

## Cooling off arrangements

This memo provides a summary of how new cooling off arrangements, which come into force from June 2014, will apply to the energy market

From	Ofgem
To	COSEG
cc	BIS, DECC
Date	20 February 2014

### 1. Introduction

1.1. BIS has transposed the EU Consumer Rights Directive (CRD)<sup>1</sup> into GB law. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations<sup>2</sup> (the "Regulations") will come into force on 13 June 2014. The Regulations are supplemented by guidance<sup>3</sup>.

1.2. This memo provides a summary of the Regulations. It then considers the practical application of the Regulations to the energy market. It has been reviewed by BIS and DECC.

1.3. This memo is intended as a summary, as of 20 February of our understanding of the cooling off arrangements and is not updated. It should not be relied upon as legal advice. Should you have any legal concerns as to the application of these arrangements and your obligations you should seek independent legal advice.

### 2. Summary of the Regulation

2.1. The Regulations provide for a 14 calendar day cooling off period for gas and electricity consumers<sup>4</sup>. This cooling off period cannot be waived.

2.2. Under the Regulations, mains gas and electricity supply is treated as a service<sup>5</sup>. A supplier is not prohibited from offering and providing a supply during the cooling off period<sup>6</sup>. However, a trader must seek the express consent of a consumer before providing a service during the cooling off period<sup>7</sup>.

<sup>1</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:01:EN:HTML>

<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/265898/consumer-contracts-information-cancellation-and-additional-payments-regulations-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265898/consumer-contracts-information-cancellation-and-additional-payments-regulations-2013.pdf)

<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/266525/bis-13-1368-consumer-contracts-information-cancellation-and-additional-payments-regulations-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/266525/bis-13-1368-consumer-contracts-information-cancellation-and-additional-payments-regulations-guidance.pdf)

<sup>4</sup> For the purposes of the Regulations, "Consumer" means an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession' (Regulation 4 of the Regulations). Whilst Ofgem considers that this definition will normally capture consumers that constitute "domestic customers" for the purposes of the standard conditions of the supply licence, it is possible that the definition may also capture "non-domestic customers" in certain circumstances (e.g. where standard condition 3 of the supply licence requires a customer to be treated as a non-domestic customer in circumstances where their premises are no longer being used for the purposes of a business).

<sup>5</sup> Ofgem notes that the Regulations treat contracts for both the supply of goods and services as a goods contract (a "Sales Contract") in circumstances where a customer pays for goods as part of contract which also involves the provision of a service and, as a result, ownership of the goods is transferred to the consumer. On this basis, Ofgem, BIS and DECC take the view that this the provision of goods as part of a contract for the supply of mains gas and electricity (e.g. ancillary goods such as an In-home-display for a smart metering system) is unlikely to result in the contract being treated as a Sales Contract in circumstances where the consumer does not acquire ownership of the goods or where the customer does acquire ownership of the goods, but does not make a separately identifiable payment for those goods (e.g. where the goods or provided for free).

<sup>6</sup> It should also be noted that the CRD contains a prohibition of Member States using national law to prevent a trader from providing services during a cooling off period (see Article 9(3) of the CRD).

<sup>7</sup> Where a trader provides a service (including a service which forms part of a Sales Contract) during the cooling off period without (i) providing the consumer with information about their right to cancel and/or (ii) the consumer

2.3. A contract will be treated as terminated if a customer sends a notice of cancellation during the 14-day cooling off period. This means that a notice of cancellation sent at any time during the cooling off period will be valid even if it is actually received by the trader after the 14-day cooling off period has expired<sup>8</sup>.

2.4. For service contracts, the cooling off period starts from when the contract is entered into. Day 1 of the 14 day cooling off period is the day after the contract is entered into. In Ofgem, DECC and BIS's view, a supply contract will be "entered into" for the purposes of the Regulations in circumstances where the consumer makes a firm commitment in respect of a supply contract which would result in a binding contract in the event that no further action was taken by the consumer<sup>9</sup>.

2.5. Under the Regulations, a trader is required to provide the consumer with specified information about the right to cancel before the contract is binding on the consumer<sup>10</sup>. In the event that the trader fails to provide this specified information at the correct time, the Regulations provide that:

- a) the cooling off period will be extended (up to a maximum of 12 months and 14 days)<sup>11</sup>; and
- b) in the case of a service which is performed (fully or in part) during the extended cooling off, the consumer will be exempt from paying for that service<sup>12</sup>.

2.6. A supplier may charge a consumer under the terms of the contract up until the time when the trader is informed of the consumer's decision to cancel the contract ie when the notice of cancellation is received.

2.7. Ofgem, BIS and DECC also consider that the contract should also be treated as cancelled at the time when the cancellation notice has been received.<sup>13</sup>

2.8. Where a contract has been terminated following receipt of a cancellation notice, the customer must not incur any liability as a result of terminating that contract. In the guidance provided by BIS it said that:

*"Where services to which cancellation rights apply are delivered during the cancellation period (for example the provision of ... gas, electricity and district heating) the trader will need to take into account the nature of that service and the consequences of cancellation in that context in order to ensure that a consumer does not incur liability as a result of exercising the right to cancel. The obligations of the consumer in the event of withdrawal should not discourage the consumer from exercising his right of withdrawal"*

2.9. Ofgem can enforce the Regulation in accordance with its role as an enforcement authority under Part 8 of the Enterprise Act 2002. Local authority Trading Standards

---

making an express request for the service to be performed at that time, the Regulations provide that the consumer is exempt from paying for the costs of the service performed (in full or in part) during the cooling off period (see regulation 36(6) of the Regulations).

<sup>8</sup> For example, where the consumer posts or emails a cancellation notice on day 14 of the cooling off period.

<sup>9</sup> For example, this would include circumstances where the supplier's terms and conditions provide that a supply contract will only become binding after the supplier has verified the creditworthiness of the consumer and confirmed its willingness to supply the premises.

<sup>10</sup> In Ofgem's view the expression "binding on consumer" is to be interpreted as meaning when the consumer enters into a contract.

<sup>11</sup> If the trader provides the specified information on or before the date which is 12 months from the date the contract was binding on the consumer, the cooling off period expires 14 days after the information was provided. If the specified information is not provided to the customer, the cooling off period expires 12 months from the date the cooling off period would have expired if the specified information was provided at the correct time.

<sup>12</sup> It should be noted that the failure to provide the specified information at the correct time may also result in enforcement action being taken against the trader by the relevant enforcement authorities.

<sup>13</sup> It should be noted that this view is subject to case by case judgement.

departments<sup>14</sup> and the OFT/CMA also have direct enforcement powers under the Regulations.

### **3. Practical application of cooling off arrangements to gas and electricity sales**

Cancellation once a switch has taken place

3.1. Ofgem's Change of Supplier (CoS) project aims to introduce a fast, reliable and cost effective switching process that will facilitate competition and build consumer confidence. Reducing the time taken to transfer customers is also supported by Government who has challenged suppliers to introduce 24h switching<sup>15</sup>.

3.2. Achieving these aims will require customers to actively choose faster switching and be confident that there are appropriate arrangements to ensure that they do not incur a liability if they change their minds during the cooling off period.

3.3. It will also require suppliers to want to offer faster switching. They will therefore require reassurance that any requirements as a consequence of a cancellation are not be unduly burdensome.

3.4. There are several potential options for when a customer cancels during the cooling off period but is still transferred to the new supplier. We aim to review the options below, and any further options identified, at a COSEG meeting that has been scheduled for 26 February.

#### *Option 1: Customer returned to previous supplier*

3.5. Under this option the customer would be switched back to their previous supplier on their previous contract terms.

3.6. Whilst the new supplier is entitled to charge up until the point that a cancellation has been received, we would like to discuss the potential advantages in maintaining continuous billing with the previous supplier. Arrangements could also be considered to ensure that energy and network charges were linked to the supplier that was responsible for billing the customer.

3.7. If this option was progressed, it may be appropriate to amend the Standard Licence Conditions of the gas and electricity supply licences to ensure that customers could return to their old contract. This licence modification could for example require suppliers to insert a term within contracts that any termination of that contract would not be treated as valid if the customer transferred back and the supplier was notified that a valid cancellation notice had been received by the new supplier.

3.8. The customer transfer issues around this process would also need to be fully considered.

#### *Option 2: Customer on deemed contract with new supplier*

3.9. If the customer is not returned to their previous supplier following a cancellation, any continued supply may be considered as being taken under a deemed contract. In this circumstance, the customer would be being supplied by a party with whom they no longer wanted a contract and on terms that they had not explicitly agreed.

---

<sup>14</sup> Under regulation 44, trading standards departments have a duty to consider complaints about alleged breaches of the Regulations.

<sup>15</sup> <https://www.gov.uk/government/publications/annual-energy-statement-2013>

3.10. If the supply is taken under a deemed contract the customer would be able to choose to move to their preferred supplier without incurring any termination fees and subject to the supplier objecting to the transfer in accordance with SLC14 of the gas and electricity supply licences<sup>16</sup>. This may have some advantages for a customer who would not want to be transferred back to their previous supplier.

### Energy UK faster switching proposals

3.11. The Energy UK proposals aim to reduce switching timescales to 2 weeks plus 8 working days by mid 2014 and to 2 weeks plus 2 working days by the end of the year.

3.12. The 2 week plus 2 working day proposal requires the transfer process to start during the cooling off period. The new supplier would then stop the registration if a cancellation notice is received. This ability of the new supplier to stop the registration is however limited under the proposed arrangements to the date of the end of the 14-day cooling off period.

3.13. As noted above, any notice of contract cancellation sent by the end of the cooling off period, even where this is received after the cooling off period has concluded, should be treated as cancelling the contract.

3.14. Under the Energy UK proposals, if a cancellation is received after the end of the 14-day cooling off period (or if it is received before then but does not lead to the switch being stopped) then the new supplier will not be able to charge for energy supplied under that contract from the date of receipt.

3.15. Under the Regulations, the supplier would also need to ensure that the customer did not incur a liability as a consequence of that cancellation. The options noted above on customer liability are therefore also relevant in this context.

---

<sup>16</sup> SLC 14 permits a supplier to object to domestic customer from switching on debt grounds irrespective of whether the contract is deemed or express. Under SLC 14 a supplier is not permitted to object to a non-domestic customer switching when that customer is being supplied under a deemed contract.