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Date: 13 February 2019

Supplier Guaranteed Standards of Performance for Switching – Final Decision and Statutory Instrument

On 23 November 2018, we issued a statutory consultation on Supplier Guaranteed Standards of Performance. This statutory consultation closed on 22 December 2018. This letter forms our final decision on that consultation.

The Electricity and Gas (Standards of Performance) (Suppliers) (Amendment) Regulations 2019 (the Regulations) have been made by the Authority and received Ministerial consent. The updated Regulations will be published on www.legislation.gov.uk.

Based on the responses that we have received, we have not made any fundamental changes to the Statutory Instrument, nor have we made any changes to the key policy proposals that underpinned the draft regulations as published. However, respondents to the consultation have requested some points for clarification, and we have made some small changes to the text of the Statutory Instrument accordingly. In addition, we have made further changes to improve clarity. These changes are explained in an annex to this letter.

Suppliers will therefore be required to make payments for breaches of these Guaranteed Standards starting from 1st May 2019. We are publishing this letter now to ensure that stakeholders are informed at the earliest opportunity, and to maximise the time that suppliers are able to use to make appropriate changes to their systems.

Yours faithfully,

Rachel Clark
Programme Director, Switching Programme

Annex: Clarification of issues raised by consultation respondents

This annex contains clarification of points raised in responses to our Statutory Consultation.

Cumulative nature of standard payments

Paragraph 2 of Regulation 9 of the existing Electricity and Gas (Standards of Performance) (Suppliers) Regulations 2015 (the “Principal Regulations”)¹ states that suppliers are not required to make more than one additional standard payment under Regulation 8² of the same regulations with regard to a single failure.

We explicitly consulted on this question regarding the proposed new Guaranteed Standards in our June consultation, and indicated our intention that “... it is appropriate for suppliers to make further payments where issues are not resolved” in November’s Way Forward document.³ Our policy intent was to incentivise suppliers to resolve enduring issues quickly, by making them responsible for an additional standard payment for every 10 days that an issue was unresolved.

One respondent noted that the SI as drafted appears to contradict this policy intent, as no modification is made to Paragraph 2 of regulation 9.

We still consider that there is a case for suppliers to make further additional standard payments. However, we have decided to leave the SI as drafted until we have assessed the impact that potential unlimited payments may have upon individual suppliers. We will expect suppliers to hold data not just on the number of standard payments and additional standard payments made, but also on the time taken between notification of an issue and its final resolution, particularly where they make additional standard payments.

We will use this data to assess the impact of an effective cap on the number of additional standard payments upon consumers. Based on this data, we will consider whether the exemption from making more than one additional standard payment under Paragraph 2 of Regulation 9 of the Principal Regulations should continue to apply to Regulations 6A to 6D, and whether to make further changes when we introduce further Guaranteed Standards with a new Statutory Instrument. In addition, if suppliers systematically fail to resolve issues once they have made an additional standard payment, we will consider appropriate enforcement action.

Engagement between suppliers

Regulation 9 (3)e (ii) of Principal Regulations states that “A supplier is not obliged to make a standard payment under regulation 8(2) or an additional standard payment under regulation 8(3), as applicable, if— it was not reasonably practicable for the supplier to meet the individual standard of performance before the contravention time as a result of — the act or default of a person who is not an officer, employee or agent of the supplier and who is not a person acting on behalf of an agent of the supplier”.

Some respondents noted that in the case of Regulation 6A this could be interpreted as exempting a supplier from making a payment if their counterparty supplier was unwilling to engage with them in order to agree whether a switch is erroneous. The respondents argued that some suppliers might exploit this by refusing payments where they perceived that their counterparty supplier had refused to engage with them.

¹ “Electricity and Gas (Standards of Performance) (Suppliers) Regulations 2015”, at <http://www.legislation.gov.uk/uksi/2015/1544/regulation/9/made>.

² “Electricity and Gas (Standards of Performance) (Suppliers) Regulations 2015”, at <http://www.legislation.gov.uk/uksi/2015/1544/regulation/8/made>.

³ See “Way Forward on the introduction of Supplier Guaranteed Standards of Performance for Switching, and consultation on a Statutory Instrument to bring them into force”, 23 November 2018, at https://www.ofgem.gov.uk/system/files/docs/2018/12/way_forward_on_supplier_guaranteed_standards_or_switc_hing_and_si_consultation_on_a_statutory_instrument_toBring_them_into_force.pdf, p38

Conversely, a number of respondents noted that Regulation 6A in the draft Statutory Instrument is applicable to both the 'new' and 'old' suppliers within an erroneous switch. Meeting the Guaranteed Standard within this Regulation will in practice depend on the initial contacted supplier sending a data flow to their counterparty supplier. If the contacted supplier delayed informing the counterparty supplier in the erroneous switch until sufficiently late in the process, or did not inform their counterparty supplier at all, they could incur responsibility for a payment under Regulation 6A without having the opportunity to reach agreement on whether a switch is erroneous or not.

The policy intent of Regulation 6A is to require suppliers to engage with each other to resolve issues on behalf of consumers. We consider that where both suppliers are active in the retail market, the 21 day timespan following initial notification should provide enough time for a supplier to contact its counterparty supplier and identify whether a switch is in fact erroneous in most instances.

It is our intention that the exclusion within Regulation 9 (3)e (ii) should only apply where the Guaranteed Standard cannot be met due to activity of a party which is not a counterparty to the erroneous switch, or where one of the counterparties to the erroneous switch has never or no longer operates in the retail market. It should not be exploited to excuse suppliers from making reasonable endeavours to engage with a counterparty supplier, or where a supplier has been contacted in good time and where the two suppliers have failed to reach agreement.

We also consider that the supplier which is initially contacted by the customer also has an appropriate incentive to contact the counterparty supplier in good time to resolve the issue. We would therefore expect that both suppliers would make a payment under this Guaranteed Standard where the contacted supplier has informed their counterparty in good time for both parties to reach a decision. If a supplier other than the contacted supplier feels that it has been contacted too late to arrive at a decision within 21 days of initial contact and that this constitutes an adequate reason not to make a Guaranteed Standard, it should record its reasons for doing so. We do not consider this to be a reason to amend either Regulation 6A or Regulation 9 in the SI at this stage.

However, we will continue to monitor the operation of this Regulation to ensure that it effectively achieves this policy intention and delivers good outcomes for customers. If we find that this Regulation is being mis-applied by suppliers or is distorting the operation of the retail market, we will consider whether to make further changes when we introduce further Guaranteed Standards with a new Statutory Instrument. In addition, if and where we identify suppliers either failing to contact their counterparty supplier to agree whether a switch is erroneous, or unreasonably citing an exemption to avoid making payments under a Guaranteed Standard, we will consider appropriate enforcement action.

Making Standard Payments by cheque

Some respondents to the statutory consultation requested more clarity on our intentions regarding the issuance of cheques to meet payments under Guaranteed Standards. Regulation 6D (4) of the Statutory Instrument states that the "cheque is to be treated as refunded when it is received at the postal address provided by a customer". A number noted that our proposed approach appeared to be inconsistent with the accepted practice that the despatch of the cheque to a customer is usually considered as meeting a requirement, and that the only mechanism to verify receipt of the cheque would be to send via recorded post, which would add further cost to suppliers.

It is not our intention to diverge from this accepted practice, nor that a supplier should be responsible for recording whether a customer has received the cheque or cashed the payment within the 10 working day period to avoid being in breach of this requirement. Rather, the intention of the policy is that a supplier who is responsible for making a

Guaranteed Standard payment should make reasonable steps to ensure that it is despatched in good time so that the customer receives the payment within 10 working days of it falling due.

In practice, this means that where a supplier is making a payment by cheque, it should consider whether their mechanism for sending a cheque payment will allow the customer to receive it before the 10 working days have elapsed under usual circumstances. ‘Usual circumstances’ in this instance would mean a typical duration for sending a cheque through the postage system, allowing for factors which are within the control of the supplier (such as the method or class of postage used) but does not require an allowance for circumstances which are genuinely outside the supplier’s control, such as delays or losses incurred during sending. For example, we would consider that to send a cheque on the 10th working day following the triggering of a Guaranteed Standard would be unlikely to meet this requirement under Regulation 6D, whereas sending a cheque by first class post after five working days would meet the requirement, even if the cheque was subsequently delayed within the postal system.

For this reason, and to provide further clarity in this area, we propose to amend Regulation 6D (4) to read “For the purposes of paragraph (3), a supplier must despatch the cheque in good time such that the customer will receive the payment within 10 working days of issuing a customer’s final bill, or corrected final bill.”

Similarly, under Regulation 8 of the existing Electricity and Gas (Standards of Performance) (Suppliers) Regulations 2015,⁴ a supplier is required to make an additional standard payment if they fail to make the original standard payment within ten working days of a failure to meet a Guaranteed Standard. When making a standard payment by cheque, we would consider that the payment should be made so that under usual circumstances the customer would receive the cheque within 10 working days in order to avoid the requirement to make an additional standard payment.

Resolution of erroneous transfers

In our Way Forward document, we state our expectation is that Regulation 6A, 6B and 6C should work in conjunction to ensure that erroneous switches are effectively resolved.

Some respondents noted that under the procedure set out for change of supply in the Erroneous Transfer Customer Charter within MRA and SPA, return of supply to a customer is expected within 21 *calendar* days rather than working days. A number of respondents suggested changing the wording of Regulation 6C to reflect calendar days rather than working days.

We consider that 21 working days is an appropriate standard for resolving an erroneous switch. This maintains the same standard for suppliers to process erroneous switches regardless of whether notification occurs around weekends or non-working days. However, if suppliers feel that they are able to return a customer’s supply within 21 calendar days to maintain alignment with industry codes, this would result in a better outcome for the customer.

In practice, this means that we would expect complete resolution of the erroneous switch to take no longer than 41 working days in total; 20 working days to agree whether the switch is erroneous and 21 working days to restore the customer to their correct supplier.

Providing compensation where a supplier does not have a customer relationship

A number of respondents noted that they would find it difficult to provide compensation to a customer for whom they have no relationship at a particular premises. We consider that

⁴ See Regulation 8 of the Electricity and Gas (Standards of Performance) (Suppliers) Regulations 2015 at <http://www.legislation.gov.uk/uksi/2015/1544/regulation/8/made>.

in most cases a supplier would have the opportunity to obtain a customer's details (for example from the counterparty supplier, or address details from existing industry data) in a manner which allows them to be compliant with data protection legislation, and they should make every effort to do so. We note in our Way Forward document that where no customer relationship exists "...we expect that a supplier would make reasonable endeavours to make a payment".⁵ We will monitor compliance with this and other Regulations through our existing compliance processes.

Customer notice of investigation of erroneous transfers via the "20 working day letter"

Some respondents asked whether it was necessary to provide the "20 working day letter" in a hard copy format.

Regulation 6A requires a supplier to provide written confirmation that a customer will be returned to their supplier (the "20 working day letter"), or a written statement otherwise confirming the outcome of investigations made carried out by the old or new supplier. This confirmation must be delivered to the customer in a written form that can be recovered and reproduced by the customer. With the customer's consent, email confirmation to the customer would suffice to meet this requirement.

We have provided further clarification in Regulation 9 that this applies to the documentation provided to the customer in the case of either outcome of the supplier investigation following the original notification of a potential erroneous switch by the customer. This will either be a written confirmation of an erroneous switch or a written statement detailing the outcome of the investigation.

Definition of 'customer' under Regulation 6D

One respondent noted that the definition of 'customer' was undefined with regard to Regulation 6D. For the purposes of this Regulation, we would regard this as being a customer who has an outstanding credit balance with a supplier (the 'old' supplier) following a switch to another supplier. We do not consider it necessary to produce a further or separate definition of 'customer' for the purposes of this Regulation.

Definition of Last Resort Supply Direction

In the revised Statutory Instrument, we have amended references to the Supplier of Last Resort process to refer to a "last resort supply direction", and also amended the relevant definition. This aligns the wording of the Statutory Instrument with language used in electricity and gas supply licence conditions.

Using reporting to ensure compliance

Some respondents noted the importance of ensuring that all market participants are acting in good faith with regard to making payments under these Guaranteed Standards.

It is our intention to collect reporting data on supplier performance against these Guaranteed Standards. We will use this performance data to ensure that the Guaranteed Standards are being effectively implemented and will take enforcement action against suppliers who fail to do so. Suppliers should hold data on payments made against each of these standards in preparation for these requirements.

⁵ See "Way Forward on the introduction of Supplier Guaranteed Standards of Performance for Switching, and consultation on a Statutory Instrument to bring them into force", 23 November 2018, at https://www.ofgem.gov.uk/system/files/docs/2018/12/way_forward_on_supplier_guaranteed_standards_or_switc_hing_and_si_consultation_on_a_statutory_instrument_toBring_them_into_force.pdf, p37