective matter, and as such, without direct interaction with the consumer or their representative, a supplier cannot provide the intended level of support that Ofgem is expecting to achieve through these proposals.

Additionally, paragraph 3.23 of Ofgem's consultation paper that discusses the policy intention, did not set out (as it did for self-disconnections) the need to provide support. This is inconsistent with the proposed SLCs. Ofgem has woefully failed to be sufficiently clear in its consultation document to enable suppliers to apply "intelligent consideration" to its proposals.

We believe that assessing this scenario with a customer is also highly intrusive in nature, and many consumers may not welcome, nor understand, this level of monitoring. We are not comfortable with the monitoring of self-rationing without a full Data Protection Impact Assessment (DPIA) being carried out, alongside a Legitimate Interests Assessment for such intrusive monitoring and urge Ofgem to undertake these assessments in advance of any further consultation on this matter. We would welcome further discussion with Ofgem, specifically on the points around privacy and the General Data Protection Regulations (GDPR).

Introducing monitoring of self-rationing activity across both credit and prepayment customers would significantly increase operational costs, and we do not believe these costs are considered within the Default Tariff or Prepayment (PPM) Price Caps. Any increase in monitoring activity (assuming this is even feasible) which extends beyond what we already do would attract significant additional costs, training and data mining beyond which we believe have been considered as part of the Default Tariff and PPM Price Caps.

We would find it useful to understand from Ofgem and other suppliers which use Estimated Annual Costs (EAC), vend and consumption data, how they manage such considerable data sets in a cost-efficient manner, and to understand what customer outcomes this enables. Similarly, it would be helpful to gain an understanding from any suppliers using thresholds of energy consumption to define household consumption, and how such conversations are balanced with consumers when considering energy efficiency and affordability.

Ofgem has failed to convey the scale of self-rationing and has acknowledged (in paragraph 2.17) that there is no data on self-rationing from suppliers. Ofgem is using the specific reports from Christians Against Poverty (CAP) and BEIS to establish that there is a problem. However, the CAP report was on a small scale which is not statistically robust enough to draw any meaningful conclusions from it and whilst the BEIS report was focussed on looking at fuel poverty and the difference between theoretical energy consumption and actual consumption, it was not looking specifically at self-rationing. Whilst the BEIS report found that lower income households are more likely to restrict consumption, there could be several reasons for this, including following energy efficiency measures. We feel undue weight has been given to these reports. This is yet another reason why it is imperative that Ofgem conducts a full impact assessment to establish the need for action and the costs of different solutions.

Monitoring self-rationing is not going to tackle the underlying causes of poverty and fuel poverty. As mentioned above, and flagged several times to Ofgem officials, Ofgem could take proactive action to address some of the root causes by speaking directly with DWP and other Government departments about the roll out and effectiveness of Universal Credit.

The ability to identify self-rationing is made more difficult because of the many reasons that could be driving any data that displays a change in consumption, e.g. is the consumer being more Energy Efficient? Is the consumer choosing to spend more on other necessities, or luxuries? Do they have a particularly costly period in their life and are making life choices which are short term? Not all changes in consumption and consumption habits will be attributable to poverty / fuel poverty.

The complexity of consumer situations is clear; however, the suggestion that suppliers could use some thresholds of the amount of energy used to understand detriment is verging on the absurd. This would fail to appreciate that every consumer is different, their homes and energy needs are different at different times, their income is different and the choices they make about what they spend their money on are personal choices which consumers are free to make. The reasons for changing energy consumption are all part of a complex and ever-changing picture. It is difficult to see how a supplier could anticipate fuel poverty, or even wider poverty, and as such, be able to accurately identify self-rationing of energy use because of that fuel poverty.

If Ofgem is suggesting that suppliers ask customers intrusive questions to establish what they spend their money on and why, then this is deeply disturbing. This is not an area we consider suppliers should be held responsible for, and should be explored further through Government, consumer groups and debt related charities to encourage the self-help support available for consumers who are more generally struggling to make ends meet, and where energy is only one factor of many.

Notwithstanding this, the current ATP obligations in the supply licence conditions and principles and Standards of Conduct provide a robust framework to ensure that consumers who are struggling to pay for

their energy are provided with appropriate support and information. If Ofgem has concerns that new entrants and smaller suppliers are not meeting these obligations, it is for Ofgem to properly investigate these suppliers and resolve why they are not providing the support that is already currently required. Creating new licence conditions is not going to encourage better outcomes from those suppliers which are not even complying with the current framework to support consumers in vulnerable situations.

Question 3 a: Do you agree with our proposal to require suppliers to offer emergency and friendly credit functions for all customers? Question 3b: Do you agree with our associated proposed licence conditions?

We consider Emergency Credit to be a standard offering to all our customers with PPMs and plan to continue to offer the current level of Emergency Credit as we do today. This includes notifying customers on how Emergency Credit is available through their meter, at the point of, or prior to, its installation.

Friendly Credit is available on some PPM electricity meters and all Smart PPM meters that we install. However, we would not consider it technically feasible to upgrade the functionality of non KBC/D electricity meters or traditional gas meters to provide this Friendly Credit service. Instead, we can consider providing customers with the option of wind-ons, or the collection of messages / replacement devices from outlets, where appropriate.

We consider that our rollout of Smart PPMs will help to address the ability to offer Friendly Credit without attracting additional costs which are ultimately passed on to customers. However, we will continue to assess customers' needs on a case by case basis, should they find themselves in difficulty and without access to funds or the means with which to access their energy supply.

The proposed SLC 27A.4 refers to "short-term" support in a "timely manner". However, it is not clear what exactly these terms mean, and we would suggest that these terms need to be clearly defined by Ofgem to avoid any uncertainty or inconsistency in a supplier's approach.

Please see Annex 4 for specific amendments on the proposed licence conditions.

Question 4 Do you agree with our proposal to require suppliers to offer discretionary credit for customers in vulnerable circumstances? Question 4b: Do you agree with our associated proposed licence conditions?

No. We do not agree with the proposals that Discretionary Credit should be mandated by a licence condition.

In paragraph 4.32 of the consultation document it states that, "We are therefore proposing to require suppliers to have a policy of offering discretionary credit to customers in vulnerable circumstances and who have been identified as having self-disconnected, either via supplier's own monitoring or where the customer or a third party has informed the supplier." However, within proposed SLC 27A.5 there is an inconsistency with the policy intention, as it refers to suppliers being obliged to offer Discretionary Credit for where the Domestic Customer encounters an event of self-disconnection and / or self-rationing. We do not think that it is relevant, appropriate or affordable for suppliers to offer Discretionary Credit in instances of self-rationing, as the customer is not off supply. In these instances, suppliers should refer to the ATP principles to reach a suitable resolution with the customer. The purpose of Discretionary Credit is to resolve the immediate issue of harm when a customer is off supply.

It is not appropriate that suppliers should be mandated to offer Discretionary Credit in all instances of self-disconnection. It should be left to the supplier and their individual discussion with the customer to decide when it is appropriate for credit to be offered. This approach would more firmly align with the intention of good customer outcomes, using Principles Based Regulation and enables suppliers to utilise insight of their own customers to discuss, agree and deliver great outcomes.

We also believe that Discretionary Credit is not always the most appropriate solution for every customer. Whilst the provision (or continuous provision) of Discretionary Credit can serve as a short-term solution for some customers who continually get into debt, it does not help those customers' budgeting practices in the future and may result in a continuous and never-ending cycle of debt.

Please see Annex 4 for specific amendments to the proposed licence conditions.

Question 5: Do you agree with our proposal to incorporate the Ability to Pay principles in the supply licence?

As set out in our response dated 8 August 2019 to Ofgem's Draft Consumer Vulnerability Strategy (CVS), we are broadly comfortable with incorporating the ATP principles into the supply licence. However, we will require Ofgem to consult properly and give much more clarity on how the principles will be amended (and operate in practice) before we can properly assess Ofgem's proposals.

Specifically, clarification is needed as to whether Ofgem is proposing to copy the main headings of the ATP Principles into the Supply Licence Conditions or to include the full detail of the ATP Principles in their entirety, as set out in Figure 2 in the consultation proposal document. We would also expect the ability to consider the exact details of the future proofing and additional changes that Ofgem alludes to in the consultation.

We have set out in our response to Question 6 the additional changes that we would like to see incorporated within the proposed ATP licence conditions.

Question 6 Do you agree with our proposal to update the Ability to Pay principles to reflect changes in supplier debt recovery practices? Are there other changes that we should implement?

We urge Ofgem to specifically outline what is meant by the 'changes in supplier debt recovery practices' and to consider any Impact Assessments or Data Protection Impact Assessments that may be necessary, along with a full and proper consultation before making any updates to the Principles as they apply to suppliers currently.

We have considered some further changes to the ATP principles which we strongly believe should be incorporated:

- Ofgem must provide clear guidance on what is meant by 'all available information must be considered'. For example, a supplier who pays for and accesses external credit bureau information in the interests of understanding the customer's full circumstances could find themselves at a disadvantage as the information has become available to them. Their options may adversely be more limited than suppliers who choose not to make use of this information. Without any clear guidance on what is expected, suppliers could choose to use only very limited available information, resulting in customer detriment through unacceptable repayment rates not based on the full customer circumstances.

- Any changes to debt recovery practices need to acknowledge and make provision for those customers who choose not to engage with their supplier. Ofgem must accept and acknowledge that some consumers will choose to never engage with their supplier or they will avoid any contact from their supplier.

- As we set out in our CVS response, there is a need for Government to take the lead on affordability, with Ofgem and other regulators playing a supporting role. Affordability and low incomes reflect wider poverty than just fuel poverty. Ofgem should encourage the DWP to take the lead on identifying which individuals and families receive support, including support on energy bills. This is particularly pertinent where:

    - Customers simply do not have any ability to pay for their energy. It is neither sufficient nor indeed realistic to have an obligation that requires suppliers to set a repayment rate based on a customer's ability to pay where there is no means to pay, as the intended outcome would be no repayment commitment. This is neither helpful to the customer, nor to the supplier and this must be acknowledged by Ofgem.

    - Where a customer states they cannot afford their energy bill due to significant other bills e.g. broadband / internet / satellite TV bills, it is not a supplier's responsibility to determine how the customer attributes / prioritises their money to their bills. However, this does cause suppliers

difficulties in setting up affordable repayment rates with the customer in order to to get the customer energy debt free.

Annex 4 – Comments on proposed licence conditions – with tacked changes for ease of reference

Condition 27A Self-disconnection and Self-rationing

Policy intent: We are proposing to introduce a new licence condition regarding self-disconnection and self-rationing. We are planning for this to include our proposal to require suppliers to identify customers who are self-disconnecting and self-rationing and to require suppliers to offer Emergency, Friendly and Discretionary Credit.

Identifying Self-disconnection and Self-rationing

27A.1 Where a Domestic Customer uses a Prepayment Meter the licensee must take all reasonable steps to identify whether a Domestic Customer who is in a vulnerable situation is Self-disconnecting, ~~give due consideration to customers who are in a Vulnerable Situation,~~ and offer appropriate support where needed, in accordance with this condition ~~SLC~~ 27A.

~~27A.2. Where the licensee has identified a Domestic Customer as being in a Vulnerable Situation, the licensee must take all reasonable steps to identify whether that Domestic Customer is Self-rationing, regardless of payment method, and offer appropriate support where needed, in accordance with this conditionSLC 27A.~~

Provision of Emergency Credit and Friendly Credit

27A.3 Where a Domestic Customer uses a Prepayment Meter the licensee must offer Emergency Credit and Friendly Credit to the Domestic Customer, unless it is technically unfeasible and outside of the reasonable control of the licensee to offer these credit facilities. In assessing the sum of Emergency Credit and Friendly Credit offered and the related repayment rate, the licensee must adhere to condition ~~SLC~~ 27.8.

27A.4 Where it is technically unfeasible and outside of the reasonable control of the licensee to offer Emergency Credit and Friendly Credit to the Domestic Customer, the licensee must take all reasonable steps to provide that Domestic Customer alternative and appropriate short-term support in a timely manner.

Provision of Discretionary Credit

27A.5 Where the licensee has identified a Domestic Customer who uses a Prepayment Meter as being in a Vulnerable Situation, and that Domestic Customer encounters an event of Self-disconnection ~~and/or Self-rationing~~, at the premises which are supplied by the licensee, the licensee must consider if it is appropriate and reasonable in all the circumstances to offer Discretionary Credit to that Domestic Customer in addition to the support offered in condition~~SLC~~ 27A.3 or~~and~~ 27A.4. In assessing the sum and frequency of Discretionary Credit offered and the related repayment rate, the licensee must consider this on a case by case basis and must adhere to condition~~SLC~~ 27.8

Provision of Information

27A.6 The licensee must ensure that each Domestic Customer who uses a Prepayment Meter is given adequate information, at an appropriate time, of the licensee's Emergency Credit, Friendly Credit and Discretionary Credit facilities (as appropriate) including what they are~~this is~~, when they~~this~~ can be used and how they are~~this is~~ repaid by the Domestic Customer.

Definitions

In this condition:

"Emergency Credit" means

an interest free ~~fixed loan of~~ credit provided to a Domestic Customer when that Domestic Customer's Prepayment Meter ~~credit~~ runs low or runs out to ensure continuity of [gas / electricity~~-~~] supply or return on supply.

"Friendly Credit" means

an interest free ~~loan of~~ credit provided overnight and/or weekends and public holidays to a Domestic Customer when that Domestic Customer's Prepayment Meter credit runs low or runs out to ensure continuity of [gas / electricity~~-~~] supply or return on supply.

"Discretionary Credit" means

an interest free discretionary ~~loan of~~ credit provided to a Domestic Customer in a Vulnerable Situation when that Domestic Customer's Prepayment Meter credit runs out to ensure return on [gas / electricity~~-~~] supply.

"**runs low**" means the Domestic Customer has less than [x] credit on their Prepayment Meter.

"Self-disconnection" means

When a Domestic Customer uses a Prepayment Meter and experiences an interruption to their [gas / electricity] supply because the credit on the meter has been exhausted or the credit is not easily accessible.

"Self-rationing" means

When a Domestic Customer deliberately limits its [gas / electricity] use [*wording to be provided by Ofgem which is specific, clear and capable of being interpreted in practice to deliver the outcomes*]~~to save money for other areas~~

Condition 28 Prepayment Meters

Policy intent: In addition to the proposed new requirement 27A.6 on provision of information relating to the provision of Emergency, Friendly and Discretionary Credit, we are proposing to introduce an additional requirement on information provision as part of existing supply licence conditions when a prepayment meter is installed to ensure consistency across the rulebook. It is important that customers are aware of the support available at all points of the customer journey. We have set out in red the additional requirement we are proposing to introduce.

Information about Prepayment Meters

28.1 If the licensee offers to enable a Domestic Customer to pay or a Domestic Customer asks to pay Charges through a Prepayment Meter, the licensee must provide, prior to or upon the installation of that meter, appropriate information to that customer about:

(a) the advantages and disadvantages of a Prepayment Meter;

(aa) information relating to the operation of the Prepayment Meter, including information about the process for, and methods by which, the Domestic Customer can pay in advance through the Prepayment Meter;

(b) where he may obtain information or assistance if: (i) the Prepayment Meter is not operating effectively; or (ii) any device used to allow the Charges to be paid through the Prepayment Meter is not operating effectively;

(bb) the licensee's Emergency Credit, Friendly Credit and Discretionary Credit facilities as defined in condition~~SLC~~ 27A including what they are~~this is~~ and when they~~this~~ can be used (as applicable) by the Domestic Customer; and

(c) the procedures that the licensee will follow when removing or resetting the Prepayment Meter, including the timescale and any conditions for removing or resetting it.