



Consumers, consumer organisations and representatives, suppliers, academics and other interested parties

Promoting choice and value for all customers

Our Ref: -
Direct Dial: 020 7901 7018 / 020 7901 0507
Email: Paul.Huffer@ofgem.gov.uk / Gosia.Rees@ofgem.gov.uk

Date: 26 October 2009

Dear Colleagues,

Guidance on deemed contract relationship

1.1. This guidance¹ note is intended to provide both domestic and non-domestic customers with a greater degree of clarity on whether a deemed contract relationship is likely to exist with a gas and/or electricity supplier. This in turn will help customers to understand when Ofgem may have the ability to investigate whether suppliers' terms are unduly onerous.

Background

1.2. Where a customer is supplied on the basis of a deemed contract relationship², 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 (standard condition 7.3 of the gas and electricity supply licences³). For the avoidance of doubt, Ofgem is only able to investigate a potential breach of this provision⁴ (and ultimately take enforcement action) if the customer is being supplied pursuant to a deemed contract.

1.3. A deemed contract relationship will normally exist in circumstances where any type of customer moves in to 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.

1.4. It has come to Ofgem's attention that some customers may be making incorrect assumptions about when they will be subject to a deemed contract relationship in circumstances where an existing contract has come to an end (and therefore when Ofgem

¹ This guidance is being published pursuant to section 35(1) of the Gas Act 1986 and section 48(1) of the Electricity Act 1989.

² In this document the expression 'deemed contract' is only intended to cover the relationship between a supplier and 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.

³ It should be noted that standard condition 7.4 contains a test for assessing whether the charges for the supply of gas and/or electricity under a deemed contract will be unduly onerous.

⁴ It is important to highlight that Ofgem has separate powers under the Unfair Terms in Consumer Contracts Regulations 1999 to investigate unfair terms which appear in contracts with consumers. However, these powers do not apply to contracts with customers who are receiving a supply of gas and/or electricity for the purposes of a trade, business or profession.

is able to investigate unduly onerous terms). For this reason, Ofgem has decided to issue guidance to help clarify the position.

Ofgem's views

1.5. Ofgem recognises that there may be a lack of clarity on whether a deemed contract relationship exists in a situation where an existing contract has been terminated or has expired due to the passage of time. In order to help provide greater clarity on this issue, Ofgem has set out below a number of general principles.

1.6. Whilst the general principles are intended to reflect Ofgem's views on when a domestic or non-domestic customer is likely to be subject to a deemed contract relationship with a supplier, we acknowledge that the precise legal position will depend on the individual circumstances of each case⁵. 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 condition 7.3.

1.7. Ofgem would also like to confirm that it considers that any terms of a contract which deal with what will happen in the event of termination and/or expiry will constitute principal terms for the purposes of the standard conditions of the gas and electricity supply licences⁶. For example, this means that suppliers will need to bring such terms to the attention of domestic customers⁷ and micro business consumers⁸ before they enter into a supply contract.

The General Principles

1. 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:

(a) 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

(b) the existing customer continues to consume gas and/or electricity at the premises.

2. 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:

⁵ This may include the construction and effect of terms in the original contract and the conduct of the parties.

⁶ This is because the definition of 'Principal Terms' contained in standard 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".

⁷ 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."

⁸ 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.

(a) 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); and

(b) 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

(c) the customer continues to consume gas and/or electricity at the premises.

Associated Documents

- Standard Conditions of the Gas Supply Licences:
http://epr.ofgem.gov.uk/document_fetch.php?documentid=14459
- Standard Conditions of the Electricity Supply Licences:
http://epr.ofgem.gov.uk/document_fetch.php?documentid=14458
- Schedule 2B to the Gas Act 1986 (as amended)
http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1986/cukpga_19860044_en_20#sch4
- Schedule 6 to the Electricity Act 1989 (as amended):
http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1989/cukpga_19890029_en_20#sch6