



Holders of Gas Supply, electricity
Supply licence, consumers and
their representatives and other
interested parties

*Promoting choice and value for
all gas and electricity customers*

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Dear Colleagues

Collective purchasing and switching schemes

Effective competition is an important way of promoting the interests of consumers in the retail energy market. Ofgem welcomes innovative ways of engaging consumers, particularly where this involves consumers who are vulnerable or not currently engaged. Collective purchasing is an innovative concept attracting much interest. We generally welcome this development, whilst remaining alive to any potential risks to consumers.

We are writing this open letter in order to provide general information to help suppliers and other parties that wish to participate in collective purchasing and switching schemes understand aspects of the legal framework which licensed suppliers are required to operate within. It outlines Ofgem's general position on such schemes and provides a summary of some of the relevant licence conditions that licensed suppliers will need to consider and comply with.

Background

Interest in collective purchasing and switching is growing, with a number of organisations exploring and/or establishing mechanisms to facilitate greater consumer and supplier engagement through these vehicles.

A number of stakeholders have raised questions about how collective purchasing and switching may operate within the current regulatory framework as well as that being proposed under the domestic Retail Market Review (RMR) proposals.¹

Ofgem's view

Collective purchasing activity will need to comply with wider consumer protection requirements², the provisions of the electricity and gas supply licences (where relevant) and the current standards of conduct governing supplier's interactions with customers – details of the standards of conduct are set out in Annex 2.

¹ The RMR proposals are available on Ofgem's website: www.ofgem.gov.uk.

² For example, this would include (but is not limited to) the Consumer Protection from Unfair Trading Regulations 2008, the Consumer Protection (Distance Selling) Regulations 2000 and the Unfair Terms in Consumer Contracts Regulations 1999. Further information and guidance on these regulations are available from the websites of the Office of Fair Trading (www.oft.gov.uk) and the Department of Business, Innovation and Skills (www.bis.gov.uk).

Our general view is that the licence conditions that apply to licensed suppliers do not, in principle, prevent suppliers from engaging in collective purchasing and switching schemes. Annex 1 provides information on some of the relevant licence conditions that suppliers and interested stakeholders will need to consider in relation to collective purchasing and switching schemes.

Similarly, our general view is that the regulatory requirements under the RMR proposals would not prevent suppliers from engaging in collective purchasing and switching schemes.

As the detail of collective purchasing and switching proposals become known we expect a number of regulatory issues may arise. For example, a supplier may need to consider how to avoid undue discrimination. Licensed suppliers will therefore need to take full responsibility for ensuring compliance with the relevant licence conditions. As part of this, licensed suppliers will need to seek their own advice on the application of such provisions to their particular circumstances.

For the avoidance of doubt, this open letter is not intended to cover all the issues that suppliers and other parties will need to consider and they may wish to obtain legal advice on these and other issues.³ This includes consumer protection law requirements that are enforceable by Ofgem⁴ in respect of both suppliers and other businesses that have dealings with consumers.

Requests for guidance or clarification

If suppliers or other stakeholders have concerns that there are other aspects of the regulation of licensed suppliers that might prevent or discourage collective purchasing schemes we would welcome them bringing these to our attention.

However, suppliers should be aware of the spirit and letter of the obligations of the relevant licence conditions. In the absence of exceptional circumstances or compelling evidence of genuine uncertainty, we are unlikely to consider it appropriate to provide specific or case-by-case guidance in this area. It remains the responsibility of suppliers to ensure compliance with all licence conditions and relevant provisions of consumer protection laws.

Yours faithfully



Andrew Wright
Senior Partner, GB Markets

³ By way of examples, the issues that would need to be considered are likely to include (but not be limited to) compliance with data protection and consumer protection law. In addition, depending on the nature of collective purchasing and switching schemes, a person seeking to operate such a scheme may also need to consider, and obtain legal advice on, whether they would be supplying gas and/or electricity to premises and require a licence to carry on such activities.

⁴ The Office of Fair Trading and local authority trading standard departments are also responsible for the enforcement of these laws.

RELEVANT STANDARD LICENCE CONDITIONS

This annex provides illustrative and non-exhaustive information on the requirements of some of the standard licence conditions that will be particularly relevant to activities of licensed suppliers in respect of collective purchasing/switching schemes. In respect of some aspects of the relevant conditions, Ofgem has sought to provide its general views on the effect of the requirements.

For the avoidance of doubt, this information should not be treated as legally binding and does not cover all potentially relevant licence conditions or any other relevant legal requirements (e.g. consumer protection law). We would also take this opportunity to remind suppliers that they are responsible for ensuring compliance with licence conditions and, as such, will need to seek their own legal advice and form their own views on how the requirements apply in any particular circumstances.

Standard Licence Condition 22 – Duty to offer terms

Standard Licence Condition 22 (paragraphs 2 and 3) applies to all domestic supply licence holders and (subject to some exceptions) provides that, where a domestic customer requests a supplier to supply their premises with electricity and/or gas, that supplier must:

- offer to enter into a contract with that customer within a reasonable period of time; and
- (if the customer accepts the terms of the contract) supply electricity and/or gas to that customer in accordance with the contract.

In Ofgem's view this standard licence condition will apply in all circumstances where a supplier has received a request to supply one or more individual premises and has details of each specific person that is seeking supply to the premises. However, in such circumstances, our general view is that this condition would not have the effect of requiring a supplier to offer any bespoke pricing terms to any particular groups of customers and therefore it is likely to be permissible for the supplier to offer the same pricing terms that currently apply to existing tariffs.

Standard Licence Condition 23 – Notification of key contract terms

Standard Licence Condition 23 (paragraph 1) applies to all domestic supply licence holders and provides that, before a domestic supply contract is entered into (e.g. by a customer signing a contract or orally agreeing to a contract via the telephone), via any sales method, the supplier is required to take all reasonable steps to communicate key contractual terms ('Principal Terms') to the customer.

The Principal Terms of the contract would include (but are not limited to): the duration of the contract and arrangements for terminating or extending that contract, the charges that apply to the supply of electricity/gas, and the existence of any termination fees.

In light of these requirements, in the context of collective purchasing schemes, suppliers will need to ensure that appropriate arrangements are in place for ensuring that details of the Principal Terms are properly communicated to consumers before they enter into a supply contract.

Standard Licence Condition 25 – Obligations in respect of face-to-face and telephone marketing and sales activities

This licence condition applies to all domestic supply licence holders and their representatives in respect of face-to-face and telephone marketing and sales activities with domestic customers.

The definition of 'representatives' means that a licence holder is responsible for any person directly or indirectly authorised to represent the licence holder in its dealings with customers. By way of example, Ofgem's general view is that this definition would capture any situation where a supplier pays commission to a person that engages in face-to-face and telephone marketing and sales activities with domestic customers.

The definition of 'face-to-face marketing and sales activities' covers any activities of the licensee, that:

"(a) take place with the simultaneous physical presence of the licensee or any Representative and a Domestic Customer; and

(b) are directed at or incidental to identifying and communicating with Domestic Customers for the purpose of promoting the licensee's Domestic Supply Contracts to them and includes entering into such contracts with such customers."

The definition of 'telephone marketing and sales activities' covers any activities of the licensee that are:

"(a) conducted by telephone; and

(b) directed at or incidental to identifying and communicating with Domestic Customers for the purpose of promoting the licensee's Domestic Supply Contracts to them and includes entering into such contracts with such customers."

In respect of face-to-face and telephone marketing and sales activities, this licence condition requires the supplier to take all reasonable steps to secure the achievement of, and to avoid doing anything which jeopardises its ability to achieve, an objective that consists of the following two elements:

- *"all information which the licensee or any Representative provides (whether in Writing, by electronic display or orally) to Domestic Customers in the course of the licensee's [face-to-face and telephone marketing and sales activities] is complete and accurate, is capable of being easily understood by Domestic Customers, does not relate to products which are inappropriate to the Domestic Customer to whom it is directed, does not mislead the Domestic Customer to whom it is directed and is otherwise fair both in terms of its content and in terms of how it is presented (with more important information being given appropriate prominence);" and*
- *"the licensee's [face-to-face and telephone marketing and sales activities] and all contact by the licensee or a Representative with, and the behaviour of the licensee and any Representative towards, a Domestic Customer in the course of the licensee's [face-to-face and telephone marketing and sales activities] conducted in a fair, transparent, appropriate and professional manner."*

In respect of face-to-face marketing and sales activities only, this condition also requires the supplier to comply with a range of additional obligations that cover (but not limited to):

- requirements relating to the selection, training and management of sales staff and representatives;

- a requirement to provide an estimate of the total annual charges for supply that would be payable under a contract offered to a consumer;
- in respect of customers with a pre-payment meter or whether a savings claim is made to a consumer, a requirement to provide a comparison between the supply charges a consumer is currently paying and the charges that would be payable under a contract offered to that customer;
- requirements to provide key information to consumers, including a copy of a contract that a consumer has entered into;
- a requirement relating to follow up contact with a customer to ensure that they are happy to have entered into a Domestic Supply Contract and have received key information.

In light of these requirements, where collective purchasing schemes involve face-to-face and telephone marketing and sales activities, suppliers will need to ensure that appropriate arrangements are in place for securing compliance and addressing their responsibility for the actions and behaviour of representatives.

Standard Licence Condition 25A – Prohibition on undue discrimination

This licence condition applies to all domestic supply licence holders with 50,000 or more domestic customers and **must be interpreted and enforced in accordance with Ofgem’s “Guidelines on Cost Reflectivity between Payment Methods and the Prohibition of Undue Discrimination in Domestic Gas and Electricity Supply Contracts”** (‘the Guidelines’)⁵.

In summary, this licence condition requires a domestic supplier to have an objective justification for any material discrimination between different groups of Domestic Customers in respect of Principal Terms⁶.

The Guidelines also contain important principles about the application of the licence condition including Ofgem’s approach to assessing objective justification, materiality and cost allocation. Therefore, in the context of collective purchasing schemes, suppliers subject to this condition will need to ensure that any proposed pricing arrangements are developed in light of the principles contained in the Guidelines.

⁵ See:

www.ofgem.gov.uk/Markets/RetMkts/ensuppro/Documents1/Guidelines%20on%20Cost%20Reflectivity%20and%20Undue%20Discrimination%20in%20Supply.pdf.

⁶ For the full definition of the expression “Principal Terms” see standard licence condition 1 of the gas and electricity supply licenses.

STANDARDS OF CONDUCT

Ofgem expects suppliers to comply with the current standards of conduct which were put in place as part of the Energy Supply Probe in 2009⁷. The standards are currently intended to apply to suppliers' dealings with domestic and small business customers and contain the following principles:

- *You must not sell a customer a product or service that he or she does not fully understand or that is inappropriate for their needs and circumstances;*
- *You must not change anything material about a customer's product or service without clearly explaining to him or her why;*
- *You must not prevent a customer from switching product or supplier without good reason;*
- *You must not offer products that are unnecessarily complex or confusing; and*
- *You must make it easy for customers to contact you and act promptly and courteously to put things right when you make a mistake.*

⁷ See "Standards of conduct for suppliers in the retail market" 19 October 2009:
<http://www.ofgem.gov.uk/MARKETS/RETMKTS/ENSUPPRO/Documents1/Standards%20of%20conduct%20for%20suppliers%20in%20the%20retail%20energy%20market.pdf>.