Guidance

Deemed contracts for energy consumers

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Contact:	Paul Redmayne and Isabelle Haynes
Team:	Non-domestic Retail Policy
Email:	NonDomesticRetailPolicy@ofgem.gov.uk

This document provides guidance on Standard Licence Conditions ("SLC") 7.3 and 7.4 of the Electricity and Gas supply licences (the "deemed rates licence conditions"), for all suppliers in Great Britain.

This guidance applies both to domestic and non-domestic suppliers. We clarify in the guidance where there are differences between the requirements for domestic customers and non-domestic customers.

We will periodically review this guidance to ensure that it remains fit for purpose and consult stakeholders prior to making any changes which might result from our review. As such, we welcome any comments you may have on it.

This document provides guidance for suppliers in setting their deemed contract rates for all customers. Suppliers are responsible for keeping up to date with the latest version of the rules on deemed rates.

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Executive summary

This document provides guidance on SLC 7.3 and 7.4 of the Electricity and Gas Standard Licence Conditions for Supply. In accordance with SLC 7.14, following consultation, the Authority may issue guidance on standard condition 7 and may from time to time revise the guidance following further consultation. The licensee must have regard to any guidance on standard condition 7.

This guidance document replaces Ofgem's previous guidance on Deemed Contracts and consolidates our Guidance on SLC 7.3 and SLC 7.4 in one document. While noting that Ofgem has previously published guidance on the general principles describing when a Deemed Contract relationship exists, this document also provides further guidance information relating to circumstances in which Ofgem would consider deemed rate contracts to be in effect. We have also published a related guide on security deposit best practice. This document gives guidance on Ofgem's approach to compliance and enforcement of SLC 7.3 and 7.4.

SLC 7.3 states that where a customer is supplied on the basis of a deemed contract relationship, the supplier is required by its licence to take all reasonable steps to ensure that the terms of its deemed contracts are not unduly onerous. SLC 7.4 sets out one way in which the terms of a Deemed Contract will be unduly onerous.

This document:

- provides guidance for suppliers on acceptable behaviours and conduct when setting deemed contract rates, and what Ofgem might consider to be unduly onerous.
- lays out key principles of deemed contract rates for the purpose of the SLC.
- provides examples of when a deemed contract may exist.
- provides a definition for 'Out-of-Contract' (OoC) rates as compared to deemed contract rates, to clarify the difference between them. The guidance does not apply however to OoC rates.
- provides guidance on the interpretation of the term "significantly exceeds" for the purpose of SLC 7.4(a). It explains what Ofgem considers to be good practices for suppliers in relation to setting their deemed contract rates and elements of how we interpret unduly onerous. This includes the frequency of review, reasons for updating, relevant classes of consumers, pricing policies and methodologies.

Finally, this document provides guidance on certain behaviours Ofgem would not consider to be consistent with SLC 7.3 compliance.

1. Introduction

Context and related publications

1.1 Ofgem's principal objective is to protect the interests of existing and future electricity and gas consumers (Section 3A Electricity Act 1989; Section 4AA Gas Act 1986). We consider whether any regulatory requirement we are proposing to introduce is the best way to protect consumers, including having regard to the statutory growth duty to promote economic growth, as well as consumer interests in terms of fair prices, quality and standards, the reduction of greenhouse gases and in the security of the supply of gas and electricity to them.

1.2 SLC 7 (Terms of Contracts and Deemed Contracts) was subject to review in 2006/7, during the supply licence review.

1.3 Further information about the changes that were made to the Deemed Rates Licence conditions, including changing its numbering from SLC 28 to SLC 7, can be found in this memo.

1.4 For previous Guidance on Deemed Contract relationships, please see the following note: Guidance on deemed contracts as per Standard Licence Condition 7.3 of the Gas and Electricity Supply Licences.

1.5 We invited stakeholders to give their views on the state of the non-domestic retail energy market in our Call for Input (CfI) on the Non-Domestic gas and electricity market, which closed on 31 March 2023.

1.6 We published our findings of our Non-domestic market review, and our Policy consultation, which closed on 6 September 2023. This included consulting on draft guidance on deemed contract rates.

1.7 Standard Conditions of Gas Supply Licence.

1.8 Standard Conditions of Electricity Supply Licence.

1.9 Relevant legislation regarding deemed contract: Schedule 2B to the Gas Act 1986 and Schedule 6 to the Electricity Act 1989.

2. Deemed Rates – Key Principles and Definitions

Section summary

This section sets out the basis for Ofgem issuing Guidance on SLC 7.3 and 7.4. It lays out Ofgem's approach to Compliance and Enforcement with respect to SLC 7.3 and 7.4. It also sets out the key principles with respect to SLC 7.3 and 7.4, including elements Ofgem would consider when assessing the term "significantly exceeds". It sets out the behaviours Ofgem expects to see from suppliers when setting their deemed rates and complying with SLC 7.3 and 7.4.

Issuance of guidance

2.1 SLC 7.14 sets out that the licensee must have regard to any guidance Ofgem issues on Standard Licence Condition 7, after consulting on the guidance.

2.2 Ofgem will consult on any changes to this guidance. Please see our consultation policy.

Compliance and Enforcement

2.3 We may carry out investigations into the activities of suppliers we believe may have breached one or more conditions of their licence or relevant requirements under the Gas Act 1986 and the Electricity Act 1989. For more information, see our page on compliance and enforcement.

2.4 If a breach is found, Ofgem may engage in compliance and enforcement action. Our Enforcement Guidelines set out the approach we take when applying our powers to investigate and, where appropriate, take enforcement action in respect of behaviours which are non-compliant with relevant conditions or requirements.

2.5 The Enforcement Guidelines outlines enforcement action which we may take using our sectoral powers. This may include making provisional or final orders; making consumer redress orders or imposing financial penalties of up to 10% of a regulated person's turnover.

2.6 In certain circumstances, we may use alternative action to bring a licensee into compliance and remedy consequences of any non-compliance e.g. accept non-statutory undertakings for future compliance; make voluntary redress payments or implement specified remedial actions.

Standard Licence Condition 7.3

2.7 Ofgem will consult on any changes to this guidance. Please see our consultation policy.

2.8 Standard Licence Condition 7.3 requires that suppliers must take all reasonable steps to ensure that the terms of each of its Deemed Contracts is not unduly onerous.

2.9 We have previously issued guidance on the general principles describing when a Deemed Contract relationship exists. These general principles are reproduced below for ease of reference and with an aim to consolidate our guidance in a single document. Whilst the general principles are intended to reflect Ofgem's views on when a Deemed Contract relationship exists with a supplier, we acknowledge that the precise legal position will depend on the individual circumstances of each case. This may include the construction and effect of terms in the original contract and the conduct of the parties. On this basis, Ofgem recognises that it may be necessary to carry out a case-by-case assessment of whether a Deemed Contract exists before any potential enforcement action could be taken in relation to a breach of Standard Licence Condition 7.3.

2.10 Any terms of a contract which deals with what will happen in the event of termination and/or expiry will constitute principal terms for the purposes of the Standard Licence Conditions of the gas and electricity supply licences. This is because the definition of 'Principal Terms' contained in Standard Licence Condition 1 of the gas and electricity supply licences covers terms that relate to "the duration of the Contract" and "any other term that may reasonably be considered to significantly affect the evaluation by the Customer of the Contract". For example, this means that suppliers will need to bring such terms to the attention of domestic customers[1] and Micro Business consumers before they enter into a supply contract.[2]

The General Principles of when a Deemed Contract is Likely to Exist

2.11 A Deemed Contract relationship will normally exist in circumstances where any type of customer moves into new premises, and starts to consume gas and/or electricity, without agreeing a contract with a supplier. However, a Deemed Contract relationship may also arise in some circumstances where an existing contract comes to an end, and the customer continues to consume gas and/or electricity.

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[1] Standard condition 23.1 of the gas and electricity supply licences provides that "[b]efore it enters into a Domestic Supply Contract with a Domestic Customer, the [supplier] must take all reasonable steps to bring the Principal Terms of that contract to the attention of that customer".

[2] Standard condition 7A of the gas and electricity supply licences provides that "[b]efore the [supplier] enters into a Micro Business Consumer Contract, it must take all reasonable steps to bring the following information to the attention of the Micro Business Consumer and ensure that the information is communicated in plain and intelligible language: [...] (b) the Principal Terms of the proposed Contract." However, it is important to note that standard condition 7A only applies to new contracts (or extensions of existing contracts) that are entered into with Micro Business Consumers on or after 18 January 2010.").

2.12 Where a contract is terminated (by either the supplier or the customer) and the supplier continues to supply the same customer, a deemed contract is likely to exist if the following circumstances apply:

2.13 the original contract does not expressly provide for what will happen after termination (e.g., the original contract does not provide that the original terms will continue to apply); and

2.14 the existing customer continues to consume gas and/or electricity at the premises.

2.15 Where a contract expires by the passage of time and the supplier continues to supply the same customer, a deemed contract is likely to exist if the following circumstances apply:

2.16 the original contract does not expressly provide for what will happen after expiry (e.g., the original contract does not contain renewal provisions or otherwise provide that the original terms will continue to apply);

2.17 the existing customer has made the supplier aware (expressly or implicitly) that it does not intend the original contract to continue (or vice versa); and

2.18 the customer continues to consume gas and/or electricity at the premises.

Out of Contract and Deemed Rates – Definitions, Differences and what is in scope of this guidance

2.19 OoC rates are the rates customers are put onto, as defined by the terms of their contract, when their current contract continues to apply after the fixed term period of a contract has expired.

2.20 Deemed rates are different from OoC rates. These terms are not interchangeable.

2.21 By our definition of deemed rates, OoC rates are not 'deemed'. Therefore, OoC rates are not captured by SLC 7. By extension, this guidance does not cover OoC rates. It applies only to deemed rates.

2.22 Following on from the above, in the case where a contract does not continue to apply, and the customer is moved onto deemed rates, this guidance will apply.

2.23 Where this guidance refers to a Deemed Contract, we are referring to the relationship between a supplier and a customer created by paragraph 8 of Schedule 2B to the Gas Act 1986 and/or paragraph 3 of Schedule 6 to the Electricity Act 1989.

Standard Licence Condition 7.4

2.24 This licence condition sets out that one way in which the terms of a Deemed Contract will be unduly onerous for any class of Domestic Customers or for any

class of Non-Domestic Customers is if the revenue derived from supplying gas/electricity to the premises of the relevant class of customers on those terms:

- (a) significantly exceeds the licensee's costs of supplying gas/electricity to such premises; and
- (b) exceeds such costs of supplying gas/electricity by significantly more than the licensee's revenue exceeds its costs of supplying gas/electricity to the premises of the generality of its Domestic Customers or, as the case may be, to the premises of the generality of its Non-Domestic Customers (in each case excluding from the calculation premises supplied in accordance with Standard Licence Condition 8 (Obligations under Last Resort Supply Direction)).

2.25 It should be noted that the test in Standard Licence Condition 7.4 is only one way in which Deemed Contracts may be considered to be unduly onerous. Each individual case will be determined on a case-by-case basis by Ofgem.

Implications for Domestic Suppliers and Customers

2.26 As it stands, deemed rates for domestic customers currently fall under the price cap requirements, as per SLC 28AD. Whilst the price cap is in effect, Ofgem consider that compliance with the price cap alone is sufficient to comply with SLC 7.3 and 7.4.

2.27 As the price cap is a temporary measure, Ofgem may issue further guidance on SLC 7.3 and 7.4 with respect to domestic customers should the price cap requirements change or be removed.

Significantly Exceeds

2.28 As noted, SLC 7.4 is one way in which deemed rates may be considered to be unduly onerous. SLC 7.4(a) refers to the situation in which the revenue derived from supplying gas or electricity to customers on those terms significantly exceeds the costs of supplying gas or electricity.

2.29 In the context of SLC 7.4(a), we consider that 'significantly exceeds' for the purpose of determining if deemed rates are unduly onerous, means that the deemed rate is much higher than an equivalent contracted rate, and that this difference between the deemed rate and the equivalent contracted rate is not otherwise justified, for example by the increased costs the supplier faces in supplying deemed customers.

2.30 An equivalent contract rate in this context means a contracted rate that is comparable to the deemed rate. Ofgem is aware of the significant differences between non-domestic customers and the often bespoke nature of non-domestic contracts. When Ofgem is undertaking an analysis of an equivalent contracted

rate, we will work with suppliers to find appropriate contracts to compare for the purposes of assessing compliance with the SLC:

2.31 This comparison will be against the supplier's own equivalent contracted rates; it will not be a comparison against the rates of any other suppliers.

2.32 In our assessment, we will consider market changes that may cause the costs of supplying deemed rates to fluctuate, such as significant volatility of energy prices.

2.33 One example of an equivalent contracted rate could be a contract rate for Small to Medium enterprises (SME)s and a deemed rate for SMEs, across a broadly equivalent time period (for example, comparing a contract rate taken out on 1 Jan 2022 for a year with the deemed rate throughout 2022), where there may be similar energy usage/consumption for this SME on deemed and the equivalent contracted rate.

2.34 In this example, by deemed rates throughout 2022, Ofgem refers to each of the supplier's deemed rates in each given months – this is not an average of the deemed rates – to allow us to consider the factors (such as wholesale prices) that may cause deemed rates to change with time.

2.35 As the SLC refers to "exceed[ing] such costs of supplying gas/electricity by significantly more than the licensee's revenue exceeds its costs of supplying gas/electricity to the premises of the generality of its Domestic Customers or, as the case may be, to the premises of the generality of its Non-Domestic Customers"; we could also consider other contract types such as variable contracts. The goal of this assessment is to understand the supplier's cost to supply to the generality of domestic or non-domestic customers for comparative purposes, and Ofgem will work with suppliers to find the most suitable comparator.

2.36 Ofgem will consider whether deemed rates are much higher than an equivalent contracted rate, and whether this difference between the deemed rate and the equivalent contracted rate is otherwise justified on a case-by-case basis. However, some of the criteria Ofgem may consider in this assessment include, but are not limited to:

2.37 The difference between the elements in contracted rates and deemed rates and the reasons for them, including the elements that make up standing charges, unit rates and margins, as relevant.

2.38 The supplier's methodology in setting the deemed rates. This may include whether there is a clear, thought-out process, with consideration given to the relevance of the deemed charge to the type of customer (e.g., Industrial and Commercial (I&C), SME) generally being exposed to it and where they are based (i.e. their geographical location) to the extent that the supplier is able to review these factors in the present time, or with consideration to past customers served. This methodology should also include a regular review to check whether the

methodology could be routinely (considered likely over a longer-term time span, from 6 months to a year) over-compensating expected costs, resulting in higher deemed charges than are necessary. Equally, whilst Ofgem does not intend to interfere in supplier's pricing strategies or impact their ability to meet the principles of financial stability, we expect suppliers to act in compliance with the SLC.

2.39 We would not usually consider it to be unduly onerous for increased charges associated with the costs of supplying deemed contract customers to be reflected in the deemed rates, to the extent that the supplier can justify and evidence these additional costs and that they are set at a reasonable level. Ofgem is aware of and will consider during our assessment, the higher risk and costs to serve for supplier's that is associated with deemed rate customers and is priced into deemed contracts. This can be due to, for example, reasonable levels of bad debt recovery, risk of non-payment, poor credit, other costs associated with supplying deemed customers or merely by virtue of the fact that suppliers have not yet had any contact with a customer in a new premises, and as such do not necessarily have the ability to predict future supply for deemed customers and hedge their wholesale energy needs accordingly, which may result in higher risk and costs. Wider commercial risks, including forecasting uncertainty and hedging costs, are distinct from bad debt costs. Where suppliers seek to recover bad debt costs through deemed contract, we would expect them to take a comparative approach to how those costs are recovered from contracted customers

2.40 It should be noted that in this assessment, Ofgem will focus on the supplier's methodology for deemed rates and how it compares to their contract rates, not a comparison to the deemed rates of other suppliers.

2.41 In the following sections, we provide further guidance on how we consider whether deemed rates may be unduly onerous.

2.42 However, it should be noted that this will be assessed on a case-by-case basis by Ofgem. Supplier's must make their own assessment as to whether they are in compliance with the Licence condition.

Setting of Deemed Rates

2.43 There are certain behaviours which Ofgem expects to see suppliers undertake with respect to the setting of their deemed rates. These are laid out in the respective headings below.

2.44 The below guidance is illustrative to how Ofgem expects suppliers can be compliant with the SLC. However, this is not an exhaustive list of examples of how suppliers should behave with respect to their deemed rates. This guidance is not a substitute for any regulation or law and should not be taken as legal advice. We will consider each case on its merits and will apply the guidance as is appropriate to do so.

2.45 We do not set pricing methodologies or hedging strategies for non-domestic deemed rates. While deemed rates should not be unduly onerous, each supplier will have their own hedging and pricing strategies.

2.46 This guidance does not replace any of the additional protections provided to Micro Business Consumers (Guidance for Micro Businesses), Small Business customers, nor those provided to domestic customers.

Relevant Classes of Consumers

2.47 Suppliers should ensure that where relevant they have deemed rates which are applicable to relevant classes of customers. We consider that this does not refer to simply domestic or non-domestic customers but instead refers to subcategories of customers such as Micro Business, SME and I&C, or Half hourly (HH) and non-Half Hourly (NHH), for example. Given that there is significant range in the pricing across customers, in many cases it would not be suitable to assume one price for, for example, all non-domestic customers where a supplier's contracted prices range significantly across their non-domestic customers.

2.48 As such, relevant classes of customers in this context may refer to the groups of customers that have similar contract pricing based on consumption rates, meter classifications and/or location, as appropriate. Ofgem is aware that this may not always be immediately obvious to suppliers, and suppliers may only become aware of them retrospectively. This is one reason why routine review is necessary.

2.49 Suppliers must ensure that their deemed contract pricing considers the customer base which they serve. For example, if the highest band in a network charge across all regions is chosen for their deemed contract charges and no review is done to consider the spread of their customers across regions and to select a cost accordingly, we would not consider this to be compliant with SLC 7.3 and 7.4, as a supplier would in all likelihood be over-compensating its costs. This is unless the supplier could show that most of its deemed customers are historically in the highest price band/meter type/region.

Regular Evaluation of Rates

2.50 Supplier's must have a process in place to review their deemed rates on a regular basis. This refers specifically to a review of the deemed rate, not the methodology for setting the deemed rate. It may also be useful for the supplier to review their methodology from time to time to ensure they are satisfied with how and when they update their deemed rates, but we expect this is not likely to need to be reviewed as regularly. We recognise that a distinction exists between reviewing the deemed rate and changing it, and a review may conclude that a change is not necessary.

2.51 For example, the deemed rate standing charge and unit prices (or their underlying elements such as bad debt, margin, etc) may be updated following each review

depending on a number of factors as outlined by the methodology (such as an increase in wholesale prices).

2.52 Deemed rates must be reviewed regularly enough to ensure that prices are appropriate and that the revenue suppliers are receiving from their deemed contract customers is not unduly onerous, and at the least in line with SLC 7.4. While circumstances may differ across supplier's, we consider that a review at least once a quarter of the rate is likely to be appropriate in most cases. In times of significant market volatility, supplier's may be required to update their deemed rates more frequently, for example, on a monthly basis.

2.53 Ofgem may request that supplier's provide proof that they are reviewing their deemed rates, including the criteria which suppliers have considered and the reasons for any change or decision to not change their rates. As such, suppliers should ensure they have a record of reviews undertaken and changes made to their deemed rates.

2.54 Suppliers must consider their reasons for their deemed rates pricing decisions when reviewing their deemed rates and consider whether the rates should be updated. Suppliers must be conscious of their supply licence conditions and ensure that they are not routinely overcompensating any costs.

2.55 We do not consider that suppliers comparing their deemed contract rates to other suppliers deemed contract rates is a valid measure of compliance with SLC 7.

2.56 Whilst Ofgem appreciates that supplier's often have a preference to agree a contract with their customers, deemed rates must be in compliance with the SLC. Setting deemed contract rates at a higher level to incentivise customers to move onto contracted rates is not considered to be a justification for the level of deemed contract rates and may not be compliant with SLC 7.3 and 7.4.

Information for Customers

2.57 We expect suppliers to have up-to-date information about their deemed contract rates readily available for customers. This information should be easily accessible, for example easy to find on the supplier's website.

2.58 Supplier's must ensure that they meet the terms of SLC 7.7.

2.59 For any domestic customers, suppliers must also ensure that they meet the conditions of SLC 31I.1 when notifying customers of updated rates. Any references to licence conditions which apply exclusively to domestic consumers are not applicable to non-domestic consumers or their supply contracts.

Examples of poor behaviours in relation to SLC 7.3

Customer transfer blocking

2.60 We have seen cases where a supplier objects to the transfer of a deemed rate customer on the basis of deemed contract debt. We wish to remind suppliers of the requirements on SLC 7.6A which states that a Deemed Contract must not:

- (a) provide for any fixed term period;
- (b) provide for any Termination Fee; or
- (c) subject to sub-paragraph 5(b), require a Customer to give any form of notice before they are able to change supplier.

2.61 In addition, when read with SLC 14.2(a)-(d), for non-domestic customers, suppliers are not able to object to a deemed contract customer transfer on the basis of debt.

2.62 This is because for the purposes of this licence condition, "Contract" in the context of SLC 14.2(a) should not be read to include deemed rate contracts. The supplier cannot object to deemed contract customer switches on the basis of debt into the deemed contract terms.

2.63 The definition of Contract contained in SLC 1 states that it "includes, as between the licensee and a Customer, a contract deemed to have been made because of paragraph 23 of Schedule 7 to the Utilities Act 2000 but does not include a Deemed Contract and related expressions must be read accordingly".

2.64 On the other hand, for domestic customers on a deemed contract, the grounds for blocking a switch are not reliant on the existence of a contract, rather any debt can be considered in relation to the blocking of a switch, and therefore, this would be permissible in line with SLC 14.4(a).

Delayed switching due to dispute

2.65 Where a customer has moved into a new property and is placed on deemed contract, and the customer genuinely disputes an element of the deemed bill with the supplier (e.g. the meter reading), the supplier should act promptly to resolve the dispute with the customer.

2.66 We have heard of cases where the customer wishes to agree a contract or switch away from the deemed rate, but the supplier attempts to block this on the basis of the dispute. As outlined above, the supplier is not able to object to this switch if the customer is a non-domestic customer.

2.67 If the supplier is responsible for delays in resolving a dispute and the customer has been paying the deemed rate during that time, we would expect the supplier to work with the customer to re-bill the account or look to retrospectively reduce the rates which the customer has paid over that time period.

Suppliers charging deemed rate customers security deposits.

2.68 We have heard that some suppliers are charging non-domestic customers security deposits. We understand there may be some instances where a supplier may require a security deposit for deemed rate sites, particularly those which are viewed as high risk (e.g. where there have been multiple previous disconnections, or if the site is about to be disconnected due to non-payment).

2.69 However, Ofgem are of the view that generally, it would be inconsistent with SLC 0/0A and 7.3 for suppliers to charge security deposits to deemed rate customers.

2.70 Instead of requiring a security deposit, we would recommend that the supplier reaches out to the customer and attempts to contract with them.

2.71 If a supplier does charge a deemed customer a security deposit, when the security deposit is due to be returned to the customer, we recommend that the supplier refunds the security deposit as soon as possible. The supplier should inform the customer when they can expect to receive their refund.

Send us your feedback

We are keen to receive your feedback about this guidance. We would also like to get your answers to these questions:

- Do you have any comments about the quality of this guidance?
- Do you have any comments about its tone and content?
- Was it easy to read and understand? Or could it have been better written?
- Do you have any further comments?

Please send your feedback to stakeholders@ofgem.gov.uk.