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Ofgem  
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14 August 2020

Dear Sir/Madam,

### **Ofgem Statutory Consultation – Supplier Licensing Review: Ongoing Requirements and Exit Arrangements**

I write in response to the statutory consultation – Supplier Licensing Review: Ongoing Requirements and Exit Arrangements.

Our response focuses on the key proposals outlined in the consultation paper and looks at the importance of the wider regulatory landscape within the energy sector working together, in a more proactive and preventative way, to protect consumers and reduce the risk of costs having to be mutualised when a supplier fails. We have also included background to Ombudsman Services at Appendix A.

#### **General Comments:**

We welcome the final proposals outlined by Ofgem in the Supplier Licensing Review which looks to strengthen ongoing requirements and exit arrangements to prevent and minimise the risk of disorderly market exits. We agree that these proposed measures are even more important considering the additional pressures placed on consumers and energy suppliers by Covid-19 and the response to it.

We think that, in general, principles-based regulation is suitable where it promotes competition and allows suppliers to be more flexible to innovate and deliver for their customers. It also allows Ofgem to be more flexible in determining the right approach at the right time. However, we do agree that when it comes to issues such as cost mutualisation within the energy sector, there may well be need for a greater level of prescription supporting the principle of responsible risk management to minimise costs that may be mutualised by the sector when a supplier fails. While company failure is a natural, and arguably necessary, feature of any competitive market, the lasting effects of failure on other suppliers and consumers in many ways makes the energy market unique. At present, it feels that the burden of failure falls too heavily on customers and the rest of industry. Setting out what is required of energy suppliers in these circumstances and what action Ofgem will take has the potential to reduce the broader impact of failure.

We appreciate that the requirements of suppliers outlined in the consultation are part of a wider package that has involved putting in place enhanced entry requirements on potential suppliers, as well as proposals for on-going requirements on suppliers. It is important to ensure that exit arrangements strike the right balance between consumer protection and additional burden on suppliers, but if this can be achieved Ofgem will facilitate a more sustainable



energy market with increased consumer protection. The substantive point we make in our response is that if Ofgem intends to introduce a principle-based approach to financial responsibility, then it must consider the full range of indicators that could be used to identify struggling suppliers – and be prepared to intervene positively to protect consumers.

## **Key points:**

### Ofgem's proposed Financial Responsibility Principle approach

As Ofgem is aware, though we take a proactive approach to managing bad debt, we have direct experience of having to mutualise unpaid case fees from failed suppliers. We have done so out of necessity, given our obligation to continue to work with all suppliers and to accept complaints that fall within our terms of reference from any energy customer. The mutualisation of costs has affected many more across the industry, and all else being equal, reducing the occurrence of failure would limit the burden on all stakeholders. We were supportive of the proposals outlined in the consultation last year for suppliers to cover a percentage of credit balances and government scheme costs. We understand Ofgem's rationale for the Financial Responsibility Principle being put forward, in that it more easily accommodates diverse business models and allows for suppliers to be more flexible in their approach to meeting their requirements. Though it clearly has benefits, this approach in our view is unlikely to protect industry from the mutualised costs of failure to the same extent as a more prescriptive approach to requiring suppliers to ring-fence these costs.

In choosing a principles-based approach, therefore, we think it is even more important to be clear on how Ofgem will identify when a supplier is not acting in line with its principles and what actions Ofgem will take when it identifies such behaviour. Suppliers can fail for a variety of different reasons and can do so quickly, which will necessitate a robust routine of engagement with suppliers and other stakeholders in the market to gather appropriate information and to be able to intervene as quickly and effectively as possible. We agree that Ofgem should keep this principle under review and consult on more prescriptive measures if necessary.

### Data, insights and engagement with industry stakeholders

We agree with the indicators and areas which will be looked at for milestone assessments. Similarly, we think it is right that dynamic assessments should include financial indicators such as missed payments, debt enforcement action, and winding up petitions. As we highlighted in our response last year, however, we think it important to look at a full range of factors that may indicate a supplier is in difficulty. Ombudsman Services has data on factors such as complaint spikes, poor signposting (where suppliers are not informing consumers of their right to seek alternative dispute resolution), failure to implement remedies and not paying case fees to Energy Ombudsman. It could also be useful to consider other changes to a supplier's normal complaint profile such as a higher volume of certain complaint types (such as delayed refunds), a higher number of deadlock letters, increased number of case disputes and a more general lack of engagement from the supplier. Where such factors can be identified by the Energy Ombudsman, we would be happy to work with Ofgem on agreeing clear criteria and thresholds that, if met, could be used to inform Ofgem's judgement on supplier risk.

More generally, it is important to have a clear understanding – for suppliers and other stakeholders – of what will be considered a concern that would lead to a dynamic assessment being triggered and clear mechanisms for gathering relevant information in a timely manner. Ofgem receives data and insight already from industry stakeholders, including Ombudsman Services through our engagement as the Energy Ombudsman in the Tripartite Working Group, to identify areas of actual and potential consumer detriment.

We support the proposals for independent audits to be requested when suppliers have been unable to provide adequate information for milestone and dynamic assessments, for example where a supplier has not sufficiently demonstrated its financial status or where it has not been engaging appropriately to identify systemic issues or repair customer service failings. Again, we are keen to share out data and insight to help support this process.

## Consumer protection

We are encouraged to see proposals for debt recovery practices being required to be included in contracts and Ofgem's continued engagement with insolvency practitioners to look for opportunities to work together to ensure better outcomes for consumers. However, this remains an area of serious concern for consumer protection – affecting consumers who typically have experienced disruption through the Supplier of Last Resort (SoLR) process only to then deal with administrators who are not held to the same standards. We see complaints where consumers are chased by administrators for incorrect balances and we will continue to share such insight with Ofgem. We think it needs to be clear what happens when administrators do not follow the rules and engage in what might be viewed as harsh practices.

We support the proposal for suppliers to take all reasonable steps to honour the terms of a bid they provide as part of the SoLR process and to honour credit balances. We see complaints from consumers that result from either incorrect information or a lack of information being passed from the failing supplier to the gaining supplier via the SoLR process. We think that Customer Supply Continuity Plans (formerly living wills) have the potential to help here. However, to a large extent their effectiveness will depend on swift action being taken when a supplier fails. To be most effective, such plans need to be executed in a timely way before significant detriment occurs. Though Ofgem has changed the proposed terminology from "living wills", it does raise the question of who the executor is of such plans and how they will be accessed and enacted in a timely manner upon failure.

We welcome the licence condition being introduced by Ofgem which prevents licensees from engaging in commercial transactions which may pervert or distort the SoLR process, and the requirement to notify Ofgem when a sale involves the transfer of customers. We do think that gaps and ambiguity remain here, and more clarity on the responsibilities which both the losing and gaining suppliers have for ensuring positive outcomes for their consumers would be helpful. Clarity around the expectations relating to redress was one of the key points raised in our SoLR workshops held last year with energy suppliers, Ofgem and Citizens Advice. The outputs from that workshop can be found at:

<https://partners.ombudsman-services.org/news-events/supplier-of-last-resort-workshop-solr>

As Ofgem is aware, as well as the SoLR workshop mentioned above, we also recently produced guidance and outlined our approach to complaints around acquisitions and mergers and where this interacts with SoLR, in an attempt to provide clarity on our expectations of all parties across a range of transaction types: <https://partners.ombudsman-services.org/resources/guidance-notes/draft-our-stance-on-mergers-and-acquisitions>

## A new approach

Finally, the measures outlined mean a potentially more fluid interaction between principles-based and prescriptive regulation. Whilst this new approach involves an element of more traditional monitoring and compliance, to undertake interventions and assessments in the right way and at the right time will require a detailed understanding of how and why businesses make the commercial decisions they do. To make good decisions under the new framework, therefore, Ofgem may need to consider experience and expertise to supplement its current capability. At Ombudsman Services we are keen to support this approach and play our part in making the proposed new measures a success.

Please do not hesitate to contact us if you would like further information regarding our response. Our response is not confidential.

Your sincerely,



Ed Dodman  
Director of Regulatory Affairs

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## **Appendix A**

### **About Ombudsman Services:**

Ombudsman Services is a not-for-profit private limited company established in 2002 which runs a range of discrete national ombudsman schemes across different sectors including energy, communications and an appeals service in private parking. Each scheme is funded by the companies under our jurisdiction and our service is free to consumers. In 2019 we received 157,808 initial contacts from complainants and resolved 88,840 complaints. In the energy sector we received 116,700 initial contacts and resolved 58,034 cases, and in the communications sector, we received 40,184 initial contacts and resolved 17,426 cases. We also received over 84,000 appeals in our private parking appeals service.

We are:

- to our consumers, the people they can turn to for impartial advice and solution that's fair;
- to our partners, the people they look to for knowledgeable and insightful ways to help them reduce complaints by enabling them to make the changes they need to deliver better customer services;
- to our regulators, champions in protecting rights as well as partners in information sharing, we share our analysis so that regulators and business partners can make improvements; and
- to our people, here to enable them to deliver clarity to consumers and partners through meaningful work.