

Ofgem consultation on the future of retail market regulation

Question 1

In what circumstances do you think that prescriptive rules are likely to be most appropriate? Which specific SLCs/policy areas should remain prescriptive in nature?

1. It would be most appropriate to use prescriptive rules where the requirement is absolute or where Ofgem require standardisation across the industry and it is important that all licensed suppliers operate in exactly the same way, such as the interoperability of Advanced Domestic Meters.
2. We need to understand more about Ofgem's proposed approach and application of broad and narrow principles to enable further consideration of suitable prescriptive rules.

Question 2

Should we supplement the principle of "treating customers fairly" with any other broad principles? If yes, please outline what these should be and why.

3. The principle of treating customers fairly is far reaching, covering the way suppliers behave and information provided to customers. It can be applied to a considerable proportion of standard licence conditions.
4. It would be helpful to understand Ofgem's rationale for the introduction of the proposed broad principles detailed in the consultation. We are concerned that the proposed broad principles appear to add an additional layer of complexity rather than simplifying matters and, other than the principle of 'not putting customer outcomes at risk', are not customer focused. The proposed broad principles create greater risk and uncertainty for a supplier as, in part, they dictate how a supplier should run its business rather than allowing it to focus on customer outcomes.
5. In particular, we do not see good record keeping as a broad principle. It is more prescriptive in nature, as it will need to be fairly specific what information should be recorded in order to ensure consistency. For example, one supplier may consider it is necessary to retain training records for five years in all circumstances, whereas another may feel it is appropriate, under data protection rules, to destroy training records once an employee has left the business. At best this principle would be narrow rather than broad, as in SLC 25B.4:

"Where paragraph 3 applies, the licensee must take and retain (and ensure that any Representative takes and maintains) appropriate record of its compliance with the requirements of paragraph 3 of this condition."

Question 3

Where might narrow principles be more appropriate than broad principles or prescription?

6. We consider the Standards of Conduct (**SoC**) to be far reaching and sufficient to support a much reduced prescriptive rule book.
7. Until CMA concludes its investigation it is difficult to propose what narrow principles should be included. We may be supportive of having narrow principles for defined specific outcomes which might apply to a specific subset of customers, such as vulnerable customers, but those requirements may be more suited to prescription if Ofgem wants to deliver a specific policy intent.
8. Any potential conflict between proposed narrow principles should be avoided. The interpretation of any narrow principle may change over time and any changes to Ofgem's understanding of principles should be communicated in a timely manner and not be applied retrospectively.

Question 4

What are your views on the potential merits or drawbacks of incorporating consumer protection law into licences?

9. We do not support the incorporation of consumer protection law into licences and we do not believe that it is necessary for Ofgem to have these powers. This will simply lead to dual regulation.

Question 5

How should we use principles and prescription to most effectively protect consumers in vulnerable situations?

10. We believe that the SoC already provide significant protection for vulnerable customers. However, if Ofgem would like to deliver specific policy intent and believe that there is only a single appropriate outcome, it should be clearly defined in a prescriptive rule.

Question 6

Do you agree with our proposed approach to guidance?

11. We believe that clear guidance would play an important role in the success of the implementation of principles-based regulation (**PBR**) and agree that guidance should not simply be introduced in place of prescriptive rules. It could be the case that less, if any, guidance may be required if the principle is appropriate and clearly drafted.
12. We agree that any guidance should be concise, straightforward and located in a single, well-signposted place (paragraph 2.40 of the consultation).

13. Historically, guidance has been provided through a variety of means, for example open letters, decision documents, written advice to individual suppliers, information in consultation documents. There is no direct link between this guidance and the relevant licence condition. Suppliers have great difficulty ensuring they have access to the latest (or any) guidance on a particular topic.

Question 7

How can we best engage with suppliers in the context of principles?

14. We welcome Ofgem's proposal to increase engagement with suppliers. The introduction of PBR will be a culture change for both Ofgem and suppliers and we believe that constructive engagement with suppliers will be fundamental to ensure the new principles-based regime is a success.
15. Historically, Ofgem have been reluctant to provide advice to suppliers to help them understand the policy intent in particular circumstances. We believe a framework should be set up for engagement: Ofgem will need to have adequate resources to support this. Given the expansion of the competitive market and the influx of smaller suppliers the resource requirement is likely to be significant, particularly during the early days of PBR.
16. In order not to stifle innovation or prevent positive actions, responses to requests for advice from suppliers will need to be provided in a timely manner.
17. It is important that if any advice given to suppliers subsequently becomes outdated or no longer applicable, suppliers should be informed in writing of this fact.
18. Paragraph 3.11 of the consultation suggests that views shared by Ofgem in one-to-ones will not restrict Ofgem's ability to later take compliance or enforcement action. Provided the supplier has followed both the letter and the spirit of advice given, we do not believe enforcement action by Ofgem would be appropriate. Suppliers must be able to have confidence in advice given by Ofgem, otherwise there will be no value in consulting the regulator.

Question 8

What specific support may be needed for new and prospective entrants?

19. Ofgem should ensure that suitable support is available to new and prospective entrants in the form of publically available information and guidance.

Question 9

Do you have any views on how best to approach monitoring in the context of principles? Specifically, which indicators and approaches should we use to catch potential problems early?

20. There should be appropriate monitoring, not more monitoring.
21. Effective monitoring will require Ofgem to have a greater understanding of suppliers' businesses. Under a PBR approach, Ofgem must not look to measure or monitor suppliers' compliance through benchmarking or comparisons – each supplier's compliance must be monitored and measured independently.
22. We agree that monitoring consumer outcomes by analysing consumer contacts and complaints data will continue to be important.
23. We have a concern over the use of a survey to be distributed to customers by suppliers as the results could be biased. It is possible that customers will only respond to surveys of this nature if they have an issue. There may be little incentive for a customer to respond if the customer is happy with the outcomes received.
24. Developing standard monitoring indicators will be a challenge as each supplier may have different fair outcomes, therefore there will need to be a full understanding of each supplier's processes and rationale for that particular outcome before specifying leading indicators for monitoring purposes. Suppliers systems are currently set up to provide particular sets of monitoring information. In developing new indicators Ofgem should recognise that suppliers may need significant lead times to develop changes to their systems. It will be really important to ensure the development of these indicators is in conjunction with suppliers. They should also be specified before the introduction of PBR.
25. Any monitoring system needs to be able to differentiate between one-off issues and systemic failures.
26. The current level of information requests issued by Ofgem to suppliers can be extremely burdensome and the significant proportion of time spent responding to the information requests would be better spent ensuring that we are getting things right for our customers first time. We therefore welcome Ofgem acknowledging the importance of monitoring being proportionate, risk-based, targeted and not unduly burdensome.

Question 10

Do you have any views or comments on the following proposals?

- ***We will expand our engagement with suppliers to enhance our understanding of their businesses and help them better understand our rules so they can get things right first time.***
- ***We will collaborate closely with the Citizens Advice Service and the Ombudsman Services: Energy to ensure we maximise the effectiveness and impact of the monitoring activities across our organisations.***

27. We are supportive of your proposals in Question 10.

Question 11

Do you have any views on how best to approach compliance in the context of principles?

28. The introduction of PBR requires a degree of culture change. Employees of suppliers are required to move from the certainty of prescriptive regulation to a new world of assessing what the principles mean in the context of each new situation. While our employees will already be used to considering things in terms of what is fair for customers, as treating customers fairly and delivering fair customer outcomes is at the heart of our strategy, further culture change will be required as prescriptive rules are removed.
29. We believe that, until PBR is fully embedded, compliance should focus on methodologies and processes used by suppliers in developing solutions that have the required outcomes, and the ability of suppliers to provide evidence of documentation of the way decisions were made. In the early days, suppliers will need time to revisit decisions previously taken under prescriptive licence conditions. Ofgem should make allowances for this and take a fair and pragmatic approach. We welcome Ofgem acknowledging the importance of monitoring being proportionate, risk-based, targeted and not unduly burdensome.
30. We are disappointed that Ofgem have decided against introducing a two-stage enforcement model or the variant whereby, in certain circumstances, Ofgem could stop the behaviour rather than seek to enforce (paragraph 4.6 of the consultation). We would urge Ofgem to reconsider their decision.

Question 12

Do you have any views or comments on the following proposals?

- ***We will retain our current flexible and discretionary approach to escalating issues to enforcement. We will prioritise compliance activities where possible and appropriate.***

- ***We will increase the links to the level and impact of harm when deciding whether to open a case.***
- ***Engaging early with Ofgem may reduce the likelihood of later enforcement. Information from engagement and monitoring activities may be shared with enforcement where appropriate.***
- ***We will continue to apply our full range of enforcement tools to principles-based rules.***
- ***We will make it easier for all suppliers to learn lessons from enforcement outcomes.***
- ***Enforcement action will continue as usual throughout the transition to principles.***

31. Ofgem should be consistent in its approach to enforcement, and develop a fair and appropriate enforcement process with opportunities for dialogue with the regulator and the option of independent review.
32. Ofgem's intent to regulate more through principles, which are more subjective than prescriptive rules, means that there is a greater likelihood of mistakes in enforcement decisions. It should therefore provide certainty that suppliers have an effective route through which they can appeal Ofgem's enforcement decisions on the merits of the case.
33. The enforcement regime needs to be developed in parallel with Ofgem's regulatory framework. The "reasonable person" test used under SoC is a good starting point on which to develop further.
34. A desired outcome of a transition to PBR should be to facilitate greater innovation and competition. To promote this outcome, enforcement must be flexible and allow for different suppliers to comply with Ofgem rules in different ways.
35. A supplier should be expected to be able to evidence that due process was followed when it made a business decision to take an action, and be able to demonstrate to Ofgem why the decision meets the relevant principle.

Question 13

How would you like to engage with us on our proposals and the broader work programme?

36. We would be interested in all forms of engagement.

Question 14

Do you agree with our proposal to take a phased, priority-driven approach to reforming the supply licence.

37. We believe that a phased approach would be the most appropriate, allowing suppliers time to embed and assess the impact of any changes, before Ofgem move to the next phase. It is also important for Ofgem to work with suppliers to identify priorities and how each principle can be tested prior to moving to the next.

Question 15

Which areas of the licences should we prioritise? In particular, please provide examples where existing prescriptive rules may be causing problems or where market developments are leading to new risks to consumers.

38. SLC25 is a priority. We see the following licence conditions (in no particular order) as also lending themselves to PBR:

- SLC22B provisions identified under the CMA's recent investigation;
- SLC31A regarding the prescriptive requirements for bills and annual summaries;
- SLC31B regarding the prescriptive requirements for the tariff information label;
- SLC31C regarding the prescriptive requirements for the TCR;
- Those parts of SLC31D that are equivalent to the above licence conditions.

39. While the information required by these licence conditions is important, suppliers are likely to be able to achieve the required outcomes in a way that could provide better outcomes for customers and improve engagement in the market. There will also be opportunities to tailor communications for specific customer groups. For example, certain vulnerable groups (e.g. deaf customers and those who use sign language) may find it easier to understand communications if the information is reorganised and phrased differently.

Question 16

Can you provide any initial views on potential costs and benefits (eg avoided costs) of regulation via principles versus prescription to your organisation? Please explain which parts of our proposals (eg rulebook, operations) these costs relate to.

40. We are not in a position to assess the potential costs and benefits until we have a clearer view of what will be implemented and how it will be delivered.

Question 17

Are the existing provisions of SLCs 25.1 and 25.2 the right ones for regulating sales and marketing activities (or are any additional principles needed)?

41. It will depend to some extent on Ofgem's policy views on whether a condition can only be achieved in a particular way or whether it would be appropriate for suppliers to develop their own methodologies to achieve particular outcomes. In our opinion, most of the requirements in SLC25 are already covered by SLC25C. The remaining requirements could be covered by additional requirements in SLC25C, such as "Provide all relevant information to enable a customer to make an informed choice when selecting a tariff."
42. By using SLC25C, all channels (telephone, face-to-face, online) will have the same regulatory requirements. We believe this is appropriate and fairer for consumers.

Question 18

What, if any, prescriptive rules are needed in addition to the principles in SLC 25 to deliver good consumer outcomes?

43. We believe that the SoC cover much of SLC25 and therefore, with a few minor changes, the prescriptive elements of SLC25 could be removed. Suppliers will need to ensure that customers have access to fair comparisons over the phone and face-to-face; for example, consider at what point is the personal projection used? Should this element be consistent across the market and therefore more prescriptive?

Question 19

What engagement and monitoring process might be required to best operate SLC 25?

44. It is anticipated that the policy outcomes for SLC25 under PBR will be similar to those under the current mix of principles and prescription. In this case, it would be expected that suppliers already meet the requirements of the new SLC25. The risks for suppliers will be in introducing new or revised processes to improve consumer outcomes.
45. In the early days of PBR we would hope that Ofgem would not take an aggressive approach to enforcement. It will be important for suppliers to be able to engage with Ofgem before introducing new or revised processes in order to ensure those processes meet Ofgem's policy intent and interpretation of principles.
46. It will also be important for Ofgem to enter into open and honest discussions when initial compliance concerns are raised by either party, without the threat of enforcement. If suppliers believe they risk immediate enforcement action they will take a more cautious approach to interpretation and opportunities for innovation will be lost.

47. While we agree that the use of pilots could be advantageous in allowing suppliers to build their confidence in complying with principles, such methods are not always the most cost-effective way to approach changes. Where it would be preferable to introduce a blanket change we would hope that it was possible to work closely with Ofgem in ensuring that the change is compliant: if the outcomes are not as expected, we would hope that Ofgem would be tolerant and not penalise suppliers' for their attempts to innovate.