

**For the attention of Future Retail Regulation**

Ofgem  
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13 March 2017

Dear Sirs

**Consultation response: Standards of Conduct for Suppliers in the Retail Energy Market, 30 January 2017 (the “Consultation”)**

The Industrial and Commercial Shippers and Suppliers (ICoSS) group is the trade body representing non-domestic industrial and commercial (I&C) suppliers in the GB energy market. Members collectively supply three-quarters of the gas needs of the non-domestic sector as well as half of the electricity provided by non-domestic independent suppliers<sup>1</sup>.

**Executive Summary**

We write in response to the Consultation proposing to change the standards of conduct wording that governs the conduct of non-domestic suppliers. We do not consider it reasonable that Ofgem should introduce an obligation with which it knows suppliers cannot comply. To do so is to ask suppliers to knowingly breach their licences in reliance on Ofgem’s enforcement guidelines (as Ofgem advocates in paragraphs 2.32 to 2.36 of the Consultation). In addition we are concerned about the standard against which a supplier will be judged against if this benchmark is not available, in particular those organisations that do not fit the model of a big six supplier.

**All Reasonable Steps requirement**

We consider that the rationale for removing the “all reasonable steps” requirement in Standard Licence Condition 7B.5 is based on a misunderstanding about the legal effect of the phrase “all reasonable steps”. As a result of that misunderstanding, Ofgem is asking suppliers to accept an obligation that is likely to put



them in breach of their licences, and to do so in reliance on Ofgem’s enforcement guidelines. We consider this unreasonable.

In para 2.23 of the Consultation, Ofgem suggests that there should be “*a greater focus on achieving the Standards, rather than the steps taken to achieve them*”. While the nature of the steps is relevant (in that they must be reasonable), the principal effect of an “all reasonable steps” obligation is that it requires a party to take all reasonable steps that are in his control and, depending on the circumstances, can require that party to subordinate its own commercial interests in exhausting the available options (see the line of cases including *Jet2.com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm))

An “all reasonable steps” obligation is therefore about the effort involved in meeting the standard rather than the steps themselves. It is frequently used in circumstances where it is impossible to quantify an obligation and therefore to measure the parties’ performance against it – usually where broad principles are involved. In such circumstances, an absolute, pass/fail obligation is usually considered unreasonable.

The reason that effort, rather than outcome, must be measured in the context of the Standards of Conduct is because there is no clear, objective benchmark against which suppliers can measure their compliance. Whereas compliance with an obligation to issue (for example) Principal Terms is a binary thing (they were issued or they were not), compliance with an obligation to apply the Standards “in a manner consistent with the Customer Objective” is not; hence, the original drafting focuses on effort rather than absolute compliance (and not internal processes, as Ofgem has misunderstood).

Ofgem clearly recognises the challenge suppliers will have in complying with its proposed drafting when it says that “*We recognise that things may sometimes go wrong, and our proposals are neither designed nor intended to result in enforcement action every time we see a negative consumer outcome*”. Ofgem explicitly acknowledges that its proposals will put suppliers in breach of licence. We consider this is because Ofgem knows the obligation is nebulous and suppliers will not be able to satisfy an absolute obligation.

### **Benchmark to judge supplier performance**

Linked to our concern with the removal of the all reasonable steps criteria for judging as to whether a supplier has failed to meet the standards expected, we are unclear as to what exactly Ofgem’s criteria will be when assessing supplier performance. The move to principles-based regulation has the potential to substantially widen the levels of customer service which may be offered by a supplier. Would for example a basic service be acceptable to Ofgem as long as that is clearly communicated to the customer prior to them entering into a contract? Without any form of guidance or benchmark (such as all reasonable steps), it is difficult to know how significantly different levels of service can be judged acceptable and there is a risk that the current “big six” service level will become the default standard, stifling innovation.

### **Summary**

We consider that this proposal to remove the all reasonable steps benchmark should be reconsidered as regulator should not encourage licensees to tolerate situations where they are in breach of its own rules



and if removed the explicit licence drafting will be simply replaced with an indistinct standard that will ultimately be to the detriment of customers.

Yours faithfully

A handwritten signature in black ink, appearing to read 'G. Evans'.

Gareth Evans

Chair ICoSS