

Neil Barnes
Ofgem
9 Millbank
London
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Dear Mr Barnes,

Regulation of marketing to domestic customers

Consumer Focus welcomes the opportunity to respond to the issues raised in this open letter. This response is non-confidential and we are happy for it to be published on the Ofgem website.

General comments

In February 2008 our predecessor organisation energywatch recommended that the license condition in relation to marketing to domestic customers should be retained. This was based on evidence of continuing cases of mis-selling by energy companies and serious doubts about the effectiveness of the EnergySure Code. We were therefore pleased that Ofgem resolved to keep standard license condition 25 in place until March 2009.

Consumer Focus, and its predecessor energywatch, have seen little evidence in the last year (2008/9) that the energy industry is capable of satisfactorily self regulating in relation to marketing and mis-selling. Therefore we would strongly recommend that Ofgem retains the current license condition on marketing until 2011 at the very minimum. However given the evidence presented in the Ofgem Energy Supply probe¹, Consumer Focus is keen to see an improved and strengthened licence condition brought into force before 2011.

The issue of marketing and mis-selling by energy companies has also recently been subject to strong comments in the government's response to a recent select committee report² on energy policy. Commenting upon the future of direct selling the government noted that:

"unless this sector gets its act together, it is "supping at the last chance saloon" during the next 18 months"

¹ <http://www.ofgem.gov.uk/MARKETS/RETMKTS/ENSUPPRO/Documents1/Energy%20Supply%20Probe%20-%20Initial%20Findings%20Report.pdf>

² Business and Enterprise select committee, Select Committee Announcement 11th March 2009

Furthermore Consumer Focus has recently been contacted by the Trading Standards Institute (TSI) expressing the concerns that they and many of their local authority colleagues have about door step selling of energy supply and the potential need for a challenge from the TSI to current practices.

Consumer contacts on direct marketing

We are pleased to see that Ofgem have highlighted the most recent instances on mis-selling including the Npower investigation which resulted on a £1.8 million fine in January 2009. Recent data from energywatch and Consumer Direct also highlights a number of complaints and concerns relating to mis-selling over the last year (2008/9)³:

- In the last 12 months, 3,223 marketing cases were received by energywatch and Consumer Direct across the energy suppliers. energywatch received 1,994 cases during its last eight months of operation, while Consumer Direct has handled 1,229 contacts since taking over responsibility for this function.
- In July 2008 (the last month energywatch published statistics) there were 40 marketing cases per 100,000 customers across the industry.

In the light of this evidence of continued problems surrounding mis-selling, we would conclude that the energy industry is still failing to self regulate sufficiently and the licence condition is clearly very much still required to regulate marketing and to provide adequate protection for consumers.

The EnergySure Code

In our response to Ofgem's open letter consultation of 22nd February 2008 on the regulation of marketing to domestic consumers, energywatch raised significant concerns about the effectiveness of the Energysure Code. In this response energywatch called for published evidence as to the effectiveness of the Energysure Code in helping the industry self regulate. We would ask again to see evidence that the Energysure Code is indeed effective and is providing consumers with adequate protection.

Whilst the EnergySure code of practice is fairly comprehensive, Consumer Focus believes that the Code needs to be equal to or stronger than the regulatory protections. In our February 2009 response to the Office of Fair Trading consultation⁴ on proposals to accredit the EnergySure Code of Practice Consumer Focus recommended that the following conditions would need to be added **as a bare minimum** to the EnergySure Code to enable it to become an effective tool to prevent mis-selling:

³ More detailed data attached to this consultation as appendix 2

⁴ Full consultation response attached as appendix 1 to this document

1. A requirement for suppliers to provide written like for like comparative information to consumers based on annual usage, when undertaking doorstep or telephone selling. The evidence in Ofgem's probe document concluded that a large percentage of those consumers who do switch end up on higher tariffs. The Code must ensure that consumers are not misled.
2. Materials left with the consumer following a face to face sale should include the recommendation to the consumer to check that the product is right for them and a telephone number to contact for independent advice if the consumer has concerns;
3. Ensuring agents comply with customer requests to privacy from cold calling.

Consumer Focus also has concerns about the transparency of the administration of the Energysure Code (see Appendix 1).

The Ofgem probe

Consumer Focus welcomes the proposals within the recent Ofgem probe to strengthen the licensing conditions covering marketing to domestic consumers. We will welcome the chance to comment in more detail on Ofgem's future proposals. However we are keen to raise a few points for consideration now:

- energywatch's previous response to Ofgem's consultation into the regulation of marketing to domestic customers highlighted substantial concerns about telephone and website marketing as well as door step marketing. These two forms of marketing are growing and Consumer Focus believes that it is essential for Ofgem to focus on these two marketing and sales channels in any future proposals to strengthen the marketing licence condition.
- Consumer Focus agrees that whilst the Consumer Protection from Unfair Trading Regulations are a useful tool, however, they are still to be established and the lack of ability to impose a financial penalty is a weakness. We do not believe that the CPRs are sufficient on their own to regulate marketing to domestic consumers within the energy market.
- We are also very keen for Ofgem to produce the promised guidance on the application of the CPRs to the energy sector. energywatch wrote of Ofgem in March 2008 proposing a joint piece of work as part of the transition to the new arrangements for consumer redress and representation. Ofgem would draft guidance on the application of the CPRs, with energywatch to provide this information in a format suitable for use by all the Consumer Voice bodies including Consumer Direct and the Energy Ombudsman. This would help ensure that all of the Consumer Voice bodies provided consistent information and advice to energy consumers. Consumer Focus has not yet received the promised guidance from Ofgem.

Going forward

Consumer Focus will continue to keep issues of mis-selling through all sales channels under review by monitoring data from Consumer Direct and our Extra Help Unit.

Conclusions

Consumer Focus agrees that the current marketing licence condition should be maintained until March 2011. We are also anticipating that Ofgem will be shortly be consulting on a strengthened licence condition, as part of remedies proposed in the probe.

If you have any questions about the issues raised in the letter please do not hesitate to contact me on 0207 799 7961.

Yours sincerely



Audrey Gallacher
Head of Company Performance and Consumer Experience
Consumer Focus

Appendix 1: Consumer Focus Response to OFT on the proposal to accredit the EnergySure Code of Practice for the Face-to-Face Marketing of Energy Supply

Summary

The EnergySure code of Practice for the Face-to-Face Marketing of Energy Supply is fairly comprehensive and unambiguous and therefore meets some of Consumer Focus's requirements on mis-selling that we have previously set out.⁵

Consumer Focus shares the Energy Retail Association (ERA) objective of ensuring that the code is an effective consumer protection tool that seeks not only to police but indeed to proactively improve marketing policy and practice. But before accreditation Consumer Focus believes the OFT should require the introduction of further conditions in the code which would then ensure it is an effective tool to prevent mis-selling:

1. A requirement for suppliers to provide written like-for-like comparative information to consumers based on annual usage, when undertaking doorstep or telephone selling. The evidence Ofgem has discovered indicates a large percentage of those who do switch end up on higher tariffs.⁶ The code must prevent this.
2. Materials left with the customer following a face to face sale should include the recommendation to the customer to check that the product is right for them and a telephone number to contact for independent advice if the customer has concerns;
3. Ensuring agents comply with customer requests to privacy from cold calling.

The current Ofgem Probe into the energy sector is likely to result in a strengthening of the existing licensing condition on marketing. For the code to serve any purpose at all, it must be at least equal to the regulatory provisions and preferably stronger. **Therefore, without the above clauses added as a bare minimum we would not recommend accreditation at this time.**

⁵ Consumer Focus, Response to Ofgem energy supply market probe – initial findings report consultation, December 2008, p12.

<http://www.ofgem.gov.uk/Markets/RetMkts/ensuppro/Documents1/Response%20from%20Consumer%20Focus%20Response%20to%20Energy%20Supply%20Probe%20-%20Initial%20Findings%20Report.pdf>

Energywatch submission, Ofgem energy supply markets investigation, p.9, April 2008.

http://collections.europarchive.org/tna/20080922203044/http://www.energywatch.org.uk/uploads/Ofgem_energy_supply_markets_investigation_30_April.pdf

Energywatch's Assessment of the ERA's Billing code and AES code, Confidential Briefing, November 2006

⁶ Ofgem energy supply market probe – initial findings report, October 2008, p.7.

An additional concern is on the resources given to monitoring compliance of the code, without which the code will never achieve its stated goals. Sadly, recent evidence persuades us that the code has so far failed to afford the desired level of protection from mis-selling. Npower was fined at the end of 2008 by the regulator Ofgem for breaches to the license condition on mis-selling. However, the case only came to light due to a media investigation by *the Times* and a complaint by our predecessor organisation energywatch. Furthermore, when energywatch tried to work through the code to prevent aggressive sales techniques, we found the code's structure to be an unwieldy and unhelpful tool (see Annex 1). These examples clearly show that monitoring and compliance mechanisms have so far been insufficient.

Consumer Focus recommends that **the OFT insist on more pro-active enforcement before accreditation**. Namely to strengthen the enforcement provisions in the code we recommend the following:

- Ensure conditions for monitoring translate into more rigorous action than hitherto;
- Faster action against any company for a potential breach with a lower evidence threshold to launch an investigation than is currently the case;
- Harsher punishment for breaches including widening the scope of compensation for consumers who suffer from breaches to the code.

Detailed Response

1. Compliance

The compliance conditions, set out under point 12 of the code, provide a sound framework, if rigorously applied, to prevent and detect mis-selling. We particularly welcome the specific measures on both the monitoring and compliance structures that are vital to ensuring the code's future success. However, no matter how comprehensive a code is in written form, it is the implementation that is key and Consumer Focus is concerned by the quality of monitoring arrangements that are currently in place. For the reasons set out below we feel that the code has not worked in the past to address consumer detriment and this needs concerted action before OFT accreditation.

The first cause for concern derives from a recent breach by NPower, not just of the code, but also of the license condition on mis-selling. After an Ofgem investigation, NPower was fined £1.8 million for insufficient internal management processes to prevent, detect or discipline staff for mis-selling.⁷ After Ofgem's ruling it is critical to reflect on the code's performance preventing mis-selling. The only conclusion possible after the breach by, and fine of, NPower, is that there were weak processes to enforce code compliance since it was *the Times* and energywatch's complaint (one of Consumer Focus' predecessors), not the code, that reported NPower. This is despite the fact that it was a flagrant breach over a prolonged period of time.

⁷ Ofgem decision on standard license condition 25 against NPower RWE, December 2008

Nor is this the only example of the code failing to enforce its monitoring and compliance structures. energywatch previously worked with the AES code manager to eliminate the aggressive sales practices by agents that the code explicitly prohibits. Annex 2 sets out the chronology where we were repeatedly frustrated by the clauses of confidentiality and the high threshold of evidence required to launch an investigation.

In short, energywatch's experience with the code leaves us in doubt about how well the enforcement mechanisms can prevent, detect or bring to book energy companies for breaches to the code without radical changes to the provisions for enforcement. Consumer Focus believes the OFT should be aware of these past failings and investigate, as part of the accreditation process, how future breaches would indeed be picked up by the revised code. Specifically, there needs to be further elaboration from ERA of proactive and creative strategies on enforcement before awarding accreditation.

2. Definition of mis-selling

The rules on energy mis-selling were produced in 2003 in response to unacceptable approaches by sales agents to market their product. However, recent evidence suggests the nature of mis-selling may have changed into more subtle versions of consumer manipulation, with agents promoting their product with only partial information that conceals the full cost of the product. Ofgem recognises that problems have moved beyond the framework of the existing license condition. The current Ofgem probe, launched to assess the functioning of the energy market, (chapter 2.13) states:

*"the situation is now more complex with some customers switching to more expensive suppliers on the basis of incomplete or misleading information not covered by the existing marketing license."*⁸

Ofgem's research indicates that as many as one third of switchers do not achieve a price reduction.⁹ This increases to 45 per cent for prepayment consumers and to 42 and 48 per cent for gas and electricity consumers who switch as a result of a direct sales approach. We believe this is in part due to consumers being provided with inaccurate or incomplete information at the point of sale. The code must be a tool to prevent or capture the changing nature of mis-selling in the energy market.

Therefore, we welcome the unambiguous statements in the code, especially 6.2.3, 7.8.2. and 9.3. We hope that the enforcement mechanisms will hold members of the code to account on this phrasing. But following concern already expressed about enforcement of even blatant breaches, we believe that extra provisions are needed to allow the code to tackle this growing problem. These are set out below.

3. Extending protection for consumers by stipulating transparent comparative price information

The code needs to do more than simply stipulate certain prohibited behaviours. From the evidence above it is clear canny operators can work round regulations to manipulate or confuse consumers. Instead, the

⁸ Ofgem energy supply market probe – initial findings report, October 2008, p.21

⁹ Ofgem energy supply market probe, p7.

code should clarify the exact procedure required when sales approaches are made to remove any hint of impropriety. Consequently, as an addition to the code, we would like a requirement for sales agents to provide written like-for-like comparative information of energy products, against current use and current price, when undertaking doorstep and telephone selling. Such a comparison should be based on annual usage as the clearest method most readily understood by consumers. This information should be left with customers so that agents can be held accountable for the claims they make about their products.

Ofgem already recognises that there is an incentive for sales agents to sell inappropriately, and that this temptation has led to mis-selling at various points. The code should be the mechanism to prevent such behaviour and adding this clause would allow it to operate as such.

4. Provision of materials to aid consumers in assessing deals

Materials left with the customer following a face to face sale should include the recommendation to the customer to check that the product is right for them and a telephone number to contact for independent advice if the customer has concerns. For certain customers, it may be difficult to say no to persuasive agents. They should have the means to go away and reflect on the merits of swapping supplier. This provision will aid them in doing so. Suppliers are already subject to a licence requirement to put Consumer Direct's telephone number on the back of bills/statements so this condition should be easy to administer.

5. Ensuring consumers' right to privacy is respected

Our predecessor, energywatch, had an on-going campaign to encourage suppliers to use the code as a mechanism to ensure agents respected consumers' rights to privacy if they had indicated they did not wish to receive cold calling sales approaches (the details of this issue can be found in Annex 3). Consumer Focus would like to take this opportunity to renew the call to respect consumers' right to privacy. To enforce this right, new clauses should be added to the code prohibiting approaches to those households who have asked not to be contacted. This is necessary because four of the six ERA members have stated that their current policy is to ignore 'no cold callers' signage.

6. Enforcement through compensation

The ERA needs to strengthen the penalties for breaches to the code. Consumer Focus believes using financial penalties is a proven tool to prevent bad practices within the sector. energywatch lobbied Ofgem successfully on compensation being a mandatory punishment for 'mis-selling' using forged signatures as part of the 'Stop Now' campaign (Virgin Energy, 2002) where £250 was awarded as compensation for those households whose signatures were forged. This proved a successful deterrent against such unscrupulous practices and serves as a model to be used more broadly to 'incentivise' energy companies to prevent illicit practices by their staff.

Therefore, fines that are used to compensate affected consumers should apply for all breaches of the code including the concerns we have made in this response on cold-calling and mis-selling. This would give the code real teeth in contrast to the evidence of past weaknesses.

Annex 1 - Summary of OFGEM Penalty on NPower, December 2008
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Ofgem found there were insufficient internal management processes to prevent, detect or discipline breaches of the mis-selling licensing conditions. In its judgement, Ofgem made the following criticisms of NPower:

2.14 There was no dedicated number or separate process for mis-selling even after the complaint was picked up

2.15 The code of Practice stipulates specific guidelines for discipline.

2.19 Despite this at hearings there was a failure to sanction staff sufficiently as the power rested with the line manager and was therefore insufficiently impartial.

2.22 No pro-active management, with too narrow an interpretation of mis-selling

4.4 Too demanding an evidence basis to trigger any action

4.7 NPower “failed in its management of administrative systems” allowing mis-selling to go on unchecked

Annex 2 - Correspondence between energywatch and the AES Code Manager over aggressive doorstep selling practices.

May-November 2005: Starting in May 2005, energywatch experienced an upsurge in contacts from consumers, police departments, Trading Standards and other stakeholder organisations complaining about the selling practices of SSE’s sales agents. Many of the consumers were calling to complain about the intimidating behaviour of these agents.

energywatch attempted to work with SSE over the following months in order to bring this sales practice to an end. Whilst there was some improvement in the number of consumer contacts received, energywatch did not have sufficient confidence in SSE’s commitment. In October energywatch worked with BBC Watchdog which aired an expose into the practices used by sales agents working on behalf of SSE. energywatch subsequently referred SSE to Ofgem for a potential breach of the Marketing Licence Condition. Ofgem’s investigation ended in May 2006.

September 2005: energywatch attempted to engage the AES code Manager in Autumn 2005 to discuss whether action could be taken, which including forwarding copies of highly inappropriate job advertisements placed by an agent (Universal Energy) working on behalf of SSE. The code Manager was reluctant to engage with us, which was extremely surprising as we had been told by another supplier that they had made representations and submitted evidence to the AES about the behaviour of SSE’s agents.

Spring 2006: The AES Annual Report for 2005 stated that there were a number of areas where compliance had fallen short of the required standards, which were investigated and resolved. No companies were named and no details were provided as to what actions the supplier had to take.

May 2006: energywatch understands from Ofgem that the Chair of the AES code (Duncan Sedgewick) refused to supply the regulator with detailed information in Spring 2006 about the specific actions taken against SSE and furthermore, requested that even this limited amount of information be kept confidential. energywatch believes that the Terms of Reference and Articles for the AES code are presently drafted in such a manner as to prevent a thorough investigation into the actions of a particular supplier from being carried out. Furthermore, the details or results of any investigation cannot apparently be shared (even in confidence) with either the regulator or the consumer watchdog!

Annex 3 - energywatch correspondence over the right to privacy

25 August 2006 – Letter sent to ERA urging members to develop an industry-wide consensus ensuring that any consumer who had posted a sign requesting no unsolicited doorstep sales calls will have their right to privacy is respected. energywatch had attempted to negotiate individually with the six ERA members but received assurances from only two members. energywatch also urged the ERA to update the AES code when it is next reviewed.

12 October 2006 – Response received from the ERA stating that they “do not anticipate changing the code and widening it beyond the already significant good service practice which it embodies.” Our request that the ERA attempt to negotiate an industry-wide consensus on this issue was not addressed.

27 October 2006 – energywatch meets with the ERA to discuss issues raised in letter. The ERA agrees to discuss issue further with its members in the hopes of securing a voluntary agreement but will not make any changes to the AES code. It is fair to say that the ERA did not hold out much hope for reaching an agreement with its members.

Appendix 2: Total industry marketing complaints Feb 2008 - Jan 2009

(1) Domestic marketing cases received by energywatch Feb 2008 - Sept 2008

	Feb 08	Mar 08	Apr 08	May 08	Jun 08	Jul 08	Aug 08	Sept 08	Total
Total cases received	257	289	316	315	255	275	151	136	1,994

(2) Domestic marketing cases received by Consumer Direct Oct 2008 - Jan 2009

Marketing complaint code	Oct 08	Nov 08	Dec 08	Jan 09	Total
Suspected forged signature	5	5	4	7	21
Inappropriate staff behaviour	96	105	68	81	350
Misrepresentation	191	215	178	181	765
Consumer agreed only to receive information	23	25	15	20	83
Signatory not responsible for account	3	3	1	3	10
Total cases received	318	353	266	292	1,229

(3) Total Cases Feb 2008 – Jan 2009

Total energywatch Cases (Feb 08 – Sept 08)	1,994
Total Consumer Direct Cases (Oct 08 – Jan 09)	1,229
Grand Total	3,223