



To: non-domestic consumers and representative groups, third party intermediaries and their trade bodies, suppliers, government bodies and other interested parties

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

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Date: 4 February 2013

## **Consultation: GEMA gaining enforcement powers under The Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276)**

### **Background and Summary**

The purpose of this letter is to consult on the Gas and Electricity Markets Authority (GEMA) gaining certain enforcement powers under the Business Protection from Misleading Marketing Regulations 2008<sup>1</sup> (BPRs) and to seek views on the possible impact.

GEMA is the independent regulator for gas and electricity markets in Great Britain. Its principal objective is to protect the interests of existing and future gas and electricity consumers. The Office of the Gas and Electricity Markets Authority (Ofgem) supports the work of GEMA in its day to day work (the terms 'Ofgem' and 'GEMA' are used interchangeably in this consultation). We are seeking powers to be able to apply for injunctions to ensure businesses comply with certain provisions in the Business Protection from Misleading Marketing Regulations 2008. This will enable Ofgem to address situations where brokers (also known as third party intermediaries (TPIs)) mis-sell to business customers by marketing energy contracts in a misleading way. GEMA does not currently have statutory powers to address these practices by TPIs. Under current arrangements these powers can be exercised by the Office of Fair Trading (OFT), Trading Standards and the Northern Ireland Department of Trade, Enterprise & Investment (NIDETI). These organisations have an economy-wide remit and prioritise issues accordingly. The specific issue of TPI mis-selling in the business energy market have not been a priority for these organisations.

In our 'Retail Market Review: non-domestic proposals', October 2011<sup>2</sup> (RMR), we consulted on measures aimed at ensuring to protect businesses better in the energy market. These included a proposal to better protect businesses against mis-selling by TPIs through gaining and using BPR powers. In response to this consultation, we received support from a number of suppliers and business representative organisations including the British Chambers of Commerce, the Forum of Private Business and the Association of Convenience Stores. One supplier did not support the proposal and another supplier noted that we are also looking at other approaches to address the issue through the accreditation of codes of

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<sup>1</sup> [http://www.legislation.gov.uk/ukdsi/2008/9780110811475/pdfs/ukdsi\\_9780110811475\\_en.pdf](http://www.legislation.gov.uk/ukdsi/2008/9780110811475/pdfs/ukdsi_9780110811475_en.pdf)

<sup>2</sup> [http://www.ofgem.gov.uk/MARKETS/RETMKTS/RMR/Documents1/RMR\\_non-domestic%20proposals\\_consultation.pdf](http://www.ofgem.gov.uk/MARKETS/RETMKTS/RMR/Documents1/RMR_non-domestic%20proposals_consultation.pdf)

practice. Given the level of support for the proposal we are pursuing our case to gain these powers.

We have now published our 'Retail Market Review: updated proposals for businesses', October 2012<sup>3</sup>, which confirms our intention to seek powers under the BPRs and we have continued to receive support in responses received to this consultation.

In its discussion document, 'Ensuring a Better Deal for Energy Consumers', November 2012<sup>4</sup>, DECC notes the importance of TPIs in the business energy market but that misleading practices can leave businesses on a worse deal. DECC also notes that the importance of TPIs more widely as an interface with business customers and the energy companies is likely to grow, given the introduction of smart meters and grids and an increased focus on energy efficiency. DECC is seeking views on whether a more formal regulatory approach across the market is needed. At this stage, and given our existing powers under the Enterprise Act 2002 to enforce the Consumer Protection from Unfair Trading Regulations 2008, we believe our gaining BPR powers is consistent with the approach outlined by DECC.

This letter sets out our reasons for seeking the powers to enforce the BPRs overall, including the current regulatory framework, the specific powers we are seeking and evidence of consumer detriment. It seeks views on our case, in particular, any further evidence of the impact of this change.

## **Regulatory framework and current enforcement powers**

Any undertaking wanting to supply gas or electricity has to be licensed by Ofgem. In addition to complying with licence conditions, regulated persons are also required to comply with all other relevant legislation. This includes the Consumer Protection from Unfair Trading Regulations, 2008 (CPRs). These protect domestic consumers by prohibiting unfair commercial practices such as misleading or aggressive marketing. Ofgem has the power to seek undertakings or an injunction to enforce certain provision of the CPRs.

However, Ofgem does not have power to enforce the roughly equivalent regulations which protect business customers. This protection comes from the Business Protection from Misleading Marketing Regulations 2008. These prohibit misleading advertising (which is broadly defined) to businesses and set the conditions under which comparative advertising is permitted. This aspect of the BPRs is relevant to the selling of energy contracts where a TPI compares a business customer's current charges with those of prospective new suppliers.

The power to enforce the BPRs is currently held by the Office of Fair Trading, Trading Standards Officers and the Northern Ireland Department of Enterprise Trade and Investment. The Department for Business Innovation and Skills (BIS) is the Government Department with policy responsibility for the legislation.

Our 'Retail Market Review: Updated Proposals for Business', October 2012, put forward the case for developing a single code of practice for TPIs, either accredited by, or potentially run by Ofgem. Currently more than one industry code has been developed in the TPI market. We see the development of an accredited code of practice by the industry as a key way of addressing TPI behaviour. We consider gaining BPR powers complement this, and criteria for accreditation would both take into account and dovetail with the requirements of the BPRs.

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<sup>3</sup> <http://www.ofgem.gov.uk/MARKETS/RETMKTS/RMR/Documents1/The%20Retail%20Market%20Review%20-%20Updated%20proposals%20for%20businesses.pdf>

<sup>4</sup> [http://www.decc.gov.uk/en/content/cms/consultations/better\\_deal/better\\_deal.aspx](http://www.decc.gov.uk/en/content/cms/consultations/better_deal/better_deal.aspx)

## Evidence of detriment to business customers

### *Research and Insight*

Business customers' spending on energy varies according to the business size and type of activity but data from research for our RMR shows that, for example, over a third of small businesses and around 80% of medium-sized businesses spend over £5,000 a year on electricity<sup>5</sup>. TPIs help many business customers successfully engage in the market with over half of major energy users and several hundred thousand SMEs (around 15 per cent) using them<sup>6</sup>. Many suppliers contract with new customers primarily through TPIs. In their response to the RMR non-domestic proposals, February 2012, British Gas stated that they alone deal with over 200 TPIs in the business market. We are not aware of exact figures of TPIs active in the non-domestic market, but estimate it to be in the hundreds (and at least in excess of 200), on the basis of the number British Gas deal with. It should be noted that TPIs vary in size and type, covering sales agents for suppliers, brokers and consultants (although boundaries between these functions are not always strongly distinguishable).

There is consistent evidence, and it continues to emerge, of TPI practices which involve the alleged mis-selling of energy contracts. While affecting a minority of business customers these practices can lead to detriment, both financially and in terms of other resources, including the time it takes a business to try to sort out the issue. Consumer Focus' 'Watching the Middlemen' report, May 2011<sup>7</sup>, highlighted a range of issues and behaviours in the TPI market. In particular, it stated that businesses can be committed to contracts that are not best suited to their needs, because prices and terms offered by TPIs are not at competitive levels.

The report provided evidence from Consumer Direct where customers were led to believe by TPIs that they would be signing up to lower prices, but then finding they had been committed to higher costs (which may in some cases have been as a result of commission not previously disclosed). Unlike domestic consumer contracts where there is a cooling-off period for contracts agreed at a distance, business customers may not be able to easily cancel contracts. These customers then experience the time, inconvenience and distress of making a complaint and/or disputing the transfer of their supply, potentially by taking cases to the Ombudsman (in micro-business cases) or seeking independent legal advice. The report highlighted that, where contracts are concluded orally over the telephone, these issues can be exacerbated.

Examples were also provided in the report of complaints of mis-representation by TPIs where they had used official sounding names (ie indicating it did not have a commercial interest) or for an official sounding purpose such as having to register a meter, when they were actually intending to sell energy contracts.

The Federation of Small Businesses (FSB) highlighted issues around its members' knowledge and ability to engage in the energy market through its 'Small Business and Infrastructure Survey: Energy', 2011<sup>8</sup>. It stated that 18 per cent of small businesses were concerned about their limited knowledge of the energy options open to their business, and the same number were also concerned about their limited knowledge and understanding of their energy contracts.

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<sup>5</sup> Accent, 2012

<http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/Non-Domestic%20SOC%20report.pdf>

<sup>6</sup> Data from Datamonitor's 2012 B2B Energy Consumer Survey, for electricity and gas combined. Major energy users spend more than £50,000 per year on energy. In this survey SMEs are defined as spending less than £50,000.

<sup>7</sup> <http://www.consumerfocus.org.uk/files/2011/03/Watching-the-middlemen.pdf>

<sup>8</sup> <http://www.fsb.org.uk/policy/assets/fsb0723%20infrastructure%20energy.pdf>

Our research evidence for the RMR shows many small businesses share the same characteristics as domestic consumers (for example, in terms of resources and awareness) and they are often no better placed than domestic consumers to protect themselves from poor behaviour in the market. The research also shows consumers are concerned about the effects of a range of TPI behaviour.

Our quantitative research showed TPIs were generally seen as a positive presence in the market, but 14 per cent of businesses across all sizes who used a broker when considering a switch of electricity supplier and 17 per cent when considering a new gas supplier were dissatisfied with them<sup>9</sup>. This was mainly due to perceived pressure and unprofessional behaviour. Given the number who use brokers, could indicate a large number of businesses may be dissatisfied with their treatment on this basis.

Evidence from qualitative research referenced in our RMR showed that a number of businesses were concerned about TPI behaviour. Some of the practices cited by businesses in the research<sup>10</sup> included pressurising customers into one-day-only deals; talking quickly and deliberately trying to confuse; contacting a supplier on a business's behalf without permission and, when responding to disputes, presenting incomplete recordings of conversations.

Comments in our research made by business customers on their views and experiences of TPIs, particularly related to cold calling, and included:

*'From my own experience, if any company phones up to say they'll give you cheaper electricity, but could you just tell us who your supplier is... the answer I'll give them is no. They get very irate at that. We only want to know who your supplier is, and I just say, I don't want to give them that information... I really think there should be some kind of control... I work with Supplier X is not the same as working for Supplier X' (micro business)*<sup>11</sup>

*'Brokers were felt to employ scare tactics to encourage commitment then and there 'If you don't sign up to this new deal now it will be gone and you will be stuck on a hugely inflated tariff' (Small business)*<sup>12</sup>

*'I've had the situation where a broker has phoned me pretending to be our own broker and that is really unethical. Or phoning to say that they are phoning on behalf of [our supplier] about our renewal so we got to the stage where they almost fooled us and now that's absolutely unethical' (large business)*<sup>13</sup>

### Complaint cases

From November 2011 to October 2012, data from the Citizens Advice consumer service shows 179 of the 422 contacts about alleged mis-selling received from businesses<sup>14</sup>

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<sup>9</sup> Accent, 2012

<http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/Quantitative%20Research%20into%20Non%20Domestic%20Customer%20Engagement%20and%20Experience%20of%20the%20Energy%20Market.pdf>

<sup>10</sup> Insight Exchange, 2012

<http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/Non-Domestic%20SOC%20report.pdf>

<sup>11</sup> ibid

<sup>12</sup> Harris, 2011

<http://www.ofgem.gov.uk/Pages/MoreInformation.aspx?docid=47&refer=Sustainability/Cp/CF>

<sup>13</sup> Opinion Leader, 2012

[http://www.ofgem.gov.uk/Markets/RETMKTS/RMR/Documents1/Ofgem\\_Non%20Doms%20Research.pdf](http://www.ofgem.gov.uk/Markets/RETMKTS/RMR/Documents1/Ofgem_Non%20Doms%20Research.pdf)

<sup>14</sup> These cases generally cover micro-business customers as these customers are included in requirements concerning the Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008

[http://www.legislation.gov.uk/uksi/2008/1898/pdfs/uksi\\_20081898\\_en.pdf](http://www.legislation.gov.uk/uksi/2008/1898/pdfs/uksi_20081898_en.pdf)

contained references to TPI behaviour. During the same period 73 (11 per cent) of the micro-business cases referred to Consumer Focus' Extra Help Unit (EHU) have been about TPIs. The EHU generally takes complaints of a more serious nature, for example, where disconnection is threatened. Often the initial complaint is not against a TPI but on talking to the business the EHU establishes that the problems may have arisen because of unacceptable TPI behaviour.

The Energy Ombudsman continues to receive cases involving mis-selling to micro-business customers. In the year from November 2011 to October 2012, the Ombudsman settled 55 SME mis-selling cases. An example of such a case is where a TPI did not properly explain the costs of a contract. The supplier was required to re-bill the account based on the costs discussed during the sales call.

While Ofgem does not have a direct role in dealing with complaints, we continue to receive contacts from business consumers raising similar concerns around TPI behaviour.

***Q. Do stakeholders have further evidence of the impacts of mis-selling by brokers on business customers?***

**The powers we seek**

In order to address the business detriment we have identified, Ofgem is seeking certain powers to be able to enforce the BPRs. These powers are consistent with existing powers we have in relation to the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

The additional powers would be gained by amending the BPRs to nominate Ofgem as an enforcement authority in respect of a limited range of the available enforcement provisions. Namely:

- Power to bring proceedings for an injunction for a breach (or likely breach) of regulations 3, 4 or 5 prohibiting misleading advertising, or the promotion of advertising which misleads traders, including non-compliant comparative advertising. (This power is contained in regulation 15 of the BPRs);
- Power to accept an undertaking for compliance with regulations 3, 4 or 5. (This power is contained in regulation 16 of the BPRs); and
- Power to request information for the purpose of determining whether to bring injunction proceedings. (This power is contained in regulation 21).

For the avoidance of doubt, Ofgem is seeking information gathering powers and the ability to apply to the Court for an injunction to secure compliance with the BPRs. We are not seeking powers to undertake criminal prosecutions for breaches of the BPRs. Additionally we are not seeking powers of entry or powers to make test purchases. This reflects the level of powers available to Ofgem under the Enterprise Act 2002 in respect of being able to enforce the CPRs and is the level we consider adequate to enable effective action to combat the relevant concerns about TPI behaviour.

***Q. Do you agree with the identified gap in Ofgem's powers?***

***Q. Do you agree the exercise of the powers we are seeking will help address the issues we have identified with TPIs?***

## Regulatory benefits and impacts

### *Benefit for businesses*

As described earlier, the evidence from our RMR indicates small businesses in particular display some similar characteristics and behaviours to domestic consumers in terms of their ability to engage in the market. Poor TPI practices and mis-selling of energy contracts can have a considerable impact both financially, in terms of contracts with higher costs and/or more generally on resources as a result of pursuing a complaint.

The power for Ofgem to seek formal assurances and, where necessary, injunctions will assist business customers by stopping offending TPIs from making misleading claims about prices or contract terms, or other elements of the services they are promoting. Ensuring that business customers are provided with information they are able to rely on should help them to make properly informed decisions. Increased trust and engagement in the market should lead to more effective and rational switching and contracting decisions by businesses.

More broadly, this could foster competition in the non-domestic supply market providing benefits for business customers at a time of rising prices, contributing to growth.

### *Impact on businesses*

Ofgem, in exercising these powers, would be seeking to ensure compliance with existing obligations, not adding to the regulatory burden on business. Providing Ofgem with powers to enforce the BPRs has no impact on the coverage of the Regulations and there is therefore no increased burden on business, which is already required to comply with the regime. There may be an increase in the likelihood of the use of these powers where breaches are identified. In exercising these powers we would determine whether to open a case in accordance with the existing procedures for cases, as set out in our Enforcement Guidelines<sup>15</sup>. While exercising these powers will add a burden to the non-compliant business, other compliant businesses in the sector are likely to benefit as a result, as it would help ensure they are operating on a level basis.

Additionally, in our RMR we have proposed the creation of a single code of practice for TPIs. The criteria for accreditation would both take into account, and dovetail with the requirements of the BPRs. Where a TPI makes a misleading claim regarding its membership of a code which amounts to a breach of the BPRs, it would be open to Ofgem to take action under the BPRs. Decisions whether to open an investigation are taken in line with the Enforcement Guidelines and would follow the procedures contained in them.

We are currently in the process of an Enforcement Review, looking at our enforcement policies and procedures across the range of our powers. Any resulting changes would be published in revised Enforcement Guidelines, and would take any new powers into account.

***Q. Do stakeholders have further evidence on the impact of Ofgem gaining BPR powers on TPIs, including details of the number of TPI firms operating in this market and their size and revenues.***

### *Costs to businesses*

The obligations currently exist and apply to TPIs and we therefore consider that gaining these powers would not put additional costs on TPIs overall provided they comply with BPR

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<sup>15</sup> <http://www.ofgem.gov.uk/About%20us/enforcement/Documents1/Enforcement%20guidelines%202012.pdf>



requirements. There may be an increase in the likelihood of the use of these powers where potential breaches are identified.

It may be the case that we gather information from compliant businesses or that there are cases where an injunction is sought but not granted by the Court, where costs could be incurred by these businesses. We do not have information on any costs which may be incurred in this way.

There may be an increase in the likelihood of the use of these powers where breaches are identified but any costs on non-complying businesses are likely to be more than offset by benefits to both their prospective customers and other compliant TPIs.

We have not been able to identify or quantify, any further costs on businesses through Ofgem gaining the proposed BPR powers at this stage.

***Q. Do stakeholders have further views on our assessment of the regulatory impacts of Ofgem gaining these powers in terms of costs to TPI firms of Ofgem taking action under powers requested?***

*Impact on other regulatory bodies and consumer protection 'landscape' changes*

To date, the OFT has not used the BPRs to take action against TPIs in the context of energy supply. In November 2010 we referred a number of complaints to the OFT who considered them under its published Prioritisation Principles<sup>16</sup>. The OFT decided not to prioritise an investigation given other competing priorities at that time and considered that others may be better placed to act. We have noted that the OFT's 'Strategic Assessment of Risks to UK Consumers and Markets' November, 2012<sup>17</sup> (covering priorities through to April 2014) does not contain specific work in this area, based on its Prioritisation Principles. The Government has proposed institutional changes under the Consumer Landscape review<sup>18</sup> which include proposals for a new Competition and Markets Authority (CMA) and the dissolution of the Office of Fair Trading. At this point it is not clear that the CMA would take cases such as these, but given its proposed remit and that the nature of these issues is directly related to business customer, consumer protection rather than competition, it would appear less, rather than more, likely that it would take them on.

Much of the OFT's national enforcement work is to be taken on by trading standards via the National Trading Standards Board (NTSB) covering England and Wales. The purpose of the NTSB is to provide for coordinated action across local authority boundaries on issues of wider and general importance. However, there is so far no indication that action in respect of TPIs would necessarily be given priority over other issues causing high levels of detriment to consumers.

Ofgem, as sectoral regulator, has expertise in the energy market and is able to draw on market knowledge and intelligence, together with its overall experience and expertise in enforcement.

The BPRs currently provide the OFT with a co-ordinating function and we would liaise with the OFT, or the body which will take on this role, to ensure there are no overlapping investigations. We would expect to review this approach once changes to the OFT have taken place.

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<sup>16</sup> [http://www.ofg.gov.uk/shared\\_ofg/about\\_ofg/ofg953.pdf](http://www.ofg.gov.uk/shared_ofg/about_ofg/ofg953.pdf)

<sup>17</sup> [http://www.ofg.gov.uk/shared\\_ofg/about\\_ofg/annual-plan-13/ofg1463.pdf](http://www.ofg.gov.uk/shared_ofg/about_ofg/annual-plan-13/ofg1463.pdf)

<sup>18</sup> <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/12-510-empowering-protecting-consumers-government-response.pdf>

There are a range of coordinating mechanisms currently in existence which are used successfully where concurrent powers exist. We would liaise on any future action in this area with OFT, or the body with its current coordinating functions, the CMA once established and Trading Standards. In particular, we would expect to use the Consumer Concurrencies Group<sup>19</sup>, as well as other strategic groups where appropriate, to ensure this coordination.

### *Impact on the Court*

We are seeking powers to bring proceedings for an injunction for a breach or likely breach. This has the potential to increase the number of cases taken to the Court. While we are able to identify the impacts of potential breaches, we do not know the numbers of breaches or those which would require an injunction. Additionally, our understanding of the number of TPI businesses which operate in the business energy sector is limited.

### ***Q. Do stakeholders have further information on the expected impact on the Court of Ofgem gaining these powers?***

### **Next steps**

Ofgem would like to hear from interested parties in relation to any of the issues set out in this letter. We are particularly interested in receiving any further information in relation to the costs and benefits, and the nature of any such costs and benefits, in relation to this proposal. We especially welcome responses to the specific questions set out below. Unless marked confidential all responses will be published. Respondents who wish to have their responses remain confidential should clearly mark their response to that effect and include the reasons for confidentiality. Ofgem will respect this request, subject to any obligations to disclose information, for example under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004.

Based on the responses to this consultation and any additional evidence we receive on the impacts of Ofgem gaining these powers, we will provide details to BIS in spring 2013 to inform the case for the changes to be made to the relevant legislation.

We welcome responses by **4 April 2013**. Responses, and any queries relating to this consultation, should be sent to Phil Sumner, [phil.sumner@ofgem.gov.uk](mailto:phil.sumner@ofgem.gov.uk)

Yours faithfully



**Philip Cullum**  
**Partner – Consumer Policy and Demand-Side Insight**

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<sup>19</sup> <http://www.ofg.gov.uk/OFTwork/policy/concurrencies/>



## **Annex 1**

### **Summary of questions**

***Q. Do stakeholders have further evidence of the impacts of mis-selling by brokers on business consumers?***

***Q. Do you agree with the identified gap in Ofgem's powers?***

***Q. Do you agree the exercise of the powers we are seeking will help address the issues we have identified with TPIs?***

***Q. Do stakeholders have further evidence on the impact of Ofgem gaining BPR powers on TPIs, including details of the number of TPI firms operating in this market, and their size and revenues?***

***Q. Do stakeholders have further views on our assessment of the regulatory impacts of Ofgem gaining these powers in terms costs to TPI firms of Ofgem taking action under powers requested?***

***Q. Do stakeholders have further information on the expected impact on the Court of Ofgem gaining these powers?***

## **Annex 2**

### **Glossary of Acronyms**

BIS – Department of Business, Innovation and Skills

BPMRs (BPRs) – Business Protection from Mis-leading Marketing Regulations 2008

CMA – Competition and Markets Authority

CPRs – Consumer Protection from Unfair Trading Regulations 2008

EHU – Consumer Focus' Extra Help Unit dealing with complaints of a more serious nature such as disconnection

FSB – Federation of Small Businesses

GEMA – Gas and Electricity Markets Authority

NIDETI – Northern Ireland Department of Enterprise, Trade and Investment

NTSB – National Trading Standards Board (for England and Wales)

Ofgem - Office of Gas and Electricity Markets (the office supporting GEMA in its work)

OFT – Office of Fair Trading

RMR – Ofgem Retail Market Review: updated proposals for business consumers, October 2012

TPIs – Third Party Intermediaries (often known as brokers)