Making a positive difference
for energy consumers

Domestic gas and electricity suppliers, energy consumers and their representatives and other interested parties

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Modification of electricity and gas supply licences to introduce five 'informed choices' principles and remove the majority of the prescriptive sales and marketing rules

We have decided to modify the electricity and gas supply licences to replace the majority of prescription from the sales and marketing rules (Standard Licence Condition (SLC) 25) with a package of enforceable principles – three on tariff comparability and two on sales and marketing. We consider that these changes will improve protection for consumers in an evolving market, place a greater onus on suppliers to deliver positive consumer outcomes and promote innovation and competition.

The changes outlined below will take effect from 23 June 2017. The notification decision documents are published alongside this letter. The principles we are introducing are as follows:

i)	*The licensee must ensure that the structure, terms and conditions of its Tariffs are clear and easily comprehensible.*
ii)	*The licensee must ensure that its Tariffs are easily distinguishable from each other.*
iii)	*The licensee must ensure that it puts in place information, services and/or tools to enable each Domestic Customer to easily compare and select appropriate Tariffs within its offering, taking into account that Domestic Customer's characteristics and/or preferences.*
iv)	*The licensee must not, and must ensure that its Representatives do not, mislead or otherwise use inappropriate tactics, including high pressure sales techniques, when selling or marketing to Domestic Customers.*
v)	*The licensee must only Recommend,* and must ensure that its Representatives only Recommend, to a Domestic Customer Tariffs which are appropriate to that Domestic Customer's characteristics and/or preferences.* **Recommend means communicating (whether in Writing or orally) to a Domestic Customer information about one or more Tariffs in a way which gives, or is likely to give, the Domestic Customer the impression that a particular Tariff(s) is/are suitable for their characteristics and/or preferences.*

We are retaining the requirement to keep sales records for two years, which we are also extending to include records of telephone sales. This means that, where a supplier or their representative provides an estimate or comparison that results in a sale, they must retain a record of the information they provided to the customer about the contract for a period of two years. Finally, we are expanding the scope of SLC 25 to cover all sales and marketing activities (as opposed to limiting it to face-to-face and telephone sales).

In addition to these changes to SLC 25, we have also decided to make amendments to some of the 'Clearer Information' tools, originating from our 2013 Retail Market Review (RMR) reform package (see section 2 below).[1] These changes reflect the removal of the RMR Simpler Tariff Choices rules in November 2016.[2]

This decision follows two consultations held over the past 8 months that outlined our proposed changes and rationale.[3] In reaching this decision, we have carefully considered and taken into account responses received to these consultations.

Overview of consultation responses and way forward

We asked two questions in our January 2017 statutory consultation. The first was whether respondents had any specific concerns with our proposal to replace the majority of prescription in SLC 25 with the proposed package of principles. The second was whether respondents had any specific concerns with our proposals to amend some of the RMR Clearer Information tools. An overview of responses to these two questions is set out below.

1. A new sales and marketing licence condition

Our proposal to overhaul SLC 25, replacing prescriptive rules with five enforceable principles, is designed to better protect consumers whilst promoting innovation and competition. It attracted almost unanimous support from stakeholders. All stakeholders remained supportive of our policy objective of consumers being able to make informed choices. Respondents also broadly welcomed the drafting changes we had made to the principles following feedback to our August 2016 consultation.

On two of the five principles (Principles 1 and 4), respondents either remained silent or offered unqualified support. A few stakeholders, however, requested further clarification around the policy intent of Principles 2, 3 and 5. These are addressed below.

Principle 2

Statutory consultation proposition
The RMR found evidence that one of the causes for confusion was suppliers flooding the market with numerous almost identical tariffs, which consumers found difficult to distinguish between. Principle 2 was developed in the context of the 'four tariff rule' being removed last year. It is designed to supplement the rule (which remains in force) that requires suppliers to use only one name per tariff in each region. The proposed drafting of Principle 2 in our statutory consultation was as follows:

'The licensee must ensure that its Tariffs are easily distinguishable from each other.'

[1] Ofgem, Retail Market Review
[2] We removed these rules in line with the Competition and Market Authority's (CMA) recommendation to remove certain licence conditions originating from our RMR package. See Ofgem, (2016) Modification of electricity and gas supply licences to remove certain RMR Simpler Tariff Choices rules
[3] See Ofgem, (2016) Helping consumers make informed choices – proposed changes to rules around tariff comparability and marketing and Ofgem, (2017) Statutory consultation: Enabling consumers to make informed choices

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Stakeholder feedback
A number of the larger suppliers sought clarification around whether this principle would affect their ability to offer differing version numbers of a tariff. This common practice allows suppliers to continue offering what is essentially the same fixed-term tariff, but to price it differently over time to reflect fluctuations in wholesale prices. To manage this, they withdraw the fixed-term tariff (e.g. 'Purple Fixed Tariff Version 3') and replace it with another one that is priced differently and which has a sequential version number (e.g. 'Purple Fixed Tariff Version 4'), but which is otherwise identical.

Way forward and rationale
We are proceeding with Principle 2 as currently drafted. We consider that suppliers should be free to continue the practice outlined above – so long as only one version of any given tariff is on sale at any one time. We consider that this meets our policy objective of averting widespread confusion, while enabling suppliers to continue with what we consider to be a legitimate tariff naming (and hedging) practice. Our intention is not to force suppliers to create artificial distinctions between tariffs in order to comply with this principle; indeed, this is precisely the kind of behaviour we are seeking to avoid.

Principle 3

Statutory consultation proposition
The proposed drafting in our statutory consultation was as follows:

> *'The licensee must ensure that it puts in place information, services and/or tools to enable each Domestic Customer to easily compare and select appropriate Tariffs within its offering, taking into account that Domestic Customer's characteristics and/or preferences'*

This reflected a number of minor changes made in light of stakeholder feedback to our August 2016 consultation.[4]

Stakeholder feedback
The majority of respondents were either silent on this principle or actively supportive of the drafting changes made (in particular, the recognition that 'characteristics' may not always align with 'preferences').

However, a couple of the larger suppliers raised two new concerns that had not been expressed previously. One sought reassurance that Principle 3 only applied to tariffs available through the particular sales channel that the customer was using. If, for example, a customer contacts a supplier by phone, this respondent suggested that suppliers should not be required to provide information about tariffs available exclusively through a Price Comparison Website (PCW).

Another supplier sought clarification that Principle 3 would not require suppliers to list white label tariffs on their websites, arguing this could undermine the rationale for entering into white label partnerships. A change of drafting was proposed to clarify that this was not the case. However, a consumer group disagreed with this point, arguing that customers should have sight of all of the tariffs offered by a supplier, regardless of the brand used.

Way forward and rationale
Regarding the point about sales channels, there is clearly a balance to be struck between providing a consumer with sufficient information to enable them to make a properly informed choice while not overburdening them with information or providing information

[4] In our August 2016 consultation, Principle 3 read as follows: *'The licensee must ensure that it puts in place information, services and/or tools to enable each Domestic Customer to easily compare and select which Tariff(s) within its offering is/are appropriate to their needs and preferences'.*

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that is not relevant (e.g. about tariffs for which they are ineligible). How best to achieve this balance in a way that delivers positive consumer outcomes will vary according to the circumstances and it will be for suppliers to reassure themselves that they are getting this right. The intent of Principle 3 is to place a clear obligation on suppliers to be proactive in helping their customers compare and select a tariff that is appropriate for them. We consider this to be a basic, fundamental requirement and note the support this proposal has received throughout the consultation process.

Regarding the other query about white labels, we continue to believe that white labels have a role to play in promoting innovation and competition (e.g. by engaging otherwise disengaged consumers through the offering of distinct tariffs, customer service arrangements and sales channels). We also acknowledge that white label partnerships can help household names and new innovative brands enter the retail energy market. To the extent that white labels continue to further these aims, we remain keen to facilitate their development.

We do not interpret Principle 3 to necessarily require suppliers to list (e.g. on their website) all of the tariffs offered by white label brands that they partner with. In response to concerns about the transparency of a supplier's offerings, we note that under the Cheapest Tariff Message (CTM) rules, we require suppliers to alert customers regularly to their cheapest tariffs – including where these are offered by white label partners.[5] In addition to this, we note that existing obligations require suppliers to make clear who the licensed partner supplier is when a customer signs up to a white label tariff.[6]

Ultimately, it is for suppliers to reassure themselves that they are behaving in a way that complies with the spirit and the letter of Principle 3 (as well as all other informed choices principles). We have been clear that part of the rationale for moving to a more principles-based regulatory approach is to get suppliers to take greater responsibility for delivering positive consumer outcomes, whilst also allowing them more space to compete and innovate.

As with all of the 'informed choices' principles, we will be watching closely how suppliers interpret and implement Principle 3. We will take the opportunity of our upcoming review of the rules around customer communications to consider the utility of prescriptive rules in this space.

In light of the above, we are not minded to make any drafting changes to Principle 3.

Principle 5

Statutory consultation proposition

Principle 5 requires suppliers to ensure that, before recommending a specific product or service to a customer, they have satisfied themselves that they know enough about the customer to make the recommendation. The proposed drafting of Principle 5 in the statutory consultation was as follows:

> *'The licensee must only Recommend*, and must ensure that its Representatives only Recommend, to a Domestic Customer products and/or services which are appropriate to that Domestic Customer's characteristics and/or preferences'*
>
> **Recommend means communicating (whether in Writing or orally) to a Domestic Customer information about products or services in a way which gives, or is likely to give, the Domestic Customer the impression that that a particular product or service is suitable for their characteristics and/or preferences*

[5] See SLC 31D.21.
[6] See SLC 31D.23.

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Stakeholder feedback

Support for this principle remained strong following changes made in light of stakeholder feedback to our August 2016 policy consultation. However, three drafting issues were raised which we discuss in turn below.

The first was around the use of '*products and/or services'*, which one stakeholder argued should be replaced with '*Tariffs'* in order to make it consistent with Principles 1 – 3. This stakeholder also questioned whether Ofgem has the *vires* to regulate marketing or sales activities beyond those relating to Domestic Supply Contracts.

The second was around the definition of '*Recommend'*, which a number of the larger suppliers felt was too broad. One, for example, suggested that under the current definition, a supplier could be seen as making a recommendation simply by mentioning a range of tariffs during the course of a sales conversation with a customer. Another suggested that a broad definition risked forcing suppliers to introduce caveats into virtually all customer communications in order to make it clear that they were not "making a recommendation". Various minor drafting changes were suggested, all broadly designed to make the definition of '*Recommend'* more restrictive.

The third drafting comment was around '*characteristics and/or preferences'*, which one consumer group argued should be changed to '*characteristics and preferences'* (underlined emphasis added for clarity). This respondent argued that, while the '*and/or'* drafting may be appropriate in Principle 3 (as it accommodates trade-offs that a consumer may be willing to make), it is not appropriate for Principle 5. They felt this because consumers might assume that the recommended tariff is suitable for both their characteristics *and* preferences.

Way forward and rationale

'*Products and/or services'*: We agree that drafting should be consistent where possible and recognise that, unlike '*products and/or services'*, '*Tariffs'* is a defined term in the licence.[7] We are therefore changing the drafting of Principle 5 from '*products and/or services'* to '*Tariffs'*. It is worth noting that under the definition of '*Tariffs'*, bundled products are clearly captured (see emphasis in bold in footnote 7).

Regarding the related comment about Ofgem not having the *vires* to regulate marketing or sales activities beyond those relating to Domestic Supply Contracts, we would point stakeholders to the Gas Act 1986[8] and the Electricity Act 1989.[9] This legislation gives us a broad remit to place conditions on licensees where we consider it to be requisite or expedient, and in line with our principal objective and general duties, including where those obligations do not relate to the activities authorised by the licence.

'*Recommend*': We are proceeding with the definition of '*Recommend'* as drafted (noting the change from '*products and/or services'* to '*Tariffs'* outlined above). We consider that the reference to '*characteristics and/or preferences'* in the definition makes it clear that a degree of specificity is inherent in both the scope and the intent of this principle (i.e. it captures situations whereby a specific domestic customer is given the impression that a specific tariff(s) is suitable for them based on their specific characteristics and/or preferences).

As such, we are confident that the proposed definition is not so broad as to restrict innovation or competition. We agree with stakeholders that requiring suppliers to routinely introduce caveats into customer communications in order to make it clear that they were not "making a recommendation" is not likely to benefit consumers. (We also note that,

[7] '*Tariffs'* is defined in the licence as follows: *"…the Charges for the Supply of Electricity* ***combined with all other terms and conditions that apply, or are in any way linked****, to a particular type of Domestic Supply Contract or particular type of Deemed Contract"* (SLC 1)

[8] Section 7B(4)(a)

[9] Section 7(1)(a)

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where a supplier communication clearly gave the impression that it *was* making a recommendation, a statement to the contrary would not be considered effective).

The intention with the proposed drafting is to strike an effective balance between keeping the scope of the definition as narrow as possible without jeopardising our ability to take action in the future if we see suppliers making recommendations that are clearly unsuitable or inappropriate for customers' interests.

'Characteristics and/or preferences': We do not agree that a meaningful distinction can be drawn between the use of '*characteristics and/or preferences'* in Principles 3 and 5. Under the application of both principles, there may be instances in which the tariff that best aligns with a customer's '*characteristics'* does not necessarily align with their stated '*preferences'*. As such, we are proceeding with the current drafting of '*characteristics and/or preferences*'.

Other general comments on our SLC 25 proposals

'Must ensure' threshold

Our proposal to apply a '*must ensure'* threshold to all five principles had received considerable pushback in our August 2016 consultation, with stakeholders (particularly the larger suppliers) expressing a strong preference for '*all reasonable steps'*. Having carefully considered this feedback, our January 2017 statutory consultation confirmed our intention to retain the '*must ensure*' threshold, including in its application to Representatives. This was consistent with our proposal to remove '*all reasonable steps'* from the existing Standards of Conduct.[10] Our rationale is based on the following three points.

First, the principles set out basic, fundamental expectations that we believe any competent, responsible supplier and their representative(s) should be able to achieve. Second, the provisions contained within the proposed principles are essential to the healthy functioning of energy markets. Third, we want to improve our ability to take swift, effective and appropriate action when a potential breach is clearly resulting in, or is likely to result in, consumer harm. A '*must ensure*' threshold will enable us to respond with greater agility to support and compel compliance measures where there is a genuine prospect of consumer harm, or to take enforcement action.

All but two stakeholders accepted this rationale. Of these, one argued that the proposal could lead to a box-ticking exercise by creating an overly risk-averse compliance culture, thereby stifling innovation. The other, while broadly agreeing that the '*must ensure'* threshold was necessary, expressed concern that removing the '*all reasonable steps'* defence could see suppliers penalised for issues through no fault of their own.

We stand by the reasoning set out in our January statutory consultation and are encouraged by the extent to which stakeholders agree with our rationale. We do not consider that any new argumentation or evidence has been put forward that would warrant a change in our proposals. Rather, we consider that the reassurances we have already provided collectively address all of the concerns raised. In particular, we would point concerned suppliers to our commitment to applying principles in a way that is proportionate, as set out in our Enforcement Guidelines,[11] our Better Regulation duties and our statutory obligations.[12] The Enforcement Guidelines also set out enforcement prioritisation criteria, which make clear that Ofgem is likely to regard issues as serious where they give rise to consumer harm, or appear to be reckless or intentional, for

[10] Ofgem, (2017) Standards of Conduct for suppliers in the retail energy market
[11] Ofgem, (2014) Enforcement Guidelines
[12] Under section 4AA(5A) of the Gas Act 1986 and section 3A(5A) of the Electricity Act 1989, when carrying out its actions the Authority (Ofgem) must have regard to: a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and, b) any other principles appearing to it to represent the best regulatory practice

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example. This should reassure licensees that we will continue to deal proportionately with small or minor breaches.[13]

As such, we are proceeding with the '*must ensure'* drafting across all five principles, including in its application to Representatives. As set out in our January statutory consultation, when assessing any potential breach, we will take into consideration the nature of a supplier's relationship with a representative. This is because we recognise that the level of control and influence a supplier is able to exert on the conduct of a Third Party Intermediary depends on the proximity of the relationship.

Finally, during bilateral discussions, one stakeholder asked whether the new sales and marketing licence condition would cover marketing materials like leaflets and mailshots. Given that we are expanding the scope of SLC 25 to cover all sales and marketing activities (as opposed to limiting it to face-to-face and telephone sales), we confirm that this is the case.

2. Changes to the Clearer Information Tools

There was unanimous support for our overall package of proposals to make changes to the Clearer Information tools – specifically, to: (i) remove the Tariff Comparison Rate (TCR); (ii) amend the Tariff Information Label (TIL), and; (iii) remove various transitional provisions covering rollovers, end of fixed term notices and existing Fixed Term Supply Contracts (SLCs 22CA and 22CB).

One stakeholder reiterated a concern expressed previously about the TIL – specifically, the provision for all TILs (live and closed) to be shown on suppliers' websites. This supplier suggested that the only justification for this requirement would be if a customer wanted to see what tariffs they had missed an opportunity to switch to.

As set out in our statutory consultation, we do not accept this argument. The requirement to include TILs for all operational tariffs (i.e. all tariffs that customers are still on) is important because it ensures that all customers have access to the key information about their tariff (e.g. name of supplier, tariff name and type, payment method, unit rate(s) and standing charge(s)). Whilst we acknowledge that this information is also available on bills and annual statements, it is entirely plausible that a customer may not keep a record of these. If and when they go to switch supplier and/or tariff, these provisions ensure they have the information they need to make comparison (and switching decisions) easier.

As such, we are proceeding with the changes to the Clearer Information tools as set out in our January 2017 'informed choices' consultation.

Our Decision

Having carefully considered the responses to our statutory consultation, we have decided to proceed with the modifications that are set out in this letter and our decision notices published alongside this letter. As set out above, we consider that these changes will help ensure consumers are able to make informed choices, provide robust protection in a fast-changing market and promote innovation and competition, whilst putting responsibility firmly on suppliers to deliver positive consumer outcomes.

Next steps and implementation
The changes set out in this decision will take effect on 23 June 2017.

[13] See also Ofgem, (2017) Forward Work Programme 2017-18 for further details on our approach to compliance and enforcement. This sets out our intention to publish revised Enforcement guidelines on our approach to opening investigations in Q3 this year.

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During bilateral discussions with various stakeholders over the past few months, some suppliers have enquired as to whether there will be a transitional period during which they can make any necessary systems changes. We recognise that there will be some operational challenges involved – particularly in relation to the two-year record keeping requirement and around systems changes to implement the Clearer Information tools changes. We also appreciate that implementation of some of these changes may be more of a challenge for some suppliers than others.

However, we are not proposing to change the implementation timeline for any of the proposals. Where suppliers have specific concerns about their ability to make systems changes in time, we would encourage them to contact us, providing a justification (supported by evidence) for any delay and a detailed implementation proposal.

We note that a number of suppliers have already made progress in implementing aspects of our proposals. Where suppliers are in a position to 'go live' with changes in advance of 23 June 2017 (e.g. removing the TCR), we do not generally envisage that it would be appropriate for Ofgem to take enforcement action in relation to the specific Clearer Information rules mentioned in this decision. However, any supplier thinking of implementing any of these changes should discuss this with us in advance.

Finally, regarding further changes to the remaining Clearer Information tools (namely, the Personal Projection and Cheapest Tariff Message) we will shortly be updating stakeholders on our thinking before formally consulting in the summer. This will also include our proposals around the tariffs onto which suppliers can move customers at the end of a fixed-term contract, where no active choice has been made. This follows on from a proposal first put forward in our 2016 policy consultation.[14]

Yours faithfully,

Neil Barnes
Associate Partner, Consumers and Competition
Duly authorised on behalf of the Gas and Electricity Markets Authority

[14] See Ofgem, (2016) Helping consumers make informed choices – proposed changes to rules around tariff comparability and marketing, p13

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