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Standards of Conduct for suppliers in the retail energy market

EDF Energy is one of the UK's largest energy companies with activities throughout the energy chain. Our interests include nuclear, coal and gas-fired electricity generation, renewables, and energy supply to end users. We have over five million electricity and gas customer accounts in the UK, including residential and business users.

EDF Energy is supportive of a review of the existing standards of conduct (SoC) as part of the transition from prescriptive to more principles based regulation (PBR). We believe that the regulatory framework fundamentally shapes the competitive response of energy suppliers. There are some significant benefits from lowering the regulatory burden and the simplification of the existing rules. It is therefore important to periodically review the regulatory framework to ensure it is producing the best outcomes for consumers and facilitating effective competition and innovation in the market.

EDF Energy is committed to treating its customers fairly. We know that there is a continual need to improve trust in our sector and that growing this trust will take time. We have an ambition to become the best and most trusted energy supplier. We will only succeed if we consistently live up to our commitment to deliver fair value and better service, and by making energy easier for our customers. It is for this reason that we supported the introduction of Standards of Conduct in August 2013, and have continued to work hard since then to meet our overall ambition and strategic objective to be the best and most trusted for customers. We have made significant progress over this period demonstrated, for example, by our strong performance in both the Citizens Advice complaints and customer service league tables.

The proposed changes to the fairness test and more significantly, the compliance threshold, are a fundamental policy change that will introduce greater regulatory risks for suppliers and which may have the effect of stifling innovation given the perception of compliance risk. Furthermore, we do not believe the move away from established fairness principles set out in general consumer protection law, has been duly justified. The introduction of the existing standards has delivered real consumer benefits with complaint levels falling and switching levels increasing, which are all indicators that the market is reacting to the challenge. Additionally, in a number of cases where Ofgem has

determined customers were being treated unfairly, it has been able to effectively enforce the SoC to address the detriment. Consequently, we believe it is more appropriate to make amendments to the standards, to ensure they are future proofed as we move to a

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more principles-based regulatory approach, rather than undertake a significant rewrite as is proposed.

We accept that Ofgem, in introducing more principle based regulation, is seeking to move to a regulatory model that has a focus on consumer outcomes. There are clear advantages in such a model where the regulator is able to step back from prescribing specific actions suppliers must take to one where it appropriately sets out the consumer outcomes it expects suppliers to achieve. We believe suppliers are best placed to determine the operational practices and actions within their business to achieve a consumer outcome, in the most efficient and effective manner.

However, the subjective nature of principles, together with the potential for Ofgem to interpret such principles with perfect hindsight, poses potentially significant risks for suppliers. In order to mitigate these and to avoid stifling innovation a supplier needs to have confidence that it can robustly defend its actions, prior to any determination on breach, by demonstrating that it duly considered the principles and consumer outcomes and acted in good faith in undertaking its activities. Ofgem state that the removal of all reasonable steps is set against a backdrop of proportionality safeguards within its Enforcement Guidelines and in particular, due consideration as to the level of harm to consumers, taking account of the actions of the supplier. However, this consideration is in terms of whether to proceed with an enforcement investigation and not in respect of ascertaining whether any non-compliance has occurred in the first place, given the steps taken by the supplier concerned to achieve the consumer outcome.

We strongly disagree that the compliance threshold should be set against an absolute standard that 'must achieve' imposes. Not only is such an absolute standard unrealistic, it could force suppliers into taking unreasonable and disproportionate steps to meet the consumer outcomes covered by the Principles to the detriment of consumers generally. It is for these reasons, we believe the continued inclusion of the 'all reasonable steps' compliance threshold is fundamental to the achievement of the retail regulation reform objectives in terms of promoting competition and the delivery of positive consumer outcomes through innovation.

It should be recognised that suppliers are likely to have differing assessments of risk and will adopt differing approaches in how to achieve compliance with the principles. However, it is important that Ofgem's interpretation of the principles and the compliance and enforcement approach that is followed is consistently applied in a transparent manner, so as to ensure a level playing field is maintained and to avoid market distortions.

If the proposed changes are implemented, we believe there will be a need for Ofgem to provide some clarity on its interpretation of some of the key terms proposed. For instance, the use of 'reasonable' and 'relevant' within the proposed rewording of the 'fairness test' are highly subjective and open to a wide interpretation. On the face of it the application of these terms could interfere with the commercial relationship between a supplier and a customer, preventing for instance the recovery of legitimate and proportionate charges for supply activities. We believe therefore that where subjective terms are used within the principles, some guidance is required in order to aid compliance, achieve fair treatment for all customers and avoid any distortions in competition.

We are supportive in principle of the inclusion of a broad vulnerability principle. We believe that such a principle should be designed to provide suppliers the opportunity to understand and serve its customers who require additional support in ways that are practical and appropriate to their needs. However, Ofgem must ensure this is not implemented in a way which reduces the freedom of suppliers to innovate and differentiate to truly embrace the intent of principles based regulation.

Our detailed responses are set out in the attachment to this letter. If you wish to discuss any of the issues raised in our response or have any queries, please contact Steven Eyre on 01452 653741, or myself.

I confirm that this letter and the attachment may be published on Ofgem's website.

Yours sincerely,

A handwritten signature in blue ink that reads "Paul Delamare".

Paul Delamare
Head of Customers Policy and Regulation

Attachment

Standards of Conduct for suppliers in the retail energy market

EDF Energy's response to your questions

Q1. Do you agree with our proposal to retain a Fairness Test for all the broad principles within the domestic Standards of Conduct? If you don't agree, please provide an explanation in support of your answer.

The inclusion of a fairness test is a fundamental part of any assessment as to the extent to which customers have, or have not, been treated fairly. It is also an established principle in general consumer law and as such we see no rationale for it to be removed.

Q2: Do you agree with our proposed wording for a revised Fairness Test: "the licensee or any Representative would not be regarded as treating a Domestic Customer/Micro Business Consumer Fairly if their actions or omissions give rise to a likelihood of detriment to the Domestic Customer/Micro Business Consumer, unless the detriment would be reasonable in all the relevant circumstances"?

We do not believe that the move away from established fairness principles set out in general consumer protection law, has been duly justified. We are keen to see an energy market where customers are treated fairly and feel able to engage with the market and make informed choices regarding their supplier and energy products. The introduction of the existing standards was an important step in this trust agenda and had the effect of delivering real consumer benefits by requiring suppliers to adopt a focus on treating customers fairly. Evidence of industry progress is highlighted by the fact that complaint levels fell by over a third in 2016 and now sit at their lowest level for three years. Furthermore, Ofgem has successfully enforced the SoC in a number of cases where it has determined customers were being treated unfairly. We are therefore of the view that it is more appropriate to make amendments to the standards, to ensure they are future proofed as we move to a more principles-based regulatory approach, rather than undertake a significant rewrite as is proposed.

If the proposed revisions to the 'fairness test' are to be made, we believe there will be a need for Ofgem to provide some clarity on its interpretation of some of the key terms proposed. For instance, the use of 'reasonable' and 'relevant' within the proposed rewording of the test are highly subjective and open to a wide interpretation. On the face of it the application of these terms could interfere with the commercial relationship between a supplier and a customer, preventing for instance the recovery of legitimate and proportionate charges for supply activities. We believe therefore that where subjective terms are used within the principles, some guidance is required in order to aid compliance, achieve fair treatment for all customers and avoid any distortions in competition.

Q3: Do you agree that the changes to the Fairness Test should be made to the non-domestic Standards of Conduct at the same time as the domestic Standards of Conduct?

Despite not agreeing to all of the changes proposed, we see no rationale for treating the non-domestic standards any differently to the domestic standards in this respect.

Q4: Do you agree with our proposal to remove the all reasonable steps threshold from the domestic Standards of Conduct? If you don't agree, please provide an explanation in support of your answer.

We have strong concerns about both the way in which this change would work in practice and the effect it could have. The subjective nature of principles, together with the potential for Ofgem to interpret such principles with perfect hindsight, poses potentially significant risks for suppliers. Crucial to the success or failure of Ofgem's future of retail regulation reforms is the degree of comfort firms have that they are complying with the principles, when compared with the degree of certainty firms have previously had with prescriptive regulation. In particular, without a constructive approach to compliance and enforcement, principles-based regulation runs the risk of creating substantial regulatory risk. Suppliers (and consumers) must believe that enforcement action is proportionate and fair. How it is implemented and enforced is critical to its success.

By removing, an 'all reasonable steps' threshold, all failures in achieving the required consumer outcomes will be deemed to be a breach of the standard, without any available defence to a supplier. Ofgem state that the removal of all reasonable steps is set against a backdrop of proportionality safeguards within its Enforcement Guidelines and in particular, due consideration as to the level of harm to consumers, taking account of the actions of the supplier. However, this consideration is in terms of whether to proceed with an enforcement investigation and not in respect of ascertaining whether a non-compliance has occurred in the first place, given the steps taken by the supplier concerned to achieve the consumer outcome.

We strongly disagree that the compliance threshold should be set against an absolute standard that 'must achieve' imposes. Not only is such an absolute standard unrealistic, it could force suppliers into taking unreasonable and disproportionate steps to meet the customer outcomes covered by the Principles to the detriment of consumers generally. Including all reasonable steps in the threshold ensures a sense of proportionality is embedded in the Standards of Conduct.

One of the benefits of a principles-based approach to regulation is that suppliers should be able to maximise their efforts and secure cost efficiencies by ensuring that the right services are provided to the right people. Suppliers, therefore, need flexibility in determining the extent of a customer's need and whether to provide services. Providing services and support to customers is not free. It comes at a cost to the supplier and ultimately all customers via the bill. Without any reasonableness or proportionality test there is a danger that suppliers could face uncontrollable costs in meeting the standards implied by an absolute principle.

Consequently, we oppose this fundamental policy change. In order, to mitigate the risks described above, a supplier needs to have confidence that it can robustly defend its actions. This needs to be prior to any determination of breach, by demonstrating that it duly considered the principles and consumer outcomes and acted in good faith in

undertaking its activities. We continue to believe that a breach of a principle must involve an element of fault.

Q5: Do you agree that all reasonable steps should be removed from the non-domestic Standards of Conduct at the same time as the domestic Standards of Conduct?

No. See response to question four above.

Q6: Do you support our proposal to introduce a broad “informed choices” principle into the domestic Standards of Conduct?

We are not opposed in principle to the idea of a new broad ‘informed choices’ standard. However, we would question the degree to which this offers additional consumer benefit over and above that which will be provided by the proposed ‘narrow’ tariff comparability principles. Taken together with the existing SoC principles these ensure that suppliers have to provide information that is complete and accurate, and relates to products or services appropriate to the customer.

Q7: Do you agree with the proposed drafting of the broad “informed choices” principle we have set out?

On the face of it the proposed drafting is not contentious. However, the key to its success will be the establishment of a shared understanding between the regulator and the regulated as to the role and scope of the principle. This is particularly important when dealing with broad principles such as the one proposed. There will therefore be a need for such an understanding to be developed through the production of effective industry guidance and feedback to suppliers when issues of interpretation are raised.

We would welcome additional clarity on what precisely ‘informed choices’ means in this context. Ofgem highlight some factors, other than the tariff itself, which may fall within the scope. However, we believe the scope of this principle should only capture relevant factors to the choice of supplier and/or tariff. For instance, information regarding services or products that are ancillary to energy provision (e.g. such as insurance provision) should not be captured, unless they are intrinsic to the transaction. Clarity on issues such as these from Ofgem would be welcome.

We note also that Ofgem expect suppliers to proactively provide enough information for consumers to make informed decisions. We do not believe that this should have the effect of requiring suppliers to provide such information at every customer interaction point in order to achieve compliance. For instance, interactions that are related to metering (e.g. reads, faults etc.) should not require a proactive discussion on tariff/service options. Suppliers should have the freedom to innovate in this area, including developing different approaches for distinct customer groups based on their own consumer insight.

Q8: What, if any, additional guidance on the domestic and non-domestic Standards of Conduct do you consider would be helpful in light of the changes we are proposing?

The provision of regulatory guidance can be a valuable means by which licensees can gain a better understanding of Ofgem's approach to the relevant principles and how they will be interpreted and enforced, which will in turn facilitate compliance. However, there is clearly a need to strike an appropriate balance between the provision of clarity through guidance and avoiding the risks that are inherent in providing substantial informal and formal guidance, such as minimising the room for innovation and flexibility in approach.

As we have identified above, we do believe that some of these proposals are a significant shift in policy and introduce a substantial increase in regulatory risk for suppliers. The removal of the reasonable steps threshold and the changes to the fairness test would necessitate the provision of additional effective guidance in order to aid compliance, the delivery of the consumer outcomes and to avoid any unintended consequences. For example, greater clarity on Ofgem's interpretation of the terms 'relevant' and 'reasonable' in the fairness test is required.

Q9: Do you consider that the "Treating Customers Fairly" statement has a valuable role to play and should be retained as an obligation in the domestic and non-domestic Standards of Conduct? Please provide an explanation for your answer

It is appropriate for Ofgem to review the extent to which this obligation is providing information valued by customers. Our experience (customer copy requests and website hits) has shown that customer interest in the statement is very low. Consequently, in the absence of any evidence to the contrary, we believe the obligation should be removed and suppliers should be provided with the freedom to determine how best to communicate to their customers in terms of the fair and trusted service provided.

Q10: Do you agree with our proposal to include a broad vulnerability principle in the domestic Standards of Conduct? If not, please explain why with supporting evidence.

We are supportive in principle of the inclusion of a broad vulnerability principle within the SoC.

It's important that all suppliers have regard to the needs and requirements of vulnerable customers, particularly around delivering the right customer outcomes. Protecting the interests of vulnerable customers is important to us and our approach is to treat each customer on a case by case basis dependent upon their circumstances.

Developing a board vulnerability principle should ensure that the customer outcome is at the forefront of suppliers processes, rather than having a one-size fits all, tick box approach to supporting vulnerable customers.

We disagree that this principle should enable Ofgem to prohibit suppliers from charging customers in certain circumstances, even vulnerable customers. These are commercial decisions for suppliers and should not be intra vires of Ofgem.

Q11: Do you agree with our proposed definition of 'Vulnerable Situation'? If not, please explain why with supporting evidence.

We note that Ofgem argue that the proposed definition retains the spirit of the Consumer Vulnerability Strategy definition. However, we consider the explicit removal of references to the energy market potentially results in the definition going beyond the intent. For example, no longer are the interests of the consumer or any detriment tied to a customer's engagement with the energy market. We see no reason why this should be the case and believe reference to the energy market should remain within the definition.

Furthermore, we note that the definition is inconsistent with the Customer Objective (SLC25C.3), where detriment is qualified to the extent that a breach would not incur where such detriment would be reasonable in all the relevant circumstances.

Q12: Do you have any comments on the proposal to amend SLC 5?

Part of the rationale for amending Ofgem's information gathering powers is to bring it in line with other regulators with market monitoring functions. However, we note that these regulatory powers were established by Parliament through statutory legislation. It would appear therefore that Ofgem is seeking to give itself such powers without them being subject to the same parliamentary scrutiny.

Notwithstanding the above, we would be concerned if the extension of Ofgem's powers in this respect led to a proliferation of requests for information (RFI) and in particular requests that were not directly related to any consumer detriment concern or a data requirement for its market monitoring responsibilities. We note that as part of Ofgem's Simplification Plan for 2017-18, it will continue to make improvements to its RFI processes. While we acknowledge that Ofgem has made progress over recent years, in particular by providing advanced draft requests for comment, we still consider that further improvements could be made in terms of complexity and data volumes.

Q13: How would your processes change if our proposals are implemented? Can you provide evidence of what costs you think you will incur to a) implement the changes and b) comply with these?

Q14: Can you provide evidence to support any alternatives to our proposals?

Q15: Can you provide evidence of how the proposal will benefit your business? As an example, these could include greater efficiency and coordination among internal processes, development of new business models etc.

Q16: What wider benefits do you think our proposals could deliver?

Aside from the Customer Objective and the Compliance Threshold changes proposed, the proposed amendments build upon the current SoC in terms of Ofgem's expectation that suppliers adopt a customer centric culture which achieves the right outcomes for customers, including those in vulnerable situations. EDF Energy's 'Trust' Test, introduced in 2012, demonstrates our commitment to putting customers first and we have worked hard to embed both the letter and spirit of the SoC within our policies and processes.

We are currently in the process of considering how our approach might need to evolve as a result of these proposed SoC changes and the wider move to more principles-based regulation. We have begun a programme of work to review and update our existing

policies and guidelines, training, governance and assurance in light of Ofgem's proposals. However, we are not currently in a position to quantify the costs of this work at this stage. Overall from our perspective, and what they mean for our business, the proposals are 'evolutionary' rather than 'revolutionary' and do not represent a paradigm shift in our own vision, culture and approach.

The potential benefits of these proposals need to be assessed in the context of the wider move to more principles-based regulation. As we have set out in our answers above, there are advantages in a regulatory model where the regulator is able to step back from prescriptive regulation to one where it appropriately sets out the consumer outcomes it expects suppliers to achieve. We believe suppliers are best placed to determine the operational practices and actions within their business to achieve a consumer outcome, in the most efficient and effective manner. For instance, the removal of a number of the prescriptive RMR requirements has opened up the potential for greater commercial flexibility in terms of the development of more innovative tariff offerings better suited to customers' needs both now and in the future.

However, the costs and benefits of a move to a greater reliance on principles (including amendments to the SoC) are, to a large degree, dependent on the supplier response and the perceived regulatory risks of operating under the revised regime. We have identified throughout this response some of the increased risks and challenges suppliers will face as a result of the proposed SoC changes. The extent to which these are addressed in the design of, and operation under, a revised SoC regime will dictate the success of the changes and the supplier response. For example, the removal of an 'all reasonable steps' threshold would result in all failures in achieving a consumer outcome to be determined as non-compliant. This, together with a tough enforcement approach, could result in the adoption of an overly conservative approach to interpretation and compliance that would dampen the incentive to innovate and lead to 'over compliance' costs being incurred.

Q17: In a year, how much time (in full-time equivalents/month) on average does your business spend responding to requests for information (RFIs) from Ofgem? How does this compare with the time spent responding to other organisations' RFIs (eg from BEIS, CMA)? Please provide evidence and indicate whether this is half the time or less, or twice the time or more.

The resources required to respond to RFIs can vary significantly depending on the specifics of each individual request. Factors such as the size and complexity of the request, ability to access and compile the information in the required format and the time provided to respond, significantly influence the resource burden. We note that during 2016 we responded to over 35 RFIs from Ofgem and other stakeholders. We do not hold data on the total resource impact responding to these requests has had on our business, however, the mere total numbers of requests would indicate that the resource impact is not insignificant.

As we have mentioned above, we would be concerned if the extension of Ofgem's powers provided through an amendment to SLC5 led to a proliferation of requests for

information (RFI) and in particular requests that were not directly related to any consumer detriment concern or a data requirement for its market monitoring responsibilities.

We acknowledge that Ofgem has over recent years made improvements to its RFI process, for example, through providing advanced draft requests for comment. However, we still consider that further improvements could be made in terms of complexity and data volumes. Furthermore, we agree that moving to an approach where RFIs were better planned in advance, leading to reduction in ad-hoc requests, could deliver benefits through more efficient resource planning.

Q18: Can you provide evidence of any unintended consequences that could arise as result of our proposals?

We have in our response to the questions above highlighted areas where unintended consequences may occur, particularly in respect of the perception of regulatory risk and the detrimental impact that may have on compliance costs and innovation.

EDF Energy
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