



Suppliers, consumers, consumer organisations and representatives, academics and other interested parties

Promoting choice and value for all customers

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Dear Colleagues,

Guidance on application and interpretation of certain aspects of SLC 7A

1.1. This letter¹ is intended to provide non-domestic electricity and gas suppliers (suppliers) with guidance on certain requirements of Standard Licence Condition 7A (SLC 7A), which governs contractual relationships between suppliers and Micro Business Consumers².

Background and purpose

1.2. The Energy Supply Probe highlighted a number of concerns relating to the functioning of the non-domestic market for small business customers. To address these concerns Ofgem introduced SLC 7A, which came into force on 18th January 2010. The aim of this licence condition is to help Micro Business Consumers by ensuring that certain relevant contractual information is provided to them, improving the visibility, transparency and timeliness of this contractual information and regulating Contract roll-overs.

1.3. It has come to our attention that some suppliers' Contract terms and conditions offered to Micro Business Consumers may not be compliant with certain requirements of SLC 7A. Whilst Ofgem is firmly of the view that suppliers should be fully capable of understanding the spirit and letter of the requirements of SLC 7A, we have decided that it would be helpful to issue guidance on this occasion.

1.4. The main purpose of this guidance is to highlight potential areas of concern and provide clarification as to how Ofgem intends to interpret certain licence obligations contained in SLC 7A. Ofgem is monitoring suppliers' compliance with SLC 7A and will be considering whether it is appropriate to commence formal investigations which may ultimately lead to enforcement action being taken. However, without prejudice to any further action which may be taken by Ofgem, we would encourage suppliers to review the guidance and to consider taking immediate steps to resolve any potential areas of concern.

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 many of the words and expressions which begin with capital letters are intended to be interpreted in accordance with Standard Condition 1 and 7A of the gas and electricity supply licences.

Ofgem's views

1.5. The key areas of clarification with respect of SLC 7A can be grouped into the following categories:

- a) Contract duration
- b) Ability to prevent roll-overs
- c) Termination of Contract and variation of terms
- d) Plain and intelligible language

Contract duration

1.6. SLC 7A.4 requires a supplier to take all reasonable steps to bring to the customers' attention the Principal Terms of the proposed Contract before a Micro Business Contract is entered into, and that such terms must be communicated in plain and intelligible language.

1.7. The expression 'Principal Terms' is defined in the 'Definitions' section of SLC 1.3 and includes (amongst other things): "*(d) the duration of the Contract or Deemed Contract*".

1.8. Given that the natural meaning of 'duration' is "*the time during which something continues*"³ Ofgem is firmly of the view that this expression covers the following matters:

- any specific period of time that a Contract will run 'from' and 'to' (i.e. dates) or whether the Contract is of indefinite length;
- whether all or part of the Contract (or Deemed Contract) is capable of applying for a further period after termination or expiry and, if so, what that period will be. For example, in the case of a Contract for a fixed-term period, this would include whether:
 - a) a supplier has the ability to invoke a further fixed-term period (i.e. roll-over a Contract), or
 - b) whether at the end of the fixed-term period: (i) the Contract would continue to apply for an indefinite period until terminated by either party, or (ii) the Micro Business Consumer would be subject to a different Contract for an indefinite period or a Deemed Contract.

1.9. We, therefore, expect suppliers to provide clear information on all matters relating to the duration of the Contract when communicating the Principal Terms of a Contract orally or in writing.

Ability to prevent roll-overs

1.10. SLC 7A.6 provides that suppliers are required to include (amongst other things) the following information within their 'Statement of Renewal Terms':

"a statement to the effect that the Micro Business Consumer may send a notification in Writing to the licensee at any time before the Relevant Date in order

³ Oxford Dictionary of English, Second Edition (Revised) 2005, Oxford University Press.

to prevent the licensee from extending the duration of the Micro Business Consumer Contract for a further fixed term period". (SLC 7A.6(c) (iii))

1.11. Consequently, a clear statement that a customer may prevent Contract roll-over at any time until the end of the renewal period *must* be included in the Statement of Renewal Terms in order to comply with this condition. This information should be displayed in a prominent manner and the Statement of Renewal Terms must be drafted in plain and intelligible language (SLC 7A.6).

1.12. In light of these requirements, Ofgem takes the view that the inclusion of misleading or contradictory information within the Statement of Renewal Terms (or a document containing that information) could amount to a breach of SLC 7A.6 on the grounds of insufficient prominence and/or on the basis of the overall clarity and intelligibility of the drafting. For example, misleading/contradictory information would include a statement which implies that the Micro Business Consumer can only prevent roll-over during the renewal period of a fixed-term Contract.

1.13. Ofgem also wishes to clarify that the provision of a Statement of Renewal Terms which breached SLC 7A.6 (a 'Defective Statement') is likely to constitute a failure to provide the Statement of Renewal Terms in accordance with SLC 7A.7 and 7A.8. As a result, the effect of SLC 7A.13 is that the supplier would be prohibited from rolling-over Micro Business Consumers that have received a Defective Statement for a further fixed-term period⁴.

1.14. In order to comply with the spirit of these requirements Ofgem expects suppliers to ensure that a Micro Business Consumer is fully aware of their ability to prevent their Contract from being rolled-over. Suppliers should make sure they do not make contradictory statements in any verbal communications or written documentation.

Termination of Contract and variation of terms

1.15. SLC 7A.3 provides that suppliers are prohibited from including in their Contract terms and conditions:

"a term in a Micro Business Consumer Contract which enables it to terminate the Contract or apply different terms and conditions during that fixed term period on the grounds that the customer no longer satisfies the definition of Micro Business Consumer".

1.16. Ofgem is firmly of the view that SLC 7A applies to any contractual terms which permit termination (or changes to Contract terms and conditions) during a fixed-term period on any grounds that relate to the definition of Micro Business Consumer, e.g. changes in consumption, staff numbers, annual turnover.

1.17. Further, Ofgem wishes to make clear that the *inclusion* of terms to this effect will amount to a breach of SLC 7A.3 and, therefore, it will be no defence for a supplier to claim that it has not exercised or otherwise sought to rely on such a term.

1.18. Ofgem also wishes to make clear that it is not aware of any irreconcilable conflicts between SLC 7A.3 and other requirements imposed by licence conditions or legislation. In particular, Ofgem is not aware of any legal requirements which can only be interpreted as

⁴ For the avoidance of doubt, Ofgem also considers that the same principle would apply in relation to a breach of SLC 7A.5 or SLC 7A.9.

having the effect of requiring a supplier to terminate a Contract (or to vary the terms) during a fixed-term period.

1.19. In order to comply with the spirit of SLC 7A.3 suppliers should avoid making any oral or written statements which could imply that a fixed-term Contract could be terminated or varied on the basis of a change in circumstances that relates to the Micro Business Consumer definition.

Plain and intelligible language

1.20. SLC 7A contains a number of requirements for documentation to be drafted, or information to be communicated, in 'plain and intelligible language':

- a statement to the effect that the licensee is seeking to enter into a legally binding Contract with a Micro Business Consumer (SLC 7A.4);
- the Principal Terms of the proposed Contract (SLC 7A.4);
- the express terms and conditions of a Micro Business Consumer (SLC 7A.5);
- the Statement of Renewal Terms (SLC 7A.6); and
- Principal Terms that might apply after the fixed-term period of a Micro Business Consumer Contract ends (SLC 7A.9).

1.21. In line with clarification provided during the Probe stakeholder meetings, Ofgem wishes to confirm that it intends to apply the plain and intelligible language requirements in accordance with case law and the OFT's guidance⁵ on Regulation 7 of the Unfair Terms in Consumer Contracts Regulations 1999.

1.22. As a result of Ofgem's general market monitoring activities and concerns raised with Ofgem, we believe that many Contracts aimed at Micro Business Consumers would benefit from clearer language, layout and terminology. We encourage suppliers to redraft Contracts in light of principles from relevant case law and the OFT guidance. Suppliers may, therefore, wish to use the services of organisations and lawyers which specialise in plain language drafting and may also wish to aspire to obtain a recognised independent plain language accreditation for contracts aimed at Micro Business Consumers⁶.

1.23. Based on potential concerns raised with Ofgem to date, we are particularly concerned that suppliers may not be providing clear information on a number of important issues. In relation to these issues, we have set out below Ofgem's views on particular matters which would need to be made clear for the purposes of complying with the plain and intelligible language requirements:

- When entering into any Micro Business Consumer Contract the supplier must make it absolutely clear that they are entering into a legally binding agreement and, therefore, ensure that any written or oral statements used to

⁵ See pages 85 to 88 of the main guidance document: http://www.ofg.gov.uk/shared_ofg/reports/unfair_contract_terms/oft311.pdf and pages 128 to 141 of the annex containing example of terms which have been revised: http://www.ofg.gov.uk/shared_ofg/reports/unfair_contract_terms/oft311annexes.pdf

⁶ For the avoidance of doubt, it should be noted that obtaining a recognised independent plain language accreditation would not necessarily be sufficient to ensure compliance with the plain and intelligible language requirements, if for example, clearly drafted information was misleading or contradictory.

communicate this are not ambiguous, are not capable of being interpreted in a contrary manner, and do not in any way de-emphasise the effect of entering into a legally binding agreement.

- When the terms and conditions cover a variety of contractual arrangements (e.g. fixed-term Contracts, Deemed Contracts, Contracts for indefinite periods etc) it is imperative that suppliers make it clear to a Micro Business Consumer precisely which terms relate to which type of Contract.
- As discussed above, suppliers should provide clear information on all matters relating to the duration of the Contract, including what will happen at the end of a fixed-term period of a Contract and any ability to roll-over Contracts for further fixed-term periods.
- Any differences between - (i) the Micro Business Consumer's ability to prevent a supplier from extending the duration of the Contract for a further fixed-term period, and (ii) Micro Business Consumer's obligations to give notice to terminate the Contract - should be made absolutely clear in Contract terms and conditions and the Statement of Renewal Terms⁷.
- Suppliers should ensure that clear and accurate information is provided in respect of the definition of Micro Business Consumer. For example, suppliers should make clear that a Customer does not need to satisfy both the consumption⁸ and the other relevant criteria⁹ in order to qualify as a Micro Business Consumer¹⁰.

Requests for further guidance

1.24. As indicated above, Ofgem takes the view that suppliers should be fully capable of understanding the spirit and letter of the requirements SLC 7A. However, in the event of evidence of genuine uncertainty, Ofgem will consider the possibility of publishing further guidance or revisions to the contents of this letter.

Relationship with Ofgem's Enforcement Guidelines

1.25. For the avoidance of doubt Ofgem will consider whether to investigate potential breaches of SLC 7A in accordance with the criteria contained in our published enforcement guidelines:

<http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/Enforcement%20Guidelines%20post%20consultation.pdf>

⁷ Specifically, depending on the terms of the Contract, it may be necessary for a supplier to make clear that steps taken by a Micro Business Consumer to prevent a Contract from being extended for a further fixed-term period (i.e. Contract rolled-over) would not result in the termination of the Contract and therefore separate notice of termination would need to be provided (within the period specified in the Contract). For example, depending on the terms of the original Contract, a Micro Business Consumer who has contacted their supplier to prevent their Contract from being rolled-over onto another fixed-term period may not have terminated their contractual relationship with the supplier. Hence, after the end of the fixed-term period, the original Contract may continue to apply without any fixed-term periods (or the Micro Business Consumer may still be subject to different contractual arrangements) and therefore the Micro Business Consumer may still need to give a valid notice of termination (i.e. in accordance with the terms of the applicable Contract) in order to be able to switch to an alternative supplier.

⁸ An annual consumption of not more than 55,000 kWh to qualify as a Micro Business Consumer for electricity or an annual consumption of not more than 200,000 kWh to qualify as a Micro Business Consumer for gas.

⁹ Fewer than 10 employees (or their full time equivalent) and an annual turnover or annual balance sheet not exceeding 2 million Euros to qualify as a Micro Business Consumer for both gas and electricity.

¹⁰ However, we do not consider that there would be a bar on suppliers giving the customer the voluntary option of providing evidence of satisfying all of the criteria.

Associated Documents

- Standard Conditions of the Gas Supply Licences:
http://epr.ofgem.gov.uk/document_fetch.php?documentid=14510
- Standard Conditions of the Electricity Supply Licences:
http://epr.ofgem.gov.uk/document_fetch.php?documentid=14509
- the Office of Fair Trading's Unfair Contract Terms Guidance and Annex:
http://www.offt.gov.uk/shared_offt/reports/unfair_contract_terms/oft311.pdf
http://www.offt.gov.uk/shared_offt/reports/unfair_contract_terms/oft311annexes.pdf
- OFGEM's Enforcement guidelines:
<http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/Enforcement%20Guidelines%20post%20consultation.pdf>