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Dear Mr Thomsen

Standards of Conduct for suppliers in the retail energy market - Consultation Response

Thank you for the opportunity to respond to the consultation on Standards of Conduct for suppliers in the retail energy market, published on 30 January 2017.

Please note that as our customer base is predominantly domestic, we have not responded to all of the questions covering proposals or matters relating to non-domestic customers. We include below all the questions for which we have comments.

By way of summary, we are supportive of Ofgem's proposals overall. However, the move to Principles Based Regulation does carry with it substantial risk, from how the regime is actually to be applied to differences in approach (e.g. a low-cost, no-frills service, to a "gold standard" and how Ofgem, and other regulatory stakeholders such as Citizen's Advice and the Ombudsman approach this) to uncertainty of the "right" approach as suppliers fully take up the burden of determining for themselves their view of fairness given their customer base, brand and service identities and approach to customer communications.

Noting these risks, we nevertheless agree with Ofgem that the Standards of Conduct (**SoC**) are "at the heart of the supply licence" (paragraph 2.3). The principles they embody inform our approach to all that we do. These proposals, overall, are a step



towards a future that will enable a continued focus on the needs, circumstances and individuality of our customers.

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.

We agree with Ofgem's proposal to retain a Fairness Test for all the broad principles within the domestic SoC. The principle of fairness is a universal concept that resonates with consumers and those entrusted with the protection of the consumer. It is reasonable to suppose that the consumer will associate "Standards of Conduct" with an ethical framework around which it is determined what is fair and acceptable behaviour. In a competitive market, engaging with our customers (in particular those who have become disengaged) is not possible without a visible acknowledgment of the importance of fairness. Once engaged, delivering great customer service then requires the continued application of fairness.

The broad principles lend themselves to a test of fairness. On their own, they provide a guide to what is acceptable and expected behaviour. The fairness test then adds that additional contextual layer based on the impact that the behaviour has on a particular customer.

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"?

We are conscious that the existing fairness test incorporates an element which takes account of the extent to which a supplier has benefited from an act or omission. SLC 25C.3 would currently enable supplier action to be considered "fair" if it did not significantly favour the supplier. We envisage, however, that there must surely be circumstances in which our actions might not directly favour our own interests but



nevertheless give rise to the likelihood of customer detriment. To that extent, we welcome the removal of the relevant text. We agree that the proposed wording makes the *outcome for the customer* of primary importance. The Industry must move to a world where suppliers are thinking, in advance, how their *proposed* actions further the objective of achieving a fair outcome for the customer

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?

We consider that there is an increasing blurring of the line between domestic and non-domestic circumstances. Day-to-day work habits for consumers are changing across the UK, meaning that properties that would otherwise be domestic are increasingly being used as a place of business. To all intents and purposes those premises are home to individuals with similar, if not identical, needs to those of wholly domestic premises.

Taking this into account, we agree that the changes to the Fairness Test as applied to domestic Standards of Conduct should be made to the non-domestic Standards of Conduct.

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.

We agree in principle, albeit subject to the following observations.

Ofgem states (at paragraph 2.27) that it considers that removing "all reasonable steps" will better meet its aims by ensuring that the SOC require the achievement of good consumer outcomes. We do not believe, however, that good consumer outcomes can only be achieved by removing the supplier's ability to show it has taken reasonable steps to achieve the SoC.



We understand and agree with Ofgem’s focus on achieving the standards rather than on the steps taken to achieve them (paragraph 2.24 et seq) and agree that the SoC should focus on consumer outcomes rather than provide a perceived mechanism for suppliers to avoid responsibility. We do not however see that the “all reasonable steps” is incompatible with a licence condition that focuses on good consumer outcomes.

We have indicated in previous engagement with Ofgem that we believe suppliers should embed a culture within their business that puts the customer at the centre of what they do. We believe that suppliers should be thinking, in advance, how their *proposed* actions lie in harmony with the Standards of Conduct.

We do have some concern that in the event Ofgem determines that a supplier has *not* achieved, interpreted and applied the Standards of Conduct as required by the new wording, credit will not be given to the supplier (particularly in situations when the action or omission is entirely unintentional) either for any positive “intent” sitting behind the activity, or for the steps they may have taken to mitigate unfairness to the customer which could not reasonably have been foreseen. We would ask where are the protections for suppliers if the “reasonable steps” element is removed.

The current SoC do offer suppliers some protection, or at least an opportunity, to have such circumstances taken into account. We take the view that, in retaining this protection, it would be a small price for suppliers to pay in requiring *them* to demonstrate that they had taken all reasonable steps to achieve the SoC (rather than for Ofgem to show that they had not).

Nevertheless we are comforted by Ofgem’s assurance that the Standards will be applied proportionately in accordance with the Enforcement Guidelines, and that no change is intended to Ofgem’s approach to enforcement. Ofgem has said (paragraph 2.33) that it will continue to consider the steps taken by the supplier to put things right promptly if they go wrong.

Question 6

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

We agree in principle with Ofgem’s proposal to introduce a broad “informed choices” principle into the domestic SoC. This is consistent with developments elsewhere - in particular the five narrow principles proposed to support a principles-based SLC 25, as



well as work undertaken by the SCWG¹ in relation to a customer's consent for inclusion on the Priority Services Register.

It is important that suppliers understand the use to be made of the broad principle in conjunction with the narrow principles, potentially by way of worked examples (which can be replaced by best practice descriptions as the regime matures) if the broad principle is not to become something of a general catch-all measure for behaviours that may not be entirely approved of but don't otherwise on their face contradict one or more of the specific narrow principles.

We note for example that the wording used is that the information is sufficient to enable a customer to make informed choices "about their *supply* of gas and electricity...". Ofgem's related proposals for SLC25, however, would appear to cover this. This is an important area to clarify for suppliers. Here, we assume that SLC 25.C.4(b) is intended to promote informed choices in a much more general way than that specifically related to "supply".

Assuming this principle is intended to be more general in scope, we believe that the concept is not new. It is reasonable to require suppliers to think intelligently about the information a reasonable person might require. We trust here that Ofgem intends to adopt an approach which recognises that suppliers might operate a variety of different mechanisms and levels of communication in deciding what information will enable a customer (including their own customers or potential customers taking into account their approach overall to marketing) to make an informed decision. We welcome the iterative approach anticipated by Ofgem as behaviours are considered against the SoC (broad or narrow) in supporting suppliers in this relatively unfamiliar territory, as the industry moves closer to Principles Based Regulation.

¹ The Safeguarding Customer Working Group is chaired by Jo Giles of The Energy Networks Association. It is a group formed under the ENA reporting into the CSIWG to bring together DNOs GDSs and invited Suppliers for the purpose of delivering OFGEM's vulnerable customer strategy. The group looks for areas where a co-ordinated approach can be taken across the industry to benefit and safeguard vulnerable customers.



Question 7

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

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?

We consider that guidance is needed around the meaning of “detriment” given the shift towards customer outcomes as the focus for principles interpreted by and behaviours undertaken by suppliers. The term itself is of course not new but we consider that Ofgem’s proposals in emphasising the impact on the *customer* is an important opportunity to reconcile *good consumer outcomes* with *detriment*. This is particularly important when considering *financial* detriment. Part of any guidance would be specific guidance on what Ofgem itself would consider financial detriment and what would be considered *non-financial* detriment.

We would also welcome clarity as to how Ofgem will consider supplier intent in cases where there is *prima facie* unfairness. We also welcome guidance on the scope of SLC 25C.4(b) as indicated in our response to Question 6.

Whilst suppliers endeavour to manage all routine scenarios, we have no doubt that we will encounter more exceptional situations which were not as reasonably foreseeable. As stated, a framework for how best to approach this would be helpful so that suppliers can factor in how Ofgem could approach this given the removal of “all reasonable steps”.



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.

The “Treating Customers Fairly” (TCF) statement should be retained. It is an important medium for suppliers to convey to their customers their intentions in terms of what they are doing to treat their customers fairly.

We note the observations made by Ofgem in their “Enabling consumers to make informed choices - Findings from the 2016 Challenge Panel” - in particular that few suppliers are using the TCF statement to communicate their intentions to consumers.

These proposals present an opportunity for suppliers to review the structure of their TCF Statements which may, in turn, achieve Ofgem’s expectations in terms of content. We believe that this also provides an important test of the extent to which differences in approach are actually acceptable recognising that the requirements in the Supply Licence around the TCF are quite general, leaving each supplier to interpret the content in very different ways.

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.

We agree. Vulnerability is closely linked with treating customers fairly, and it seems sensible that the SoC should therefore have connection with it. Fairness (or, in accordance with Ofgem’s proposed SLC 25C.3, “a likelihood of detriment”) can be subjective, based on the needs and circumstances of individuals. Whereas one customer may consider that their treatment is fair, another might feel that that same treatment is unfair based on their own particular needs and circumstances. Thus, in



our view, in considering what is fair, a supplier is inevitably required to consider vulnerability.

To that extent, we feel that the proposed inclusion of the words “including each Domestic Customer in a Vulnerable Situation” at SLC 25C.2 is not strictly necessary, but we acknowledge that it usefully serves to focus attention on the needs of vulnerable customers at a relevant point in the Licence. We are therefore supportive.

Until now, the Supply Licence has to some extent “isolated” vulnerability to one main Licence Condition, but it is possible that the Licence may, as it continues to develop, benefit from similar such references in other areas wherever relevant.

As for the proposed Broad Vulnerability principle itself, we agree that identification of vulnerable customers is a key consideration for Ofgem and, as we have noted above, for suppliers and their customers. We see a similarity between the proposed SLC 25C.4(d)(i) and the new SLC26.1(c)(i) which came into effect on 1 January 2017. Both require suppliers to identify vulnerable customers. There is consistency between these provisions, and, again, we acknowledge the value in underlining the link within your proposed SoC.

Question 11

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

We agree with Ofgem’s proposals. We are pleased to see a definition that, with reference to “Domestic Customer”, is now more closely linked to our customers than to consumers generally. This is a positive step which more clearly defines that sub-group of consumers to whom our efforts should be directed.

We believe that the existing words “combine with aspects of the market to...” probably do more to create uncertainty, and add little value to the definition. It is not immediately obvious what this means. It suggests that even in circumstances where an individual’s circumstances create a prima facie need for that customer, there must be some other market-based factor present to justify the presence of actual vulnerability.



The proposed changes to the definition would more closely reflect the desired emphasis on the individual's needs and circumstances alone. We ask, however, for clarity around the reconciliation of the term "vulnerable situation" which, of course, is already part of the recent changes to SLC26. The use of the term in that Licence Condition does not attach to the definition within the CVS. Overall, the effect of SLC 26 has been to acknowledge the impact of an individual's personal circumstances and needs. The individual does not need to be "significantly" less able than a typical customer or "significantly" more likely to suffer detriment to be afforded a level of protection. Ofgem's proposal for SLC 25C, on the other hand, appear to define "vulnerable situation" by reference to a more stringent test requiring the customer to be "significantly less able" and "significantly more likely" etc. We ask Ofgem to consider whether the terms are entirely consistent.

Question 12

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

The proposal is to amend SLC 5.2 so as to remove the restriction which currently prevents Ofgem from requesting information under its market monitoring function. The intention is to allow Ofgem to gather information for monitoring the market, including monitoring compliance with licence conditions.

Whilst, clearly, we are keen to support any proposal that would allow Ofgem to discharge its core function to monitor the market, we would like to understand from Ofgem more specifically its plans to increase the level of information it requires from suppliers in the future. For all suppliers and for smaller suppliers in particular, the impact on resources of regular and the increasing number of ad hoc information requests is, and seems set fair to become, more substantial.

We hope that you will find our comments helpful, but if we can be of any further assistance, please do not hesitate to contact us.

Yours sincerely,

Malcolm Henschley
Head of Legal Services