

Response to Ofgem consultation on the Future of Retail Market Regulation

11 March 2016

Ofgem consultation on the Future of Retail Market Regulation

Ombudsman Services' (OS) response

1 Summary - About OS

Established in 2002, The Ombudsman Service Ltd (TOSL) is a not for profit private limited company which runs a number of discrete national ombudsman schemes across a wide range of sectors including energy, communications, and property.

We are an independent organisation and help our members to provide independent dispute resolution to their customers. Each scheme is funded by the participating companies under our jurisdiction. Our service is free to consumers and, with the exception of an annual subscription from Department of Energy and Climate Change (DECC) for the Green Deal, we operate at no expense to the public purse. OS governance ensures that we are independent from the companies that fall under our jurisdiction and participating companies do not exercise any financial or other control over us.

We have in the region of 10,000 participating companies. Last year we received 220,111 initial contacts from complainants and resolved 71,765 complaints. We saw a year on year increase in complaints of 118% between 2013 and 2014 and a further 35% increase between 2014 to 2015. In the energy industry alone we have witnessed a 336% increase in complaint volumes between 2013 and 2015. The company currently employs more than 600 people in Warrington and has a turnover in excess of £27 million.

In July 2015 the EU Alternative Dispute Resolution Directive (the ADR Directive) came into force requiring all member states to ensure that ombudsman or ADR schemes are available in every consumer sector. The Department for Business Innovation and Skills, the government department responsible for implementing the ADR Directive in the UK, called upon the market to plug the gaps where no ADR provision existed and

to coincide with this in August 2015 we formally launched our new portal (<http://www.consumer-ombudsman.org>). The launch of this website was welcomed by BIS and means that consumers can raise a complaint about a product or service in any sector where there is no existing redress provision - including retail, travel and home improvement.

Our complaints resolution service operates once a company's own complaints handling system has been exhausted, and we have the authority to determine a final resolution to each complaint. Our enquiries department handles primary contacts and makes decisions on eligibility. If a complaint is not for us, or has been brought to us too early, we signpost the consumer and offer assistance. Eligible complaints are then triaged. The simplest can be resolved quickly, usually by phone in two or three hours. Around 10% are dealt with in this way. For the majority of complaints we collect and consider the evidence from both parties, reach a determination and seek agreement; about 55% are settled like this. The most complex cases require a more intensive investigation; they may require more information and lead to further discussion with the complainant and the company to achieve clarification. The outcome will be a formal and binding decision.

Traditionally our key focus has been on handling individual complaints and ensuring that consumers, where appropriate, receive redress. In future we will take a much more proactive role. Firstly, through identifying and tackling issues in individual companies, and making recommendations to improve customer service and complaint handling. Secondly, by identifying systemic industry wide issues and either making recommendations for improvement, or referring them to the appropriate body for action. This will allow us to make a stronger contribution to tackling consumer detriment in the sectors in which we operate, and in addressing emerging problems before they become systemic.

We are 'Good for Consumers and Good for Business'.

For consumers, we offer a free, fast and accessible form of civil justice with no requirement for legal representation or specialist knowledge, and with a particular focus on access for vulnerable consumers. We ensure that complaints are dealt with swiftly

in an impartial manner, and we make decisions based on what is fair and reasonable rather than narrow remit of the law.

For businesses, we offer a fast and low-cost alternative to the courts, and make decisions based on expertise in industries. By looking to resolve disputes, we promote brand loyalty and repeat purchasing as well as building reputation and trust. We offer guidance on improving standards of service hence sharpening competitiveness. We go beyond individual complaints to find broader trends which can be a source of innovation.

More broadly, we provide an efficient and effective means of addressing consumer detriment and building business capability without recourse to the public purse. We take pressure and cost away from small claims court and legal system and help to build consumer confidence which bolsters the economy.

2 Specific response to the questions

OS welcomes the move from prescriptive rules to principles based rules and outcomes and believes that this is the right way forward for the energy retail market. OS has considerable experience of working with high level principles such as fairness and, as a multi sector ombudsman, we also have experience of working in sectors where regulators have worked to high level principles and guidance for some time, for example, the Royal Institution of Chartered Surveyors and the Solicitors Regulatory Authority. OS welcomes the opportunity to respond to the consultation and intends to respond to questions 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15. We have the following points to put forward:

Question 1: In what circumstances do you think that prescriptive rules are likely to be most appropriate? Which specific SLCs/policy areas should remain prescriptive in nature?

OS believes that it should be possible for Ofgem to apply a principles based model to a number of areas of retail market regulation. However, we would expect to see some degree of prescription retained in areas which Ofgem identifies as having a particularly high risk profile to ensure that consumers, and particularly vulnerable consumers, are sufficiently safeguarded.

For example, looking at SLC 25, Ofgem may wish to retain some level of prescription around the provision of comparison data during a sale to ensure that this is carried out in a standardised way throughout the industry. We would also suggest that some prescription should be retained in respect of face to face sales; in particular ensuring that companies record the information they provide to a customer during the sales process. Another specific area where Ofgem may wish to retain some prescription in order to safeguard vulnerable consumers is SLC26, and specifically the requirement to maintain a Priority Services Register.

A full assessment of the risks associated with removing specific areas of prescription at each stage of the transition process should allow Ofgem to identify any areas where prescription may need to remain in place.

Question 2: Should we supplement the principle of “treating customers fairly” with any other broad principles? If yes, please outline what these should be and why.

We believe that this work provides a real opportunity for energy companies to think about their businesses and the customers who use their services, and engage with the spirit of the principles rather than the letter of prescriptive rules. Current supplier practices have been largely shaped by the existing prescriptive rules and so to an extent these have established a baseline for what is considered ‘fair’ in many scenarios. Where prescriptive rules are removed, we would expect companies to use the added flexibility to seek to improve on this baseline, and we believe that the broad principle of ‘treating customers fairly’ should be sufficient to guide the desired behaviours.

Question 4: What are your views on the potential merits or drawbacks of incorporating consumer protection law into licences?

OS believes that the spirit of consumer protection law can be included within high level principles. As all businesses are required to comply with these laws, we see no reason why elements of this legislation should not be taken into consideration when revising licenses.

Question 5: How should we use principles and prescription to most effectively protect consumers in vulnerable situations?

As a multi sector ombudsman, OS has experience of regulation working effectively with a mixture of high level principles and limited prescription. We believe that prescription should be avoided where possible, however, we agree that protecting vulnerable consumers is a key area where Ofgem will likely need to retain some degree of prescription in order to ensure that sufficient safeguarding is present.

Question 6: Do you agree with our proposed approach to guidance?

OS has experience of regulation working effectively with high level principles underpinned by supporting guidance and advice. We note that Ofgem sees itself as having a limited role in publishing guidance. We agree that a plethora of detailed guidance sitting outside the rulebook could effectively create “prescription via the backdoor” and we would suggest that guidance should be used predominantly in areas with a higher risk profile so that suppliers still have room to innovate, with adequate guidance and direction in place where needed.

In our experience, the balance between companies interpreting the principles for themselves and regulators providing guidance is a much contested area, with each party often expecting the other to play more of a role. We believe that trade associations and organisations like OS can help to bridge this gap by working closely with both the industry and the regulator to help develop a shared interpretation of principles.

In the energy sector specifically, there are likely to be areas where companies will find it particularly difficult to navigate the new principles based world. Here, we would expect to see Energy UK facilitating the sharing of best practice, producing guidance, and perhaps even developing additional codes of practice. We have already seen successful outcomes from industry led, voluntary codes of practice, such as the Code of Practice for Accurate Bills.

We also see a prominent role for OS. Making judgements on what is fair and reasonable is a key part of our decision making process, so we are very skilled at interpreting principles like fairness. We envisage a function for OS in guiding companies broadly on their interpretation of principles and feeding back to companies when we identify behaviours which we feel go against the spirit of the principles.

We would also expect to see suppliers utilising other resources available to them in order to interpret principles, including reports of previous investigations carried out by Ofgem and others which often highlight bad practice to be avoided.

Question 7: How can we best engage with suppliers in the context of principles?

OS acknowledges that principles based regulation is a big change for the industry and so independent but collaborative working with suppliers will be required throughout the transition.

OS attended Ofgem's recent consumer group workshop and we understand that similar workshops have been held with suppliers to discuss the move to principles based regulation. We believe that these workshops provide a useful forum for discussing key issues and we would encourage Ofgem to continue engaging with stakeholders in this way.

The move to principles based regulation will clearly be a big culture change for the sector, and may require substantially different skills on the part of compliance staff to make the sort of judgments needed to work to broad principles. Ofgem may wish to allow a period of time in which it makes additional advice and support available to suppliers to assist with this transition.

Question 8: What specific support may be needed for new and prospective entrants?

It is our view that, to an extent, established suppliers will initially be able to continue with 'business as usual' under principles based regulations but with the added room to innovate which, in due course, should bring new advances and improvements.

For new entrants, the situation is arguably more challenging as they would likely prefer a more prescriptive world where they can track their compliance more easily as they settle into the market. It is our view that in addition to promoting competition, new entrants are also likely to bring fresh ideas to the industry so we would not want to see this stifled by an over-apprehensiveness regarding compliance. We would suggest that Ofgem provides an additional degree of monitoring and support for new entrants to

allow them to bring fresh and innovative ideas to the market but with the reassurance that they will be guided back in right direction if they begin straying towards non-compliance.

Question 9: Do you have any views on how best to approach monitoring in the context of principles? Specifically, which indicators and approaches should we use to catch potential problems early?

We believe that Ofgem's current customer service indicators, including customer satisfaction levels and complaint volumes, should still be applicable in the context of principles. In addition, Ofgem may also wish to identify high risk areas and monitor these closely, using targeted sampling checks and other monitoring tools to detect potential issues.

We also see a much more prominent role for OS in monitoring supplier performance in the future, and the data and information sharing strategies which we are currently developing with Ofgem will be vital to this work.

Where companies choose to use the added flexibility provided by principles based regulation to innovate, we see a key role for OS in sharing any insights we may have on the proposed changes, ensuring that the company has robust contingency plans in place to limit consumer detriment in the event that things go wrong, and monitoring any changes closely in order to identify issues at an early stage.

Question 10: Do you have any views or comments on the following proposals?

- ***We will expand our engagement with suppliers to enhance our understanding of their businesses and help them better understand our rules so they can get things right first time.***
- ***We will collaborate closely with the Citizens Advice Service and the Ombudsman Services: Energy to ensure we maximise the effectiveness and impact of the monitoring activities across our organisations.***

OS welcomes these proposals and agrees that close engagement with the industry and other key stakeholders is essential to a smooth transition to principles based regulation. OS looks forward to working closely with Ofgem and other stakeholders to play our part in ensuring that the anticipated benefits of principles based regulation are realised.

Question 11: Do you have any views on how best to approach compliance in the context of principles?

In order to encourage innovation, OS would suggest that some room for trial and error will be required but with sufficient safeguards in place to protect consumers if things go wrong. If suppliers attempt to innovate and inadvertently find themselves in breach of regulations, taking immediate enforcement action against businesses risks discouraging them from attempting to innovate in the future. This may lead to the industry choosing to ‘play it safe’ which could cause stagnation.

Ensuring compliance while encouraging innovation will no doubt be a difficult balance for Ofgem to strike and we would suggest that close monitoring and proactive engagement is the key to this so that potential non-compliance is highlighted and addressed early on.

Question 12: Do you have any views or comments on the following proposals?

- ***We will retain our current flexible and discretionary approach to escalating issues to enforcement. We will prioritise compliance activities where possible and appropriate.***
- ***We will increase the links to the level and impact of harm when deciding whether to open a case.***
- ***Engaging early with Ofgem may reduce the likelihood of later enforcement. Information from engagement and monitoring activities may be shared with enforcement where appropriate.***
- ***We will continue to apply our full range of enforcement tools to principles-based rules.***
- ***We will make it easier for all suppliers to learn lessons from enforcement outcomes.***
- ***Enforcement action will continue***

OS broadly agrees with these proposals. Looking specifically at the use of compliance orders, OS would suggest that where the specific actions or objectives set out by Ofgem relate to redress, OS could be given the opportunity to input on the mechanics of these targets to ensure that they are formulated in such a way as to drive the correct behaviours in suppliers and maximise the efficacy of the ombudsman in tackling consumer detriment.

Question 13: How would you like to engage with us on our proposals and the broader work programme?

We would be keen to be involved in discussions on principles and guidance. OS is already working closely with Ofgem on a number of other areas of the broader work programme as part of the joint working group to take forward the recommendations of the Lucerna Partners review of OS:E, and we look forward to continuing this work.

Question 14: Do you agree with our proposal to take a phased, priority-driven approach to reforming the supply licences.

OS believes that this is a sensible approach as a ‘big bang’ approach would likely make it very difficult to trace the precise root of any resultant benefits and improvements seen in the industry. Removing prescription in specific areas in individual phases should make it much easier to link successes to specific changes.

We believe that the phased approach also provides clarity for companies on which areas of their business they should think about first, as well as allowing those monitoring their performance to focus their efforts on specific areas where changes and advances are likely to be occurring.

OS is, however, mindful of the value of having a cohesive approach to introducing such a change with a clear timescale and structure.

Question 15: Which areas of the licences should we prioritise? In particular, please provide examples where existing prescriptive rules may be causing problems or where market developments are leading to new risks to consumers.

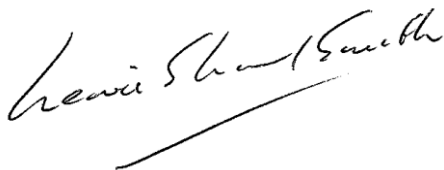
We see billing as a key area where Ofgem could replace the current prescriptive rules with broad principles in order to allow greater room for innovation and improvement. At present, SLC 31A stipulates a number of specific pieces of information which suppliers must include on all customer bills. While we acknowledge that there is some information which should always be included on bills in order to communicate to a customer how their charges have been calculated, it could be argued that some of the information currently stipulated within the SLCs may actually be making energy bills overly-complicated for consumers. As energy suppliers are obliged to include this information, they are somewhat restricted in how far they can go to try to improve billing for their customers.

In 2015, 80% of all energy complaints resolved by OS related to billing. While not all of these complaints related specifically to the clarity of bills, we believe that this is something which often exacerbates other issues. For example, where companies are required to rebill customers, the current prescriptive rules require them to do this in a specific way which can cause further confusion and take the focus away from resolving the primary issues.

We believe that there is scope for improvement in this area which might be aided by the removal of some of the current prescription. We note that Ofgem has suggested carrying out some safe trialling in this particular area and we welcome and support this proposal.

I trust that this answers the consultation questions in full, but if you would like us to clarify any of the points made in this response please don't hesitate to get in touch.

Yours sincerely



Lewis Shand Smith
Chief Ombudsman & Chief Executive

11 March 2016