

Making markets work for consumers: The regulation of gas and electricity sales and marketing: a review of standard licence condition 48

energywatch has collaborated with the regulator during the development of this consultation and looks forward to working as closely together in the future during development of proposed changes to regulation that directly affects consumers. The paper will provide views on all the points requested and offer evidence for these when applicable or available.

The purpose of the Marketing Licence Condition is to ensure that consumers are treated fairly during any selling activity. Unsolicited marketing by energy companies can be a nuisance¹, cause considerable stress and unnecessary hassle, especially where the agent has access to a consumers' property. Consumers must have assurance that if sales agents act unfairly, aggressively or resort to coercion then sanctions are in place and will be brought to bear. This will promote an environment where consumers can participate with confidence in the competitive market and reap the benefits the market offers.

energywatch complaint statistics show a steady trend downwards in the absolute number of marketing complaints dealt with. We believe that the main reason for this is that the domestic supply market is becoming more consolidated and selling strategies are focussing on retaining customers and appealing to old customers to return. This may obviously change if market dynamics shift. The fact that **energywatch** received its highest ever levels of marketing complaints in the first half of 2002 puts the decrease in marketing complaints into context.

Nevertheless we still receive hundreds of complaints every month and continue to witness the same types and mix of complaints. We believe that this indicates that the quality of marketing hasn't necessarily improved during the time the quantity of complaints has fallen.

Consumer confidence in energy suppliers is very low and it may take a step change in working practices or culture to help restore it. A strong marketing licence condition which underpins existing self-regulation, incentivises compliance and allows Ofgem to take quick action is key to rebuilding consumer confidence. Future energy policy aims, such as the promotion of energy services, efficient appliances/products, micro-CHP etcetera may be stifled by consumers' unwillingness to engage in the energy market.

Responses to views requested

- **Ofgem considers it is appropriate to retain the requirement to renew the licence condition at regular intervals.**

The marketing licence condition must be renewed on a regular basis to take account of developments in the market and changes in legislation. It would be useful, especially for **energywatch**, if Ofgem could publish details of which factors trigger a review of licence conditions. Any review of a marketing licence condition must of

¹ *Trading Standards Service – Public Survey: Doorstep Traders/Callers*. February 2003. 95.7% of 8700 respondents did not want doorstep sellers calling.

course be undertaken via a full programme of consultation and clear evidence which sets out what the implications for consumers are.

- **There are minor differences in the wording of the marketing licence condition contained in the gas and electricity supply licences. These have no significant impact and there is no justification for maintaining the inconsistency. Ofgem proposes that the conditions should conform wherever possible.**

energywatch agrees with this proposal.

- **Sub-paragraph 1 defines the scope of the existing licence condition in that it applies to marketing activities in respect of the supply to the premises of domestic customers. Ofgem is interested in views on whether this continues to be appropriate.**

energywatch strongly believes that there is a need for for greater regulatory protection for business consumers, particularly for small and medium enterprises. Smaller firms (e.g. newsagents, hostellers, farmers, restaurants etc) often have the same understanding, resources and interest in procuring their energy needs as domestic consumers do. When mishaps do occur resources are unnecessarily diverted to resolve a problem not of their making. In our experience many businesses face the same variety of complaints that domestic consumer do but are left locked into a contract or face a hefty termination fee². The scope should cover all consumers who do not negotiate a tailored contract. This would exclude many large users of energy, but capture most businesses where energy is a service rather than integral to their business processes.

During a sales pitch to a business consumer it should be compulsory to give the customer written information on the breakdown of all variable charges, contract length and penalties for terminating the contract early.

- **Ofgem is interested in views on whether it would be desirable to make specific provision for vulnerable consumers, what that provision might be and how workable definitions could be drawn up.**

energywatch is appalled at the level of complaints we receive from vulnerable consumers, especially in cases where there has been clear evidence of the vulnerability. We recognise that the issue is contentious as it requires 'drawing a line' between different consumers. The Disability Rights Commission³ for example provides detailed guidance on defining disability. Nevertheless, the onus remains with suppliers to ensure all their agents receive the most robust and sensitive training on this.

²During 2002/3 **energywatch** dealt with over 110,000 consumer complaints – of which approximately 10,000 were complaints received by industrial and commercial consumers, a significant rise from the 1,500 I&C complaints received during 2000/1. 14% of the I&C complaints for year 2002/3 were direct selling complaints. Examples of typical cases are in Appendix 1.

³ http://www.drc-gb.org/uploaded_files/documents/2008_229_guidance.doc

If a situation arises where a breach of the licence condition involves vulnerable consumers, as defined in the **energywatch** remit⁴ for example or using the DRC definition, then sanctions should be far more severe.

- **Ofgem invites views on whether a wider scope would be desirable and how workable definitions could be drawn up.**

As mentioned above **energywatch** believes the scope of the marketing licence condition should be extended to cover smaller businesses. This would be desirable as business intelligence indicates that agents do not always fully explain the terms and conditions of the contract or associated termination fees⁵. Most companies operate on such slight margins that the time and resource taken to resolve problems of mis-selling are unnecessarily out of proportion to the level of service and need they require. The majority of businesses simply want energy at a reasonable cost, with decent service so they can concentrate on running their business.

energywatch suggests that representatives from the business community (e.g. Federation of Small Business, Small Business Service, Confederation of British Industry) and suppliers with I&C supply licences would be best placed to begin developing definitions.

- **Ofgem would welcome views on whether and to what extent the licence condition should be modified to cover all channels for contact with consumers and whether different provisions should be made for different media.**

The overriding aim should be to minimise confusion for suppliers and consumers alike. This would be achieved by ensuring that the licence condition covers media where there is direct contact with consumers – ie direct selling and teleselling. The scale of the problem should be put into some perspective when considering this point. **Energywatch** statistics show that over the last 16 months domestic complaints via different media is as follows:

Media	Percentage
Direct Selling	89.1
Telesales	9.9
Mailshot	0.85
Websales	0.15

It should be noted however that telesales complaints have risen sharply during 2003 and now account for 19% of all marketing complaints.

- **Ofgem is interested to receive views about the need to balance the optimal level of protection to consumers with the need to maintain consistency and avoid unnecessary complexity for consumers.**

⁴ 'Individuals who are disabled or chronically sick, of pensionable age, individuals with low incomes and those residing in rural areas' – Utilities Act 2000, Part III, s.17 (2).

⁵ 'The FSB recognises that comparing business tariffs can be difficult but tariff information should be clearer and more widely available on the web. Contractual terms are often unfair, particularly for small businesses, and so sales staff should be required to explain them in clearer and simpler terms. We would also like to see the Marketing Code of Conduct extended to small businesses' - FSB Environment Chairman, John Holbrow. 12th September 2003

As the competitive market matures **energywatch** expects suppliers to continue to diversify and offer a wider range of products and services, some of which may not be energy related (i.e. household contents insurance, telecoms etc).

Consumers are beginning to take on bundled packages from suppliers and expect to receive the same level of service and protection from their energy supplier regardless of specific product or service offered. Where a supplier holds licences to supply another regulated service or product (i.e. telecoms or financial services) then the licence that gives the greatest consumer protection should be over-riding until regulation is harmonised across industry sectors.

- **Ofgem considers that the licence condition covers all ‘win back’ or ‘save’ activity which may be undertaken by a supplier, but would like views on whether this should be made more explicit.**

The current trend to ‘win back’ old customers or ‘save’ existing customers are just two (of many) marketing strategies and as such the marketing licence condition should cover all types of marketing with the question of coverage focussed on the point of interaction between supplier and consumer, regardless of the strategy behind the contact.

energywatch does have anecdotal evidence that many consumers consider ‘win back’ and ‘save’ strategies as a nuisance because being an existing or old customer the supplier has contact details with which to target their products and services on. Consumers should retain the right not to be contacted by suppliers for marketing purposes if they request this. This should easily be implemented for existing customers.

- **Ofgem believes that the licence condition should specify minimum requirements for information and is interested in views on the practicality of providing such information and the value it would provide to consumers; and whether there should be different requirements for information according to different sales channels.**

energywatch believes that the licence condition should contain an explicit requirement to present written and verbal information to consumers in a clear, transparent and comparable way. The Duty to Trade Fairly directive is likely to be helpful insofar as it provides a definition of an average consumer.

We believe that the licence condition should be structured so that Ofgem can provide guidance on the nature and manner of information to be provided. However there are two or three key pieces of information that should be explicitly referred to within the licence condition. These are; the provision of a copy of the contract; the provision of a quote and a copy of the tariffs and prices.

- **Ofgem would welcome views on the introduction of a mandatory 14 day cancellation period, how this would fit with other legal obligations, how consumers could be made aware of this right and what impact it would have upon the transfer process.**

energywatch would like to see the cancellation period to be extended to 14 days for all sales as this allows consumers sufficient time to receive information, digest it and make a reasoned decision. This is even more the case for sales conducted over the

telephone. The sales agents must make it explicitly clear what the length of the cooling off period is and when it begins.

- **Views are invited on the use of terms such a ‘reasonable steps’ and the suggestion that the licence condition should focus on outcomes and outputs.**

energywatch has previously stated that an ‘outcome’ based licence condition can give consumers the necessary protection provided it is worded so that evidence of compliance is tangible, transparent and readily available. Where this is not possible then prescriptive measures will be necessary.

Ambiguous terms cause confusion for suppliers, consumers and the regulator when it comes to interpreting what the conditions mean in actual terms of service and redress. Where possible we urge the marketing licence condition to avoid the use of ambiguous language as it has meant investigations into compliance have been unnecessarily mired in semantics, instead of promoting what is expected of suppliers.

- **Some suppliers do not process a transfer without having had positive confirmation that a consumer wishes to transfer, Ofgem is unlikely to propose to extend the licence condition in this way, but would welcome views.**

energywatch believes that a contract should only be processed once the consumer has received written confirmation of costs and tariffs and has then been contacted by the supplier. This step would cut out many of the problems surrounding marketing and erroneously transferring a customers’ supply without their knowledge (as opposed to erroneous transfers associated with incorrect MPAN/MPR details).

Before dismissing this as an option, Ofgem (and industry for that matter) undertake some cost benefit analysis of the option. Our experience of companies who undertake this type of auditing (usually as a consequence of having mis-sold) is that the number of complaints to **energywatch** reduce dramatically. It is also likely to be the case that the avoiding the costs of having consumers switch who do not want to be with them may offset the higher cancellation numbers, especially if this is linked directly to payments to agents.

- **Ofgem thinks it is unlikely that the introduction of third party verification could be achieved at a reasonable cost and without unduly slowing or halting the transfer process, but is interested in wider views.**

energywatch tends to agree that third party verification would be unduly expensive and could slow down the transfer process.

- **Ofgem invites views on whether compensation payments should be specified in the licence condition, in what circumstances and in what amounts.**

energywatch believes that consumers should be compensated for levels of service that fall below what is expected. Compensation would demonstrate to consumers that suppliers accept the problem was of their making, which would increase consumers’ confidence that problems will be resolved and hence are more likely to

remain engaged with the market. The payments should also reflect the effort, time and distress caused to the consumers.

We recognise that suppliers fear a 'compensation culture' but this does not stand up to scrutiny. Ofgem figures⁶ show that compensation payments are currently virtually nonexistent, which raises the question why suppliers believe that consumers will ask for compensation during all complaint resolutions. Anecdotal evidence suggests that consumers often want speedy redress, an apology, explanation of action to be taken and reimbursement for costs and time incurred (compensation). We do not believe that consumers, in general, will create complaints in order to attempt to win compensation. The pro's of compensating consumers outweigh the con's of not as consumer confidence is most damaged when problems are not satisfactorily resolved, leaving them unwilling to participate any further in the market.

energywatch considers that consumers should be automatically compensated (to a consistent guaranteed, minimum level, commensurate with distress but accepting distress to consumers varies) once a complaint has been resolved and the outcome identifies the supplier being at fault. In practice this would take the form of a point scoring system which takes into account the nature of the complaint and the consumers' personal circumstances.

Suppliers who have good marketing practices and control over their sales staff have little to worry as their complaint levels are low and as such will not have to make many payments.

- **Views are sought on what information should be made available to the public and in what form.**

energywatch would like to see much more information available to the public so that consumers can decide which supplier to contract with on factors other than just price and complaint levels.

Specifically we believe the following should be available:

- Number (or percentage) of contracts terminated during the cooling off period
- Number (or percentage) of unsolicited marketing consumer contacts
- Levels of compensation payments made – only if compensation becomes mandatory. Otherwise suppliers could make payments on the basis of how it will be perceived by the public when comparing suppliers on this point. By paying less compensation a consumer could infer that the supplier had fewer complaints, which may not be the case.
- **Recognising the difficulty of providing a detailed response without specific proposals, Ofgem would welcome views on the costs and benefits of:**
 - **extending protection to industrial and commercial customers**

energywatch believes extending the marketing licence condition to cover I&C consumers would have some initial costs for suppliers, although they would be

⁶ 'Making markets work for consumers. The regulation of gas and electricity sales and marketing: a review of standard licence condition 48. A consultation document.' – August 2003. Table 7.1 'Number of compensation payments made as a percentage of qualifying contracts entered into in 2001/02'

minimal as it would only impact on suppliers if the marketing outcome was not satisfactory for the consumers. It should not change the way the marketing is conducted substantially – although there will be extra administration associated with processing the contract.

In terms of benefits it would help increase businesses confidence in participating in the market – bearing in mind government energy policy aspiration and the role the I&C market has to play in this. It would also reduce effort and costs associated with resolving problems which would allow businesses to concentrate on the competitive market they operate in.

- **extending the licence condition to cover other channels of communication**

energywatch believes extending the licence should be done when there is a demonstrable need to do so – i.e. benefit outweighs the cost. Instead of necessarily writing specific provisions for the relatively small internet based market existing channels of communication need improving, especially telephone sales where the lack of need for a signed contract to proceed cause problems for consumers disputing they agreed to change supplier.

The onus must be on the supplier to ensure that consumers are treated fairly and diligently during any marketing activity regardless of the communication route to achieve this.

- **ceasing to mandate 'inputs' (e.g. recruitment and training requirements) and focussing instead on outputs (e.g. information given to consumers);**

As stated above an 'outcome' based licence condition can deliver the necessary protection for consumers but **energywatch** believes that mandated inputs are necessary for certain aspects of the licence condition. The EnergySure training and accreditation scheme is a good example of the input necessary to ensure that agents are equipped with the relevant knowledge to interact with the vast diversity of consumers they are to interact with, and as this system is already in place costs would be kept to a minimum. Whilst training alone will not prevent agents from acting unscrupulously if they are that way inclined honest sales agents will be safe in the knowledge they are sufficiently empowered to act within the law and regulation.

- **introduction a 14 day cooling-off period;**

energywatch recognises that lengthening the cooling off period could prevent people being transferred as soon as they can be currently but the benefits would greatly outweigh the dis-benefits. Consumers would be able to receive all the necessary information in time to properly evaluate the terms and conditions of the contract which would in turn prevent contract being processed that are not wanted.

- **introducing 3rd party verification;**

energywatch believes this would be unnecessarily expensive. The current review of the transfer system should result in a speedier process and so improve the overall experience for consumers. If suppliers have to verify each contract then this will remove the need for third party verification.

- **introducing compulsory compensation; and**

The introduction of a compulsory compensation system would only be costly for those suppliers with poor marketing practices and should be welcomed by suppliers with good marketing records as implementation costs (i.e. development of an industry wide 'points' system) would be low.

Typical business complaints

The examples given below have all occurred in the last two months and only represent the type of complaints **energywatch** receives from the business community.

Example 1: Consumer only speaks Cantonese and thought that the sales representative was from her own supplier and was unaware that she was agreeing to transfer.

Example 2: Customer convinced by agent that contract was a one year rolling contract, no copy contract left behind. Took customer 6 weeks to obtain copy contract, which inevitably was for 5 years. He is now being charged a hefty termination fee.

Example 3: Customer persuaded by agent to transfer on the basis that prices are cheaper. This turned out to be false, and customer has now incurred termination fee from previous supplier.

Example 4: Consumer was visited by a sales agent after being told over the phone that by him that he represented a consumer council. The consumer eventually agreed a contract for supply after the salesman promised that any termination fee incurred would be paid for by the outgoing supplier. The agent also produced a letter stating that termination fees were illegal.

Example 5: A consumer's business partner was approached at their place of work. The consumer advised they were busy and the agent said that they could supply cheaper and that he was actually representing the parent company.

Appendix 2

The graph below illustrates the percentage of domestic marketing complaints that involve disputes about the contracts validity. The **energywatch** complaint categories are:

- Suspected forged signature;
- Signatory not responsible for the account;
- Signed to prove a visit or request information
- Misrepresentation by the agent;
- Disputed verbal contract

% of Marketing Complaints Disputing Contracts

