

Sent by email

Project Manager
Competition and Market Authority
Victoria House
37 Southampton Row
London
WC1B 4AD

7th April 2016

Dear Sir/Madam,

COMPETITION AND MARKETS AUTHORITY (CMA) PROVISIONAL DECISION ON REMEDIES

Gemserv welcomes the CMA's Provisional Decision on Remedies. This is Gemserv's fourth response to the CMA, and focuses on three key areas:

1. Price Comparison Website (PCW) access to the Electricity Central Online Enquiry Service (ECOES) as outlined in Chapter 6 (Domestic retail: helping customers engage to exploit the benefits of competition);
2. New responsibilities for Ofgem to produce a strategic direction and a set of strategic work plans for code modifications outlined in Chapter 10 (governance of the regulatory framework); and
3. The licensing of code administration as outlined in Chapter 10 (governance of the regulatory framework), and how best to ensure the proposed remedy is able to meet its stated objectives.

1. PCW Access to ECOES

Within its Provisional Decision, the CMA states that it recommends an "*order to Gemserv...to give PCWs access upon request to the ECOES...database*"¹. In this section of our response, we provide clarification around Gemserv's role with regard to ECOES, explaining that due to current governance arrangements, Gemserv does not have the authority to grant access to ECOES.

Gemserv is responsible for the ongoing management and service delivery for the ECOES infrastructure in accordance with the service agreement between Gemserv and MRASCo Limited (a copy was provided to the CMA on 25th November 2015). However, the governance of ECOES (including access) is managed under the Master Registration Agreement (MRA).

The MRA is governed on a day-to-day basis by the MRA Executive Committee (MEC), with service delivery discharged to Gemserv under the role of code administrator. Consequently, it is MEC that approves ECOES access, not Gemserv.

The MRA has a number of ancillary documents known as MRA Agreed Procedures. These are mandatory procedures to which MRA Parties must adhere. MRA Agreed Procedure 15² provides processes and procedures around the governance and maintenance of ECOES. Section 4.12 of the procedure may be helpful to the CMA in that regard as it confirms that, whilst the ECOES Central Administration Service (CAS) is responsible for processing applications (currently Gemserv), it is MEC that is responsible for granting access. Gemserv cannot therefore decide which parties gain access.

Consequently, with respect to the CMA's proposal to issue an order to Gemserv to give PCWs access upon request to the ECOES database, Gemserv recommends that the 'order' be addressed to the Chairman of the MRA Executive Committee and directed at MRASCo Limited. The MRASCo Limited registered address is the same as it is for Gemserv Limited (see below).

In the meantime, it is worth highlighting that MEC has set up an MRA Working Group to consider the terms and conditions for PCW access to ECOES.

¹ CMA, 17th March 2016. *Energy market investigation*. Paragraph 102 p.23

² <https://www.mrasco.com/mra-products/mra-agreed-procedures>

2. New responsibilities for Ofgem to produce a strategic direction and a set of strategic work plans for code modifications

Gemserv are very supportive of this remedy. We have been advocating a very similar approach for some time, culminating in the publication of our Thought Leadership Paper on Transforming Code Governance Arrangements³, a copy of which was provided to the CMA on 11th December 2015.

We have discussed our proposals with Ofgem, which have a strong bearing on the CMA's proposed remedies package. For example, we proposed the establishment of a strategic body to oversee strategic direction which is very aligned to the CMA's remedy of a consultative board to serve as a forum for addressing cross-cutting code issues⁴. Our proposals as presented in our Thought Leadership Paper were well received and perceived as a possible precursor to the licensing regime being advocated for Code Administrators.

We also advocate that improvements to code harmonisation would benefit from a Standard Code Model (SCM) - a blueprint for a code drawing upon industry best practice - with input by the Code Administration Code of Practice (CACoP) Working Group in order to facilitate this.

The CMA may wish to consider enhancing its proposed remedies package to include the development of a SCM.

In the meantime, we shall continue to work alongside Ofgem and industry stakeholders to help speedily progress the CMA remedies and Ofgem's Code Governance Review (phase 3) work.

3. Licensing of code administration

In our previous responses to the CMA, we have explained there are a number of important considerations to take into account as we move forward toward the licensing of code administration, as proposed by the CMA⁵. In particular, the CMA notes⁶ that by licensing the activities of code administrators and code change delivery, this proposed remedy aims to give Ofgem the power to efficiently monitor performance of the relevant code bodies, give them directions and impose sanctions.

In order to best achieve this, Gemserv supports an incentive based model for code administrators - where there is no guarantee of future revenue other than under a competitively won contract; and where a code administrator is able to reap the rewards of success, but suffer the consequences of failure. Indeed, to do otherwise runs counter to the CMA's objective to ensure that the imposition of sanctions delivers strong accountabilities and to ensure that incentives placed upon code administrators are aligned with those of customers.

It is difficult to see how a licensing regime could be fully effective unless the two go hand-in-hand, i.e. where licensing ensures there are strong accountabilities against which performance can be measured and enforced, and a fully competitive code regime ensures the licensing impacts are felt by the code administrators themselves.

As previously highlighted to the CMA, all Gemserv's code administration work is secured on a competitive tender basis, which drives efficiencies and innovation, meaning we are constantly improving the services we deliver, and keeps down costs for the industry and therefore customers.

The CMA notes that "*Code Administrators are not consistently subject to competitive constraints for their services*"⁷ and "*there is no common approach to funding or contracting Code Administrator services*"⁸ leading to a disparity between current code administrators⁹. Gemserv agrees with the CMA that there is a lack of a uniform approach to funding, and we also believe this disparity causes a significant issue with regard to competition in code administration.

The CMA's proposal for Ofgem to award licences to each of the current code administrators (and delivery bodies) before considering whether it would be appropriate to initiate a competitive tender for those licences¹⁰, concerns

³ <http://www.gemserv.com/insights/thought-leadership-papers/transforming-code-governance-arrangements/>

⁴ CMA, 17th March 2016. *Energy market investigation*. Paragraph 10.404 p.721

⁵ CMA, 17th March 2016. *Energy market investigation*. Paragraph 191 p.41

⁶ CMA, 17th March 2016. *Energy market investigation*. Paragraph 10.367 p.712

⁷ CMA, 17th March 2016. *Energy market investigation*. Appendix 1.4: *Reform of code governance*. Paragraph 25, p.7

⁸ CMA, 17th March 2016. *Energy market investigation*. Appendix 1.4: *Reform of code governance*. Paragraph 10, p.17

⁹ CMA, 17th March 2016. *Energy market investigation*. Appendix 1.4: *Reform of code governance*. Paragraph 25, p.7

¹⁰ CMA, 17th March 2016. *Energy market investigation*. Paragraph 10.447 p.732

Gemserv. We believe that code contestability must be considered in line with licensing such that sanctions may not apply under the licence until after full code contestability is realised. This is primarily because, without a consistent approach to funding, code administrators will incur different risks which is particularly prevalent with regard to sanctions borne from licensing.

For example, a code administrator which competes via open tender for every contract faces the fundamental risk of losing contracts. A code administrator which, for example, is a subsidiary of another industry participant, not for profit, or which delivers a contract/service under licence (i.e. a deemed contract), does not face the same risk of losing a contract, particularly where there is no re-tender process. The risk these types of organisations incur with regard to losing a contract is negligible. This drives very different behaviours.

Gemserv have long been advocating a pro-competitive position, including a recent response to a code change¹¹ which highlights the challenge whereby code administrators that operate non-competitive code models are incompatible when it comes to engaging in competitive market services.

As code administrators are at different 'starting points' in terms of business models, it is vital that the process toward licensing includes establishing a consistent funding approach to provide a level playing field. Taking the time to get the implementation of licensing right, and addressing the issue of inconsistent business models, is vital to the success of the remedy and the CMA's objectives to deal with the AEC.

The consequences of not addressing the inconsistency ahead of licensing carries risk. Licensing will invoke significant changes to code administrators including a change in liabilities. Should a code administrator be sanctioned for example, the question arises around who pays. The current set-up means different industry participants pay depending on the governance of that particular code. Gemserv, for example, would be likely to bear the risk of enforcement action directly.

In other business models, like not for profit, the risks and consequences of sanctions are passed through to industry (and ultimately customers). The company breaching its licence is therefore not bearing the consequence of its breach, and therefore its behaviours will not be aligned with the CMA's desired outcomes for this remedy.

Whilst all industry codes are different in terms of their complexity and what they cover, undoubtedly behaviours change where there is a real risk of competitive pressure placed on those codes and their administrators. Competition in code administration ensures that organisations that look after codes remain focused on the quality of service; it ensures efficient pricing of goods and services; and it drives organisations to innovate in order to stay ahead of its competitors. Critically, it ensures they are exposed to any underperformance.

That said, we agree with the way forward proposed by the CMA¹². Namely that, certainly as a first step, Ofgem should award licences to each of the current code administrators (and delivery bodies). This would lay the foundations for moving forward.

However, in order to deliver the full benefits of the proposed remedy, it will be necessary to ensure there is full contestability for all codes i.e. for all code administrator funding arrangements to be fully exposed to the risks of their business decisions. Since this will take time to secure, we recommend the CMA advise Ofgem to defer the possibility of 'sanctions' under a licensing regime, until the code contestability issue is resolved. The CMA might consider including a "backstop" date whereby sanctions and code contestability can be implemented as a package.

We hope you find our comments useful. If you have any comments or questions about this, please let me know as I am very happy to discuss these further with the CMA.

Yours faithfully,

Tony Thornton | Head of Transformation

¹¹ <https://www.elexon.co.uk/wp-content/uploads/2015/12/P330-Assessment-Procedure-Consultation-Responses-v2.01.pdf>

¹² CMA, 17th March 2016. *Energy market investigation*. Paragraph 10.448 p.732