



Gas or Electricity Supply Licence
Holders, consumers and their
representatives, and other
interested parties

*Promoting choice and value for
all gas and electricity customers*

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Dear Colleagues

Exchange of domestic tariff pricing information between suppliers – Standard Licence Condition 22

Background and purpose

Gas and electricity suppliers have sought guidance from Ofgem on aspects of Standard Licence Condition 22 of the gas and electricity supply licences ("SLC 22") and in particular whether SLC 22 may require the bilateral exchange of pricing information between suppliers about current tariffs. Suppliers have raised concerns that such information exchange practices would potentially be incompatible with the Chapter 1 prohibition of the Competition Act 1998 ("Chapter I prohibition") and Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

The purpose of this letter is to provide further guidance on SLC 22 and highlight that Ofgem would have general concerns with suppliers engaging in the bilateral exchange of pricing information. This letter also sets out a proposed way forward to ensure that these potential concerns are addressed whilst transparency with tariff information is maintained for the benefit of consumers.

Scope of SLC 22

Paragraph 8 of SLC 22 provides that:

"If a person requests a copy of any form of Domestic Supply Contract that the licensee may offer under paragraph 22.2 [requirements for a domestic supplier to offer terms for the supply of gas and/or electricity], the licensee must send a copy of that form of contract to that person within a reasonable period of time after receiving the request."

This requires suppliers to provide the terms and conditions, including all charges, of a Domestic Supply Contract to any person making a request. This applies to Domestic Supply Contracts which may be offered to a new or existing Domestic Customer at the time of the request. Ofgem notes that the intention behind this provision was to enable customers and third parties to access tariff information and thereby facilitate switching activities. Ofgem's view is that this objective remains important and accords with recent proposals under the Retail Market Review to promote more effective consumer engagement.

Ofgem's general concerns

In line with guidance issued by the European Commission¹ and relevant case law, Ofgem can confirm that it would be concerned about the exchange of any strategic information (which, as set out below, may include information about individual current tariff prices) between suppliers (or indeed any other actual or potential competitors) in certain circumstances. In particular, Ofgem notes the following commentary made by the European Commission on information exchange amounting to a concerted practice for the purposes of Article 101 of the TFEU:

"...This precludes any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, thereby facilitating a collusive outcome on the market. Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete." (footnotes omitted)²

As noted above, Ofgem's general view is that individual current tariff prices (which may be requested under paragraph 8 of SLC 22) may be strategic information. In undertaking an assessment of whether its exchange is likely to be contrary to the Chapter I prohibition and Article 101 TFEU, it will also be necessary for suppliers and their legal advisers to consider the circumstances of such exchange. Relevant factors to such assessment include the frequency of any such information exchange and whether such exchange is public.

Ofgem notes, in line with the view expressed by the European Commission³, that public exchanges of information are both less likely to be restrictive of competition and more likely to benefit consumers. Publishing information regarding individual current tariff prices to comply with the obligation imposed by paragraph 8 of SLC 22 may therefore carry less risk of infringing the Chapter I prohibition / Article 101 TFEU than providing such information to competitors on a bilateral basis.

Ofgem's proposed way forward

The general guidance provided in this open letter is not legally-binding and is not a substitute for suppliers obtaining appropriate legal advice regarding their obligations under licence conditions and competition law. In particular, Ofgem would recommend that suppliers obtain legal advice on the application of the Chapter I prohibition and Article 101 TFEU before disclosing pricing information to competitors. As noted above, suppliers should consider publishing pricing information rather than providing it on a bilateral basis to their competitors.

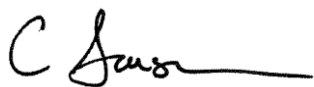
Ofgem has also been made aware of related issues around the provision of data to customers and third parties. These issues concern the clarity and format of information supplied in accordance with the condition, as well as the availability of historic data. Where historical data is not available, a customer may not be able to make an informed switching decision. We are considering these matters further and whether additional work is required.

¹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements. Available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC0114\(04\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011XC0114(04):EN:NOT)

² See above, at paragraph 61.

³ See above, at paragraphs 94 and 99.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C Sausman', with a long horizontal flourish extending to the right.

Colin Sausman

Partner, Retail Markets and Research