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Dear Andrew,

Ofgem Consultation Paper

Standards of Conduct for suppliers in the retail energy market

I am a former Non-executive Director of Ofgem and Director of Consumer Insights, a consultancy providing advice on Principles Based Regulation, Treating Customers Fairly, complaints handling and Conduct Risk. I am a former Chairman of the Financial Services Consumer Panel and Non-executive Director of the Financial Ombudsman Service.

I welcome this opportunity to comment on Ofgem's Standards of Conduct for suppliers in the retail energy sector.

I am broadly supportive of the proposals in the consultation paper. I have answered questions where I have substantial comments, namely on the fairness test and the vulnerability principle but not on those questions aimed specifically at suppliers.

I would be most grateful if you would kindly acknowledge safe receipt of this response.

Yours sincerely,

John Howard

Director Consumer Insights Ltd

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.

Answer 1: Agreed

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"?

Answer 2: Detriment is a good marker for unfairness to the customer but it must have some bounds placed upon it. For example the test must cover the following situations:-

- (a) Where the customer has agreed to the detriment. This could be where the customer has agreed at the outset to less good levels of service, which might be likely to cause detriment, in return for a better deal on price.
- (b) It must also cover the situation where the cost to avoid the detriment would be so high that it would be unfair on the company and other customers to try to eliminate it, for example where 95% of telephone calls are answered within 2 minutes but at certain times and under certain circumstances it could take up to an hour, causing detriment to some customers. To achieve 100% within two minutes might require disproportionate expenditure pushing up prices for all customers.

It seems to me that the final eleven words of the proposed wording do provide the reasonableness test required to cover these situations.

The word 'relevant' in the proposed wording does not appear to add anything of value. If the circumstance is not relevant it cannot affect the judgement of reasonableness.

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?

Answer 3: Yes. In the large proportion of situations micro business customers are no more expert and in no more powerful a negotiating position than domestic customers.

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.

Answer 4: The revised wording for the fairness test appears to replace the obligation on the supplier to take 'all reasonable steps' to act fairly. The revised fairness test says that a likelihood of detriment indicates unfairness, unless any detriment is 'reasonable in all the circumstances'. So in future the detriment has to be reasonable, whereas the present test asks whether the supplier has done all that is reasonable to avoid the detriment.

The old test might have required the regulator to identify all the possible steps a firm might reasonably have taken. The new test only requires the regulator to evaluate whether any likely detriment is reasonable. However I think in any enforcement case this may also require the regulator to identify reasonable solutions that would have avoided the detriment.

So it seems to me that these provisions have the same effect and that both will meet the circumstances outlined in (a) and (b) above in Answer 2, to produce an outcome which is fair overall.

In both cases judgements have to be made about what is reasonable. I would suggest that the burden of proof be put on the supplier to prove that the detriment likely to be suffered by a customer is reasonable in all the circumstances.

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?

Answer 5: Yes. See 3 above

Question 6: Do you support our proposal to introduce a broad "informed choices" principle into the domestic Standards of Conduct?

Answer 6: In my view if customers are not given appropriate information to make an informed choice, they are not being treated fairly, which would suggest that a specific informed choices principle is not necessary and is simply increasing the size of the 'rulebook' again.

However I understand that the introduction of such a principle was required by the Competition and Markets Authority, so I presume that this is the reason for introducing it. Fortunately this principle does not take anything away, even though I believe it adds nothing.

Question 7: Do you agree with the proposed drafting of the broad "informed choices" principle we have set out?

Answer 7: Yes, however removing the word 'fair' seems unnecessary and the new wording is a collection of phrases which amount to what is 'fair'.

In addition I would maintain that the provision of information is not enough to avoid detriment. The customer requires the time to read and digest the information and to make an unhurried rational decision.

In my view the transaction would still be unfair if the information was sufficient but the customer suffered detriment because:

- (a) they were not given the time to understand what they were agreeing to
- (b) They were coerced into signing
- (c) The customer did not understand the information and no help was provided by the supplier.

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?

Answer 8: See Answer 7 above which suggests guidance might be needed about the time and the level of explanation suppliers should provide to customers to enable them to understand the information.

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.

Answer 9: Yes, it should be retained. Drawing up the statement requires firms to refresh their approach to Treating Customers Fairly. Annual consideration of the statement, ideally at Board level, ensures that fairness gets annual attention.

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.

Answer 10: It is to be welcomed that consumers are no longer seen as an amorphous mass but being at least in distinct groups each needing special consideration.

The ideal would be for suppliers to consider each customer as an individual and treat them accordingly.

With that in mind, my view is that if a supplier did not identify a customer as being vulnerable and did not adjust their treatment of that customer according to their individual requirements, then they would not be treating that customer fairly. Therefore the only reason I can see to introduce a specific vulnerability principle is to highlight this special situation and cause firms to focus on it.

There is though one disadvantage of classifying a group of individuals as 'vulnerable'. There is a broad spectrum of 'capability' in society extending from the most capable at one end to those who are least capable at the other. By trying to define the vulnerable where do you draw the line? Hiving off the less capable and labelling them 'vulnerable', will leave many people just outside that categorisation who may be deserving of special consideration to avoid unfairness. (My neighbour gets quarterly meter readings, why don't I?)

Question 11: Do you agree with our proposed definition of 'Vulnerable Situation'? If not, please explain why with supporting evidence.

Answer 11: The proposed drafting appears to fulfil the objective set out in the consultation but I would say again that the capability of customers to interact effectively with the energy market is a broad distribution going from the most capable at one end, who need no help, to the least capable at the other who are 'vulnerable' by the Ofgem definition. Those customers just outside this categorisation may still need help and what is actually required is for suppliers to treat all consumers as individuals, to understand their level of capability and to provide each with an appropriate level of service to ensure a fair outcome.

Question 12: Do you have any comments on the proposal to amend SLC 5?

Answer 12: This would seem to be appropriate for the effective monitoring of markets

ENDS