

RECC response to MCS Consultation

Additional paper setting out background, legal considerations and comments on the Scheme Rules and Consumer Duty

This paper contains some introductory remarks, some comments on legal considerations and comments on the proposed Scheme Rules and Consumer Duty. It should be read alongside RECC's responses to the specific questions contained in the MCS Consultation, set out in a separate paper.

The MCS Consultation does not give a fair or accurate representation of the work carried out in the sector by RECC since 2006. This is disappointing given that RECC has worked extremely closely with MCS for the past 15 years and has gone above and beyond to ensure the integrity of the sector. Having put forward many suggestions to MCS for simplifying and strengthening the regulatory model, it is disappointing that RECC has not been invited to contribute to the Consultation in any way and was given a few days' advance notice of its contents.

Summary

The 'Background' section of the Consultation states that:

'Increased demand for goods and services comes with the danger of unqualified contractors entering the market to capitalise on potential earnings. We are determined this will not happen in our industry and so we have undertaken a rigorous review of the consumer protection measures needed to maintain and improve the regulatory reputation of the industry.'

This implies, firstly, that the measures outlined in the Consultation will improve standards of consumer protection and, secondly, that the Consumer Codes are somehow responsible for unqualified contractors entering the market. Neither of these implications is true and so the underlying premise of the Consultation is false. The MCS consumer report published in 2022 did not show this nor were its conclusions supported by the consumer research which supposedly underpinned it.

As demand for small-scale renewable systems grows, and as systems become more affordable within the context of overall energy prices, so more consumers will choose to install systems without the assistance of Government initiatives. Many of the contractors they use will not be MCS-certified and they will thus be unprotected. Nothing in the Consultation addresses this conundrum. Indeed, the less reputable a contractor is the less likely it will be MCS-certified, and the more likely that consumers in vulnerable circumstances will be taken advantage of.

The same section of the Consultation cites Citizens Advice's description of a 'net zero protections puzzle' of 'disconnected protections offered by a broad arrange of interconnected organisations' as a further motivation for the proposed changes. Yet, the Consultation proposes a regulatory system consisting of 17 Certification Bodies, all interconnected with each other and with the MCS Service Company, UKAS, the Competent Persons Scheme, insurance providers, an ADR body and others. Eliminating two Consumer Codes from the picture hardly negates Citizens Advice's description, if that is the rationale for the exercise.

The Each Home Counts review, also cited, was set up in the light of the shortcomings of the CIGA and SWIGA insulation protection funds which had previously been shown not to be fit for purpose. The review did not recommend consumer protection improvements. In the energy efficiency sector both CIGA and SWIGA continue to operate. They are backed up by TrustMark which does not require a

high level of consumer protection. By comparison, the level of consumer protection in the small-scale renewable sector, approved by CTSI, was found to be much higher.

It is RECC's view that the changes MCS is proposing are based on very flimsy evidence, will not address the issues identified and will reduce the level of consumer protection in the regulated part of the sector to a tick-box Consumer Duty. They will do nothing to improve the levels of consumer protection in the non-regulated sector and, indeed, the increased costs of the regulatory model being proposed will drive more contractors into the non-regulated sector. This is a clear case of throwing the baby out with the bathwater.

MCS states:

"Our research indicates that a contractor's choice of Certification Body and Consumer Code affects the outcome of a customer's complaint. As the sector hopes to expand through greater customer demand for small-scale renewable technology, it is essential that a new scheme operating framework addresses these inconsistencies and strengthens the ability to hold contractors to account."

This suggests that some of the Certification Bodies and Consumer Codes are better than others. Surely MCS's proposed changes should aim to ensure that all Certification Bodies and Consumer Codes are operating at the same high level. Getting rid of those that are, in MCS's own views, doing a good job is surely perverse.

Legal basis for Consumer Code membership

The Boiler Upgrade Scheme [England and Wales] Regulations 2022

These Regulations require participating contractors to be members of a Consumer Code in several different places:

- Under Regulation 15(8) the Authority responsible for issuing boiler upgrade vouchers (Ofgem) may refuse to do so if it is satisfied that the installation or operation of the eligible plant is or will be in breach of any provision of a Consumer Code;
- Under Regulation 19(1) the authority may suspend payments of a boiler upgrade grant if it requires time to investigate compliance with the scheme. The Authority will have reasonable grounds for suspecting that aspects of the regulations are not being followed if it has received notification to that effect from a Consumer Code.
- Under Regulation 14(3)(a) a grant application must be in writing, in such form as the Authority may require, and include— the information specified in Schedule 2 (information required for grant application)
- Under Schedule 2 2(c) the information that must be provided in support of a grant application must include the name of the Consumer Code the contractor is a member of and the relevant membership number.

Ofgem Guidance on administering the Boiler Upgrade Scheme [England and Wales] Regulations 2022

Ofgem has produced guidance for installers in a note and on its website. The Ofgem Guidance confirms the Regulations in relation to Consumer Codes:

Role of Consumer Codes

2.9. Consumer codes aim to guarantee a high-quality experience for consumers. MCS installation companies working with domestic customers must also be a member of a consumer code approved

by the Chartered Trading Standards Institute (CTSI). MCS works closely with these consumer codes to help address complaints for domestic consumers.

2.10. The two relevant consumer codes are the Home Insulation and Energy Systems Contractors Scheme (HIES) and the Renewable Energy Consumer Code (RECC). Property owners can find out which code their installer is signed up to, by looking on MCS's installer search.

2.11. In the event of a dispute with an installer, consumers can access the dispute resolution service provided by the Consumer Codes. Code-related issues are addressed directly by the Consumer Codes. Where there are technical aspects to a dispute, MCS works closely with the relevant Consumer Code to fully investigate the matter. In some cases, a dispute may need to be addressed by both organisations to ensure that they are fully resolved.

2.12. For more information and to contact the Codes please see their contact details below:

- Home Insulation and Energy Systems Contractors Scheme (HIES):
- Renewable Energy Consumer Code (RECC):

In RECC's view it would be difficult for Ofgem to administer the Boiler Upgrade Scheme in line with the Regulations in the absence of approved Consumer Codes. MCS has not addressed this point in its Consultation.

[See RECC's answers to MCS's specific questions in the associated document.]

Scheme Rules

In the brief section on page 9 the Consultation states that the Scheme Rules '*encompass... the need to comply with the Consumer Duty*'. Yet there are no details anywhere in the Consultation or in these Scheme Rules explaining how contractors will be judged to have complied with the Consumer Duty or by whom and when. For a Consultation whose main aim is to strengthen consumer protection in the sector, it is notable that all detail as to how this will be achieved is lacking.

1. Introduction

'MCS is governed by independent Working Groups comprised of technical experts from across the industry in a Scheme backed by Standards.'

There is no mention here of consumer protection and nor is there any consumer representation on the Working Groups other than that provided by RECC. The Standards approved by the Working Groups do not allow for consumer protection in the sector.

'To be MCS certified you'll need... (3) to abide by the Consumer Duty. This will be determined by MCS who will ensure that contractors provide the highest levels of customer care and protection.'

There is no information anywhere in any of the documents as to what this means, how it will be 'determined', against which criteria or what the sanctions for any 'non-compliance' will be.

'(4) to demonstrate compliance with the MCS System Performance Estimate Standard. This will be determined by MCS.'

Once again, there are no details as to how or when this will be determined. Compliance needs to be determined before an installation takes place, not after. How and when will MCS access performance estimates? This all needs much more explanation if it is to be credible.

‘Once your Certification Body has assessed your compliance with the MISs for the technologies you wish to install and MCS has completed a series of checks on your business’ you will be approved as MCS certified.

There are no details as to what these checks comprise. What consumer protection checks will be carried out? Without these the Consumer Duty will be nothing more than a tick-box.

2. Scope of MCS

‘Each MCS certificate represents your statement of compliance to the relevant MIS, System Performance Estimate Standard, these Scheme Rules and the Consumer Duty.’

Consumers can be misled by a logo if a contractor is MCS certified for one technology but not another, which may be the one they are interested in installing. For example, a quotation might be provided on headed paper which carries the MCS logo but in respect of a different technology. It is essential that the correct use of the logo is strictly monitored and enforced.

3. Scope of Scheme Rules

No training is mentioned in relation to consumer protection. How will this be covered off?

4. You and Your Certification Body

There are currently 17 Certification Bodies working with MCS (product and installer). With UKAS and the other relevant organisations this means that MCS certification involves at least 20 different organisations with 20 different logos. It is not clear that laying waste to consumer protection in the sector has helped reduce the alphabet confusion in the sector identified by Citizens Advice.

The section on Compliance Assessments does not mention consumer protection anywhere. The section explaining how risk will be assessed describes ‘complaints received’ as one of the factors. It is important to stress that it is not the number of complaints per se, but rather it is the underlying issues demonstrated by the complaints that are important.

‘Your assessments are likely to follow an annual cycle...’.

This statement suggests that very little will change in practice. Consumer protection will not be checked during these Compliance Assessments and the Certification Bodies are not set up to assess it in any case.

5. You and Your MCS

The list of ‘MCS Approval Checks’ is minimal and likely to be carried out by a system powered by AI. These checks will be insufficient to allow MCS to weed out those applicants who will bring the MCS into disrepute. There will be no access to the database of businesses trading in the sector which RECC has built up since 2006. Rather, the system will allow Phoenix Companies which are currently excluded to become certified much more easily.

Contractors will not routinely inform you if there are changes to the ownership and management of their businesses. Rather, this needs to be proactively checked.

MCS claims that it will be able suspend or withdraw a Contractor Agreement on various grounds, one of which is that the Contractor has not complied with the Consumer Duty. Yet there is no indication how this compliance will be ‘determined’, against which criteria, when or by whom. Subjective

judgements of this sort are bound to invite accusations of unfairness and legal challenge, given that MCS has been shown to be capable of Judicial Review.

This is also true for the section which gives MCS the right to enforce this even if a Contractor is no longer certified. It is hard to understand how this will be implemented.

6. You and Your Business

Who will be responsible for ensuring that there is consumer protection training for front line staff in the business? Is there an equivalent to the Technical Supervisor? What will their role be? What sanctions will there be for non-compliance? Where does the Consultation describe the range of sanctions and how MCS will take decisions to implement them?

7. You and Your Customers

This first paragraph contains a very short list of consumer protection legislation. Furthermore, it assumes knowledge of consumer protection legislation on the part of contractors and consumers. This is entirely unrealistic. Consumer Codes interpret consumer protection legislation specifically for the sector which avoids contractors and consumers having to know the details which are very complicated. The legislation which under pins the Consumer Codes includes the following:

- Alternative Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015
- Arbitration Act 1996
- Business Names Act 1980
- Companies Act 1980 & 2006
- Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
- Consumer Protection Act 1987
- Consumer Protection from Unfair Trading Regulations 2008 ('CPRs').
- Consumer Rights Act 2015
- Data Protection Act 2018
- Direct Selling Association Consumer Code
- Enterprise Act 2000 (and all the legislation covered by it)
- Misrepresentation Act 1967
- Ofcom Consumer Code
- PhonePayPlus Consumer Code
- Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR)
- Provision of Services Regulations 2009 ('the Regulations')
- UK Code of Broadcast Advertising (BCAP Code)
- UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code)

How will MCS judge what the 'appropriate resolution of disputes' looks like? This is not the role of a mediator (first element of ADR). A mediator seeks to achieve a mutually agreed resolution. It is not the role of a mediator to apportion blame. Independent arbitration or adjudication (second element of ADR) can fulfil this role as the end point of a dispute resolution process. There are no details anywhere explaining how an ADR Decision or Award will be enforced if the contractor does comply with it.

Consumer Duty

The Consumer Duty is described as a 'set of obligations on MCS Contractors'. Yet it is not addressed to MCS contractors. It is a vague set of aspirations addressed to 'the Customer'. (The terms

'consumer' and 'customer' are used interchangeably throughout, without any explanation as to what might be the difference.) The Consumer Duty is written in a way that no consumer will be likely to read or understand and assumes legal knowledge on their part and on the part of contractors.

The Consumer Duty contains no information at all as to how a contractor will be expected to demonstrate compliance with the 'obligations' placed on them. Without such a yardstick any judgement about compliance will be entirely subjective and open to challenge. Furthermore, it assumes detailed consumer awareness of rights and responsibilities under consumer protection legislation which is entirely unrealistic. There is a vague reference to 'initial and ongoing' checks on businesses being carried out, but no further details of these are provided anywhere in the Consultation. Rather, the section implies that compliance will be measured by consumer satisfaction monitoring and feedback which is completely different from compliance monitoring.

1. *Be trustworthy*

- a. There are no details as to how to comply with the Consumer Duty (see above).
- b. How will contractors be able to ensure '*that the customer requirements are also adequately defined*'? This is meaningless and unenforceable.
- d. Contractors are hardly likely to tell consumers that they have insufficient funds available to complete the installation.
- e. How will consumers be expected to know whether the contract they signed with a contractor was fair? How will contractors know what an unfair contract term is? How will consumers know what their cancellation rights are? How will they know if they have signed an 'on premises' or an 'off premises' contract? The rationale for consumer protection legislation is the imbalance of power between contractors and consumers, especially those in vulnerable circumstances. None of what is proposed in this section is practical or assessable.

2. *Be responsible*

- b. How will consumers know whether they have been assessed as potentially being in vulnerable circumstances? Those in vulnerable circumstances are less to understand the information being provided to them, depending on the circumstance.
- c. What is the acceptable amount of time for which contractors can remain in a consumer's home? This is not defined and consumers have very little power to ask a contractor to leave if they have overstayed. How is pressure selling defined? What is the legal basis for the definition? No details are provided.
- d. What is the relevant legislation that covers fair marketing practices? How will contractors know how this will be judged and how will consumers know whether marketing they have received is fair and accurate or not?
- e. It is not realistic to think consumers are going to be examining scaffolders' Public Liability Insurance policies. How will consumers be made aware of any exclusions or endorsements on the policy? What is the minimum acceptable level of insurance? None of this is set out or explained.
- f. How will the retention of records be checked if there are to be no back-office assessments made?
- h. The question of who has caused any damage to a property is often very subjective. This issue is at the heart of many complaints registered with RECC by consumers.

3. *Communicate well*

- a. How can a consumer check whether a contractor has given them the correct business name?

- b. Consumers do not necessarily need to know about the sub-contractors. The most important information for them is who is responsible for any problems that might arise. This must be one point of contact, the one who signed the contract with them. Giving too many details of other contractors risks confusing consumers.
- c. How will this be judged and by whom?
- d. There are no details of the information that should be passed to consumers.
- e. It is the consumer's responsibility to ensure that they have all the necessary permissions, approvals and licences in place. Confusion on this point has led to many complaints registered with RECC by consumers.
- f. There is no reference to the need to vary the contract with a new cancellation period if there are any significant changes made to the original contract. Full details need to be provided to contractors so that they can be assessed for compliance with this. Otherwise it is pressure selling.

4. *Contract with clarity*

- a. How will contractors know what should be included in a fair quotation and terms and conditions? RECC has technology-specific model documents free for contractors to use that consist of: a proposal, a quotation and a performance estimate. These have been checked by our Primary Authority partners, giving contractors legal protection if they use them.
- b. In the case of heat pumps contractors are permitted to sign a contract before they carry out a detailed survey. This means that this will be impossible to comply with.
- c. This will be difficult for contractors to comply with in the absence of any detail of how they are expected to do so and why. For example, should parts and labour been shown separately in an invoice? What happens if the costs change during the installation process? How should the BUS grant be shown on the invoice? RECC has detailed guidance on all these points.
- d. There is no guidance for contractors as to what percentage of a total contract is considered a 'reasonable' percentage to require as a deposit payment. It is essential that this is carefully controlled. Otherwise, experience shows that contractors demanding too high a percentage of the contract price as deposit. Deposits should be a maximum of 25% of the total value of the contract. There is no explanation of further advance payments or stage payments, or what the difference between the two is. There is nothing about the importance of protecting deposits here. Without any of this detail, and without any compliance and monitoring attached, it is certain that a high number of consumer deposits will be lost.
- e. How will contractors' contracts be checked? Against which yardstick will they be judged? The majority of RECC Members use RECC's model contract which has been checked and approved by our Primary Authority partners and shown to be even-handed between the two parties. There needs to be a clear explanation of the Cancellation Notices required by law in different circumstances ('on premises' and 'off premises' contracts).
- f. See the points set out in (b) above. This will not necessarily be provided in advance where a contract is signed before the survey is carried out, in the case of heat pumps.
- g. Figures for financial benefits must be from a reputable source and this source must be cited. No other figures should be provided to consumers. None of this is not made clear.
- h. It is not clear what happens if there are changes to the goods supplied after the contract has been signed? Full instructions must be provided including for a variation of contract with a new Cancellation Period.

- i. This needs to be given more prominence since it will almost invariably be the case for heat pumps. There needs to be an explanation of the different cancellation rights applicable in different circumstances.
- j. How will compliance with this be checked and by whom?
- k. This needs a lot more detail in it with clear instructions for contractors. RECC's monitoring work shows widespread confusion as to the correct Cancellation Notices to be used in different circumstances. Consumers will certainly not be adequately informed about this and nor do they need to be. There is no mention of the Express Permission that must be given to start work within the Cancellation Period nor of what happens to the deposit in such a situation. This is a fundamental requirement of the law and a frequent cause of consumer complaints.

5. *Handover*

- b. How will consumers know if they are happy with the system? The Consultation gives far too much weight to consumer feedback immediately following the installation. They are likely to have been 'blinded' by science and to have no idea whether the system works correctly or not. The proposed MCS Guarantee suggests that it might take 6 years for them to know. There are two very disparate timelines.
- d. In some of the cases listed in the bullet points consumers will not know whether the certificates are required and whether they should have them or not (e.g. Buildings Regulations compliance certificate, DNO approval certificate &c). Fuller details of all these are needed.

6. *Demonstrate good complaint handling*

There is no recognition of RECC's dispute resolution process or of what it has achieved, including the level of effort or the volume of funds returned to consumers. MCS is proposing a process that is identical to RECC's process but that is being described as 'new and improved'. (See relevant section in the answers to the Consultation questions)

- a. This is all required by Consumer Codes.
- b. This is all required by Consumer Codes.
- c. As soon as the concept of fault is introduced there will be subjectivity and lack of agreement. On this basis, assigning fault is never an element of mediation – the first stage in an approved ADR complaint handling process.
- f. It is not very likely that contractors will signpost consumers to MCS as they will not want to suggest that they will be unlikely to achieve a satisfactory outcome with the consumer.
- g. This is the second stage of an approved ADR complaint handling process and should be independent, as it is in the RECC process. What will the fees be for this element of the process? How will any awards be enforced? What will happen if a contractor does not comply? Will it lose its certification? Where is all this set out?