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Response by: Which?

## Consultation Response

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Which? is the largest consumer organisation in the UK with more than 1.2 million members and supporters. We operate as an independent, a-political, social enterprise working for all consumers and funded solely by our commercial ventures. We receive no government money, public donations, or other fundraising income. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives, by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

### Summary

Which? welcomes the opportunity to respond to Ofgem's consultation on the future of retail market regulation. Effective regulation of retail energy suppliers is important to protect consumers from poor service and unfair treatment. As the Competition and Markets Authority (CMA) provisionally concluded in its investigation of the energy market, competition is deficient meaning that many energy customers are being treated unfairly, especially those on standard variable tariffs with larger suppliers. Additionally, the customer service of large energy companies has consistently been poor, both compared to other sectors and compared to smaller energy companies.

Currently, there are low levels of trust and consumer satisfaction in the energy sector. Which? consumer insight data showed that, in January 2016, 34 % of consumers trust their gas and electricity supplier, fewer than the proportion of people who trust banks. In addition, customer satisfaction levels for the large energy providers remain consistently low.

Large energy suppliers have consistently received a low ranking in Which? consumer surveys of brands and as a group rank lower on customer service than all other sectors. Between 2013 and 2015 (the latest survey) all of the six large energy suppliers were in the bottom half of the overall rankings, with some the lowest ranked brands of all (out of 100). The average customer service score for energy suppliers is lower than all other sectors including banking and telecoms providers. Meanwhile, Ofgem's own complaints data for 2015<sup>1</sup> demonstrates that the six largest suppliers received almost five million complaints and consistently received more complaints per 100,000 customers than smaller suppliers.

Which? supports Ofgem's Standards of Conduct, and its proposed general move towards a more principles-based approach to retail regulation. Implemented effectively, a principles-

<sup>1</sup> <https://www.ofgem.gov.uk/publications-and-updates/ofgem-publishes-energy-suppliers-2015-complaints-data>

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based approach could lead to a stronger focus by suppliers on consumer outcomes. However it is important for Ofgem to maintain prescriptive rules in certain situations, especially those where the risk of harm to energy customers is highest and outweigh the benefits of the greater flexibility that principles allow.

Which? believes that there needs to be a culture shift so that large energy suppliers embed treating customers fairly throughout their business. A move to principles-based regulation makes this even more important.

This response sets out Which?'s position on a number of issues set out by Ofgem in the consultation document, as well as recommendations for further action.

In summary:

- Which? welcomes Ofgem's move to a principles-based approach to regulation. Implemented effectively, this could lead to a stronger focus by suppliers on consumer outcomes.
- There is a need to maintain prescriptive rules in certain situations, especially those where the risk of harm to energy customers is highest and outweigh the benefits of the greater flexibility that principles allow.
- Which? supports Ofgem's proposal for an additional regulatory principle to hold company boards to account for embedding the culture change needed to ensure customers are treated fairly. However, Ofgem should avoid imposing prescriptive requirements on how boards achieve this; and should be prepared to call out those boards it believes are falling short, even where formal enforcement action is not taken.
- Ofgem should take a risk-based approach to monitoring compliance with principles, undertaking intensive scrutiny where intelligence indicates a risk.
- Which? welcomes Ofgem's proposal to develop and make use of broader measures of customers' outcomes. As part of this, Ofgem must take a leading role in improving the overall landscape of collection and analysis of complaints by companies, the Ombudsman and Citizens Advice so that complaints data is sufficiently granular to allow for identification of systemic wrong-doing.
- There is a need for a stronger consumer voice and challenge that can hold energy suppliers to account and therefore Ofgem should consider establishing a Challenge Panel for each of the large energy companies.
- Which? believes that Ofgem should increase transparency of its enforcement decisions. For example, currently it is not always clear how a level of fine or redress issued by Ofgem has been arrived at.
- Finally, Which? believes that incentives on suppliers for delivering good consumer outcomes could be sharpened through more effective compensation arrangements. Ofgem should review the compensation levels being awarded to consumers, engaging with consumers to understand their views on compensation levels and reflecting this as part of clear principles for setting levels of compensation both fixed statutory payments and awarded by the Ombudsman.



## 1. A move to a principles-based approach to regulation

Which? supports Ofgem's proposed general move towards a principles-based approach to regulation of the retail market. Implemented effectively, this approach could lead to a stronger focus by suppliers on improving consumer outcomes. This approach could also avoid the risk of 'tick-box' compliance that is associated with prescriptive regulation as well as reduce potential barriers to competition and innovation.

However, there are circumstances where prescriptive rules will still be necessary as Ofgem recognises. The precise circumstances where prescription over principles are most appropriate need to be decided on a case-by-case basis. However, where there are few benefits to the greater flexibility of principles and where risk to consumers is highest are areas where prescription should be maintained.

Which? welcomed the introduction of the Standards of Conduct (SoCs) principle to 'treat customers fairly' and there have been positive changes from large suppliers referenced in their Treating Customers Fairly statements. However, in order for the SoCs to be embedded fully, Which? agrees with Ofgem that there needs to be a culture shift so large suppliers embed this principle throughout their business. A move away from prescriptive rules means this is even more important.

### Holding boards to account

Boards do need to be held strongly to account for delivering the Standards of Conduct and necessary culture change and therefore Which? supports Ofgem's proposal for an additional regulatory principle to hold boards directly to account for embedding treating customers fairly in their organisations. However, Ofgem should avoid imposing prescriptive requirements on *how* boards achieve this.

Which? notes that Ofgem has considered, but rejected, requiring senior managers to have personal accountability to the regulator. We agree that this is not the right approach, with the risk that Ofgem placing itself between a supplier's board and its managers could diminish the board's authority and accountability.

Ofgem should avoid imposing prescriptive rules on how boards achieve culture change. Which? is concerned that the mention by Ofgem of suppliers producing "accountability maps" could signal an intention to implement prescriptive rules in this area and could perpetuate the risk of a tick-box approach to compliance.

Which? believes that Ofgem should have the courage to publicly call out those boards they consider falling short of the principles and failing to change culture. Applying strong reputational pressure is likely to be an important tool, even where formal enforcement may be hard to deliver.



## 2. Engagement and Monitoring

Which? supports Ofgem's proposal to broaden the measures of customer experience and outcomes that Ofgem use beyond current complaints data reporting - to include a better understanding and clearer picture of consumers' experiences. As prescriptive rules are removed, Ofgem will need to be more proactive in monitoring for early warning signs that suppliers are not delivering good consumer outcomes, as well as not having effective processes (see 'Consumer Challenge Groups' below).

In monitoring compliance with principles, including the Standards of Conduct, it is sensible for Ofgem to take a risk-based approach - undertaking intensive scrutiny of energy suppliers' conduct where intelligence indicates a risk. Therefore, having good sources of intelligence is important. Ofgem set out a number of data sets including consumer satisfaction surveys and other consumer experience research. This could be supplemented with better data on complaints and their causes.

Ofgem should also take a leading role in improving the overall consumer landscape of data collection on complaints, including data collected by companies, the Ombudsman and other public bodies.

As Ofgem's review of the Ombudsman concluded, too little is being done to analyse its data to identify systemic issues that are causing complaints. Whilst Ofgem states that it is "committed to working with the Ombudsman as it enhances its capabilities", the regulator should take a more proactive role than this in ensuring improvement. Ofgem holds the contract with Ombudsman Services and must take responsibility for ensuring it delivers adequate progress.

### Consumer Challenge Groups

Another potential key source of information arises from the consumer challenge to providers. We welcome Ofgem's use of a Consumer Challenge Group in 2014 to explore how suppliers are embedding the SoCs. There is a strong case for building on this work to develop a more intensive process of consumer challenge to large energy suppliers by creating a Challenge Group for each large supplier.

With fewer prescriptive rules, companies will need to take a greater role in deciding how they conduct themselves, for example what detail goes in bills and how to communicate with their customers. In other words, they will decide how to implement the Standards of Conduct and to meet consumers' needs. Companies must take these decisions having properly understood what consumers want following high quality consumer engagement. Consumer challenge processes with sufficient capacity and expertise are needed to ensure effective engagement with consumers and application of the findings.

In addition, more intensive consumer challenge would help drive culture change and inform how Ofgem targets scrutiny of suppliers' compliance with SoCs by helping to monitor internal company processes, including the processes for companies' consumer engagement.

Suppliers would be likely to take consumer challenge particularly seriously if Ofgem made clear that the Challenge Panel's conclusions would inform its risk-based approach to compliance scrutiny.



### 3. Compliance and enforcement

Which? welcomes Ofgem's vision for enforcement to achieve a culture "where businesses put energy customers first and act in line with their obligations". However a significant culture change is needed to ensure that providers take these issues seriously and embed the principles of treating customers fairly and placing consumers at the heart of their business.

Which? research<sup>2</sup> demonstrates that large energy suppliers consistently score poorly across a range of satisfaction measures; including complaints handling, value for money and accuracy of bills. A shift to principles-based regulation is unlikely to improve satisfaction and customer service levels immediately and therefore Ofgem should be prepared to step in where necessary.

As part of the enforcement toolkit, Which? supports the greater use of innovative enforcement actions such as banning activities that are associated with offending behaviour, such as the 12-day sales ban placed on Scottish Power - which directly protect consumers as well as disincentivising companies. However, such enforcement actions need to be sufficiently strong and long-lasting to have the desired impact.

Whilst there have been a number of large fines issued recently by Ofgem to large energy providers for poor levels of customer service, there is a need for Ofgem to be more transparent in how it reaches such enforcement decisions, in particular to enable third parties such as consumer groups to effectively scrutinise agreements that have been reached with companies. Which? notes that it is not always clear how a particular fine level or redress amount has been arrived at by Ofgem. Other regulators, including the Financial Conduct Authority and Ofcom<sup>3</sup> provide more details about how levels of fines and redress have been determined.

As Ofgem moves to rely more on regulatory principles, enforcement cases will require more judgement and interpretation and therefore transparency on how decisions are reached will become increasingly important.

Which? supports Ofgem's proposal to continue publishing case opening decisions as they provide important information for consumer groups and for the public.

### 4. Incentives

Ofgem should use enhanced data on consumer outcomes to inform not only its monitoring and compliance activity but also to strengthen incentives on suppliers to improve customer service, satisfaction and treating their customers fairly.

These incentives could include reputational incentives such as publishing comparative data on consumer outcomes which Price Comparison Websites and consumer groups including Which? could use to inform consumer choice. This would be in addition to the procedural incentives which arise from Ofgem using data explicitly to inform the intensity of its risk-based scrutiny of suppliers' compliance with SoCs and other principles.

<sup>2</sup> Which? Annual Energy Satisfaction Survey <http://www.which.co.uk/energy/saving-money/reviews-ns/energy-companies-reviewed/best-and-worst-energy-companies/>

<sup>3</sup> Ofcom's Enforcement Bulletin (<http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/>) and the FCA's Enforcement and Fines data (<http://www.fca.org.uk/firms/being-regulated/enforcement/fines>)



Incentives on suppliers for delivering improved consumer outcomes could also be sharpened through more effective consumer compensation arrangements. Recent consumer research on compensation by Which? found that consumers considered the fixed compensation levels offered for poor service or loss of service were too low and tokenistic. Since this research was undertaken, Ofgem has raised the level of fixed payments by suppliers to £30 from £20-£22 based on inflation estimates. However, it is not clear whether Ofgem has undertaken new consumer research to assess whether the new limit takes into account consumer expectations. Our research also found fixed compensation provisions did not cover a number of the most prevalent problems that consumers experience such as issues with billing.

Ofgem should review the compensation levels being awarded to consumers. As part of this it should engage with consumers to understand their views on compensation levels, and reflect this as part of clear principles for setting levels of compensation - both by the Ombudsman and through fixed statutory payments. Ofgem can establish policy or guidance on ADR compensation levels, while respecting the Ombudsman's decisions on individual cases.

Which? supports Ofgem's move to a principles-based approach to regulation and agrees that Ofgem should take a phased approach to implementation. Which? looks forward to working with Ofgem on the Future of Retail Regulation to ensure that consumers are protected and that there is a strong focus on consumer outcomes by energy suppliers.

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