Ofgem's Supply Licence Review

COMPARISON OF THE STANDARD SUPPLY LICENCE CONDITIONS WITH GENERAL CONSUMER LAW

Energy Retail Association

1. Introduction

1.1 This paper has been prepared for the Energy Retail Association (ERA) by Roger Barnard of EDF Energy and John Cooper of Wragge & Co. Both are barristers specialising in regulatory law. They were asked to produce a paper that ERA could submit to Ofgem in order to inform debate about one of Ofgem's key principles for the supply licence review, namely**:**

- Supply licence obligations are only necessary where, because of the essential nature of the service and the specific circumstances of energy customers, particularly vulnerable ones, there is a clear need for additional protection over and above that provided by general consumer protection law.

1.2 Reaching a consensus on those elements (if any) of additional consumer protection which might clearly be needed via licence conditions requires, at least initially, a good factual view of the protections already provided by general consumer law and of any overlaps these might have with the relevant conditions of the gas and electricity supply licence. This paper intends to assist that process by comprehensively identifying observable duplications, both actual and potential, between those conditions and any corresponding provisions of general consumer law.

1.3 The likely duration of the supply licence review means that account may need to be taken, at some stage, of the prospective transposition into UK law (by 2007) of the EU Unfair Commercial Practices Directive. This is what is known as a maximum harmonisation directive, dealing with unfair business-to-consumer commercial practices on a wide scale. It could have a substantial impact on domestic consumer protection law. However, this paper can only deal with the law as it stands in the UK at the moment.

2. How this paper is structured

2.1 The factual legal analysis for this paper is set out in three attachments arranged as follows**:**

- **Attachment 1:** this shows any overlaps between (i) those conditions of the gas/electricity supply licence (roughly half the total number) which contain specific consumer protection provisions, and (ii) any similar legal protections outside the licence, whether under primary or secondary legislation, European directives, or common law.

- **Attachment 2:** this is a note on the Disability Discrimination Act. Some licence conditions require special arrangements for vulnerable customers and Ofgem has said that, in undertaking the supply licence review, specific consideration will be given to the implications for suppliers of the provisions of this Act.
- **Attachment 3:** this is a note on Part 8 of the Enterprise Act. This legislation enables certain bodies to take action against businesses that do not comply with their legal obligations to consumers. One such body is Ofgem, which is now a "public designated enforcer" of a wide range of UK and EC consumer enactments.

3. Distinguishing different types of licence condition

3.1 In the broadest sense, all the conditions of the supply licence are directed in one way or another at consumer protection. Ofgem has a principal statutory objective to protect consumers' interests, and a duty to do so with particular regard to the interests of certain specified groups. This objective applies when Ofgem decides what conditions should be included in licences. Ofgem's discretion to determine licence conditions is very wide, and it has an ongoing duty to enforce compliance

3.2 The legal presumption, therefore, is that all of the conditions of a licence will have been included in it with a view to ensuring that Ofgem is able to regulate the industry in the way best calculated to protect consumers. In terms of legal status, although not all parts or all conditions of the licence will necessarily be in force for a particular licensee, no distinction is to be drawn in principle between one part of a licence and another, or between its individual conditions. All are assumed, in law, to be equally requisite for the purpose of discharging the regulatory objective.

3.3 Nonetheless, it is possible to distinguish those licence conditions that are directly concerned with the objective of consumer protection from those that are only indirectly concerned with that objective. The former will regulate consumers' experiences of dealing directly with suppliers, such as by entering into contracts or making complaints. The latter may create a framework from which consumers benefit, for instance by establishing the industry arrangements under which changes of supplier take place, but they will not directly regulate the consumer-supplier relationship.

3.4 The focus in this paper is on those conditions of the supply licence which seek directly to protect consumers, and all of the conditions considered in the analysis at Attachment 1 are of this type.

4. Conclusions

4.1 The Supply Licence Review Steering Group may wish to consider the policy implications of Attachments 1, 2 and 3 in the light of the objectives of the review as set out by Ofgem.

Attachment 1: Comparison of Gas/Electricity Licence Conditions and General Consumer Law

This table lists all the standard licence conditions (SLCs) which contain direct consumer protection provisions and then identifies whether or not there is any overlap, or potential overlap, with the provisions of existing general consumer law.

Condition Number	Licence Requirement	Overlap (or Potential Overlap) with Consumer/General Law
Part B SLC 17 Paragraph 1	To inspect (non-half-hourly) meters at least every two years.	No overlap.
Part B SLC 17 Paragraph 2	Inspection to be carried out by person of appropriate skill and experience.	No specific overlap. However, **section 13 of the Supply of Goods and Services Act 1982** implies a term into a contract for services that the supplier will carry out the services with reasonable care and skill. But it is arguable that the 'inspection' does not form part of any contractual 'supply' of services, as it is essentially a regulatory requirement.
Part B SLC 22	Defines what constitutes 'domestic premises'.	No overlap.
Part B SLC 22A	To make appropriate arrangements for the continuity of supply (effectively where requesting permission to withdraw from any relevant market).	No overlap.
Part B SLC 24 Paragraph 2(a)	To ensure, in accordance with an approved code of practice, that persons visiting customers' premises possess the necessary skills to perform their duties.	**Section 13 of the Supply of Goods and Services Act 1982:** this implies a term in a contract for services (where the supplier is acting in the course of the business) that the supplier will carry out the service with reasonable care and skill. Suppliers (or their representatives) normally access a customer's premises as an integral part of their service provision.

Condition Number	Licence Requirement	Overlap (or Potential Overlap) with Consumer/General Law
Part B SLC 25	To provide guidance on the efficient use of electricity and gas in accordance with an approved code of practice.	No overlap.
Part B SLC 26	Record of and report on performance (in relation to customer service obligations).	No overlap
Part B SLC 27	To prepare and comply with the customer service codes of practice.	No overlap
Part B SLC 28 Paragraph 2	To ensure that deemed contracts are not unduly onerous.	Some overlap with **Regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations 1999.** This provides that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. **Note:** The licence requirement applies to all the terms of the deemed contract, whereas the UTCC Regulations do not apply to terms as to price.
Part B SLC 29	Provisions relating to the supplier of last resort arrangements.	No overlap.
Part C SLC 32 Paragraph 1	Where terms offered are accepted, to give a supply in accordance with those terms.	**General Contract Law:** provides that where the terms offered are accepted, then services will be supplied in accordance with those terms.
Part C SLC 32 Paragraph 2	No obligation to supply in certain defined circumstances (even if the terms offered are accepted).	**General Contract Law:** provides that if terms offered are refused or the supplier cannot supply for reasons beyond its control, or if a requested deposit has not been paid, there will be no obligation to supply.

Condition Number	Licence Requirement	Overlap (or Potential Overlap) with Consumer/General Law
Part C SLC 33	Provisions relating to last resort supply and security arrangements.	No overlap.
Part C SLC 35	To provide, in line with an approved code of practice, guidance and appropriate help for domestic customers who are having difficulty in paying bills.	No overlap.
Part C SLC 36	To provide, in accordance with an approved code of practice, guidance and other assistance for domestic customers on the use of prepayment meters.	No overlap.
Part C SLC 37	To provide, in accordance with an approved code of practice, certain special services for customers who are of pensionable age, disabled, or chronically sick.	**Sections 19 to 21 of the Disability Discrimination Act 1995:** these provide that it is unlawful for a service provider to discriminate against a disabled person. Such discrimination includes failing to make adjustments where policy, practice, procedure, or a physical feature makes it unreasonably difficult for a disabled person to make use of the services**:** see Attachment 2.
Part C SLC 38	To provide, in accordance with an approved code of practice, certain special services for domestic customers who are blind or partially sighted, or deaf.	**Sections 19 to 21 of the Disability Discrimination Act 1995:** these provide that it is unlawful for a service provider to discriminate against a disabled person. Such discrimination includes failing to make adjustments where policy, practice, procedure, or a physical feature makes it unreasonably difficult for a disabled person to make use of the services**:** see Attachment 2.
Part C SLC 39	To establish a procedure, in accordance with an approved code of practice, for handling consumer complaints.	No overlap.

Condition Number	Licence Requirement	Overlap (or Potential Overlap) with Consumer/General Law
Part C SLC 40 Paragraph 1	To provide customers with information relating to their consumption of gas and electricity (i.e. meter reads/estimates).	**General Contract Law:** this provides that where the price of the goods is to be ascertained by reference to some fact or thing within the peculiar knowledge of the seller, the buyer is not liable to pay it unless he receives notice of the amount.
Part C SLC 41	Not to offer terms, or enter into a contract which contains terms, that are incompatible with licence conditions.	No overlap.
Part C SLC 42	To supply only under a domestic supply contract (or deemed contract) which must (as a minimum)**:** • be in standard form (but can have different forms for different circumstances) • set out all the applicable terms and conditions (but can have different terms and conditions for different circumstances) • contain certain terms (as required by other licence conditions) • separately identify any charges for other goods or services provided.	**General Contract Law:** provides that only those terms which have been signed or agreed at or prior to creation of the contract will be binding. Some overlap with the **Consumer Protection (Distance Selling) Regulations 2000 (particularly Regulation 8).** These regulate contracts concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service provision scheme run by the supplier who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded. In respect of a 'distance contract', the supplier must provide to the consumer, either prior to contract formation or in good time after conclusion, a written and durable form of information on**:** • the identity of the supplier and, where the contract requires payment in advance, the supplier's address • a description of the main characteristics of the goods or services • the price of the goods or services, including all taxes • delivery costs where appropriate [continued]

Condition Number	Licence Requirement	Overlap (or Potential Overlap) with Consumer/General Law
		[Distance Selling Regulations, continued] • the arrangements for payment, delivery, or performance • the existence of a right of cancellation except in the cases referred to in regulation 13 • the cost of using the means of distance communication where it is calculated other than at the basic rate • the period for which the offer or the price remains valid • where appropriate, the minimum duration of the contract, in the case of contracts for the supply of goods or services to be performed permanently or recurrently.
Part C SLC 43	• To (as a minimum) have available domestic supply contracts which allow the customer to pay by the specified payment methods and at the specified frequencies. • To provide on request copies of each form of contract. • To prepare and publish the principal terms of each form of contract (which must also detail any inducements that may be on offer).	No overlap. **But note: EU Directive 2003/54/EC ('the Electricity Directive') and EU Directive 2003/55/EC ('the Gas Directive') require the implementation by member states of certain specific 'consumer protection' obligations, particularly in respect of 'household customers' (ie, the domestic energy market). To the extent that these directives mandate the right of such customers to enjoy universal service, meaning 'the right to be supplied with [energy] of a specified quality within their territory at reasonable, easily and clearly comparable, and transparent prices', they parallel some of the elements of SLCs 42, 43 and 44.**

Condition Number	Licence Requirement	Overlap (or Potential Overlap) with Consumer/General Law
Part C SLC 44	• To draw the customer's attention to principal terms before entering into the contract. • To provide customer with copy of all terms relating to any contract that has arisen or will arise within certain specified timescale (unless contract concluded on supplier's premises). • To offer terms for the renewal of the contract (unless certain specified circumstances apply). • Where a contract allows for unilateral variation, to give notice of any such variation within specified timescale and to inform the customer of rights to terminate.	Some overlap as follows**:** **General Contract Law:** this provides that where the terms of a contract are particularly onerous or are unusual in respect of such types of contract, the customer's attention needs to be drawn to them in an explicit way. Although this will not be particularly applicable to written contracts signed by the consumer, which by their nature will set out in full all the terms and conditions, it would apply in respect of contracts entered into over the phone or the internet. **Regulation 8 of the Consumer Protection (Distance Selling) Regulations 2000** is also relevant**:** see entry relating to SLC 42 above.
Part C SLC 45	To comply with certain provisions relating to security deposits.	No overlap.
Part C SLC 46 Paragraph 5	That each domestic supply contract must provide that a notice of termination which is not valid shall not be effective to terminate the contract.	**General Contract Law:** provides that an invalid notice shall not be effective to terminate the contract. However, there is a specific definition of what constitutes a 'valid' notice when used in the context of the licence requirement.

Condition Number	Licence Requirement	Overlap (or Potential Overlap) with Consumer/General Law
Part C SLC 46 Paragraph 7	That any termination fee must not be greater than what the supplier may in all the circumstances reasonably require.	**Regulation 4 of Unfair Terms in Consumer Contracts Regulations 1999:** an unfair term in a contract concluded with a consumer by a supplier shall not be binding on the consumer. An unfair term is any term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.
Part C SLC 47	That domestic supply contracts must include certain specified termination provisions.	No overlap.
Part C SLC 48 Paragraph 2(c)(i)	To take reasonable steps which ensure that where the customer is contacted by a representative of the supplier, the customer can readily identify who the supplier is.	**Rule 22 of the Committee of Advertising Practice (CAP) Code:** this provides that marketers must ensure that they clearly identify the parties. **Consumer Protection (Distance Selling) Regulations 2000:** these provide that where the supplier concludes a contract with the customer in circumstances where there is no physical presence of the supplier with the customer, the supplier must provide the identity of the supplier and a description of the goods and services.
Part C SLC 48 Paragraph 4	Where the supply contract is entered into at a place other than the supplier's premises, the supplier must contact the customer within a specified period (i) to check the customer's understanding of the existence of the contract and other matters relating to the supplier's conduct of the marketing activity, and (ii) to enable the customer to terminate if he so wishes.	**Rule 42 of CAP Code:** reflecting the distance selling regulation noted below. **Regulation 10 of Consumer Protection (Distance Selling) Regulations 2000:** gives the customer the right to cancel a service contract within seven days. **Regulation 4 of Consumer Protection (Cancellation of Contracts Concluded Away From Business Premises) Regulations 1987:** provides that the customer must have the right to cancel the contract within seven days. See also the **AES Code of Practice for the Face to Face Marketing of Energy Supply** (though this has no formal legal status).

Condition Number	Licence Requirement	Overlap (or Potential Overlap) with Consumer/General Law
Part C SLC 49	Enables previous supplier of the customer to assign customer debt to customer's new supplier in certain specified circumstances.	No overlap.

General

Section 211(2) of the Enterprise Act 2002: this applies where a business does an act or makes an omission which harms or could harm the collective interests of consumers in the UK. The act or omission must consist of one of the following**:**

- a contravention of an enactment which imposes a duty, prohibition, or restriction enforceable by criminal proceedings
- an act done or an omission made in breach of contract
- an act or an omission in breach of a non-contractual duty which is owed to a person by virtue of an enactment or a rule of law and is enforceable by civil proceedings
- an act or an omission in respect of which an enactment provides for a remedy or a sanction enforceable by civil proceedings
- an act or an omission by a person supplying or seeking to supply goods or services which**:**
  - results in an agreement or security relating to the supply being void or unenforceable to any extent, or
  - enables that person to exercise a right or remedy relating to the supply in circumstances where doing so is restricted or excluded under or by virtue of an enactment, or
  - enables that person to avoid any liability relating to the supply in circumstances where doing so is restricted or prevented under or by virtue of an enactment.

In any of these circumstances, an enforcement order can be made against the party which will prevent him from continuing the practice in that business or any other.

Note: These provisions of the Enterprise Act comprise the legal core of the new domestic consumer law enforcement regime for which a number of statutory 'enforcers' (including Ofgem) are now responsible under Part 8 of the Act**:** see Attachment 3.

Attachment 2

THE DISABILITY DISCRIMINATION ACT 1995

1. In its Social Action Strategy, published in June 2005, Ofgem stated that, in carrying out the supply licence review, it would pay special attention to how best to provide proportionate protection for vulnerable customers. In particular, "specific consideration will be given to the implications for suppliers of the Disability Discrimination Act" (DDA).

2. This note provides an overview of certain legal provisions of the DDA in relation to service providers, and of the perceived degree of duplication of those provisions with the standard supply licence conditions.

A. Disabled persons and service providers

3. Only people who are disabled as defined by the DDA have rights under the DDA. By section 1(1), a person has a disability for all the purposes of the DDA "if he has a physical or a mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities". By section 1(2), a "disabled person" means a person who has a disability. These definitions would potentially cover all of the vulnerable customer categories mentioned in SLC 37 and 38, apart from mentally and physically competent pensioners.

4. Part 3 of the DDA imposes legal duties on service providers in relation to disabled persons. Anyone who is a service provider has obligations under Part 3 that are owed to disabled persons. By section 19(2), a service provider is widely defined as any person "concerned with the provision, in the United Kingdom, of services to the public or to a section of the public". With some exceptions that are not relevant here, all services to the public are covered. Suppliers of gas and electricity are manifestly service providers for the purposes of the DDA.

B. No discrimination by service providers

5. Section 19 makes it unlawful for a service provider to discriminate against a disabled person in any of the following ways**:**

   - refusing to provide, or deliberately not providing, the service;

   - failing to comply with a duty to make reasonable adjustments, where the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to use the service;

   - in the standard of service provided or the manner in which it is provided; or

   - in the terms on which the service is provided.

C. Duty to make reasonable adjustments

6. Under section 21, a key concept at the heart of the legislation is the duty on service providers to make reasonable adjustments where existing policy, practice, or procedure, or a physical feature, makes it impossible or unreasonably difficult for a disabled person to use the service.

7. It should be noted that the duty to make reasonable adjustments is a duty owed to disabled people at large, regardless of whether the provider of the service knows that someone receiving, or wanting to receive, the service is disabled. In other words, this is an anticipatory duty which requires the service provider to plan ahead.

8. The DDA does not define what is meant by "unreasonably difficult", but the statutory code of practice issued by the Disability Rights Commission says that, when considering if services are unreasonably difficult for disabled persons to use, service providers should take account of whether the time, inconvenience, effort, discomfort, or loss of dignity entailed in using the service would be considered unreasonable by other people if they had to endure similar difficulties.

9. The DDA envisages reasonable adjustments being made in the following ways**:** changes to policies, practices, and procedures; providing auxiliary aids and services; and overcoming barriers caused by physical features. The cost of providing an adjustment in any such way will be relevant to the question of whether the adjustment is reasonable. However, if an adjustment is reasonable, the DDA does not permit the cost of making the adjustment to be passed on to the disabled person concerned. Instead, cost must be absorbed by the service provider's general overheads.

10. It should be noted that the DDA enforcement regime is quite different from the enforcement regime for SLCs 37/38. The first is consumer-led (via individual claims in the county court for compensation for financial loss, or for an injunction to prevent future discriminatory acts), while the second is regulator-led on behalf of gas and/or electricity consumers generally (and can result in a fine or other penalties on the supplier if breach of licence is shown).

D. Conclusions

11. Looking at the particular requirements of SLC 37 (services for persons who are of pensionable age or disabled or chronically sick) and SLC 38 (services for persons who are blind or deaf), and having due regard to the life-sustaining nature of the service provided by energy suppliers, the above analysis suggests that their free-standing obligations under the DDA could require them to have special services and/or arrangements in place of broadly the kind currently specified in the licence, even if those standard conditions were removed.

<u>Attachment 3</u>

<u>PART 8 OF THE ENTERPRISE ACT 2002</u>

1. The Enterprise Act made a number of significant reforms to competition law and consumer law enforcement in the UK. In particular, Part 8 of the Act aims to enhance consumer protection by giving "enforcers" stronger powers to obtain court orders against businesses that do not comply with their legal obligations to consumers.

2. Of the three types of enforcer specified in Part 8, the Gas and Electricity Markets Authority (ie, Ofgem) is a public enforcer designated by the government (see the Enterprise Act 2002 (Part 8 Designated Enforcers) Order 2003). Under this designation, Ofgem has a responsibility for action taken in the UK against licensed energy suppliers in respect of a wide range of breaches of certain legislation.

A. <u>Policy and scope of the Part 8 regime</u>

3. Part 8 gives no new rights to consumers, and imposes no new obligations on businesses. What it does is to provide a new enforcement regime to regulators and other authorities by giving them enforcement powers in areas where they did not previously have them. These powers now sit alongside their existing regulatory and enforcement activities.

4. Part 8 is not a means of pursuing individual redress. The general policy behind it is that, in order for an enforcement body to take action under Part 8 in respect of a breach of the law, the enforcer must be able to show that the infringement harms the collective interests of consumers.

5. In the case of a Part 8 enforcer such as Ofgem, therefore, there are clear parallels here with the policy of the older enforcement regime in place under the sectoral legislation for securing suppliers' compliance with their statutory duties and licence obligations. The key differences lie in the remedies available (because the Part 8 enforcer can apply urgently to the courts for an injunction to stop the conduct) and in the more restricted scope of the new regime (it does not cover business consumers).

B. <u>Laws qualifying for enforcement action</u>

6. Under Part 8, breaches of certain specified legislation are classed as two distinct types of infringement**:**

    - Domestic infringements**:** these relate to breaches of a wide range of UK laws listed in a statutory instrument made under Part 8.

    - Community infringements**:** these relate to breaches of the laws by means of which the UK has implemented the European directives listed in Schedule 13 to the Act.

7. The number of items of legislation to which the definition of a domestic infringement or a Community infringement applies currently amounts to some 52 and 12 respectively. Ofgem has been designated as an enforcer in respect of all such infringements of all the relevant legislation, but this would be subject to the central co-ordinating duty of the OFT to ensure that action under Part 8 is taken by the most appropriate body.

C. Potential areas for Ofgem enforcement action

8. Looking at the domestic and Community infringement lists in the round, and taking account of Ofgem's principal objective and statutory duties, it seems likely that the legislation in respect of which Ofgem could claim an enforcement interest under Part 8 in relation to energy sector activities would substantially comprise any and all of the following enactments**:**

- Consumer Credit Act 1974
- Consumer Protection Act 1987 Part 3
- Consumer Protection (Cancellation of Contracts Concluded Away From Business Premises) Regulations 1987
- Consumer Protection (Distance Selling) Regulations 2000
- Consumer Transactions (Restrictions on Statements) Order 1976
- Control of Misleading Advertisements Regulations 1988
- Electronic Commerce (EC Directive) Regulations 2002
- Misrepresentation Act 1967
- Protection from Harassment Act 1997
- Sale of Goods Act 1979
- Sale and Supply of Goods to Consumers Regulations 2002
- Supply of Goods (Implied Terms) Act 1973
- Supply of Goods and Services Act 1982
- Telecommunications (Data Protection) Regulations 1999
- Unfair Contract Terms Act 1977
- Unfair Terms in Consumer Contracts Regulations 1999

D. Conclusions

9. The key issue raised by the above analysis is whether continuation of Part C of the supply licence in its present form is justified. Apart from the "vulnerable consumer" obligations (see Attachment 2), most of Part C is designed to regulate suppliers' marketing activities and the scope and content of domestic supply contracts – matters which would otherwise fall to be regulated under one or more of the above enactments.

10. The question, therefore, is whether, in a competitive supply market, to adopt Ofgem's own words, "the essential nature of the service and the specific circumstances of energy customers" are factors so exceptional as to justify the continuation of consumer protections and methods of enforcement additional to those now available under Part 8 of the Enterprise Act in respect of other market sectors.