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Dear Andrew

Standards of Conduct for suppliers in the retail energy market - E.ON response

Thank you for the opportunity to comment on the above consultation. A summary of our responses to the questions posed is below and we have provided a detailed response to each of the questions later in this document.

We are surprised at the magnitude of the changes to the Standards of Conduct ("**SoC**") being proposed by Ofgem in this consultation, having reviewed the working paper in August 2016 which made mention only of minor amendments to wording as opposed to completely redefining the Fairness Test or removing the 'all reasonable steps' threshold entirely. In the absence of a reasonableness test, we propose that a supplier should not be considered to have failed to achieve the SoC if it can be demonstrated that it did everything reasonably practicable to achieve it.

We do not believe that the 2016 Challenge Panel findings that 'suppliers could be doing more to secure a consumer-centric culture' is a reflection that the current SoC is not relevant to the market or that the current SoC requires changes to prompt suppliers to become more consumer-centric.

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Question 1

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.

1. Yes. We agree with the proposal to retain a Fairness Test for all the broad principles within the domestic SoC.
2. We consider the Fairness Test as not only being a useful tool for Ofgem but also as a useful tool for suppliers to assess the fairness of decisions that are being made by them. The Fairness Test, together with the 'all reasonable steps' threshold, formed the basis of our own definition of fairness.
3. We do, however, have serious concerns with the proposed wording of the *revised* Fairness Test, which we discuss in our responses to the next question. We therefore support the retention of the Fairness Test as it is currently worded.

Question 2

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"?

4. No. We do not agree with the proposed wording for a revised Fairness Test. We set out our concerns below.
5. As stated in the consultation, the existing Fairness Test has been applied successfully by Ofgem since it was introduced in 2013. We do not believe the current wording is less relevant to the energy market today than it was in 2013, or that it will be less relevant to the energy market as the market continues to develop and suppliers continue to innovate. The current Fairness Test will continue to ensure suppliers consider whether customers are being treated fairly as a result of the decisions they are making and any innovations they may bring to the market. In achieving the current SoC, whilst carrying out existing activities or innovating, we will carefully consider any potential detrimental outcomes for customers.
6. Ofgem states "the focus of this new test is on whether the nature of any detriment to the consumer is reasonable in all the relevant circumstances and **not** [Ofgem's emphasis] on whether a supplier has taken reasonable steps to avoid causing the likelihood of detriment". We do not agree that the focus of the test can be solely on any detriment caused, or likelihood of detriment to be caused, to the customer without taking into account the steps taken by the supplier to avoid causing the likelihood of detriment. There are processes that will result in detriment that is reasonable in the relevant circumstances, but *only* if the supplier has taken reasonable steps to prevent the detriment from occurring in the first place. As cited by Ofgem, it may be necessary to disconnect a customer for non-payment of charges. However, it is only a reasonable detriment in all the relevant circumstances where the supplier *has taken all reasonable steps* to avoid reaching the point at which a

disconnection is necessary, which might include communicating with the customer via various means to explain the consequences of failing to contact the supplier and visiting the customer's property.

7. We believe the current Fairness Test gives suppliers the opportunity to put things right in a timely manner in the event of a detriment being caused, without being deemed to have failed the test. However, the proposed wording suggests that once something goes wrong for customers, the supplier will have immediately failed the Fairness Test regardless of the cause or intent of their actions, or their subsequent attempts to put things right.
8. The revised wording of the Fairness Test may result in suppliers failing for reasons that are beyond their control. For example, whilst the energy industry features regularly in local and national media, unexpected and widespread coverage of a story regarding a specific supplier could result in significantly increased call volumes and therefore longer waiting times for its customers, which the supplier could not have reasonably foreseen. The revised wording takes into consideration only the fact that detriment to customers has occurred, and not whether the supplier could have done anything to prevent it.

Question 3

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?

9. No. We have the same concerns regarding changing the Fairness Test in the non-domestic SoC as discussed in our response to question 2.

Question 4

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.

10. No. We do not agree with the proposal to remove the 'all reasonable steps' threshold from the domestic SoC and have several concerns with the revised wording of SLC 25C.5. We set out each of the reasons below.
11. We are concerned that the replacement of the 'all reasonable steps' threshold with 'must achieve' gives no consideration to whether the supplier acted reasonably. We believe the 'all reasonable steps' threshold, as currently set out in licence, sets clear expectations on suppliers that they must do everything that is *reasonably practicable* to achieve the SoC, including incurring reasonable costs.
12. The requirement to 'must achieve, interpret and apply the Standards of Conduct' introduces an absolute requirement against a subjective requirement (e.g. *must (absolute) interpret (subjective)*). We do not consider that this combination of wording is compatible as it gives no certainty to the supplier as to how to comply with the requirement. For example, the supplier must interpret the SoC in a manner consistent with the Customer Objective, but that interpretation is subjective with a high likelihood that different suppliers and Ofgem will reach different interpretations.

13. The replacement of the 'all reasonable steps' threshold with 'must achieve' takes the regulation of the retail energy market out of line with other comparable markets, such as finance, water, telecommunications, rail, etc., where reasonable steps thresholds continue to be used in assessing compliance with licence conditions. Indeed, replacing 'all reasonable steps' with 'must achieve' makes it more difficult to achieve compliance with energy regulation than with legislation such as the Health and Safety at Work Act 1974, which requires owners of commercial premises and employers to *take all reasonably practicable steps* to ensure the safety of customers and employees, thus recognising that it is impossible to completely guarantee safety. We do not believe it is appropriate to have a different standard for achieving compliance with energy regulation compared to other regulation and legislation.
14. We believe the SoC should retain a test of reasonableness. We propose that, as an alternative to retaining the all reasonable steps threshold, it should be written into the SoC that a supplier will not be considered to have failed to achieve the SoC if it can be demonstrated that it did everything reasonably practicable to achieve it.

Question 5

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?

15. No. We do not agree that the 'all reasonable steps' threshold should be removed from the non-domestic SoC for the same reasons as discussed in our response to question 4.

Question 6

Do you support our proposal to introduce a broad "informed choices" principle into the domestic Standards of Conduct?

16. Yes. We support the introduction of a broad 'informed choices' principle into the domestic SoC.

Question 7

Do you agree with the proposed drafting of the broad "informed choices" principle we have set out?

17. Yes. We agree with the proposed drafting of the broad 'informed choices' principle.

Question 8

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?

18. In the absence of a reasonableness test, we believe any guidance Ofgem can provide on how suppliers can comply with the SoC would be useful.

Question 9

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.

19. We have determined that only a very small number of customers visit the relevant page on E.ON's website and most visitors to the page spend very little time there, exiting the website or navigating elsewhere, which indicates it is not what the customer was looking for. We therefore support its removal from the obligation.

Question 10

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.

20. We are supportive of the proposal to include a broad vulnerability principle into the SoC. However, it should be pointed out that the current SoC already requires suppliers to consider vulnerability due the requirement that suppliers ensure 'each Domestic Customer [E.ON's emphasis] is treated fairly', which as currently worded is inclusive of all customer groups. Therefore, in achieving the current SoC, we already consider customers in vulnerable situations when making decisions as part of our fair decision making process.

Question 11

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

21. We agree with the proposal to have a definition of Vulnerable Situation in the SoC, but we do have some concerns with the proposed definition.
22. The Vulnerable Situation definition is very broad. In the absence of a reasonableness test the proposed wording will require suppliers to identify *all* customers who could be in a Vulnerable Situation which would be practically impossible to achieve.
23. We believe the proposed wording of being '*significantly less able* [E.ON's emphasis] than a typical Domestic Customer to protect or represent his or her interests' or '*significantly more likely* [E.ON's emphasis] than a typical Domestic Customer to suffer detriment' is ambiguous. We note Ofgem's statement in paragraph 3.33 of the consultation that it does not intend to publish further guidance on the domestic SoC. However, we believe additional guidance on the proposed definition of a Vulnerable Situation would be useful to suppliers in helping them to achieve the SoC and ensure suppliers' efforts and resources in identifying customers in a Vulnerable Situation are directed at the most appropriate customers.

Question 12

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

24. No.

Question 13

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?

25. As discussed in answers to previous questions, we believe the proposed changes have the likelihood to decrease supplier certainty around what they must do to achieve the SoC. When making investment decisions a supplier has to take into consideration what is reasonable and achievable, based on competing priorities and to deliver good customer outcomes. The current reasonableness test assists suppliers in making investment decisions. In the absence of the reasonableness test it will be extremely difficult to make investment decisions, as we discuss in response to question 18 regarding unintended consequences.

Question 14

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

26. As stated in paragraph 14 of this response, we believe, as an alternative to retaining the all reasonable steps threshold, that a supplier should not be considered to have failed to achieve the SoC if it can be demonstrated that it did everything reasonably practicable to achieve it.

Question 15

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.

27. We have already invested a significant amount of time and effort in creating a framework for assessing the fairness of decisions that are made and are regularly reviewing these decisions in light of customer and colleague insight and feedback, and developments in the market.

Question 16

What wider benefits do you think our proposals could deliver?

28. In conjunction with the removal of other prescriptive licence conditions and the introduction of narrow and broad principles in the licence, we believe the *current* SoC still has a significant role to play in ensuring the market functions well for customers and suppliers put customers at the heart of their decision making processes.

29. Whilst we believe vulnerability is already covered implicitly by the current SoC we agree there is some benefit in making it explicit to suppliers that vulnerable customers must be specifically considered in any decisions that are being made.

Question 17

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.

30. When an RFI is received we engage with numerous colleagues across E.ON who collaborate on preparing the response. This activity is performed in place of their usual responsibilities and the time they dedicate varies according to the complexity of the RFI, but can be significant.
31. We understand there may be instances where an RFI is submitted due to something that has been observed in the market; however, we would welcome a more structured approach to receiving notice of upcoming RFIs so we can plan and allocate resource as appropriate.

Question 18

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

32. We understand Ofgem's desire to send a strong message to suppliers about embedding a consumer-centric culture, and we appreciate Ofgem's assurances that 'our proposals are neither designed nor intended to result in enforcement action every time we see a negative consumer outcome'. Ofgem also acknowledges that, as per paragraph 2.22 of the consultation, the all reasonable steps threshold recognises there is more than one way to achieve a good outcome and there is room for innovative approaches. However, we are concerned that the proposed licence changes do not reflect those intentions.
33. Firstly, we are concerned that, owing to the lack of regulatory certainty about what suppliers must do to achieve the SoC, suppliers may tend towards the same undifferentiated approaches to developing products and services, resulting in less innovation.
34. In addition, we do not believe the proposed changes to SoC are conducive to conducting trials. When creating and trialling innovative products and services suppliers will face increased risks of encountering outcomes that could not have been anticipated. The 'all reasonable steps' threshold is required so reasonable expectations are set on suppliers to: (a) take all reasonable steps (e.g. robust trials) to anticipate potential detrimental outcomes; (b) take all reasonable steps (e.g. implement controls) to detect detriment that occurs; and (c) take all reasonable steps to react quickly to redress customers if appropriate. Suppliers may therefore be reluctant to innovate due to the increased risks of failing to achieve the SoC.

If you have any queries or wish to discuss our response in more detail, my contact details are provided above right. If you email me, please copy in regcomms-external.com as this mailbox is regularly monitored.

Yours sincerely

A handwritten signature in grey ink that reads "Tracey Wilmot". The signature is written in a cursive style with a large initial 'T'.

Tracey Wilmot
Head of Regulation