

Legal Drafting Commentary

This commentary is divided into two main parts, the first deals with the text for self-governance and the second part with the text for SCR

Part 1 - Implementation of Code Governance Review 3 Decision on the assessment of the materiality of Modification Proposals in connection with the determination of whether or not the Self-Governance Process should apply.

Overall the proposed changes implement [Ofgem's CGR3 Final Proposals](#) and the requirement in the [Annex to its letter to the Panel Chairman of 3 May 2016](#). The latter requires "modifications to codes such that Industry assesses whether a modification is material, and therefore requires the consent of the Authority, in deciding whether to use the self-governance route

Modification Rule (MR) 6.6.7 has been added so that where it concludes that a Modification Proposal does not meet the Self-Governance Criteria the Panel has to explain its reasons to Ofgem.

MR 7.2.2 has been amended to make it clear that the Panel must make determinations under MR 7.2.3 including as to whether or not the Modification Proposal satisfies the Self-Governance Criteria.

MR 7.2.2(g) requires the Panel to determine whether or not the Modification Proposal can be expected to have a material impact, having regard to any guidance as may be inserted into the Code Administration Code of Practice on what amounts to a material impact for the purposes of determining whether it is necessary to refer Modification Proposals to Ofgem for determination, as well as the Proposer's views as set out in the Proposal.

MR 7.2.3(a) has been changed so that it also deals with determinations that the Self-Governance Criteria are not satisfied.

Part 2 - Implementation of Code Governance Review 3 Decision on Significant Code Reviews

Section A shows the mapping of the licence changes to the modification rules and section B provides a commentary of the routes for both the Option 2 and Option 3 listed in the CGR3 decision document. Under Option 2 Ofgem raises an SCR modification proposal that follows the usual route and under Option 3 Ofgem raises an SCR modification proposal that goes straight to Panel. Note that in section A below the term 15CB Mods refers to Mods made in the circumstances specified in Mod Rules 6.1.4 (that is Option 3 route Mods, not SCR Mods which go through the normal Option 2 route). They are so called because 15CB is the licence paragraph that enables them.

A) Standard Licence Condition A11 Modifications Mapped to Amended Modification Rules

Para 9(a): Without prejudice to “paragraphs 15A to 15CD”.

No need for change: The new provisions implementing 15C to 15CD are not overridden by procedures for modifying the Codes.

P. 9(i) Extended to cover Modification Proposals made by Ofgem or the licensee “which fall within the Scope of 15CE” (i.e. Significant Code Review Modification Proposals as well as EU law compliance Modification Proposals).

MR 6.1.1(e) amended to enable Ofgem to make Significant Code Review (SCR) Modification Proposals to amend the UNC. MR 6.1.2(d) amended to enable Ofgem to make SCR Modification Proposals to amend individual network codes. New MR 1.1(m) has been inserted to reflect the central thrust behind the SCR licence changes and MR 1.1(d) and (e) have been amended to recognise that Ofgem’s ability to make Modification Proposals is not restricted solely to circumstances where modification is required to comply with EU Law. MR 1.1(b) and (c) have been amended for the sake of consistency with amended MR 1.1(d) and (e). MR 1.1(d) and (e), as well as (f), (g) and (k) have also been amended to reflect the different treatment accorded to Ofgem SCR Modification Proposals made in the circumstances described in paragraph 15CB. (See commentary on paragraphs 15CB and 15CC and related legal text below)

(i) Significant Code Review Modification Proposals to be accepted into the Modification Procedures by the Panel.

No need for change – MR 7.1.1(c) already requires the Secretary to submit all Modification Proposals made under the Rules to the Panel.

(ii) Significant Code Review Modification Proposals made by licensee not to be withdrawn without Ofgem’s consent.

MR 6.5.1 states that the right to withdrawal a Modification Proposal is subject to MR 6.5.7. MR 6.5.7 has been changed so that it also prevents Transporters from withdrawing Significant Code Review Modification Proposals without Ofgem consent.

(iii) Significant Code Review Modification Proposals to proceed in accordance with the timetable directed by Ofgem.

MR 12.5.2 has been changed so that Ofgem may also dictate the timetable for Significant Code Review Modification Proposals.

9(j) Transporters and Panel to follow the timetable dictated by Ofgem for Significant Code Review Modification Proposals.

MR 12.5.2 has been amended to enable Ofgem to make directions as to the timetable for the processing and implementation of Ofgem SCR Modification Proposals (including 15CB Modification Proposals). MR 12.5.3 already provides that directions as to timetables under MR12.5.2 must be implemented.

9(j)(ii) See the commentary on 15CC regarding new rules implementing the requirements of 15CC.

10(a)(v) Ofgem can make Significant Code Review Modification Proposals which do not relate to a UNC Charging Methodology

MR 6.1.1(e) has been modified so that Ofgem may make Significant Code Review Modification Proposals in respect of the UNC.

10(ab) Ofgem can also make Significant Code Review Modification Proposals which do relate to a UNC Charging Methodology.

MR 6.1.1(e) has been modified so that Ofgem may make Significant Code Review Modification Proposals in respect of the UNC.

10(b) Although there is no change to this provision, having regard to the existing MR 1.1(d) and the scope of Ofgem's *Code Governance Review (Phase 3): Final Proposals*, the intent appears to be that Ofgem (which is in fact mentioned at 10(ab), though only in a limited capacity as far as making Modification Proposals is concerned) should only be entitled to make alternative modification proposals where the original Modification Proposal is a Significant Code Review Modification Proposal or relates to compliance with EU law.

MR 1.1(d) (which describes the procedures that the Modification Rules should provide for with respect to alternative Modification Proposals in relation to the UNC) is now made subject to a new MR 6.4.5(c) which circumscribes Ofgem's rights to make alternate modification proposals (including by replicating the wording with respect to EU compliance Modification Proposals deleted from MR 1.1(d)) to the circumstances specified in paragraphs 10(a)(v), 10(ab) and 11(a)(v). Cross-referencing errors in MR 6.4.1(a) and (b) have been corrected to make it clear that Ofgem may raise alternate Modification proposals. MR 6.4.1 has also been amended to make it clear that Ofgem's right to make alternate Modification Proposals only extends to proposals relating to a Significant Code Review or required to comply with EU law.

10(a)(v) Extended so as to give Ofgem the right to make Significant Code Review Modification Proposals in relation to the Uniform Network Codes.

MR 6.1.1(d) has been modified so that Ofgem may make Significant Code Review Modification Proposals in respect of individual network codes.

11(a)(v) Extended so as to give Ofgem the right to make Significant Code Review Modification Proposals in relation to individual network codes.

MR 6.1.2(d) has been modified so that Ofgem may make Significant Code Review Modification Proposals in respect of individual network codes.

11(b) Although there is no change to this provision, the intent appears to be that Ofgem (which is mentioned at 11(a), though only in a limited capacity as far as making Modification Proposals is concerned) is not entitled to make alternative modification proposals by virtue of its right to make Significant Code Review Modification Proposals, and that that entitlement should only relate to making alternative modification proposals to Significant Code Review Modification Proposals.

MR 1.1(e) (which describes the procedures that the Modification Rules should provide for with respect to alternative Modification Proposals in relation to the individual network codes) is now made subject to a new MR 6.4.5(c) which circumscribes Ofgem's rights to make alternate modification proposals (including by replicating the wording with respect to EU compliance Modification Proposals deleted from MR 1.1(e)) as appropriate.

13(a) Includes a new reference to Modifications to comply with paragraph 15CC(b)(i).

See the commentary on 15CC(b)(i) regarding new rules implementing the requirements of 15CC(b)(i)

15 The exclusion of Modification Proposals made by Ofgem under paragraph 15CB from the reporting requirements under paragraph 15 is implemented through the new MR 7.2.11, which excludes such Modification Proposals from the standard consultation process set out in MR 7.2.1 to 7.2.10 and 7.3. As consultation does not take place under 7.3, there is no obligation to prepare and circulate a Modification Report on the outcome of the consultation under MR 9.1.1. Such Modification Proposals go directly to the Panel for a decision as to whether or not to recommend implementation.

15A The change in this paragraph to the effect that restrictions on Modification Proposals in respect of the subject of an ongoing Significant Code Review do not apply to Modification Proposals made by Ofgem under paragraph 15CB has been implemented by the new 7.2.11 which dis-applies MR 7.2.8 with the result that the provisions of MR 6.7.1 and 6.7.2 do not apply to such proposals. MR 6.7.3 has been amended to make it clear that it does not apply to Modification Proposals made by Ofgem under paragraph 15CB. 15C Various changes regarding the ending and continuation of a Significant Code Review Phase.

No change required. The definition of Significant Code Review Phase in MR 2.1 relies on the definition of Significant Code Review Phase at paragraph 24(a) which has been

changed to reflect the changes as to the ending and continuation of Significant Code Reviews at 15C.

15CA Changes regarding the ending of a Significant Code Review Phase where Ofgem has issued a statement that it will continue work on the review.

No change required. The definition of Significant Code Review Phase in MR 2.1 relies on the definition of Significant Code Review Phase at paragraph 24(a) which has been changed by the addition of a new paragraph (iv) so as to reflect the changes to 15CA regarding the ending of a Significant Code Review.

15CB Ofgem may submit a Modification Proposal directly to the Panel, where it has issued a statement that a Significant Code Review shall continue or where it has issued a back-stop direction.

In line with the new MR 6.1.2(d)(ii) and the revised definition of Significant Code Review Modification Proposal at MR 2.1 Ofgem may issue Significant Code Review Modification Proposals which, as provided by new MR 6.1.4, include Modification Proposals made in the circumstances specified at paragraphs 15C(bb) and 15CD. A new MR 6.2.1(q) requires Ofgem to identify a SCR Modification Proposal as such and, where it is made by Ofgem in the circumstances specified in paragraph 6.1.4 (that is to say on issuing a back-stop direction or a statement that the Significant Code Review is ongoing, as described in paragraph 15CB and the new MR 6.1.4,). It also requires Ofgem to produce its own legal text for such a proposal,.

15CC(a) Provides for the making of Panel recommendations in respect of Ofgem's SCR Modification Proposals made on issuing a back-stop direction or a statement that the Significant Code Review is ongoing, as described in paragraph 15CB and the new MR 6.1.4 (15CB Modification Proposals), the submission of such recommendations, along with reports on the factors on which they are based, to Ofgem, and the dissemination of such Modification Reports to Code Parties etc.

New MR 9.2.1 provides for the Modification Panel to make recommendations on whether or not in its opinion 15CB Modification Proposals should be implemented and specifying factors that should be taken into account in its determination (including compatibility with relevant licence conditions where the Modification Proposal relates to a charging methodology). New MR 9.2.2 provides for the preparation by the Code Administrator of a Modification Report on the Panel's recommendation, the submission of the report and recommendation to Ofgem and distribution to Code parties etc. This must be done within 5 business days or within such other period as the Ofgem directs.

15CC(b) Provides for 15CB Modification Proposals to be implemented where directed by Ofgem, and for Ofgem to be able to direct additional steps to be taken in relation to 15CB Modification Proposals.

MR 9.3.5 has been amended to enable Ofgem to determine whether or not a 15CB Modification Proposal is to be implemented (and the outcome to be notified to Code parties etc) and, where appropriate, for the modification to be made under 9.7.1. MR 9.3.8 has been amended to enable Ofgem to direct additional steps to be taken in relation to 15CB Modification Proposals.

15CC(c) Specifies that the Rules must require each of the procedural steps outlined in paragraph 15CC, to be in accordance with any timetable(s) directed by the Authority under paragraph 9(j). It also specifies that the discretion of the Panel and its members with respect to a 15CB Modification Proposal should not be fettered by Ofgem’s statements in relation to the proposal or the relevant Significant Code Review.

MR 12.5.2 has been amended to enable Ofgem to make directions as to the timetable for the processing and implementation of Ofgem SCR Modification Proposals – which include 15CB Modification Proposals)New MR 9.2.3 confirms that the discretion of the Panel is not inappropriately fettered.

MR 9.3.5 has been amended so that it covers Ofgem decisions following recommendations under MR 9.2.2 as well as under MR 9.3.3

MR 9.3.8(b) has been amended so that (as required by 15CC(b)(ii)) it covers Ofgem directions to revise notices etc. following receipt of a Modification Report under 9.2.2 as well as under 9.3.4.

MR 9.4.1 has been amended so that Modification Reports on Ofgem’s SCR Modification Proposals (whether or not made under MR 9.2.2 or 9.3) contain appropriate details.

MR 9.4.3 has been amended so that Modification Reports on Ofgem’s SCR Modification Proposals also serve as the notices to Ofgem of the Panel’s recommendation on the proposal, as required by 15CC(a).

15CD Ofgem may issue a back-stop direction requiring a Significant Code Review Modification Proposal and any alternatives to be withdrawn, in which case the Significant Code Review shall recommence.

New MR 6.5.8 provides for Ofgem to direct the withdrawal of Significant Code Review Modification Proposals and alternative proposals, and MR 6.5.2 has been amended so that the Secretary gives notice giving effect to such withdrawal. The recommencement of a Significant Code Review is covered by the definition of “Significant Code Review Phase” at MR 2.1 which refers to the amended definition at paragraph 24.

15CE Categorises Modification Proposals which are either (a) reasonably considered by Ofgem as necessary to comply with EU regulation or (b) in respect of a significant code review. References to Modification Proposals which are reasonably considered by Ofgem as necessary to comply with EU regulation in the Licence Condition have been replaced by references to Modification Proposals referred to at 15CE(a).

Changes to the description of the status of the Modification Rules have been made at MR 1.1(d) and (e) by replacing a description of Modification Proposals related to EU regulation with a reference to MR 6.2.5, which refers to such Modification Proposals as well as Modification Proposals in respect of a Significant Code Review. It is not necessary to change other references to Modification Proposals related to EU regulation in the existing Market Rules to References to MR 6.2.5(a).

24 Change to the definition of Significant Code Review.

No change required. The definition of Significant Code Review at MR 2.1 refers to the definition in the licence condition. See comments on 15C above.

B) Description of paths for Option 2 (Ofgem raises an SCR modification proposal that follows the usual route) and Option 3 (Ofgem raises an SCR modification proposal that goes straight to Panel)

Common processes for both Option 2 and Option 3

Section 6.2 applies to all Modification Proposal irrespective of whether they go through the Option 2 or Option 3 route. It simply says what information the Mod Proposal has to contain, and that it is given to the Secretary (who in turn passes it to the Panel under paragraph 7.1 - it is not practicable to provide for Ofgem to serve copies on individual Panel members).

6.2(q)(i) requires Ofgem to identify the Mod where appropriate as an SCR Mod and where appropriate as a SCR falling within 6.1.4 (i.e. one destined for the Option 3 Route) and where the Mod does fall within 6.1.4 to provide legal text (this is so that the Panel can make a recommendation directly without having to wait for a Modification Report and legal drafting to be prepared in the normal way).

The two processes reconverge at 9.3.5 which applies to final Modification Reports under the Option 2 route circulated pursuant to paragraph 9.3.4 as well as Modification Reports prepared (after the Panel has made its decision on recommendation under 9.2.1) under the Option 3 Route pursuant to paragraph 9.2.2. Under paragraph 9.3.8 Ofgem can require further work on a Mod that has followed the Option 3 Route in the same way as it can for an Option 2 Mod.

Option 2 modification proposals

An Ofgem SCR Mod that is not made in the circumstances described in 6.1.4 goes through the Option 2 route - normal modification procedures.

Mods following the Option 2 Route go through the normal processes it is just that they are raised by Ofgem.

Option 3 modification proposals

6.1.4 is a subset of the SCR Mods that Ofgem can issue under 6.1.1(e)(ii) (Uniform Network Code) or 6.1.2(d)(ii) (individual network codes) and this subset includes the two types of Ofgem SCR Mods that are described in the licence at 15CB. An Ofgem SCR Mod that is made in the circumstances described in 6.1.4 goes through the Option 3 route - straight to Panel for a recommendation.

Section 7 of the Modification Rules describe the process followed by proposals. Those following the Option 3 route diverge from the normal process at 7.1.1(c). When the Secretary sends a copy to the Panel there are placed on the agenda for a recommendation - there is no initial discussion process and paragraph 7.2.11 dis-applies the rest of section 7.2 from operating in the case of Option 3 Mods. Dis-applying section 7.2 also has the effect of dis-applying the processes that are dependent on determinations made under section 7.2 – namely sections 6.4, most of 6.5, sections 7.3 to 7.5 and section 8. Consequently provisions which are dependent on section 7.3 (preparation of Modification Reports) such as section 9.1 and paragraphs 9.3.1 to 9.3.4 will also not apply to Option 3 Mods.

NEXUS

Legal text has also been provided which shows the modifications change-marked against a version of the Modification Rules incorporating the Modification Proposal 440 changes to the Modification Rules (as well as subsequent changes to the Modification Rules). This text, rather than the original legal text for Modification Proposal 440, reflects the changes that should be made if Modification 440 is implemented after the SCR Modification Proposal.