

Contracts – Report from Duty to Supply, Contracts and Information workgroup

This document summarises the views of the Duty to Supply, Contracts and Information workgroup on the requirement for obligations in respect of contracts to be included in the Supply SLCs. It reviews the following SLCs:

SLC 30 – Debt Blocking

SLC 41 – Terms for supply of gas incompatible with standard conditions

SLC 42 – Domestic Supply Contracts

SLC 44 – Notification of terms

SLC 46 – Termination of contracts on notice and domestic transfer blocking

SLC 47 – Termination of contracts in specified circumstances

The issues are themed as follows and it is for further discussion whether it would be appropriate for the licence to be remodelled along these or different lines:

- Requirement to supply through a domestic supply contract or deemed contract and definition of a domestic supply contract,
- Content and structural requirements for a domestic supply contract,
- Information to be provided to the customer, and
- Supplier behaviour, in particular in relation to charging of termination fees, customer switching and transfer blocking

Apart from SLC 30, which relates to non-domestic gas customers, all of the issues discussed below relate to domestic customers.

1. Requirement to supply through a domestic supply contract or deemed contract and definition of a domestic supply contract

The Gas and Electricity Acts provide that where an energy supplier supplies energy to any premises otherwise than in pursuance of a contract, the supplier shall be deemed to have contracted with the consumer for that supply. The licence limits the contracts through which a supply may be made to a domestic consumer to a “domestic supply contract” (which has a particular meaning in the licence). In the absence of a “domestic supply contract”, a domestic consumer will receive their energy pursuant to a “deemed contract”.

To the extent that existing differences between the obligations attaching to each type of contract are reduced under the review process, it may be advisable at some point to consider whether it is any longer necessary to exclude “deemed contract” from the licence definition of “contract”. This should be considered at the drafting stage.

1.1 Definition of Domestic Supply Contracts.

SLC 42(2) provides that the licensee shall not supply energy to domestic premises except under a “domestic supply contract” or a “deemed contract”. The purpose of the paragraph is to establish the two types of contracts pursuant to which energy may be supplied to domestic consumers.

The group considers that defining “domestic supply contract” is a helpful and simple term to which obligations in the rest of the licence can be attached.

SSE does not agree with the above proposal and have requested that an alternative view be expressed in this paper. They do not believe that it is necessary to continue to directly regulate domestic supply contracts and there is no requirement to define such contracts as a mechanism to allow obligations to be attached to such contracts. Such contracts should be governed by existing contract law, as is the case in other industries. In addition, deemed contracts are provided for under the Electricity and Gas Acts. SSE consider that their approach does not prevent the retention of specific obligations for domestic (or small groups of) customers, but in many such cases the licence should not require such obligations to also be a contractual requirement i.e. it is a licence obligation with its own enforcement regime if suppliers do not comply. At the very least, where Ofgem wish to specify that a certain obligation must also be a contractual requirement this could simply be stated as part of that licence obligation.

Summary: **Retain** the substance of SLC42(1) and SLC (2) as a mechanism to require that domestic customers are only supplied under a “domestic supply contract” or a “deemed contract” and to require that obligations in the licence are to be attached as appropriate to both types of contract.

2. Content and structural requirements for a domestic supply contract

Given the requirement to supply under a contract or deemed contract noted above, this section sets out the requirements to include defined terms and conditions within domestic supply contracts.

The group’s view is that specific terms and conditions should only be required by the licence where there is a demonstrable and significant need for these over and above the requirements of general customer protection and contract law. Of particular relevance will be evidence that the supply of gas and electricity is so significantly different from the provision of other goods and services as to justify additional requirements.

In particular this section recommends that:

- all terms and conditions (including price) should be included in writing in domestic supply contracts
- there is no requirement for contracts to be in a standard form
- contracts must include certain defined termination provisions
- charges for gas and electricity should be separately identifiable in contracts from the provision of other goods and services

2.1 Terms and conditions (including price) to be included in a written contract (SLC42(3)(b))

For domestic customers the group considers that the licence should include a requirement for all terms and conditions (including price) to be included in a written contract. This is considered necessary to provide consumers with certainty about their rights and obligations in respect of their energy supply. There is potential that without this obligation there may be confusion about such rights and obligations.

SSE, npower and Centrica do not agree with the above proposal and have requested that an alternative view be expressed in this paper. They consider that it is in suppliers’ commercial interests to provide customers with all the terms and conditions of supply (including price) to avoid being challenged at a later date. In addition, the Distance Selling Regulations require a supplier to provide specific detailed information on the terms and conditions of the contract prior to the

formation of the contract or in good time thereafter in a written durable form, following which the customer has a cooling-off period. SSE, npower and Centrica do not therefore support the retention of the above obligation.

Summary: The substance of the principle set out in SLC 42(3)(b) should be **retained** in electricity and gas supply licences so that domestic contracts are required to include in writing all the terms and conditions of the supply including price.

2.2 Domestic supply contracts to be in a standard form (SLC 42(3)(a))

Once it has been established that domestic supply contracts and deemed contracts should contain all terms and conditions (including price) then the group does not consider it to be a requirement to have a licence obligation to set out these terms and conditions in a standard form. The group considers that the supply of gas and electricity does not require protection additional to that provided by general law such as the requirement under the UTCCRs for contracts to be in plain and intelligible language.

Summary: It is recommended that the requirement set out in SLC 42(3)(a) for contracts to be in a standard format should be **removed** from the gas and electricity supply licences.

2.3 Different contractual terms for different cases and classes of cases of customer or areas (SLC42(4)(a))

There is provision for suppliers to define different contractual terms for different cases and classes of cases or for different areas. This is linked to the previous obligation (SLC 42(3)(a)) and it clarifies that whilst contracts should be in a standard form, suppliers are able to define separate contracts for different groups of customers. The group considers that this requirement is redundant. It should be for suppliers to determine the terms and conditions which they are prepared to offer customers within the constraints provided by general law such as the Competition Act.

Summary: It is recommend that the provisions in SLC42(4)(a) that allow for different terms for different cases and classes of cases or for different areas should be **removed** from the gas and electricity supply licences.

2.4 Requirement to include defined termination provisions in a domestic supply contract (SLC 42(3)(c))

The supply of gas and electricity is different from the provision of other goods and services. In particular, a domestic customer is supplied at premises by one supplier at a time through a single metering point. One supply contract must be terminated before another can commence. Clarity is therefore required in the contract on the circumstances in which contracts will terminate, for example where a customer ceases to own or occupy premises. Ofgem considers that the licence should require contracts to set out certain termination arrangements.

SSE does not agree with the above proposal and have requested that an alternative view be expressed in this paper. Whilst SSE agrees that clarity is required in the contract as to the circumstances in which contracts will terminate, they consider that it is in the commercial interests of all suppliers to ensure that their contracts provide such clarity to avoid confusion over the contractual position

and liability for energy and they therefore question the need to directly regulate for such clarity.

Summary: The substance of the provision currently set out in SLC 42(3)(c) should be **retained** in the electricity and gas supply licences to require that contracts contain such terms for termination as are required by the licence.

2.5 Description of termination provisions required to be included in a domestic supply contract (SLC 47(1) and (3))

To provide clarity on the liability for the energy consumed, the group considers that the contract should clearly specify circumstances under which it will terminate (although other circumstances should be permitted that do not derogate from those required by the licence).

The circumstances currently set out in the licence specifically require that, if the customer has given two days' advance notice, their liability for energy charges stops on the date that they cease to own or occupy premises. Where such notice is not given then the liability stops on the first of the following occurrences: at the end of a two day notice period given by the customer, the date the meter is next due to be read, or the date a supply is taken on a contract or deemed contract by another customer from the supplier or another supplier.

The licence further requires that fixed term contracts of greater than 12 months are terminable within 5 days of the start of the domestic supply contract. This is a sound principle but appears to be covered elsewhere by the Consumer Protection (Distance Selling) Regulations 2000 and Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (the "Doorstep Selling Regulations"). It was agreed that this provision could be removed because the Distance Selling and Doorstep Selling Regulations appear to cover all instances where such fixed term contracts can be entered into.

Summary: It is recommended that the substance of the requirements for domestic contracts to set out the circumstances under which the contract terminate, as currently described in SLC 47(1), should be **retained** in the electricity and gas supply licences.

It is further recommended that the requirement for contracts of greater than 12 months to be terminable within 5 days of the start of the domestic supply contract as described in SLC 47(3) should be **removed** from the electricity and gas supply licences.

2.6 Termination of domestic supply contracts on 28days' notice (SLC46(1)(a) and SLC46(2))

There has been considerable debate over whether contracts should be terminable in all circumstances on the provision of 28 days' notice from the customer. Suppliers have argued that this is an impediment to them providing new and innovative contracts as they risk not recouping investment costs if the customer moves to another supplier.

The common law would probably require a reasonable notice period, unless such a period conflicted with an express term of the contract. Generally, the UTCCRs provide that an unfair term may be one that allows a supplier to terminate a contract on a discretionary basis where the same facility is not granted to the customer. In relation to contracts of an indefinite term, the UTCCRs provide that an unfair term may be one

that enables a supplier to terminate a contract without reasonable notice except where there are serious grounds for doing so.

In relation to the common law and the UTCCRs, what is reasonable notice will depend on the circumstances of each case. This may mean that, in some cases, a period of notice longer than 28 days may be reasonable.

Ofgem considers that suppliers should be free to develop innovative contracts of fixed lengths which are not terminable on 28 days' notice. It is not Ofgem's intention to distort the contractual relationship between customer and supplier in this instance by allowing suppliers to object where a customer on a fixed term contract seeks to transfer to another supplier. The contractual mechanisms to mitigate supplier risk are those open to providers of goods and services in other markets. In particular, suppliers are permitted to seek termination fees, security deposits or innovative payment mechanisms.

Where contracts are of indefinite length (and terminable other than during a fixed term period) then the group also considers that suppliers and customers should be free to agree terms for termination notice.

ScottishPower held an alternative view. They considered that retaining the specified 28 days for contracts of indefinite length protects switching levels and a customers' freedom of movement where they don't want to be tied into a contract of fixed term duration. Moreover, they considered that the 28-day minimum protects suppliers from the potential of unscrupulous "gaming" of the switching process. ScottishPower recognise that whilst to some extent this already exists, 28 days allows some protection by way of ensuring that at least basic account details and billing details can be established and the necessary industry processes established prior to the customer's ability to switch again.

Energywatch also did not agree with the view of the workgroup. They consider that the licence should stipulate that customers would be able to terminate rolling contracts on 28-days' notice. Energywatch consider that customers have benefited from the freedom to switch without a lengthy notice period, and that they should continue to have the choice of a 28-day notice rolling contract (accepting that suppliers may incorporate costs of this into prices) or a fixed-term locked-in (and possibly 'better') contract that contains termination fees or notice periods.

Summary: The provisions under SLC46(1)(a) and SLC46(2) that require fixed term and rolling contracts to be terminable on 28 days' notice should be **removed**. Suppliers and customers should be free to agree termination notice arrangements for contracts and customers are adequately protected in this regard by the UTCCRs.

2.7 Charges for the energy part of any contract to be clearly distinguishable

Suppliers are able to provide customers with a range of goods and services related to their energy supply and are able to provide these pursuant to the same contract. The group considers that it is important that charges for the energy part of any contract be clearly distinguishable. The purpose of this is two-fold. Firstly, to engage with the competitive market customers should be aware of the cost of their energy bill to allow comparison and consideration of alternative supply offerings. Secondly, it should be clear that any powers granted to suppliers under the Gas Act, Electricity Act and supply licences, for example on rights of entry and disconnection for debt, should be exercised in relation to energy charges only.

One suggestion of the group is that this requirement would be more usefully expressed as a billing obligation. EDF Energy considers that suppliers should maintain this distinction in both their contract and their billing arrangements. Other suppliers suggest that, while it may be reasonable to require the contract to separately identify charges it would be inappropriate for this review to strengthen regulation in this area by extending this requirement into suppliers' billing arrangements. In a competitive market, innovation and customer choice should be allowed to dictate such measures.

Summary: It is recommended that the substance of the principle currently set out in SLC 42(7) of the gas supply licence and SLC42(5) of the electricity supply licence for charges for gas and electricity to be separately identifiable from the charges for other goods and services should be **retained** within the gas and electricity supply licences.

2.8 Transportation adjustments (SLC 42(4)(b)) (gas only)

The licence provides that terms in domestic gas supply contracts relating to charges may be expressed as being subject to transportation adjustments. These transportation adjustments relate to:

- Supplemental charges levied by the transporter for the cost of laying new gas pipes to premises not previously supplied.
- In the circumstances where the customer is on an IGT network supplied by a DN and the aggregate transportation charges are greater or less than those that would have been levied for a comparable premises on a DN.

If the supplier determines their charges as being subject to transportation charges then they must inform the customer on request about the details of the adjustments (if any) that are likely to be made. This was thought to provide transparency for customers on likely charges applying to their premises.

Summary: It is recommended that the substance of the principle currently set out in SLC 42(4)(b) of the gas supply licence relating to charges subject to transportation adjustments and information to be provided to domestic customers be **retained**.

2.9 Terms for supply incompatible with licence conditions (SLC41)

SLC 41 clarifies that suppliers should not enter into or offer to enter into a variation of a domestic supply contract or deemed contract terms so that they are incompatible with the licence conditions. It also requires that suppliers do not enforce or take advantage of the inclusion or omission of terms in a contract which are incompatible with obligations or rights under the licence.

The group were not aware of any circumstances where the provisions of SLC 41 would be required over and above the obligations for domestic supply contracts and deemed contracts set out elsewhere in the licence. A licensee has a requirement to comply with conditions in its licence. If it does not comply, it may be subject to enforcement action. If a term in a domestic supply contract is incompatible with licence conditions it may affect compliance with the licence. To the extent that it does, Ofgem may take enforcement action.

energywatch do not agree with this view, and consider that while Ofgem can enforce in cases of a licence breach, there is still good reason why this licence

condition should be retained. Energywatch consider that without SLC 41, consumers could find themselves being sued by a supplier in the civil courts (or in different circumstances disconnected) where the supplier is seeking to enforce a term or variation in its contractual terms even though that term or its application is not compliant with its Licence obligations. The UTCC Regulations or general contract law may be of no help to the consumer if the contract allows the breach or provides for unilateral variation (as all suppliers' contracts do).

Summary: It is recommended that SLC 41 which seeks to prevent suppliers taking advantage of terms in contracts not compatible with the licence conditions should be **removed** from the gas and electricity supply licences.

3. Information to be provided to the customer in their contract

Customers require clear, accurate and timely information to engage in the supply market. Suppliers have clear incentives to provide customers with some information. The group considers that customers should have access to all relevant information likely to affect customers' decisions on their energy supply and that the timing of the provision of that information is critical.

3.1 Provide terms and conditions to any person on request (SLC 43(5)(a))

The group considers that suppliers should continue to be required to provide copies of each of the forms of their domestic supply contracts to any persons on request. This information is important for transparency to understand the nature of the terms and conditions being offered. This obligation is also required for regulatory purposes so that energywatch and Ofgem have access to domestic supply contracts.

Summary: **Retain** the principle of SLC 43(5)(a) of the gas and electricity supply standard licence conditions to provide transparency on the terms and conditions of domestic supply contracts for customers, energywatch and Ofgem.

3.2 Providing copies of contracts to Ofgem and energywatch (SLC 43(5)(b))

The group considers that the obligation to provide copies of contracts to Ofgem and energywatch should be removed. These contracts are not approved by either body. It would be expected that, if the obligation under SLC 43(5)(a) is retained as suggested above, then suppliers would be required to provide Ofgem and energywatch with copies of contracts on request.

Summary: It is recommended that SLC 43(5)(b) is **removed** from the gas and electricity standard licence conditions. The provision of domestic supply contract information to energywatch and the Authority is adequately covered by the requirements on SLC 43(5)(a) to provide this information to any persons on request.

3.3 Inform customers of the principal terms before entering into a domestic supply contract (SLC 44(1))

The group considers that when customers are considering entering into a contract, suppliers should make efforts to inform them of the principal terms of the contract. These principal terms should be those that customers require to make an informed

choice about the prospective new supply contract. The principal terms are currently defined in SLC 1 as being those that include:

- charges for the energy supply,
- any requirement to pay charges by prepayment through a prepayment meter,
- any requirement for a security deposit,
- duration of the (deemed) contract,
- the rights to terminate the contract (including any obligation to pay a termination fee), or the circumstances in which a deemed contract will expire, as well as
- such other terms as would significantly affect the customer's evaluation of the contract.

The group agreed that it would not always be in suppliers' commercial interests to inform customers of these principal terms in advance of signing a contract. The group therefore considers that this requirement should be included within the licence.

SSE and npower do not agree with the above proposal and have requested that an alternative view be expressed in this paper. They consider that it is in suppliers' commercial interests to inform customers of the principal terms of the contract in advance of signing a contract to avoid disputes at a later stage. They further consider that there is no demonstrable need for this requirement over and above the protection afforded to customers through general consumer protection and contract law, which is deemed sufficient for customers in the provision of other goods and services.

Summary: It is recommended that the substance of the provision currently set out in SLC 44(1) to take reasonable steps to inform customers of the principal terms before they enter into a domestic supply contract and the substance of the corresponding definition of "principal terms" be **retained**.

3.4 Provide customers with contract terms when entering into the contract (SLC 44(3))

Contracts provide a sound basis for suppliers and customers to understand the terms and conditions of supply. The group considers it appropriate that suppliers continue to provide domestic customers with copies of their contracts within 5 days of entering into the contract. Doorstep Selling Regulations and Distance Selling Regulations require certain information to be provided to the customer prior to conclusion of the contract to enable the customer to decide whether to buy. These regulations do not require that all terms and conditions are provided to the customer within an appropriate timescale.

SSE and npower do not agree with the above proposal and have requested that an alternative view be expressed in this paper. They consider that under the Doorstep Selling Regulations, Distance Selling Regulations and general contract law the customer's position in terms of obtaining a copy of the full terms and conditions of supply is already adequately provided for. As a consequence, this obligation is no longer required and should be removed from the licence.

EDF Energy considers that the timescale in this obligation should be extended from 5 to 7 days. The group considered that amendments to timings in the licence should be reviewed at a later stage for consistency.

Summary: It is recommended that the provision currently set out in SLC 44(3) to provide domestic customers with the full details of their contracts within 5 days of entering into the contract should be **retained**.

3.5 Provide information to customers on contract expiry (SLC 44(4))

As noted above, the Electricity Act and Gas Act require that where supply is not taken in pursuance of a contract then it is taken under a deemed contract. In certain circumstances a domestic supply contract may terminate when it reaches the end of the contract term period. If the contract does not make provision for the contract to continue following the fixed term period then a deemed contract will have effect. Suppliers typically make provisions for contracts to continue following the expiry of fixed term periods. However, if the contract does not make provision for the period after a fixed term has expired, the group agrees that it would be prudent to require suppliers to provide the following relevant and timely information in writing to customers:

- the principal terms that the supplier would be prepared to offer for the continuation of supply under a domestic supply contract,
- how the customer can obtain continuity of supply from the licensee, and
- the principal terms that would apply under a deemed contract if the customer did not make alternative arrangements.

The group further noted that the requirement set out under this obligation to information the customer in advance of the deemed contract principle terms that would apply on contract expiry should also fulfil suppliers obligations under SLC 28(8) to use its reasonable endeavours to provide deemed contract customers with details of the principal terms.

SSE and npower do not agree with the above proposal and have requested that an alternative view be expressed in this paper. Given the provision in both gas and electricity for a deemed contract to have effect in the event of a customer's contract expiring and their supply therefore to remain unaffected, SSE do not believe that it is necessary to retain this provision within the licence. That is, so long as customers' security of supply is protected, SSE do not believe that it is appropriate to directly regulate for the provision of information to customers in such scenarios. npower believes there is no need to mandate the notification of customers in writing but that it is sufficient for suppliers to be required to provide a means by which customers can access this information (e.g. by including the appropriate channels in the terms and conditions of contracts).

EDF Energy considers that the timescale in this obligation should be reduced from 30 to 28 days. The group considered that amendments to timings in the licence should be reviewed at a later stage for consistency.

Summary: It is recommended that the principles set out in SLC 44(4) to provide domestic customers with the information defined in that obligation in writing at least 30 days prior to contract expiry should be **retained**.

4. Supplier behaviour, in particular in relation to charging of termination fees, customer switching and transfer blocking

The nature of the supply of gas and electricity makes it necessary to have in place certain checks on the behaviour of suppliers and the rights that they afford themselves in contracts. In particular, there is a potential balance of power in favour of suppliers that is afforded by the essential nature of energy supplies, the

requirement for most domestic customers to take a supply from one supplier at a time and the ability of suppliers to hold a customer to a contractual relationship through the use of the objections process and restrict the customer's access to the competitive market.

This section considers the instances when a supplier must be required to let a customer move to another supplier (e.g. when contracts have been unilaterally amended), the termination fees that they can demand, and details the instances when the customer's proposed transfer may be blocked.

4.1 Processing contracts (SLC 43(4))

The group considers that the requirement to process all contracts for an energy supply to domestic premises without undue preference or undue discrimination should be removed. Under competition law dominant suppliers may in certain circumstances be caught by the requirement not to discriminate between different customers. Suppliers will also be required to give a supply under SLC 32 when the terms that they have offered to a domestic supplier have been accepted.

Summary: It is recommended that the principle set out in SLC 43(4) on contract processing should be **removed** from the gas and electricity standard licence conditions.

4.2 Termination on unilateral contract variation (SLC 44(6))

Customers require information to make decisions about their energy supply needs. One of the key determinants of customer decision making on energy supply is price. Ofgem and energywatch consider that customers should be informed individually and within a reasonable timescale of variations in contract terms, in particular relating to price, that may operate to the significant disadvantage of the customer. Without this information a customer would not understand the implications of the price rise for their particular circumstance. Suppliers also supported the inclusion of the use of mass-media messages to inform customers of a unilateral variation as an alternative to individual notification. This view was not supported by Ofgem and energywatch who considered that this may not be specific enough to meet the customer's needs and assumes that this would be sufficient to notify all affected customers.

Ofgem and energywatch also consider that customers should have a right to terminate the contract and not incur the revised terms or charges which they have not expressly entered into. Suppliers were generally opposed to this view noting the cost implications for operating customers on differing tariffs and unpicking price changes where a customer provided adequate termination notice.

Ofgem and energywatch further consider that customers should have a right to terminate the contract and not incur termination fees if suppliers increased their charges on a unilateral basis.

The group agreed that, rather than being sent in writing, the notice to the customer should also be able to be sent by other methods such as electronic communication that the customer can retain and refer back to in their own time. The group also noted that the removal of the definition of a valid termination notice as discussed above under section 2.6 may have implications for the definition of what is acceptable in terms of the provision of notice by the customer in this instance.

Summary: It is recommended that the substance of the principle currently set out in SLC44(6) to provide individual customers with timely, relevant information following the unilateral variation of contract terms or charges which operate to their significant disadvantage should be **retained**. It is recognised that **redrafting** may assist clarification. The group was not able to provide a consensus view on whether suppliers should be able to use mass media messages as an alternative to individual customer notification.

4.3 Limit on value of termination fees

Under the supply licences, where a termination fee may currently be charged, it must be an amount that the licensee may in all the circumstances reasonably require.

Under the common law, if a customer terminates their contract in accordance with the terms of that contract there is no general limit on the termination fee that may be charged. If, in terminating the contract, the customer is in breach of the terms of that contract (e.g. insufficient notice given), the termination fee must not exceed a genuine pre-estimate of loss.

Under the UTCCRs, if, in terminating a contract, a customer is in breach of the terms of that contract, a termination fee that is a disproportionately high sum in compensation may be unfair. (The OFT have indicated in guidance about the UTCCRs that a requirement to pay more in compensation for breach than a reasonable pre-estimate of loss is one kind of excessive penalty.) Under the UTCCRs, if a customer terminates their contract in accordance with the terms of that contract, a termination fee that is disproportionately high may be a "disguised penalty" and unfair.

Ofgem are of the view that the limits imposed on the amount of a termination fee, particularly by the UTCCRs, provide sufficient protection to customers in this instance for fixed term contracts.

Summary: It is recommend that the provisions in SLC46(6) of the gas supply licence and SLC46(7) of the electricity supply licence that seek to limit the amount payable as a termination fee are **removed**.

4.4 Restricting instances when a termination fee can be demanded

The instances where a termination fee can be demanded are currently restricted by the licence. A termination fee must not be demanded of a domestic customer where:

1. the customer has ceased to own or occupy a premises,
2. the contract was one of an indefinite length and was terminated other than during a fixed term period (NB: a fixed term period is defined in SLC 31 as a period of more than 12 months where the principal contract terms can not be varied),
3. the supplier has unilaterally varied the terms of the customer's contract and the customer has provided notice within 14 days of their intention to transfer to another supplier, or
4. the contract was for a specified period of greater than 12 months or a "fixed term period" and the customer was not informed of their right to cancel within 5 days of the date of the contract.

Customer ceasing to own/ occupy premises

The group does not consider that suppliers should be prevented by the supply licence from seeking termination charges from customers on fixed term contracts who cease

to own or occupy the relevant premises. Customers and suppliers could seek to enter into new arrangements at new premises to mitigate such charges.

Indefinite term contracts

Under the UTCCRs, if a customer terminates their indefinite term contract in accordance with the terms of that contract, the group's initial view is that any termination fee is arguably a "disguised penalty" and may be unfair. If, in terminating the indefinite term contract, the customer is in breach of the terms of that contract, it is likely that a termination fee that is greater than a genuine pre-estimate of the loss that may be incurred during the notice period that would otherwise have been given, may be unfair.

While the group has formed an initial view about what may be unfair in these circumstances, there is little certainty about whether a court would agree. Given that uncertainty, it is recommended that the interests of consumers should be protected by continuing to prohibit termination fees for indefinite term contracts.

However, it would be appropriate to include, in the licence, drafting that would permit the charging of termination fees on rolling contracts in certain circumstances defined and designated by the Authority. A potential example of this could be where the contract specifies that any dispute over the appropriateness and value of the termination fee will be determinable by an industry ombudsman scheme.

The group further considers that the definition of a fixed term contract should be relaxed to allow suppliers and customers to agree fixed contract terms of less than 12 months to which termination fees could be applied.

Unilateral variation

As discussed in section 4.2, there is broad agreement that it would be inappropriate for suppliers to be able to levy termination fees following a unilateral variation of terms or increase in charges where the customer has provided termination notice.

Fixed term and informed of right of cancellation

The group considers that the supply licence should no longer prohibit termination fees where a contract was for a specified period of greater than 12 months or a "fixed term period" and the customer was not informed of their right to cancel with immediate effect within 5 days of the start date of the contract. This is in line with the proposed removal of SLC 47(3).

Summary: In relation to SLC 46(5) of the gas supply licence and SLC 46(6) of the electricity supply licence it is recommended that:

- the restrictions in sub paragraph (a) on termination fees when a customer ceases to own or occupy premises is **removed**,
- that the prohibition in sub-paragraph (b) on the application of termination fees for rolling contracts is **retained** subject to **redrafting** to permit termination fees in the circumstances set out by the Authority. It is also recommended that the definition of fixed term contracts is **redrafted** so that termination fees can be applied to fixed term deals of less than 12 months,
- the restriction on the use of termination fees on unilateral variation of terms is **retained**, and
- the prohibition on the use of termination fees in sub-paragraph (d) is **removed** in line with the removal of SLC 47(3) to which it refers.

4.5 Non-domestic transfer objections (SLC 30 – Gas only)

The permission for suppliers to prevent a customer transfer (an “objection”) has been the subject of significant debate in both the domestic and non-domestic markets. In the non-domestic market wide consultation with the industry and customers in 2003 delivered a deregulatory change to the objection arrangements. Non-domestic customers can now negotiate the objections provisions within their supply contracts. It is not Ofgem’s intention to review the content of this provision further.

However, there is disparity between the way the rules governing objections are set out. Currently, these are described in the gas supply licence for the gas market and the MRA for the electricity market. Whilst it would be possible for the existing situation to remain, Ofgem considers that permission to object does not sit comfortably in industry codes. It sets out the ability of a supplier to take an action in relation to a customer. This is separate from the mechanism for enacting objections which is an issue of interoperability and should quite rightly be set out in industry agreements. Some suppliers are of an opposing view considering that a supplier’s right to object should be enshrined in industry codes as an issue for self-governance where possible and Authority enforcement where it is not. It should however be noted that not all non-domestic gas suppliers are currently party to the SPAA.

Summary: It is recommended that the ability of non-domestic suppliers to object in the circumstances set out in SLC30 of the gas supply licence and section 16 of the MRA should be **retained**. The workgroup was unable to reach a conclusion on whether these obligations should sit in supply licence or in an appropriate industry code. This is an issue that Ofgem intends to raise in its June consultation.

4.6 Domestic transfer objections (SLC 46 – Gas only)

The group considers it to be in the interests of domestic customers for suppliers to be able to prevent their transfer to another supplier where this has been initiated in error. The group also considers that the existing debt objection provisions are fit for purpose.

Summary: It is recommended that the ability of suppliers to prevent a domestic customer from transferring in the circumstances set out in SLC46 of the gas supply licence and Clause 16 of the MRA should be **retained**. As with non-domestic objections, however, the group was unable to reach a consensus view on whether obligations on objections should sit in the licence or in an appropriate industry code.

4.7 PPM debt assignment (SLC 46 – Gas only)

Ofgem has worked with suppliers to allow customers in debt who are being supplied through a PPM meter to switch supplier. The principle behind *PPM debt assignment* is that suppliers cannot object to a proposed transfer when the new supplier and the customer agree to accept the transfer of the debt. The provisions are set out in SLC46 of the gas licence and section 16 of the MRA.

ERA suppliers considered that the PPM debt assignment process should be removed from the licence as it was not widely used in practice. If it is not

removed then some suppliers considered that the rules should be retained in industry codes only. Ofgem and energywatch considered that it should be retained as it provided an opportunity for PPM customers in debt to seek to secure better terms through access the competitive market. Energywatch considered that further review was needed on the processes for this facility and how to improve take-up

As argued above, Ofgem considers that the circumstances setting out where a supplier can and cannot object should be set out in the licence but that mechanisms and detailed rules for how the objection is enacted should be set out in industry codes.

Summary: The group was not able to provide a firm recommendation on whether the principles behind PPM debt assignment as set out in SLC46 of the gas licence and section 16 of the MRA should be retained. As with other issues on objections, the group was unable to reach a consensus view on whether PPM debt assignment obligations, if retained, should sit in the licence or in an appropriate industry code.

4.8 Security for provision of other goods and services (SLC47(4))

The licence currently confers a right for suppliers to demand security for the ongoing provision of other goods and services once the energy part of the contract has been terminated. It is not clear why this needs to be stated in the licence. The UTCCRs may inhibit the amount of any security demanded by suppliers. It is therefore suggested that this provision should be removed. Further, the licence does not confer any particular sanction for the supplier in relation to the energy part of the contract should the customer refuse to pay security required for other goods and services.

Summary: The right of suppliers under SLC (47(4) to demand security for the continued provisions of other goods and services following the termination of the energy supply part of the contract should be **removed** from the gas and electricity supply licences.

4.9 Estimating consumption

SLC 42(4)(c) of the gas supply licence and SLC 42(4)(b) of the electricity supply licence places a requirement on the supplier to ensure that their domestic contracts include terms that correspond as near as may be to the requirements on deemed contracts set out under Schedule 2B paragraph 8 of the Gas Act and Schedule 6 paragraph 3 of the Electricity Act. It is therefore permitted under Schedule 2B paragraph 8(9) of the Gas Act and Schedule 6 paragraph 3(8) of the Electricity Act, for suppliers to include terms and conditions for estimating consumption from the start of the contract until either a meter read is taken or the supplier ceases to supply the premises. Current industry practices provide for opening and closing meter reads on change of supplier but this may also be a requirement in some instances, for example when a customer moves from a deemed contract to a domestic supply contract. However, it is suggested that this provision is removed as it is in the suppliers commercial interests to include such terms in their contracts to mitigate disputes with customers about the use of estimated meter reads and consumption.

Summary: **Remove**, under SLC 42(4)(c) of the gas supply licence and SLC 42(4)(b) of the electricity supply licence, the obligation on suppliers to include terms in contracts that allow them estimate consumption.

Note: a proposal by the group to retain an SLC does not prevent that condition from being considered for different (and better) drafting treatment under the SLR process.

AGREED