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Retail Markets
Ofgem
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24 February 2012

Dear Louise,

THE RETAIL MARKET REVIEW: NON-DOMESTIC PROPOSALS

I am writing in response to above consultation which was published on 23 November 2011. We have provided detailed answers to the consultation questions in the attached annex. Our key points are as follows:

- **Protections for smaller businesses:** We welcome the proposal to extend the requirements of SLC7a to small business customers. However, we think that the proposed definition of a 'small business' needs further work to clarify the treatment of large multi-site 'group' customers and to avoid any inclusion of half-hourly metered customers. We believe this can be achieved by simplifying the definitions and focusing mainly on existing industry classifications.

We would be happy to participate in a review of rollover conditions. For example, an additional point of contact, such as a telephone call to remind the customer of their options or a second reminder letter, could be effective as a way of preventing customers being rolled over when this was not their intention. However, our current view is that, with appropriate safeguards, rollovers can benefit customers and suppliers alike.

- **Customer Transfer blocking - Objections:** We fully support the publication of data relating to supplier objections, whilst obviously protecting any commercial confidentiality issues that could arise.

We welcome the clarification and best practice guidance that Ofgem have published within the consultation. In response, we are currently reviewing our associated customer communications and processes.

- **Third Party Intermediaries (TPIs):** We agree with Ofgem's proposals to introduce an accreditation scheme for TPIs and to seek powers to enforce Business Protection from Misleading Marketing Regulations (BPMR).

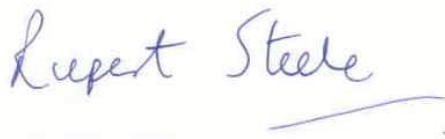
We think that there would however be significant practical difficulties associated with the current form of the proposed standard licence condition 7B. This is because the relationship between a TPI and a particular supplier will not provide sufficient scope for the supplier to monitor and enforce compliance with the condition – and it would be hugely inefficient for multiple suppliers to do so in relation to the same TPI. In addition, the draft condition seems to go much wider than TPIs, though this may not be intended.

The most practical way forward seems to us to be a requirement that suppliers should only make new TPI contracts with Ofgem accredited TPIs.

- **Standards of Conduct:** We are supportive of a legally binding commitment via an overarching licence condition (Option 1 of your proposals relating to Standards of Conduct), but given the widened scope and high level nature of the principles, we feel that these would only be appropriate in conjunction with a two stage enforcement regime. Although the Standards encompass how a business should naturally go about its affairs, we do not think that they should apply to the relationship between a supplier and a large business customer. That is a much more equal relationship, often involving bespoke or legally represented procurement, where contractual agreement under the general law should be the governing principle.

I would be pleased to discuss further any of the points raised above or within the detailed annex and provide further information that may be required.

Yours sincerely,



Rupert Steele
Director of Regulation

RMR Non-domestic proposals: ScottishPower response

CHAPTER 1: INTRODUCTION

Question 1: Are there other key issues that we should be looking into in the non-domestic sector?

No. We think that Ofgem's proposals cover the main issues in the non-domestic market at present.

Question 2: What would stakeholders like to see on our website to help business customers and support a competitive supply market?

ScottishPower regularly reviews its renewal and termination communications to ensure that the customer understands the renewal process and to facilitate a smooth transfer process for the customer, where this is their preferred option. We believe that this can be seen in our existing renewal communications. We have taken additional steps to offer smaller business customers who contact us by telephone their specific contract end dates via an automated IVR system, so that the information is available every time such a non-domestic customer contacts us.

Despite this, we agree that many customers still struggle to understand how the renewal and termination processes operate in the non-domestic supply market. It is clearly primarily for suppliers to explain this to their customers. However, any advice that Ofgem can provide to customers which will help them understand the basic features of the non-domestic market related to switching, contract renewal and termination procedures, would be welcome. This could include general information on:

- contract periods and earliest termination dates;
- contract types available and generic features of such contracts;
- rules that suppliers must comply with in relation to contract renewal;
- description of multiple and related MPANs and resulting switching rules;
- contract terminations, transfer objections etc.

CHAPTER 2: SLC7A - PROTECTIONS FOR SMALLER BUSINESSES

Question 3: Do stakeholders agree with our proposals to extend the scope of SLC 7A to include a wider small business definition, and do you agree with our proposed definition?

ScottishPower has already voluntarily extended the protections afforded by SLC 7A to all single site non half-hourly (NHH) metered customers and we agree with the principle of extending this protection to an appropriately defined category of 'small businesses'.

Ofgem is proposing to define a small business as one that meets one or more of the following criteria:

- is a micro business;
- an annual consumption of gas of not more than 293,000 kWh;
- a Profile class 3 or 4 electricity meter; or
- fewer than 50 employees and an annual turnover or annual balance sheet total not exceeding Euros 10 million.

We think that the proposed definition may inadvertently include a number of large industrial customers or other 'half hourly' (HH) metered customers. For example, a steelworks that has a separate profile class 3 meter for the gatehouse would appear to be caught. Some moderate sized energy intensive industrial processes using say 10MW of electricity at a 60% load factor might have fewer than 50 employees and less than €10 million turnover.

It will be necessary to clarify the treatment of multi-site business customers. In particular, the reference to Profile class 3 or 4 (or below) must apply to all the customer's electricity meters or premises and needs an exception for large multi-site customers. Otherwise, a customer would be classed as a 'small business', when clearly it is not. This could be the case for large financial institutions, retail outlets and franchise type establishments. We do not think this would be appropriate.

We also have examples within our business portfolio where a customer with a mixture of HH and NHH metered sites has negotiated bespoke contract arrangements through a tendering process. The proposed definition could inadvertently include such customers, because they have NHH Profile class 3 or 4 sites or because they have a limited number of employees, even though are an energy intensive user.

We would prefer a simplified approach in which the definition of 'small business' is limited to:

- micro-businesses as currently defined;
- all the business's electricity meters are in or below the industry standard definition (PC 3, 4) and a maximum of 10 such meters;
- Gas consumption across all sites no more than 293,000 kWh

In this approach, it would not be necessary to adopt the European Commission definition of a small business.

Question 4: Do stakeholders foresee significant costs or complications if we were to introduce our proposals? If so, please provide details and cost estimates.

If large customers (I&C groups and HH metered) were inadvertently included in the definition of 'small business' (as we believe to be the case - see our response to Question 3), this would require changes to our customer communications, contractual

terms and conditions, billing and communications systems and many processes associated with customer procurement and termination.

We would also have difficulty accurately assessing whether a company is included under the proposed definition as some of the information is not easily available (e.g. company turnover). In these circumstances, suppliers risk delaying the transfer process (and potentially impacting on a customer's costs) trying to establish the necessary information.

We assume that it is not Ofgem's intention to include larger businesses and HH metered customers, and therefore we are not providing a detailed cost assessment at this stage; however, should our assumption be wrong, we would be pleased to provide a more detailed impact assessment.

Question 5: Do stakeholders agree with our estimates on the number of extra businesses covered by our proposed definition?

Yes, the numbers broadly concur with our own internal assessment, but believe, as stated earlier, that the definition will have the unintended effect of including examples of both HH metered customers and customers that have a mixture of HH and NHH metered sites. We are currently investigating the impact of the proposed definition on our current customer base in more detail. Once this is concluded, we would be happy to discuss the findings in more detail with Ofgem as appropriate.

Question 6: Do stakeholders agree that we should review termination procedures and our current position that allows automatic rollovers?

We are happy to participate in such a review.

ScottishPower's current approach to rollovers is as follows:

- We contact the customer at least 30 days in advance of their renewal date (but more typically around 60 days before) to notify them about the options available for renewal and/or contract termination and to remind them of their actual renewal date.
- If the customer tells us that they wish to terminate their contract or that they do not want to rollover their contract and then don't subsequently move to a new supplier, we move them onto our standard ('published') prices. Whilst our standard prices are more expensive than any rollover price that we would offer the customer under a new contract, they are not as high as deemed prices and still enable the customer to transfer to another supplier.
- If the customer does not express any desire to terminate or switch, they will be rolled over onto a new contract. This automatic rollover gives them a better deal than they would get if they were defaulted onto deemed or standard prices.

Under this approach customers still have the freedom to move, but suppliers are afforded some protection against customers who would otherwise leave with debt on their account, as we retain the right to object under the Standard Contract terms, which contain provisions for these circumstances. Any intervention that increased the number

of customers on 'deemed' contracts and made it easier for customers to transfer to another supplier without first paying any outstanding account balance would result in increased debt and legal recovery costs, and ultimately in higher prices.

One area which might be useful to explore in a review is whether suppliers should be required to write a second time and/or attempt an outbound telephone call during the renewal window in order to reduce the risk that customers are rolled over inadvertently. However, our current view is that, with appropriate safeguards, rollovers in the non-domestic sector can work to the benefit of customers and suppliers alike.

Question 7: Are there other clauses that stakeholders believe we should be reviewing, in light of our expanded definition proposal?

No.

CHAPTER 3: CUSTOMER TRANSFER BLOCKING

Question 8: Do stakeholders agree with the conclusions we have drawn?

We are supportive of the analysis and conclusions drawn from the Ofgem review of objections and are keen to ensure that we make any necessary improvements in our communications with customers and our supporting processes to facilitate a smooth and hassle free transfer for customers who are entitled under their contract to switch.

Our own analysis of objections would suggest that there is merit in reviewing the current MRA and SPA arrangements associated with objections, to ensure that where the original reason for an objection has not or cannot be resolved in the short-term, and the objection has been made for valid reasons, the gaining supplier does not make numerous repeated registration requests.

This behaviour results in an inflated volume of objections and will influence some supplier objections volumes more than others, depending on whether a supplier loses more customers to a supplier who adopts the practice of multiple requests. Some suppliers appear to have no limit on the number of submissions they make for the same application once an initial objection is received.

Question 9: Do stakeholders agree that we do not need to make changes to SLC 14 governing objections to supply transfer for non-domestic suppliers?

Yes. We are grateful for the guidance in Ofgem's Open letter and for the clarity of the interpretation of the condition that this provides. Supporting licence conditions with additional guidance is a useful way to ensure that Suppliers understand the intent of Conditions. We do not believe that it is necessary to make changes to SLC 14, now that this guidance has been issued.

Question 10: Do stakeholders believe that we should publish our data relating to supplier objections on a regular basis?

Yes. We would welcome the publication of data related to objections so long as it was in a format that protected commercial confidentiality concerns. This would enable

individual suppliers to identify if they were operating outwith typical industry norms, thus enabling them to take proactive steps to understand their high level of objections and review customer communications and other procedures with a view to reducing them.

Ofgem would continue to have access to data which ensures the market is operating effectively. Whilst we do not believe that individual consumers would be particularly interested in the publication of the data, they would benefit from corrective remedy when this was necessary. As with all published data, care would need to be taken to ensure that definitions are clear and consistently applied between participants. We should also consider the merits of sharing best practice relating to the objections process and procedure to ensure that the consumer experience is consistent, regardless of their supplier, again, being cognisant of appropriate supplier competitive differentiation.

Question 11: Are there other issues with the objections procedure, other than the obligations of the licence condition, which stakeholders consider need to be addressed?

Please refer to our response to question 8.

We also agree that it would be desirable for Ofgem to review the appropriate use of the COT flag as part of the change of supplier process.

Question 12: Do suppliers who have voluntarily sent data have views on whether the data we currently ask for on a monthly basis needs to change and why?

We have no views on this point.

CHAPTER 4: THIRD PARTY INTERMEDIARIES

Question 13: Do stakeholders agree that the introduction of a new supply licence condition focussed on sales activities is a suitable method to prevent harmful sales and marketing activities in the non-domestic sector?

While we are willing to support further regulation in this area in principle, we consider that there are problems with the proposed condition 7B, as currently drafted.

In the first case, the condition lays down new regulation about the carrying out of all sales activities by suppliers (and not just by TPIs) including to large non-domestic consumers. We think this is probably unintended as no justification for this proposed regulation of non-TPI activity has been presented by Ofgem. Large scale consumers will have the assistance of purchasing departments and/or legal advice in their purchasing decisions and do not evidently need regulatory protection as respects pre-contract discussions with suppliers.

Secondly, while a supplier could seek to include contract terms of the kind envisaged by Ofgem in any contracts with TPIs, it is not clear how a supplier could

- (a) impose the terms on an existing TPI relationship; or

- (b) guarantee an acceptable level of compliance. Where a TPI acts for more than one supplier, it will be difficult to give that supplier sufficient audit access without risking disclosure of data belonging to a competitor supplier. It would also be hugely inefficient for each supplier having a relationship with a TPI to have to assure itself of that TPI's compliance.

While we could deliver on an obligation, when making new contracts with TPIs dealing with Small Business Consumers, to include terms requiring them to do the things proposed in Ofgem's draft Condition 7B, we do not see how we can secure that this would be fully carried out by the TPI.

Furthermore, without the support of an Ofgem accredited approvals scheme, adoption of best practice engagement principles with consumers would be inconsistent across different TPIs and between suppliers.

In the circumstances, we think that it would be best to address this issue with a licence condition that required suppliers only to make new TPI contracts with Ofgem accredited TPIs. We believe that this would be an effective way to overcome many of these difficulties. Part of the accreditation criteria could be the demonstration by TPIs that they could meet the "Standards of Conduct" principles.

We would also support Ofgem's proposal to seek powers to enforce Business Protection from Misleading Marketing Regulations (BPMMR), which would be particularly helpful in respect of TPIs which have no contractual relationships with Suppliers.

Question 14: Do stakeholders agree that this licence condition is necessary if Ofgem decides not to proceed with its Standards of Conduct proposals?

We do not believe that having both a licence condition in the form suggested by Ofgem and a legally binding 'Standards of Conduct' statement via an overarching licence condition is necessary. The latter is our preferred approach, but only if accompanied by a two stage compliance regime (see Chapter 5 responses below).

Question 15: Do stakeholders consider the introduction of an accreditation scheme for TPI Codes of Practice will reduce harmful TPI activities across the whole market?

Yes. We fully support the introduction of an accreditation scheme for TPIs and believe that in conjunction with the other measures that Ofgem have suggested, it will help to reduce harmful activities across the non-domestic market

Question 16: What do stakeholders consider to be key criteria for an accreditation scheme for TPI Codes of Practice?

A 'Standards of Conduct' statement requiring transparency, honesty, appropriateness and completeness in all dealings with customer would be required. This should be supported by a system for monitoring, reporting and management of Marketing Activities, to demonstrate adherence with requirements.

An accreditation scheme would also require guidelines that ensure appropriate representatives are employed and adequate and relevant training is given and refreshed.

Question 17: Do stakeholders believe it is necessary for TPIs to disclose their actual fee, or would making clear the fact that the customer is paying a fee for their services be sufficient?

At present, there are a number of different fee arrangements in operation between TPIs, Suppliers and customers. For example, one supplier may pay the TPI a fixed commission for each tariff that they sell, whereas another might agree a base commission and allow the TPI to add a small percentage to the customer's tariff to top up their commission. In the latter example the customer does not get an accurate picture of the true underlying tariff.

We support full transparency for the customer in this regard and would therefore support the disclosure of this information to the customer up front, when the contract is being negotiated. This would allow the customer to make a fully informed decision and help them determine which TPI gives them the best deal.

CHAPTER 5: STANDARDS OF CONDUCT

Question 18: Do you feel the revised SOC's will help to achieve our objectives?

We are supportive of Option 1 of Ofgem's proposals relating to Standards of Conduct, but given the widened scope and high level nature of the principles, we feel that these would only be appropriate in conjunction with a two (or more) stage enforcement regime.

The key feature of a two stage enforcement regime is that licensees are given a reasonable opportunity to remedy any breach before they become liable for a penalty or enforcement order. For example, a useful precedent is the bespoke enforcement regime that Ofgem introduced for Condition 25A (Prohibition of undue discrimination in supply), which normally has three stages¹:

Stage 1: Ofgem writes to the Supplier, giving it an opportunity to respond and provide objective justification for a suspected breach.

Stage 2: If Ofgem is not satisfied with the response, it writes to the Supplier explaining why it is not satisfied and allowing the Supplier a reasonable time to respond; if, at this stage, the Supplier revises its pricing, Ofgem is unlikely to take further action, unless there is evidence of a persistent failure to comply.

Stage 3: If the Supplier does not revise its pricing, Ofgem will make the case for a licence breach and continue enforcement in line with existing Enforcement Guidelines, potentially leading to a financial penalty and/ or an enforcement order.

In exceptional circumstances Ofgem reserves the right to proceed directly to enforcement action.

¹ 'Guidelines on Cost Reflectivity between Payment Methods and the Prohibition of Undue Discrimination in Domestic Gas and Electricity Supply Contracts', Ofgem, 7 August 2009, p19.

Similar approaches are also employed by other regulators. For example, the Communications Act 2003 sets out a two stage enforcement process which Ofcom must follow in enforcing telecommunications regulations:

Stage 1: Following an investigation, Ofcom issues a 'Section 94' notification explaining why it considers there has been a contravention and giving a deadline (normally one month) to remedy any ongoing contravention.

Stage 2: If the company does not comply with the Section 94 notification, Ofgem may issue a 'Section 95' enforcement notification and may also impose a financial penalty under Section 96.

We would encourage Ofgem to adopt a similar enforcement approach for the Standards of Conduct as it has for Condition 25A. This would mitigate any unintentional differences in interpretation of the high level principles between Ofgem and suppliers.

Question 19: Do you agree that the SOC's should be in a licence condition and enforceable?

Yes, we would be supportive of Option 1, but only on the basis that it is subject to a two stage enforcement regime, as discussed above.

Question 20: Do you agree the revised SOC's should apply to all interactions between suppliers and consumers?

Given the high level nature of the objectives in the SOC's, it would be easy for differences in interpretation to occur between different suppliers, and between suppliers and Ofgem. Whilst we envisage that Ofgem's intended guidance will be helpful, it will be the circumstances of individual scenarios that will create the greatest challenge. A more consultative approach to enforcement will help alleviate this problem, and we would hope that the adoption of a two stage enforcement approach would build trust and promote more informal dialogue and guidance between suppliers and Ofgem.

It would also be helpful if, as part of any accompanying guidance, Ofgem could develop some common scenarios to illustrate the sort of conduct that it considers to be appropriate or inappropriate. Building such a catalogue of case studies/best practice into the guidance for suppliers and consumer groups would ultimately improve supplier compliance and benefit consumers.

Question 21: Do you have information regarding potential costs this may impose on suppliers?

We are not currently in a position to provide a view on the potential costs associated with implementing SOC's business wide as we would always attempt to achieve these high level objectives in our dealings with customers.

Clarity on cost will be achieved, when specific requirements come to light from Ofgem that we had not envisaged within our initial interpretation of the requirements. This is where guidance and dialogue with Ofgem, supported by a two stage enforcement regime will become critical. This open dialogue will assist us in managing down costs effectively.

Question 22: Do you think these proposals should apply to the whole non-domestic market, or only a sub-set of it, e.g. small businesses?

Although the Standards encompass in general terms how a business should naturally go about its affairs, we consider that the SOC's should not apply to interactions with non-domestic customers who are not Small Business Consumers. The relationship between a supplier and a large business customer is a much more equal relationship, often involving bespoke or legally represented procurement, where contractual agreement under the general law should be the governing principle. Contracts struck under a formal tender or with the help of legal advisers on both sides may well, for example, not end up in plain and intelligible language. In these kinds of circumstances, the application of general regulatory principles rather than the precise contractual terms would add to rather than reduce uncertainty.

Question 23: Given your answers to the questions above, do we still need the licence changes proposed elsewhere in this document?

We do not believe that changes will be required to SLC 7A, other than those necessary to widen its scope to Small Business Consumers. However, a licence condition requiring suppliers only to make new TPI contracts with Ofgem accredited TPIs is still necessary in order to give teeth to Ofgem's accreditation scheme that would ensure TPI Standards of Conduct were being adhered to.

ScottishPower
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