

## **Closure of investigation under the Competition Act 1998 (“CA 98”)**

The Gas and Electricity Markets Authority (the “Authority”) has decided to close its investigation under CA 98 into the behaviour of two trade association bodies and certain suppliers on the grounds of administrative priority.

The trade association bodies were the Energy Retail Association (“ERA”) and the Association of Energy Suppliers (“AES”), whilst the suppliers were British Gas, EDF Energy, E.On, RWE Npower, Scottish and Southern Energy and Scottish Power (jointly referred to as the “Parties”)<sup>1</sup>.

The purpose of the Authority’s investigation, which was opened in 2011, was to determine whether in the period since 1 January 2005 the Parties had prevented or restricted third party intermediaries (“TPI”s) from engaging in face to face marketing in breach of Chapter I of CA 98,<sup>2</sup> including through the Code of Practice on the Face to Face Marketing of Energy Supply, more commonly known as the EnergySure Code (the “Code”). The AES (a subsidiary of the ERA) is responsible for the management of the Code, whilst the other Parties were signatories to the Code.<sup>3</sup> “TPI” in this context refers to non-exclusive agents acting for more than one supplier, as compared to exclusive or sole agents.

Over the course of the investigation, the Authority gathered information and documents using its powers under section 26 of CA 98 from the Parties and from certain TPIs which had sought to engage in face to face marketing. The Authority in particular considered certain provisions of the Code and the Parties’ reasons for including those provisions. We also considered the manner in which the Parties had engaged with TPIs seeking to engage in face to face marketing of energy supply.

At this stage, and on the basis of the evidence gathered to date, the Authority notes that it is not in a position to make a conclusive finding on whether or not there has been a breach of CA 98. Furthermore, the Authority considers that its resources would likely be better devoted to further work on the regulatory environment applicable to TPIs seeking to engage in face-to-face marketing of energy supply, rather than continuing with this investigation. For the avoidance of doubt, it should not be assumed that there has been a breach of CA 98 from the fact that the Authority has investigated using its powers under CA 98.

In the light of these factors, the Authority has therefore decided that it is appropriate to close this investigation on the grounds of administrative priority. In determining whether to continue with its investigation, the Authority has applied the criteria set out in its Enforcement Guidelines<sup>4</sup> and considered all relevant issues. In particular, we have

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<sup>1</sup> And the subsidiary companies of these holding a supply licence and to whom the Authority issued notices pursuant to s26 of the CA 98.

<sup>2</sup> and / or Article 101 of the Treaty on the Functioning of the European Union.

<sup>3</sup> Scottish and Southern Energy and Scottish Power have ceased to be signatories of the Code.

<sup>4</sup> See Chapter 3 of Ofgem’s *Enforcement Guidelines on Complaints and Investigations*:

<http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/Enforcement%20guidelines%202012.pdf>

considered the likely resources required to investigate the matter further and the availability of other actions to address the issues at hand.

The Authority has previously noted the important role which TPIs have to play in a market which functions well for consumers, including in its Retail Market Review proposals. It therefore appears to be more appropriate to proceed with this work rather than continue the investigation. In this regard, the Authority has today published a consultation on issues and options for TPIs more widely. The Authority also notes that the Code has recently been amended to clarify that it does not extend to and preclude the activities of TPIs.

The Authority wishes to take this opportunity to remind the participants in energy markets of the importance of proper competition law compliance. The Authority recommends that, in the first instance, participants consult the range of material which is available on the Office of Fair Trading's (OFT) website.<sup>5</sup> The Authority continues to work collaboratively with the OFT on competition law matters, and notes the assistance which the OFT provided on this case.

It should be noted that closing an investigation at this stage and in such a manner would not preclude the Authority from re-opening the investigation in the future should circumstances arise which would justify such action. We will continue to monitor the operation of the market and take any action as appropriate.

28 June 2013

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<sup>5</sup> <http://www.offt.gov.uk/>