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Dear Louise

The Retail Market Review: Updated Proposals for Businesses

1. The Utilities Exchange Limited ("UX") is writing in response to Ofgem's request for submissions pertaining to the above consultation, and specifically the role and responsibilities of third party intermediaries (TPIs) in the non-domestic market. UX welcomes the opportunity to respond to this request and would be happy to discuss this with you in depth at a future date if required.

2. UX is a leading and independent provider of energy procurement and risk management services. Formed in 1995 we provide comprehensive services to the private and public sector alike, tailoring the solution to the needs of the buyer. Our existing customer base provides for the modest SME consumer to very large high profile clients with complex portfolios to manage.

3. Our responses pertain to the questions raised in Chapter 6 of the Ofgem document entitled, "*The Retail Market Review: Updated Proposals for Businesses*" (Ofgem Reference 134/12), which relates to the activities of TPIs.

Question 19: Do stakeholders agree with the proposal for Ofgem to develop options for a single Code of Practice (the Code) for non-domestic TPIs?

4. We would offer conditional support to this approach. There remains a concern that Ofgem uses the term "Representative" as a description for all TPIs that operate in the sector. Ofgem's documentation notes that the definition of this term is "*any person directly or indirectly authorised to represent the licensee in its dealings with Customers*". However, this definition only covers those entities that operate on behalf of the supplier in order to secure business and are therefore not independent of any given supplier(s).

5. **Organisations such as UX are employed by the customer to secure the optimal contract from the supply community based upon a set of given criteria agreed in advance of the tender process.**

6. We would therefore reiterate our view that TPIs can be split into "Supplier Sales Agents", i.e. those that are employed and paid by suppliers to secure business,

and "Customer Agents", i.e. those that are employed and paid by customers. Based upon this view, there is still a requirement on Supplier Sales Agents to comply fully with the terms of the Code in addition to the obvious requirement for them to comply with the terms of trade that they have with the supplier that has employed them. This raises the issue of possible conflict between the two obligations and, in such an instance, the onus must be on the Supplier to ensure that its own Sales Agents are in full compliance with the Code.

7. This must include, but should not be limited, to requirements regarding the transparency of the fees charged by the Supplier Sales Agent to the customer. While we accept that the contractual structures that exist between a supplier and its Sales Agents are subject to commercial confidentiality, the fees that are levied by the Sales Agent to the customer should not be covered by this privilege. To do so would prove detrimental to the customer on the grounds of transparency and could compromise broader trust in the TPI system as a whole.

8. While we do not have any comments in principle regarding the code of conduct for TPIs that has been put forward by E.ON, as a rule would not advocate that a supplier-determined code of conduct be used solely as the basis for any broader industry agreement. Such a move would run the risk of compromising the independence of TPIs if it was effectively imposed upon the sector as a whole, while it would also place additional powers in the hands of the supply community. As indicated above, suppliers will have their own contractual relationships with their Sales Agents, although such arrangements must integrate with the Code rather than supersede them.

9. As stated below, we accept that the supply community should have an input into the Code. However, this must in no way compromise the independence of Customer Agents such as UX, and therefore any supplier involvement in the development of the Code should be for information only and to the extent that it facilitates the role of the TPI sector. There should be no insistence by the supplier community of any policy or commitment that adversely impacts the primary objective of Customer Agents, i.e. to benefit their clients.

Question 20: Do stakeholder consider the Code should apply to all non-domestic TPIs (including those serving small business and large businesses)?

10. While the application of a de minimis threshold for compliance with the code does have merit, inherent in this assumption is that determining the variable and level of this threshold would be a straightforward exercise. For example, possible thresholds could include:

    - Number of staff employed by the TPI
    - Turnover of the TPI
    - Number of clients managed by the TPI
    - The total energy use of these clients
    - The total energy spend of these clients

    While all of these could serve as the basis for a threshold, the application of such an approach is not consistent with the structure of the TPI sector.

11. This is because the sector has a structure with a small number of large TPIs at one end of the spectrum, and a large number of small (typically one individual) companies at the other with medium-sized companies in the middle. The larger TPIs have a combination of large customers and large volumes, while the existence of the small companies is often underpinned by long-term relationships with only a handful of specific clients. The application of any threshold would

therefore encompass the larger and medium-sized companies – both by volume and by customer numbers – but would run the risk of excluding the large number of small companies in the sector.

12. As a rule therefore, we would recommend that the Code be applied to all non-domestic TPIs in order to ensure a level playing field in the sector as a whole. For the avoidance of doubt, this must also include non-domestic TPIs in the form of public sector buying organisations (e.g. LASER, Government Procurement Service), and not simply be limited to the private sector.

Question 21: What do stakeholders consider should be the status of the Code, the framework in which it should sit, and who should be responsible for monitoring and enforcing the Code?

13. The issue of additional regulation in a sector that has typically not been subject to extensive statutory oversight has been highlighted in recent months by the Leveson Inquiry into the Culture, Practice and Ethics of the Press. In this context, the general approach put forward by Lord Justice Leveson is a timely example of the way in which the TPI sector could be regulated, i.e. self-regulation but subject to oversight. Of course, an alternative would be to operate under a self-regulatory approach but without the need for oversight.

14. In such an approach, an independent self-regulatory body would be responsible for setting the content of the Code, its monitoring and enforcement. The Code would be based upon representations from the TPI sector as a whole and with the participation of Ofgem, and with the supplier community providing information as to how the Code would fit in the context of its commercial requirements. To confirm, the Code should not be established in a manner that is wholly independent of the supplier community, with suppliers able to make representations as to what they require to facilitate a mutually beneficial implementation and application of the Code. However, at no point should these representations compromise the independence of Customer Agents.

15. If required under the final structure, this independent self-regulatory body would then work alongside – and subject to oversight by – Ofgem, which will have responsibility for ensuring that this independent body is operating as intended.

16. While the Utilities Intermediaries Association (UIA) already has a role as an independent body within the energy sector, UX has not had any previous dealings with them and we accept that other TPIs in the sector may be in a similar position. It is our understanding that other TPIs have been in contact with the Energy Services and Technology Association (ESTA) to serve in the role of an independent, self-regulatory body responsible for the Code as detailed above. We would, subject to clarification on the roles and responsibilities of ESTA, be supportive of such a development.

17. On the issue of whether the Code should be voluntary or mandatory, Ofgem's own statements on the implementation of any such legislation notes, "*Trust will...be fostered if there is increased transparency to businesses consumers about their* (TPIs') *services, including costs and the range of suppliers they are comparing when suggesting energy deals.*" In the context of this objective, the implication is that the Code should be a mandatory requirement for TPIs. Indeed, there is an argument that in the event that suppliers decide that they will only deal with those TPIs that are signatories to the Code, then such a self-selection process will in essence make the voluntary code mandatory by default.

18. One of the ways in which this effective mandatory requirement to sign up to the Code would be avoided would be in the event that a sizeable number of TPIs (by managed volume and client numbers) refused to be party to such an arrangement. This would potentially compromise the ability of the supply community to engage with TPIs to the extent that it would curtail business opportunities for both sides, putting self-selection against self-preservation and the risk that both sides would be curtailing their individual and mutual business opportunities.

Question 23: What issues should Ofgem consider in the wider review of the TPI market? What are the benefits and downsides to looking across both the domestic and non-domestic market?

19. Our views on the possible content of the content are as follows:

Transparency of fees charged by TPIs

- This will help to promote customer confidence in the broader TPI system and should minimise the potential for hidden charges and/or fraudulent behaviour by TPIs
  - In terms of charging, UX's fees are fully transparent.
- Transparency of any contractual relationship(s) that exist between the supplier and the TPI. i.e. has the TPI been engaged by the supplier to secure business?
  - In the interests of clarity, TPIs should be required to state if they have been employed by a supplier and – in accordance with the point immediately above – if the TPI is in receipt of a commission fee from the supplier for any business that is secured on its behalf. We accept that the TPI should not necessarily have to disclose the sum involved.
  - Customers would then have greater confidence that all offers that have been received are being compared without bias or preference as a result of any contractual relationship(s)
- UX does not receive any additional commission from any supplier of either gas or electricity
  - UX is fully independent of suppliers and we seek to promote the best interests of our customers – not those of suppliers

The application of a shared savings model, as favoured by some TPIs, in the context of fees should also be considered. This is not a fee method employed by UX and we have concerns regarding its application on the grounds that it provides an incentive for the TPI to take what could be viewed as an excessive degree of risk on behalf of their client with the intention of boosting the savings made, and in doing so, their own fee. These potentially adverse consequences for the client are an unintended consequence of the use of shared savings as a fee structure and therefore make this fee charging approach less transparent.

Behaviour and ethics

- The client should be fully briefed on both the risks and the opportunities under their current energy supply contracts and also their TPI service;
- That any service provision that is the subject of a contract between a TPI and their client be delivered in compliance with prevailing legislation;
  - This should cover both the TPIs responsibilities to comply with legislation, but also those of the client; and
- If applicable, that any services offered by the TPI are delivered in accordance with the Service Level Agreement (SLA) between the TPI and its client.

Communication with clients

- The contract between a TPI and its client should be underpinned by a proposal with clear and unambiguous fees stated to client and signed off by the client
  - In the case of a "supplier pays" charging structure for the TPI to recover its costs, the supplier should confirm directly to the client the fees that have been included in supply price
- An agreed strategy or procurement policy should then be agreed as a result of the above.

Complying with these requirements is a problem in the context of a shared savings model, for the reasons stated above. While we do not have an intrinsic problem with the shared savings approach, it is our view that the client must be fully aware of the consequences of committing to a shared savings approach, and that all actions made by a TPI are fully transparent and auditable.

One possible way around this lack of transparency would be the disclosure of additional financial information by those TPIs that employ shared savings on a large scale basis. This could include the amount of commission received under the contract as a result of the percentage of savings on an annual basis for the duration of the contract term.

Dealing with complaints

There is an important distinction that needs to be made as far as the problem of poor TPI service is concerned. Specifically, there are the obligations of a TPI under its contract with a client and those under the Code. If the TPI is deemed to have met all of its obligations under the Code, but the client is of the opinion that it has breached its contract, then any such complaint should be considered under standard legal channels. In other words, the Code should not be a means by which a client can seek redress from a TPI because the client itself has not followed its own internal processes or due diligence. Failure to ensure this balance would result in the Code becoming unduly onerous and losing its original intent.

- A mechanism that promotes a process for a client to resolve issues with their TPI in the first instance and, if not satisfactorily resolved, to be referred to an independent body;
- Ideally, the code of conduct should simply determine that the TPI has presented all the documents and fees required and has appropriate sign off from the client;
- There should be a fully independent panel to review the complaint from a client within the context of the code and the TPI response and allow for an arbitration style communication
- If necessary, there should be a hearing to determine an appropriate and binding outcome;
- There should be a right to appeal the outcome (from both sides);
- Any fines levied against the TPI should be based upon a set of criteria, and should also be appropriate to and reflective of the fees earned by the TPI from the client
  - With this approach in mind, fines should be paid to the client, although there is an argument that these should be net of a proportionate cost to help meet the financing of these procedures under the Code
  - The nature of the Code and the potential detrimental consequences to a TPI of an improper or incorrect compliant being made mean that the potential need for reciprocity must be considered
  - Many TPIs rely on referrals from existing clients, and also on the reputation of their name and those of their employees, and

therefore any incident that could unjustly compromise this must be dealt with accordingly

- The outcome of any complaint hearing should be shared on public web portal, if an appeal is not lodged or is unsuccessful.

20. We accept that there will be administrative burdens in terms of compliance with the code, as well as their associated costs. However, we consider that an effective and efficient regulatory structure should keep these to a minimum.

21. With regard to the examining domestic and non-domestic TPIs, we consider that there are some high-level, best practice methods that can be employed across the domestic and non-domestic sectors but that these should be largely treated as separate entities. This reflects the generally different factors that go into the decision-making process by a customer in using a TPI in each of the sector.

22. In the non-domestic sector, customers contract with TPIs to aid them in getting the optimum deal for their requirements. These requirements are subject to discussion and agreement between the TPI and the customer and focus on a number of price and non-price factors. The TPI brings its experience and expertise to the analysis of the contract in order to evaluate the financial consequences of the contract offers made by suppliers in order to determine the "best price".

23. In terms of non-price elements, this is something that is highly subjective and therefore could prove difficult to both evaluate and enforce – particularly in the case of more complex flexible deals, where price is merely one element of the contract. Indeed, it is the experience of UX that some of our clients have rejected the lowest price deal in favour of one that provided a better overall offering in terms of contractual terms, flexibility and other factors.

24. With this in mind, the Code can only address the performance of the TPI to the extent that it can be proven that the TPI did or did not follow the procurement process and strategy agreed with its client(s).

25. The customary focus for domestic TPIs relates to the relevant tariff rate that the customer is seeking. As highlighted by the recent proposals from the government and Ofgem itself relating to domestic tariff reform and restructuring, comparing tariffs is not as a straightforward as it might first appear. There is also a question insofar as price comparison websites are concerned, specifically as to whether on a fundamental level they actually are TPIs or information services?

26. In the context of the non-domestic sector, TPIs are paid a fee by their customers for their services which – as stated above – we would advocate is fully transparent. Price comparison websites are typically funded by commissions paid by suppliers for each customer that switches to them via a such an arrangement and/or by fees paid directly by suppliers to list on these sites and/or through advertising from suppliers. Such relationships are not always evident to those customers that use these websites, and it is not clear what the implications would be if there was a mandatory requirement on both the website owners and suppliers to detail the payments that are made by one another.

27. Therefore while we accept that there are lessons that can be learned across sectors, the role of TPIs in the domestic sector should be treated independently of those in the non-domestic sector.

We note from the email from Ofgem of 14th December 2012 that the implementation of the Code will be the subject of working group, which will have a core membership. We would like to put ourselves forward for inclusion in this core membership group, and would be happy to discuss this with you further at your convenience.

We trust that this helps with your consultation process. Should you wish to discuss this in more detail, please contact Dr. Craig Lowrey on 01473 407978 or by email at craig.lowrey@ux-online.com.

Yours sincerely

p.p. Craig Lowrey

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