RWE npower - Response to the Retail Market Review: Non-domestic Proposals

1. Overall Summary

We welcome the opportunity to contribute to this consultation, in order to help address perceived issues in the non-domestic market. We have identified proposed measures that appear to militate against better regulation and where possible suggest alternatives to try to overcome these. The paragraphs below summarise each section in turn; detailed arguments are given in subsequent sections.

Protections for smaller businesses.
We support the introduction of the new small business definition provided adequate time is allowed to make any consequent system and process changes. However, Ofgem should consider a simple consumption only definition, which would be in line with better regulation.

We do not support the removal of rollover contracts.

Customer transfer blocking
We believe that Ofgem's evidence demonstrates that the majority of objections are valid, but that there is an issue with multiple invalid registration requests. We support the introduction of good practice guidelines for objection letters, but note also that future guidelines (in any area) should be consulted on where, as in this case, they seem to be tantamount to an absolute requirement.

Standards of conduct
The sentiments of the proposed licence condition are unobjectionable, but we have difficulties with the proposal for a number of reasons, including that because of its overlap with existing consumer protections it would create double jeopardy, and could also undermine the incentive for customers to engage with the market. Importantly, its inherent ambiguity would create unacceptable regulatory risk and as such is not consistent with better regulation.

Third party intermediaries
The proposed licence condition presents similar difficulties to those outlined above for the standards of conduct. In addition, we do not believe that imposing obligations on suppliers to regulate TPIs is consistent with better regulation, not least because of the practical difficulties involved. A targeted and proportionate approach would be for direct regulation of the sector and we therefore support Ofgem's intention to acquire powers in this area. We also suggest an additional means of providing appropriate direct oversight of the sector.

2. Standard Condition 7A: Protections for smaller businesses

Extension of SLC7A to cover small businesses
Small business customers have experience of dealing with contracts for numerous goods and services for their businesses, not only contracts for energy. In general they have no additional protection in those dealings and in principle we believe that energy should be no different. This does not contradict the belief that they should receive adequate renewal notice and be communicated with in plain and intelligible language; this is good customer service and something we try hard to deliver. In normal competitive markets service is what would distinguish successful suppliers from those not so successful. Whilst, therefore, we disagree with the principle, we would not argue against the proposal to extend SLC7A to cover small business customers.

Practical issues and impact

One of the reasons given for retaining the micro business definition (2.21 and 2.25 of the RMR consultation) is that although most customers will be caught by the new small business definition there is the potential that not all will be. As this is the case, suppliers that distinguish between their business customers (at present, between non-domestic and micro business) will need to be able to consider the two definitions: to do otherwise would mean that they could miss some of those profile class 5 – 8 customers who do not meet the employee/turnover criteria but are micro businesses as a result of their consumption being below 55,000kWh. This will make matters even more complicated when attempting to establish the type of prospective or existing customer.

There will be cost and systems impacts for a number of suppliers that distinguish between non-domestic customer types. In general, we apply that distinction only in one of our electricity systems: that which serves a range of customers – corporate/ larger businesses and smaller customers. We will need to make changes to accommodate the new definition and so it is important that sufficient notice is given. Introducing an additional customer definition might also complicate referrals to the Energy Ombudsman.

Better regulation

The information necessary to define a customer cannot be derived from within our systems but has to be obtained from the customer at acquisition or point of renewal, and in some cases the decision maker may not have the information. The challenges encountered with the introduction of the micro business licence conditions therefore will be continued and exacerbated with the introduction of the Small Business definition. This could be partly overcome by adhering to a consumption only threshold rather than the additional aspects contained in the European definition. Ofgem mentions in the consultation document that it has chosen existing industry wide standards (profile classes 3 and 4 in electricity and monthly read meters in gas) to benefit both customers and suppliers, as both are likely to have systems in place to recognise the thresholds. This is true, but because the new definition is expressed as either profile class or number of employees and turnover, etc, we cannot be certain that if customers do not meet the profile class element they will not be small businesses.

There is a similar issue in other areas with the definition of vulnerability, which seems to point to the increasing practice of regulatory bodies to define customer groups such that suppliers have difficulty in putting in place measures to identify them, which in turn introduces an additional level of regulatory risk. It would be consistent with Better Regulation and the Red Tape Challenge if Ofgem were to define small businesses using a simpler, consumption only definition proposed above: information that suppliers could more easily access.

Review of termination procedures and automatic rollovers

We believe that our processes and communications for micro businesses have achieved the level of clarity and transparency required by Ofgem. Customers have sufficient notice of the contract coming to an end and the opportunity to terminate our contract if they wish. Rollover contracts guarantee customers who are not so interested in their energy supply a contract for a fixed term at a market price, because suppliers are able to hedge appropriately, rather than at a higher out of

contract price. At the same time, the process allows suppliers to be sure of a certain level of income. This is particularly important for new entrants, as pointed out in December's edition of Cornwall Energy's 'energyspectrum' (in an article entitled: 'Talking turkey – Ofgem's non-domestic sector proposals').

Summary

- We would not object to the introduction of the new small business definition and its inclusion within SLC7A; but adequate time is needed to make necessary system changes.
- Ofgem should consider a simple consumption only definition (avoiding also the need to consider the existing micro business consumption level and profile class). This would be in line with better regulation.
- We would not support the removal of suppliers' ability to offer rollover contracts.

3. Customer transfer blocking – 'Objections'

Evidence of breach

We do not agree that Ofgem's conclusions of licence breach in its consultation necessarily follow from some of the limited examples given. The document summary says that "….widespread objections to change of supplier by some suppliers may amount to breaches of our relevant licence conditions that could be causing significant consumer harm." The tentative conclusion is not borne out by later sections relating to the analysis of data collected by Ofgem as part of its information request last year. There are two principle reasons why the licence condition might be breached: objecting when a customer is out of contract, and in particular on a deemed contract, and objecting when a customer is erroneously thought to be in debt.

Out of contract objections
Paragraph 3.8 of the document reports that over half of the customers were still in contract, with 27% of the objections having been made because suppliers had not received a termination notice and 17% raised either because the termination request had been made too early or the new supplier had tried to take the supply too early. It may however point towards the need for improved customer and broker education in relation to contracts.

Objections for debt
Most of the remaining objections were made because of debt.

Conclusion on breach
Our conclusion is that Ofgem's evidence demonstrates that the overwhelming majority of objections were valid.

Further, in paragraph 3.15 Ofgem notes that the data showed a low number of withdrawals, which does not support the concern expressed in the March document that suppliers were objecting when they did not have valid reasons and then withdrawing the objection.

Multiple objections and invalid registration attempts

Ofgem also reports that the majority of those objected to on the day of the sample were multiple objections. This is not evidence of breach of any conditions, but simply a recognition that most objections are because customers are still in contract and that there are a lot of multiple objections as a result.

In our view, this could also point to a problem which is having an adverse impact on customer experience and supplier costs. Erroneous use of the T marker for change of tenancies is a constant issue for suppliers. The industry as a whole needs to give further thought as to how the whole process could be better managed so as to guard against its use to exit valid contracts. We would urge Ofgem to take a lead in resolving this issue.

Good practice proposals

npower supports better communication and therefore welcomes the publication of good practice guidelines for customer communications relating to objections. We also support any reasonable changes proposed that will improve the experience for our customers. We have already given our commitment to implement enhancements as quickly as systems changes will allow.

However, we believe it to be a principle of good regulation that where the regulator regards a requirement as mandatory as opposed to desirable practice, it should be consulted on and put forward as an explicit requirement of the licence. Please see our response to the proposed standards of conduct licence condition for more details of our view of the application of the principles of better regulation.

Data issues

Constructing metrics relating to objections is not straightforward. For example expressing the number of objections as a percentage of customers will tend to overstate the issue given that there are legitimate multiple objections especially over longer time periods. The danger is that suppliers will be criticised publicly for a high number of objections even though those objections are justified. We believe that the collection and examination of such data by the Regulator should be sufficient.

Reflecting our concerns above regarding multiple invalid registration attempts, there is a compelling case for Ofgem gathering data from the other end of the process, namely multiple attempted registrations by each supplier for the same MPAN/MPRN together with the reason for rejection. This would flush out where a supplier repeatedly seeks to acquire a customer even though it knows the customer to be still in contract.

Summary

- Our conclusion is that Ofgem's evidence demonstrates that the overwhelming majority of objections were valid
- Ofgem should look at multiple invalid objection requests, including erroneous use of the T marker for change of tenancies
- We are committed to introduce the good practice guidelines, but future guidelines should be consulted on as with prospective licence conditions
- Objections data should not be published; data collection should be expanded to include multiple attempts at registration by supplier.

4. Standards of Conduct Proposals

Introduction

Ofgem is proposing to introduce "Standards of conduct" (SOCs) into supply licences for both the domestic and non-domestic sectors. Draft wording has been included in a new condition 1A (See appendix 6 to the Non-domestic Proposals (NDPs) or appendix 4 to the Domestic Proposals (DPs)). These standards are more extensive than the present non-binding standards which were introduced as part of the probe.

The licensee must take all reasonable steps to deliver the customer objective and avoid doing anything which might frustrate the customer objectives.

The Customer Objectives are that:

> (a) the licensee, its staff and any Representative behave and carry out any actions in a fair, honest, transparent, appropriate and professional manner;
>
> (b) the licensee, its staff and any Representative provide information (whether in Writing or orally) to a Customer which:
> (i) is complete, accurate and not misleading (in terms of the information provided or omitted);
> (ii) is communicated (and, if provided in Writing, drafted) in plain and intelligible language;
> (iii) relates to products or services which are appropriate to the Customer to whom it is directed; and
> (iv) is otherwise fair both in terms of its content and in terms of how it is presented (with more important information being given appropriate prominence);
>
> (c) the licensee, its staff and any Representative:
> (i) make it easy for a Customer to contact the licensee,
> (ii) act promptly and courteously to put things right when the licensee, its staff and any Representative make a mistake, and
> (iii) otherwise ensure that customer service arrangements and processes are complete, thorough, fit for purpose and transparent.

The sentiments in the standards are unobjectionable. However, we do have a number of concerns about hard-wiring them as a licence condition in the way Ofgem is seeking to do. Our concerns are set out in detail in the following paragraphs. In summary, we have concerns that the proposal:

Duplicates consumer protections which already exist and where there is already more than one enforcement agency;

Undermines the potential for companies to differentiate themselves in terms of the service standards they offer customers and the role of competition in establishing the service level that customers seek;

Contrary to Ofgem's suggestion, the evidence suggests the standards will not avoid micro-regulation in practice;

Will markedly increase regulatory risk due to the ambiguity in the requirements and Ofgem's multiple roles as lawmaker, prosecutor, judge, jury and executioner. In particular, Ofgem will have broad scope to interpret and re-interpret the standards without any effective constraints. This, in turn, will inevitably lead to regulatory creep, thereby undermining incentives for customers to engage in the market, raising costs and regulatory risks which will ultimately feed through to customer prices to the detriment of customers.

Overlap with existing legislation

Most of the elements of (a) and (b) are covered off in existing legislation which is already administered by Ofgem or covered by existing or prospective licence conditions.

Ofgem's own enforcement consultation notes its role in enforcing the following legislation:

> **"Community infringements**
>
> - The Consumer Protection from Unfair Trading Regulations 2008 ("CPRs"), which prohibit the use of misleading, aggressive or otherwise unfair commercial practices by businesses in interactions with domestic consumers;
>
> - The Control of Misleading Advertisements Regulations 1998 (as amended), which are aimed at protecting the interests of consumers and traders from misleading or unacceptable comparative advertising;
>
> - The Consumer Protection (Cancellation of Contracts Concluded Away From Business Premises) Regulations 1987, which provide consumers with a seven-day cooling off period when they agree to buy goods or services worth more than £35 from a trader during an unsolicited visit to their home;
>
> - The Unfair Terms in Consumer Contracts Regulations 1999, which protect consumers against unfair standard terms in contracts they make with traders;
>
> - The Consumer Protection (Distance Selling) Regulations 2000, which are aimed at businesses that sell goods or services to consumers by: the internet; digital television; mail order, including catalogue shopping; phone or fax;
>
> - Sale of Goods Act 1979, and Supply of Goods and Services Act 1982, which cover consumers' statutory rights in respect of goods and services.
>
> **Domestic infringements**
>
> - Trade Descriptions Act 1968 (which covers false descriptions applied to goods and services);
>
> - Consumer Protection Act 1987 Part III (which covers misleading price indications)."

Indeed, we note that Ofgem's proposals would extend the overlap. In its non-domestic proposals, Ofgem includes a marketing licence condition aimed, inter alia, at regulating the conduct of TPIs. At para 5.25 of the NDPs, Ofgem notes that this LC might not be needed if the SOCs are introduced as an LC. However, Ofgem explicitly proposes to extend the double jeopardy problem by also asking government for powers to enforce the Business Protection from Misleading Marketing Regs.

The duplication therefore consequent on the proposed licence condition would create (at least) double jeopardy for suppliers.

It should also be noted that some of the above legislation is also already enforced by local authority trading standards services as well as by Ofgem.

It is unclear why the additional general protection is required for energy customers and not for consumers of any other product or service, bearing in mind that Ofgem already has wide powers to address any specific issues through specific licence conditions.

In addition, standards of conduct are already regulated across a wide range of company activities by the energy ombudsman (EO) the framework of and for which is set by the CEAR Act and subordinate legislation. Indeed, in recent times, the EO has garnered a wider-ranging remit to determine the standards to which companies must adhere, we believe at Ofgem's behest and with its imprimatur.

In the summer of 2011, the EO issued a paper entitled 'Commercial Decisions Document'. This extended EO involvement to being able to decide disputes referred to it which involve what might be called supplier 'business as usual' services (for example, a matter relating to the collection of a debt). We believe that this encroachment into such areas could, when it makes a binding decision, result in the EO impacting on and being able to determine suppliers' commercial policy.

This is surely not what Ofgem envisaged when an ombudsman scheme was first mooted in its response[1] to the billing super-complaint brought by energywatch. In that document, Ofgem required suppliers to establish "..***a dispute resolution body that will provide a means for customers to seek consistent and independent resolution of account and billing disputes that they have been unable to resolve with their suppliers."*** This is a much more circumscribed definition of the EO's locus than its present role today; which one could argue, in some areas, seeks to replicate Ofgem's role through suppliers' licences. Our conclusion is that the scope of EO activity has been expanded so that it now already broadly covers the same issues as the standards of conduct. Consequently, introducing the standards into licences would be disproportionate.

Having noted that the standards of conduct cover much the same ground as consumer protection legislation, we also note that most customer protection legislation is aimed at domestic consumers. We have a particular concern that a standards of conduct licence condition covering the whole non-domestic sector will distort the balance of the contractual relationship which one would expect between energy companies and larger industrial and commercial consumers.

[1] Ofgem's response to the Super-complaint on billing processes made by the Gas and Electricity Consumer Council ("energywatch") Decision document - July 2005

Usurping the role of competition

The points covered under paragraph (c) would normally be regarded as issues on which companies compete. We therefore regard it as inappropriate for Ofgem to regulate for standards on these matters, bearing in mind that the GB energy market is widely acknowledged as one of the most competitive in Europe.

Ofgem acknowledges (para 5.30 of NDP) that:

> "given current practice in the market, suppliers are likely to need to make changes to their systems and/or processes to make sure their actions are in line with the SOCs."

We believe Ofgem's approach violates the principle of competition where possible and regulation where necessary.

A proportionate approach which works with the grain of competition, rather than against it, would be for Ofgem to collect and publicize information of key dimensions of company performance. This would enable customers to choose their own preferred trade-offs between characteristics. We note that Ofgem has already embraced the information provision role on one dimension, namely price. However, in doing so, Ofgem has reduced the scope for companies to compete on price structures. We believe it would be unhelpful for Ofgem to further restrict the form of competition by setting prescriptive standards of service.

Principles-based regulation

Ofgem holds out LC1A as building on the high-level principles approach to regulation which it adopted as part of the probe (NDP para 5.9). It also claims (NDP para 5.10) that the SOCs could enable Ofgem to limit the need for more prescriptive measures in the future.

In fact, the evidence contradicts the likelihood that Ofgem would not adopt a belt and braces approach. Since the probe, Ofgem has pursued a twin track approach of seeking to regulate at both the macro level whilst at the same time micro-managing the operations of companies. For example:

- Ofgem introduced high-level principles into clause 1 of the marketing licence condition, but, in addition, introduced a large number of highly prescriptive additional requirements into the condition;

- In addition to introducing standards of conduct under the probe, Ofgem also introduced a large number of highly prescriptive requirements including additional information on bills and annual statements, amendments to debt and customer transfer arrangements, detailed financial information reporting and prescriptive requirements for the rollover of business customer contracts;

- Since the probe, Ofgem has introduced further highly prescriptive regulation such as the requirement to give 30-days' notice for variations in contract terms.

- Under the market review, Ofgem is taking and has already taken steps to increase further the level of prescription in areas where prescriptive arrangements were introduced under the probe including detailing exactly the

format and content of customer information, and more detailed prescription regarding the compilation of the annual financial statements.

It is notable that at para 5.26 (NDPs), Ofgem states:

> "We consider that there is still a need to retain the prescriptive requirements of SLC 7A to deal with certain particular issues that the condition was designed to address."

The evidence therefore points overwhelmingly to the conclusion that Ofgem will continue to micro-manage the industry with or without the standards of conduct as licence conditions. In addition, Ofgem's own instincts will be reinforced by requirements emanating from the UK and European governments which are themselves showing an increasing predilection for micro-regulation.

Ambiguity in high-level regulation

A key objection to high-level regulation is the degree of ambiguity in the requirements and consequent discretion on the part of the regulator in interpretation. This is particularly important when allied to two other features namely:

i) the very high standard required to deliver the objectives: "all reasonable steps"; and
ii) the absence of an effective appeals mechanism against regulatory decisions.

The net effect is to confer on the regulator the power to determine that a company has breached the requirements in a very wide range of unspecified ways. Given the lack of effective appeal, companies will therefore need to take an ultra-cautious approach to compliance across a very wide range of topics. We do not believe this is in the interests of customers as the costs and regulatory risk will ultimately find their way into consumer prices.

An illustration of the ambiguity in high level (so-called principles regulation) is the proposed text for a non-domestic marketing licence condition in the NDPs:

> **Standard Condition 7B. Sales Activities with Non-Domestic Customers**
>
> "7B.1 In respect of any Sales Activities, the licensee must take all reasonable steps to ensure that all information which the licensee, its staff and any Representative provides (whether in Writing or orally) to a Non-Domestic Customer is:
>
> (a) complete, accurate and not misleading (in terms of the information provided or omitted); and
>
> (b) communicated (and, where applicable, drafted) in plain and intelligible language.
>
> 7B.2 For the purposes of this condition:
> "Sales Activities" means any activities of the licensee, its staff or any Representative which are directed at or incidental to identifying and communicating with Non-Domestic Customers for the purpose of promoting the licensee's Non-Domestic Supply Contracts to them and includes entering into such contracts with such customers."

At paragraph 4.7, Ofgem claims that, as a minimum, this licence condition would require:

i) Third Party Intermediaries (TPIs) to make customers aware which suppliers they act for;
ii) TPIs disclosing to customers whether the supplier has paid them a fee;
iii) TPIs to record and retain phone calls with customers.

In themselves, these TPI proposals have much to commend them. Indeed, they mirror closely arrangements which have been established to address similar concerns in the financial services market. However, it is far from self evident that these requirements flow from the wording of the licence condition. It is entirely possible that companies would not necessarily establish such arrangements under LC 7B. And yet, Ofgem would apparently regard this as a breach of the licence condition.

Ofgem itself notes the similarity between its proposed LC 7B on non-domestic marketing and the proposed LC1A – standards of conduct. Indeed, it notes that if LC1A goes ahead, LC 7B may not be needed. However, the above discussion of LC 7B confirms the compliance problems which high level obligations impose on obligatees. This teleological approach (the obligation means whatever I want it to mean or that it has a special, unique, purpose) is convenient for the regulator. However, it imposes enormous difficulties on companies as well as markedly increasing their regulatory risk. Ofgem claims (para 5.18) that the revised SOCs are drafted in a way which enables suppliers to understand what types of activity will meet the standards. However, the above illustrates that this is plainly not the case. Moreover, there have been a number of recent examples where Ofgem has asserted that, although the meaning of an LC or obligation is perfectly clear, it is issuing an open letter or guidance. Recent examples include the application of LC27 (ability to pay), wording to comply with LC 7A and the eligibility of CFLs in the period Jan – March 2011. In our opinion, it is by no means self evident that an independent and experienced member of the judiciary would conclude that the words on the face of the licence or legislation bear the interpretation that Ofgem seeks to apply.

Also in para 5.18, Ofgem states:

> "We will in due course also consider what compliance and enforcement processes may be the most appropriate when enforcing principles-based requirements."

It would be entirely unsatisfactory for Ofgem to try to introduce a licence condition of this nature without specifying in advance how, if at all, the enforcement regime might differ from its standard approach. And yet, this issue receives no mention in the consultation on enforcement arrangements which was issued shortly after the LC1A proposal.

The ambiguity and regulatory risk which would be introduced by standards of conduct as licence conditions is well illustrated by the issue of objections. On 23 November 2011, Ofgem issued an open letter "to remind suppliers of their obligations and to provide examples of good practice." (para 1.1). Para 1.5 of the letter states:

> "The contents of this open letter will be reviewed in the event that Ofgem decides to proceed with legally binding standards of conduct. In that event, it

> is envisaged that many of the areas of good practice discussed in this open letter could be enforceable as part of the binding standards of conduct. "

Para 5.27 highlights the uncertainty which the SOCs would create for licensees. It states:

> "Our initial view is that the good practice issues we highlight in the letter would be caught by the SOCs."

It continues:

> "It is also possible that other issues related to Objections but not expressly captured in our licences (see chapter 3) at the moment may also be captured by this proposal."

Ofgem concludes that the open letter may need to be recast if SOCs were implemented.

What does this tell us about the introduction of SOCs? First, anything that Ofgem deems "good practice" would automatically be a licence requirement. Second, even though Ofgem has given this topic considerable thought and identified a whole range of good practice issues which are not currently licence requirements, it recognizes that there may be others which it has not thought of which would become licence requirements. However, if even Ofgem cannot identify the full range of topics which could be caught under its own criteria for determining good practice, what chance do licensees have? And yet the exposure of companies to this LC is severe given that it is cast in terms of companies taking "all reasonable steps".

We have already had exchanges with Ofgem on a number of licence conditions regarding requirements Ofgem regards as good practice. We do not think it is self-evident that the regulator always has better insights than regulatees as to what constitutes good practice in dealings with customers or has an adequate appreciation of practical constraints. LCs such as the proposed 1A erode the need for the regulator to expose its proposals to the checks and balances of proper scrutiny and challenge. They thereby facilitate bad regulation.

Tilting the scales of justice

We have already noted the limited scope to appeal an enforcement decision of the Authority. These arrangements were originally established under the Electricity Act 1989. They were not amended, however, when the seriousness of an adverse finding by the regulator was reinforced by the introduction of the power to impose a financial penalty. The ability to levy a penalty combined with limited appeals emphasize the importance of the Anglo-Saxon rather than the European approach to lawmaking, namely that those affected by a regulation should have reasonable certainty as to what it means.

Guidelines

LC1A also proposes that Ofgem may issue and revise guidelines on the interpretation of the standards of conduct. Guidelines are another development which have grown in popularity with Ofgem and which also subvert the checks and balances which were put in place at privatization.

Guidelines effectively confer upon Ofgem the ability to change obligations without consulting and without granting licensees the power to challenge the justification for changes at the Competition Commission. We do not think the resulting lack of effective scrutiny or potential for challenge is consistent with regulatory best practice or with the making of regulations consistent with better regulation principles as required by Ofgem's statutory duties.

Whilst we support the greater clarity which guidelines might bring to the interpretation of LC1A in respect of particular issues, we cannot support the lack of appropriate governance.

Conclusion

The above discussion has demonstrated that if the proposed standards of conduct are cast as licence conditions, they will substantially overlap with existing consumer protections, thereby creating double jeopardy. By establishing common requirements, they potentially undermine the role of competition and the incentive for customers to engage with the market.

The discussion has demonstrated the huge ambiguity which the standards would introduce, raising regulatory risks and costs to companies which would eventually need to be reflected in customer prices. The licence condition amounts to requiring that companies are in breach if they do anything which Ofgem would decide is not good practice, even if Ofgem has never been explicit about it. Given the potential for large fines and the highly restrictive grounds for appealing any penalty levied by Ofgem, this proposal is entirely unacceptable.

In some cases, Ofgem proposes that the ambiguity would be alleviated by guidelines, but, in most cases, Ofgem proposes that it shall have a unilateral right to vary guidelines. This amounts to a power to amend licence conditions without the due process of a right of appeal to the Competition Commission and is also unacceptable.

Ofgem claims that the introduction of a high level obligation would obviate the need for more prescriptive regulation. However, the overwhelming weight of evidence contradicts this claim.

Both Ofgem and the Secretary of State have a duty, under the Electricity and Gas Acts, to have regard to best regulatory practice. This means:

> "(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
> (b) any other principles appearing to him or, as the case may be, it to represent the best regulatory practice."

Taking each principle in turn:

> Proportionality: regulators should intervene only when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised.
> Accountability: regulators should be able to justify decisions and be subject to public scrutiny.
> Consistency: government rules and standards must be joined up and implemented fairly.

Transparency: regulators should be open, and keep regulations simple and user-friendly.
Targeting: regulation should be focused on the problem and minimise side effects.

For the reasons cited in this letter, we believe that elements of the SOC proposals are problematic against all five of the principles of better regulation.

An approach consistent with better regulation would be for Ofgem to proceed on a case-by-case base, only introducing new obligations when it has a sound evidence base on which to act. "Just in case" regulation as exemplified by the SOC proposal is not consistent with the principles of better regulation. Targeted regulations should be precise enough both to achieve their specific objective and to eliminate ambiguity as to what constitutes compliance. However, they should avoid micro-managing compliance processes as this eliminates the scope for companies to use different techniques to deliver compliance.

5. Third Party Intermediaries

The need for better regulation

We have expressed above our reservations concerning Ofgem's general standards of conduct proposal, which it believes would impose obligations on suppliers in respect of TPIs. Many of the points apply equally to the proposal to introduce a licence condition to make suppliers responsible for Third Party Intermediaries. I will not repeat them here but refer you to them, and in particular the section titled 'Ambiguity in high level regulation' in the section on Standards of Conduct.

In addition to our observations about the standards of conduct, we do not consider that imposing obligations on suppliers to regulate TPIs is consistent with better regulation. Better regulation would require any measures introduced in this sector to be efficient, targeted and proportionate. This has been a common theme in our responses to other documents, as has been our support for a code of practice, albeit one that is governed independently. The new licence condition would also apply to companies' own in-house sales channels, which appears disproportionate given that it is being put forward as a remedy to a perceived problem within a single channel. Ofgem has not made any more general case for the introduction of a non-domestic sales licence condition.

An efficient, targeted and proportionate approach would be for direct regulation of the sector, which could be effected in one of two ways:

1. Ofgem acquiring the powers necessary and enforcing the Business Protection from Misleading Marketing Practices Regulations, as proposed; or
2. Ofgem establishing an accreditation scheme for TPIs, with its own system of monitoring and governance. This could effectively be made compulsory, even in the absence of any formal powers for Ofgem to regulate TPIs, by establishing a licence condition that precluded suppliers from paying commission to any TPI that was not accredited in the Ofgem scheme. This is a variation on option 4 set out in the RMR consultation.

Either of the above would be sufficient.

Agents generally do not represent a single supplier

There are also a number of practical difficulties with Ofgem's three-pronged approach that militate against it being an appropriate response. Where TPIs act as agents in discharging supplier activities or obligations, it is legitimate to impose certain obligations on suppliers. However, the relationship between suppliers and TPIs is not straightforward. A TPI is not under the control of any one supplier and this creates severe obstacles to control by any one supplier. It is for this reason that the code implemented by the Association of Energy Suppliers applies only to agents who represent a single company.

Summary

We do not believe Ofgem's 'three-pronged' approach is a suitable response to the issues in this sector of the market. There are, we think, better alternatives, as suggested above. Therefore, we do not support the proposed licence condition 7B. We would also argue that its scope draws in areas of business where no case has been made for the introduction of any further measures.

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