



Andrew Thomsen
Future Retail Regulation
Ofgem
9 Millbank
London
SW1P 3GE

Head Office
Inveralmond House
200 Dunkeld Road
Perth
PH1 3AQ

Louise.murphy@sse.com

13 March 2017

Dear Andrew,

Consultation: Standards of Conduct for suppliers in the retail energy market

Thank you for providing SSE with the opportunity to comment on the Standards of Conduct for suppliers in the retail energy market consultation.

We remain supportive of Ofgem's commitment to relying more on principles in the way it regulates the energy market. We also welcome Ofgem's ongoing approach towards proactively engaging with the industry at various workshops and bilateral meetings.

We note that Ofgem's consultation document makes reference towards the intention to adapt the way in which it operates¹. This will become increasingly important as the rules governing supplier behaviours move towards a more principles-based approach. In particular, Ofgem notes that removing 'all reasonable steps' from the Standards is not intended to signal a change in Ofgem's approach to enforcement. However, SSE firmly believes that a review of Ofgem's approach to enforcement is required due to the inclusion of 'must achieve' introducing an absolute requirement in terms of compliance. 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. It would, therefore, be useful for Ofgem to provide more information on how the removal of the all reasonable steps threshold would be put into operation.

Ofgem's approach to enforcement under a principles-based regime will ultimately determine whether or not it is a success for industry and, more importantly, consumers. We do not agree that a dissuasive enforcement regime is appropriate for a principles-based regulatory framework. Instead a compliance-based enforcement model would appear to be more suitable when dealing with principles.

¹Standards of Conduct for Suppliers in the Retail Energy market Consultation Document, 'Applying the Standards Appropriately' – Page 19



We consider that positive consumer outcomes can be achieved through collaborative and transparent engagement between industry and Ofgem. An effective regulatory/ supplier relationship could be undermined through fear of a heavy-handed enforcement approach. Principles-based regulation (PBR) demands that there be close engagement between the regulator and licensee based on mutual trust. In order for a licensee to go beyond the requirements laid out in licence and develop truly innovative solutions, the regulatory expectations, outcomes and goals must be clearly communicated by Ofgem.

We appreciate that Ofgem deals with a number of compliance issues that are not necessarily made public to a wider audience. To aid transparency and help facilitate the transition to PBR SSE advocates the introduction of a process where compliance discussions and outcomes, that would not otherwise be available to the wider industry, are made available this driving better supplier behaviour and better outcomes for consumers.

Please see Annex 1 for our response to the consultation questions. Please get in contact with me if you would like to discuss further anything within this response.

Yours sincerely,

Louise Murphy

Regulation, Markets

Annex 1 – SSE response to questions

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.

Yes, we agree with Ofgem's proposal to retain a Fairness Test. However we do not agree with the proposed drafting for reasons set out within our response to Q2.

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”?

No, we do not believe that the proposed changes will deliver the improvements Ofgem refers to within the consultation document. We support Ofgem's drive to ensure improvements in the fair treatment of consumers at the same time as enabling suppliers to unlock the opportunities presented by innovation. However, with a view to keeping the licence clear, effective and ready for tomorrow's market, we do not believe the suggested revision of the fairness test would be appropriate. The current fairness test provides appropriate regulatory certainty. Suppliers have spent the last three years embedding SOC, including the Fairness Test, across their businesses. As a result the structure and wording of the test is clear and understandable for suppliers.

The existing fairness test is based on The Unfair Terms in Consumer Contracts Regulations 1999 which draws on established principles surrounding fairness and clearly communicates suppliers' responsibilities. The Unfair Terms in Consumer Contracts Regulations has subsequently been replaced by the Consumer Rights Act 2015 (CRA 2015). The fairness test was carried forward into the CRA and has two key elements. Specifically, a term is unfair if:

- It is contrary to the requirement of good faith;
- It causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

We are concerned with the proposed amendment to SLC 25C.3 for the following reasons:

- It does not have the same established principles to draw upon as the CRA 2015;
- It does not accurately reflect or build upon the CRA 2015, particularly in regard to imbalance; and

- We do not believe that it gives further clarity for established suppliers, new entrants or the consumer.

Taking account of the points raised in response to Q2, keeping the fairness test as it is currently drafted will continue to provide clarity to suppliers and consumers. High levels of certainty build confidence in the market with suppliers and consumers alike and in turn will encourage innovation to flourish.

In addition to the above, our response to Q4 elaborates on some concerns we have in relation to the uncertainty associated with Ofgem's approach to compliance and enforcement in the context of an absolute requirement (i.e. must achieve within proposed Standards of Conduct).

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?

No. Whilst we agree that it is appropriate that non domestic consumers are given the same protection as domestic customers, as highlighted in response to Q2 we see no benefit to the customers to move from an established understanding of fairness test based on the CRA2015.

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.

Whilst we agree that that achieving the Standards of Conduct is essential to the healthy functioning of energy markets, we are concerned that removal of the 'all reasonable steps' threshold will remove any debate around whether a suppliers actions in response to particular outcome were rational and justified. Our preference would be to retain the 'all reasonable steps' threshold as this ensures a sense of proportionality within the principle. The requirements drafted as 'must ensure' or 'must achieve' introduces an absolute requirement in terms of compliance. 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. It would, therefore, be useful for Ofgem to provide more information on how the removal of the all reasonable steps threshold would be put into operation.

In particular, we are concerned regarding the interaction between the proposed fairness test and the proposed compliance threshold. We see this as introducing significant extra risk for

suppliers, which could potentially make the energy supply market less attractive for new entrants. The level of the risk will greatly depend on Ofgem's enforcement approach (see further comments below). To explain the nature of this risk: first, the fairness test will be made more onerous to achieve and likely much more expansive than under the current drafting. The concept of fairness is open to interpretation and could be quite subjective. It is likely that what is considered "fair" may evolve over time and its interpretation will be respondent to the political environment at the time. Second, the new compliance threshold proposed is uncompromising in its failure to take account of the context that the supplier is operating under and the potential conflicting priorities being dealt with by the supplier at the time that the alleged unfairness occurred. These two changes together make it very important that the enforcement regime is appropriately tailored to ensure Ofgem takes a reasonable approach. At present, the licence drafting could be perceived to give Ofgem a "blank cheque" to enforce virtually any issue that Ofgem considers to be unfair. When considering the current political environment that we are operating in, to which Ofgem is not immune, we are understandably concerned by this scenario.

Ofgem is yet to formally consult on its proposed approach to compliance and enforcement within a principles-based regulatory framework. We have attended a number of industry workshops where Ofgem has set out its proposed approach in order to provide suppliers with the confidence required to innovate and deliver better outcomes for consumers but we are yet to see this set down in any form of detail. Ofgem's current Enforcement Guidelines allude to the approach that Ofgem will adopt for other principles-based requirements (i.e. the Standards of Conduct) however the guidelines were drafted when the current licence conditions on the Standards of Conduct were in place and have not been reviewed to take account of the proposed amendments. We firmly believe that a further wholesale review is required to outline Ofgem's approach in more detail. Further details of our views can be found in our consultation response on the Future of Retail Market Regulation and an additional paper on Principles- based regulation submitted to Ofgem on the 11 March 2016.

One of the potential benefits of principles-based regulation is that suppliers should be able to focus efforts on delivering innovative solutions to suit a particular customer group and providing the correct amount of information to ensure a customer makes an informed decision about their energy supplier (or tariff). We would therefore require flexibility in determining the extent to which an approach is suitable for different consumer groups (i.e. adapting our approach for vulnerable consumers, those considered 'disengaged' etc). The strict tests introduced by the revised drafting which, as noted above, substantially increases the regulatory risk for suppliers, will potentially create an environment that is less conducive to innovation. This directly counters Ofgem's stated objectives within the consultation

document. Removing a test of proportionality from the licence condition and introducing an absolute requirement, runs the risk that suppliers face a requirement that results in uncontrollable costs (i.e. incurring an ever increasing amount of cost to ensure that we achieve an absolute obligation). We would welcome further detail from Ofgem to determine what the move towards ‘must ensure’ would entail from a practical perspective.

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?

No, please see our response to Q4 as this would apply equally to the non-domestic Standards of Conduct.

Question 6

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

Whilst we support the introduction of an “informed choices” principle into the licence, we have similar concerns as set out above (Q4) regarding the interaction between the widely drafted principle and the compliance threshold. Our comments made in relation to the need for a better tailored enforcement regime are equally applicable here.

In order to gain a greater level of certainty as to the expectations under the new principle, we would welcome further detail from Ofgem on the kind of scenarios it would expect a supplier to proactively provide consumers with information to ensure they are making informed decisions about their energy services. We also note that the consultation refers to energy ‘services’ and this would appear to extend beyond energy supply - we would welcome confirmation from Ofgem as to the intended scope.

Question 7

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

See Q6 above.

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 are mindful of guidance introducing additional regulatory requirements through the ‘back door’ and would suggest that Ofgem considers carefully whether guidance is required.

However, guidance should be used strategically to address situations where Ofgem finds a supplier has been “pushing the envelope”. In this case, Ofgem should act promptly to issue guidance that is focused specifically on the harmful/undesirable behaviour identified. This will make clear to the whole industry what isn’t acceptable, whilst leaving open other approaches to the judgement of suppliers.

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.

There are a number of customer-facing documents that are already in existence, which share similar content and which SSE believes are utilised more often by customers than the TCF Statement. Whilst the TCF Statement is a useful reference point for consumers and third parties, we would support the removal of the obligation to publish the TCF Statement. It could deliver more positive customer outcomes if there are fewer customer-facing documents to consider when customers are looking for information or assistance. In keeping with the Standards of Conduct, SSE would continually review and enhance the remaining customer communications.

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 are supportive of all measures that seek to improve the outcomes for vulnerable consumers within the energy market. It is entirely appropriate that suppliers take accountability for protecting and empowering consumer in vulnerable situations.

We have invested significantly in process improvements to support vulnerable customers in line with Ofgem’s Consumer Vulnerability Strategy, including our ambition to attain the British Standard for Inclusive Service Provision: identifying and responding to consumer vulnerability (BS 18477:2010). In addition, SSE has also

- developed and delivered enhanced Disability and Equality Act training for Customer Service employees;
- delivered Dementia Training to our specialist Customer Service teams;
- launched a Sign Video service to allow customers who use British Sign Language to have real time conversations via video link; and
- introduced an efficient Language Line service, improving the way we communicate with customers whose first language is not English.

Within the consultation document Ofgem refers to debt repayment rates and prepayment installations as an area of concern. Whilst SSE agrees that more can be done, Ofgem currently holds power within the standard conditions of the gas and electricity supply licence upon which to take action should this cause concern. We support the intent of a vulnerability principle but are unclear on what Ofgem is expecting to achieve through its addition to the licence. For example, the consultation document specifically notes that Ofgem is *'concerned that outcomes for vulnerable customers may continue to worsen as new participants and technologies gain a foothold in the market'*. We do not believe that it is appropriate to introduce additional regulation on the basis that new market participants are unable to comply with existing standards.

We would therefore welcome further detail from Ofgem to ascertain what it would expect from suppliers as a result of a vulnerability principle being embedded within the Standards of Conduct. Our concerns raised in response to Ofgem's proposed to remove the 'all reasonable steps' threshold (Question 4) are also applicable here.

It is also worth considering what impact Ofgem's proposal to include a broad vulnerability principle will have on third parties. From our experience, third parties providing advice to consumers require clear information in order to inform customers of their rights and responsibilities. This allows them to provide clear information on the additional help available from suppliers when seeking to engage within the energy market. Whilst a broad principle has the potential to encourage innovation, there is also a risk that third party agencies are unable to access the information required to accurately inform customers of the help and assistance available and would need to broaden their engagement with suppliers which could add to the cost.

Question 11

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

We agree with the content of the proposed definition, pending our concerns raised within our response to Q10, of vulnerable situation. However, as Ofgem has noted much of this change is to assist with new entrants, we would encourage Ofgem to see if the wording could be cleaned and sharpened to read easier and aid understanding.

Ofgem's proposed definition of a 'Vulnerable Situation' is:

A Vulnerable Situation means the personal circumstances and characteristics of each Domestic Customer create a situation where he or she is:

- *Significantly less able than a typical Domestic Customer to protect or represent his or her interests; and/or*
- *Significantly more likely than a typical Domestic Customer to suffer detriment, or that detriment is likely to be more substantial.*

SSE would suggest that the following definition (adapted from the FCA's definition of vulnerability²):

A Vulnerable Situation means the personal circumstances and characteristics of each Domestic Customer create a situation where he or she is especially susceptible to detriment, particularly when a licensee is not acting with appropriate levels of care.

This proposed drafting would provide clarity for suppliers in terms of complying with the proposed Customer Objective and the Broad Vulnerability Principle.

Question 12

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

In order to provide a view on Ofgem's proposed amendments to SLC5, we require additional information on how Ofgem intends to apply this SLC in practice. Ofgem is looking to widen its powers in order to remove ambiguity associated with its duties under the EU gas and electricity directives; however Ofgem does not provide illustrative examples of where this ambiguity has prevented them from requesting information to date. We would also welcome further details from Ofgem to clarify where it would intend to use the new formal information gathering powers, as opposed to requesting information from suppliers on a voluntary basis.

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?

We have built on the fair treatment of customers, which has always been a part of the SSE ethos of treating customers like family across our business. We believe the current approach ensures we are actively thinking about what is good for consumers. Our current processes were recently communicated to Ofgem through the Challenge Panel information request, together with our proactive report to Ofgem on how we have embedded treating customers fairly into everything that we do. We are currently reviewing internally whether there is more we can do to further enhance our processes. In the context of vulnerable customers,

² <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-8.pdf>

our processes are being reviewed in the context of our BSI application and though we see that as being independent from the vulnerability principle, we hope that the improvements delivered through BSI accreditation will also help in ensuring robust compliance with the vulnerability principle.

In terms of cost, the Fairness Test as proposed removes the requirement to consider the financial impact on the supplier, whilst the removal of “All reasonable steps” introduces an absolute requirement in terms of compliance. We would anticipate additional cost in association with both of these elements in combination, though it is impossible to quantify this right now.

Question 14

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

No, as discussed within our response, SSE is concerned that Ofgem’s proposals to remove an ‘all reasonable steps’ threshold and apply this to a vulnerability and informed choices principle will create an unnecessary level of uncertainty across the retail market. Without certainty in relation to Ofgem’s approach to compliance and enforcement, combined with Ofgem’s intention to introduce an absolute requirement will see the market lack the necessary confidence to fully embrace principles-based regulation.

Rather than providing evidence to support alternative proposals, we would prefer to see Ofgem retain the status-quo and concentrate on developing an effective compliance and enforcement regime, alongside the development of additional broader principles. As noted above, this point takes on extra significance due to Ofgem’s increased compliance threshold.

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.

We do not believe that greater efficiency and coordination between internal processes would come as a result of amendments to the Standards of Conduct. Ultimately, competitive pressures within the energy supply market will drive internal efficiencies as opposed to additional regulation which, as outlined in our response to Q14, is more likely to lead to additional costs.

Question 16

What wider benefits do you think our proposals could deliver?

As outlined within our response to Q4, we are concerned that the benefits of Ofgem’s proposals are unlikely to be realised until such point that Ofgem’s current Enforcement Guidelines are adapted for principles-based requirements. We firmly believe that a further review is required to outline Ofgem’s approach in more detail. This is particularly important given the proposed shift to ‘must ensure’ across informed choices, vulnerability and the Standards of Conduct.

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 (e.g. from BEIS, CMA)? Please provide evidence and indicate whether this is half the time or less, or twice the time or more.

We will liaise directly with Ofgem in response to Question 17.

Question 18

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

We have highlighted the unintended consequences in our answers above. In particular, we believe that Ofgem’s proposals introduce significant additional regulatory risk for suppliers, and uncertainty in relation to how Ofgem will enforce in practice. We believe that this could have the unintentional impact of reducing the attractiveness of the market to new entrants and also hampering innovation. We recognise that to counter this, Ofgem has introduced the regulatory sandbox approach, however this does not address to the more business as usual innovations that suppliers may seek to introduce as part of normal operations. We believe it is innovation in this area that will suffer.