

Legal Drafting Commentary

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

Modification Rule (MR) 6.6.1 has been amended so that Self-Governance Statements (defined in the licence as a statement confirming that, in the Panel's opinion, the Self-Governance Criteria are met) includes the Panel's opinion as to the materiality of the Modification Proposal.

The definition of the Self-Governance criteria is unchanged as there is no change in the licence and the provision at 7.2.3 regarding the assessment of the modification as against the Self-Governance Criteria is unchanged. The changes are the additional stages at 7.2 (g) and 7.2.11 which are designed to encourage the panel to be less cautious in applying the self-governance criteria.

Firstly they have to consider whether the impact is likely to be material (if so the self-governance criteria are not satisfied). This is slightly different from the current test of deciding whether it is unlikely to be material (in which case the self-governance criteria are satisfied).

Secondly 7.2.11 requires the Panel to account to Ofgem for decisions that the self-governance criteria are not satisfied in the same way as it already has to account for decisions that they are satisfied under a Self-Governance Statement as provided for by MR 6.6.1 and the existing licence provisions.

These two new provisions do not correspond to any specific licence conditions – which makes sense since the licence conditions have not changed – but neither are they inconsistent with any existing licence conditions.

Paragraph 7.2.2 prescribes the process that the Panel must go through before making a determination under 7.2.3. MR 7.2.2(g) specifies the factors that should be taken into account in determining whether a Modification Proposal is likely to have a material impact, including any such 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. It is worth noting that theoretically the Panel could determine under 7.2.2(g) that the Proposal if implemented is not likely to have a material impact and then go onto to determine under 7.2.3 that the Self –Governance Criteria are not satisfied, but it would be rather odd if it did and no doubt the chair of the panel would challenge the panel if they did this.

The test has to remain as it is in 7.2.3 – the Panel must determine whether the Proposal satisfies the self- governance criteria or not – and the self-governance criteria are that the proposal is unlikely to have a material impact. Making the Panel consider this question first (i.e. is the Proposal likely to have a material impact) should decrease the reluctance of the Panel to conclude that the self-governance criteria are in satisfied.

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

A new MR 7.2.11 has been added so that where the Panel determine that the Self-Governance Criteria are not they are required to report to Ofgem on why it is of the opinion that the Modification Proposal will have a material impact.

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”. As the former, Ofgems 's Final

Proposal as to self-governance is “that modifications should be assessed as to whether they require an Authority decision – i.e. why they are material” (paragraph 3.15).

Part 2 - Standard Licence Condition A11 Modifications Mapped to Amended Modification Rules

This implements the revision to GT licence Standard Special Condition A11.

https://www.ofgem.gov.uk/system/files/docs/2016/06/appendix_4_-_schedule_2_-_gas_transporter_licence_slc_a11_unc.pdf

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

No need for change: The new provisions implementing 15C 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 Modification Proposals to amend the UNC. MR 6.1.2(d) amended to enable Ofgem to make 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. (There is no point describing in the Modification Rules what the modification procedures are required to provide for in any more detail than this – that is the job of the amended Standard Licence Condition.)

(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 put all Modification Proposals made under the Rules to be submitted 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 MR6.5.7. MR6.5.7 has been changed so that also prevents Transporters from withdrawing Significant Code Review Modification Proposals without Ofgem consent.

(iii) Significant Code Review Modification Proposals to proceed 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.

No change required. MR 12.5.3 already provides that directions as to timetables under MR12.5.2 must be implemented. As for the Panel, MR 5.1.1 already provides that “those functions of the Modification Panel expressly provided in these Rules relating to the Modification Procedures and the Request Procedures shall be discharged in accordance with these Rules.”

- 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).
- 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)** 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 9.2.1

which excludes such Modification Proposals from the consultation process under MR 9.1.

15A The new reference to paragraph 15CB in this paragraph is reflected in the fact that the Modification Rules have been revised to enable Ofgem to make Modification Proposals as provided by 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 to the Panel, where it has issued a statement that a Significant Code Review shall continue, or a back-stop direction.

In line with the new MR 6.1.2(d)(ii) and M 6.1.3A and the revised definition of Significant Code Review Modification Proposal at MR 2.1 Ofgem may issue Significant Code Review Modification Proposals which include Modification Proposals made under paragraphs 15C(bb) and 15CD (“Authority SCR Modification Proposals”). Under the existing MR 7.1.1(c) and 10 the Modification Proposal will be submitted to the Modification Panel by the Secretary to the Panel. The legal drafting does not include a new process whereby Ofgem itself submits the Modification Proposal to the Panel; the process for Ofgem or anyone else to submit a Modification Proposal to the Panel is to send a copy to the Secretary in line with MR 6.2.2. It has been assumed that a Modification Report will have to be prepared for the Panel following the receipt of an Authority SCR Modification Proposal (though without any consultation process) and that it is not the intention of 15CB that Ofgem itself prepares a Modification Report for consideration by the Panel. The new MR 9.2.2 provides for the preparation of Modification Reports on Authority SCR Modification Proposals and their submission to the Panel. It provides a default position that the Modification Report must be prepared and submitted to the Panel within 15 Business Days of Ofgem’s submission of the Authority SCR Modification Proposal to the Secretary, though Ofgem, acting reasonably, may specify such other period as it wishes.

A new MR 6.1.3A enables Ofgem to designate a Significant Code Review Modification Proposal as an Authority SCR Modification Proposal, and a new MR 6.2.1(q) requires the modification proposal to be identified as such and provides that Ofgem may produce its own legal text for such a proposal.

Changes to MR 7.2.3(a) and (b) and MR 7.4 deprive the Panel and the Code Administrator of their ability to determine the process for managing the development of an Authority SCR Modification Proposal. The change to MR 7.2.8 has been introduced to avoid the Panel having to conduct a pointless assessment of whether an Authority SCR Modification Proposal relates to a Significant Code Review.

- 15CC** Provides for Panel recommendations to be given to Ofgem in respect of Authority SCR Modification Proposals.
- MR 9.3.3 and 9.3.4 already deal with submission of final Modification Reports and the Panel's recommendations to Ofgem. MR 9.3.3 has been amended to cater for Modification Reports prepared in respect of Authority SCR Modification Proposals under MR 9.2.3.
- MR 9.3.3A has been inserted so as to ensure that the Panel in making its recommendation addresses greenhouse gas emissions as required by 15CC(a)(i)(bb) – though the Panel may wish to give some thought as to how this assessment is going to be made in practice. 15CC(a)(i)(aa) and 15CC(a)(ii) are covered by the existing MR9.3.3 and 9.3.4.
- MR 9.3.5 already covers directions to make Modifications to the Code as required by 15CC(b)(i). It has been amended to reflect the requirement at 15CC(b)(i) which provides that (in common with all other Modification Proposals, by virtue of 15(b)(i)), Authority SCR Modification Proposals must only be implemented where Ofgem is of the opinion that they will better achieve the relevant objectives.
- MR 9.3.8(b) already covers directions to revise notices etc. as required by 15CC(b)(ii).
- MR 9.2.4 has been inserted to implement the requirement of the final sentence of 15CC that Rules should state that the origination by Ofgem of Authority SCR Modification Proposal or the publication of conclusion in relation to its subject matter should not fetter the discretion of Panel Members etc.
- 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.