

# Proposals for regulating non-domestic Third Party Intermediaries (TPIs)

## Consultation

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### Overview

Ofgem recognises the important role TPIs play in the non-domestic energy market and in promoting consumer engagement. The majority of contracts in this market are facilitated through TPIs. We believe that there are over 1,000 non-domestic TPIs actively operating in the market, ranging from large organisations to one man operations.

As part of the Retail Market Review (RMR) we committed to reviewing the practices of non-domestic TPIs to address some of the concerns relating to poor practices by some TPIs. This document examines key issues and sets out our proposals to enhance current regulations to protect the interests of existing and future business consumers engaging with TPIs. Ofgem is proposing to place a licence obligation on suppliers to only work with TPIs who are accredited to an industry-governed code of practice.

**Please respond by 5pm on 9 May 2014.**

# Context

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Ofgem's principal objective is to protect the interests of both existing and future energy consumers. This document relates to Ofgem's Corporate Strategy and Plan 2011-2016<sup>1</sup> which reflects our commitment to promote quality and value for all consumers.

The non-domestic TPI project aims to improve current engagement between consumers and TPIs in the non-domestic market, whilst promoting transparency and helping enable those engaging in the market to get a better energy deal.

This consultation has links with our work on the Retail Market Review (RMR), Smarter Markets Strategy<sup>2</sup> programme and the TPI programme.<sup>3</sup> It is also connected to a range of other work we and others are engaged in. Some of which are outlined in this consultation.

## Associated documents

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All documents are available at [www.ofgem.gov.uk](http://www.ofgem.gov.uk)

- Quantitative research into Non-Domestic Consumer Engagement in the Energy. Market, Element Energy and the Research Perspective, December 2013.
- TPI stakeholder conference; October 2013.
- TPI Open letter; October 2013.
- TPI Factsheet; October 2013.
- Draft code of practice for non-domestic TPIs; August 2013.
- TPI working group documentation; various dates.
- Third Party Intermediaries: Exploration of Issues and Options; June 2013.
- Energy brokerage in the business and industrial energy supply market, Cornwall Energy, April 2013, Ref 103/13.
- The Retail Market Review – Final Non-Domestic proposals, March 2013, Reference: 38a/13.
- Promoting Smarter Energy Markets, December 2011, Reference: 174/11.
- The Retail Market Review – Updated Non-Domestic proposals, Reference: 135/12, October 2012.
- Energy Supply Probe - Initial Findings Report, October 2008, Reference: 140/08.

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<sup>1</sup> Corporate Strategy and Plan 2011-2016 (Ref: 44/11) March 2011 <https://www.ofgem.gov.uk/ofgem-publications/37154/corporate-strategy-and-plan-2011-2016.pdf>

<sup>2</sup> Smarter Markets Programme; <http://www.ofgem.gov.uk/Markets/sm/strategy/Pages/Strategy.aspx>

<sup>3</sup> Third Party Intermediaries (TPI) Programme 2013: <https://www.ofgem.gov.uk/electricity/retail-market/market-review-and-reform/third-party-intermediaries-tpi-programme>

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# Executive Summary

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TPIs represent an important route to market for non-domestic consumers where a majority of energy contracts are negotiated through them. From discussions with stakeholders, we estimate there are more than 1000 TPIs in the non-domestic market, with varying business models. The market represents some £200m<sup>4</sup> in terms of fee opportunities.

Whilst we acknowledge the potential role of TPIs in enhancing consumer experience and creating competitive pressure in the market, we have been made aware through research and stakeholder feedback of concerns in relation to the current regulatory framework and consumer experience.

As part of our Retail Market Review (RMR) we committed to reviewing the practices of non-domestic TPIs to address these concerns. Since last year we have been developing policy proposals through industry workshops and research. Our proposals have been developed keeping in mind the feedback received on the 'Third Party Intermediaries (TPI): exploration of market issues and options' consultation.<sup>5</sup>

We have also developed a draft code of practice for non-domestic TPIs. This draft code of practice was developed through a series of workshops with industry over the course of 2013. It sets out the standards<sup>6</sup> that TPIs should meet when interacting with consumers, including, professional and honest behaviour, transparency of information and effective monitoring.

In November 2013 we also gained new powers under the Business Protection from Misleading Marketing Regulations 2008 (BPMRs) to help address misleading TPI activity.

This document considers four options for the regulatory framework to support this draft code of practice:

- 1: Maintain status quo
- 2: Voluntary code of practice for non-domestic TPIs
- 3: Code of practice underpinned by licence condition on suppliers to work only with TPIs accredited to this code.
- 4: Direct licensing of TPIs

We propose option 3, because we consider it strikes the right balance between protecting the consumer and allowing for innovation and development of an effective market for TPIs. Further, a number of stakeholders including consumer groups have expressed support for a proposal similar to our preferred option. In contrast to a voluntary option, it would ensure

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<sup>4</sup> Report on energy brokerage in the business and industrial energy supply markets; Cornwall Energy, April 2013 (page 7).

<sup>5</sup> Third Party Intermediaries : exploration of market issues and options consultation; June 2013

<sup>6</sup> Draft code of practice for non-domestic TPIs (August 2013)

industry wide adoption of the code of practice. It also provides a more timely solution than a move to the direct licensing of TPIs which could take more than 18 months to put in place.

We are proposing that the code of practice would be governed by an independent board comprising industry representatives and consumer groups. Whilst the board would be expected to put in place arrangements for measuring compliance, performance and dealing with code of practice breaches, we would retain ultimate control over the code of practice content and have the ability to veto any changes proposed by the independent board.

We consider that our proposals will improve the market and consumer experience by increasing transparency, enhancing competitive pressures and raising standards of service. In our view this is a proportionate response to the problems identified, striking the right balance, avoiding any undue barriers to market development and improving consumer protection.

Following this consultation, and subject to the need to amend our proposals in the light of responses, we will draft and consult on the drafting of the necessary supplier licence conditions. It is our intention to have the code of practice and licence conditions in place later this year.

Alongside this work, we will also engage with stakeholders to continue the development of the code of practice and explore some of the practical issues around creating a new governance structure for the code of practice.

# 1. Introduction

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## Chapter Summary

We cover here a short background to this project, stakeholder engagement and next steps.

1.1. TPIs offer services to consumers to help them decide their energy needs. In the non-domestic market<sup>7</sup> they are a key route to market engagement. As part of the Retail Market Review,<sup>8</sup> we became aware of concerns and regulatory gaps involving TPI activity. We therefore committed to examining the role of non-domestic TPIs and to considering regulations to improve consumer protection and enhance market dynamics.

1.2. As part of our efforts to address issues with respect to non-domestic TPIs we have undertaken the following stakeholder engagement to inform our policy development on this project and the wider TPI programme.

### **Draft code of practice**

1.3. In January 2013, we convened an industry and consumer body working group. During 2013 the group met six times to support Ofgem in the development of a draft code of practice<sup>9</sup> for non-domestic TPIs. This code of practice sets out requirements on appropriate behaviour, transparency and professional conduct. A copy of the draft code of practice is an associated document to the consultation. The overarching objective of the code of practice is to 'protect the interests of non-domestic electricity and gas consumers and, in particular, ensure that consumers have confidence that when using a TPI, the TPI will act in a fair, honest, transparent, appropriate and professional manner and effectively assist them with their energy supply needs.'

### **Publication of the 'Third Party Intermediaries: exploration of market issues and options' consultation**

1.4. In June 2013, we consulted on our understanding of the key issues and concerns in the domestic and non-domestic TPI market and possible regulatory options to best address these problems. This document sets out a range of high level opinions for a regulatory framework including a voluntary code of practice, placing obligations on suppliers to only work with code accredited TPIs and licensing of TPIs. We received 56 responses to the consultation, some of which are available on Ofgem's website.<sup>10</sup> The proposed approach set out in this document takes account of the responses received.

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<sup>7</sup> In this paper and associated documents we use the terms "market" and "markets" as shorthand for different segments of the energy sector.

<sup>8</sup> The Retail Market Review – Updated Non-domestic proposals; Reference (135/12) October 2012

<sup>9</sup> Draft code of practice for non-domestic TPIs (August 2013)

<sup>10</sup> Third Party Intermediaries: exploration of market issues and options consultation; June 2013. Please note: some of these responses are confidential

## **TPI Stakeholder conference**

1.5. In October 2013, we held a conference to give an update on the projects under the TPI programme and to discuss key issues relating to the TPI market.<sup>11</sup>

## **Open letter on initiatives for non-domestic consumers<sup>12</sup>**

1.6. In October 2013, we published an open letter to provide an update on this project and other non-domestic market initiatives. Specifically, the letter set out the key 'standards of service' that we expected TPIs to follow. These standards reflect the principles that the draft code of practice is based on.

## **Ofgem's 'TPI: what your business needs to know' factsheet<sup>13</sup>**

1.7. In October 2013 we published a factsheet for business consumers to assist them in their interactions with TPIs and highlight important points for consideration.

## **Next Steps**

1.8. We invite views on the questions included in this consultation and the draft impact assessment by 9 May 2014. Responses should be sent to Meghna Tewari, Senior Economist at [Thirdpartyintermediaries@ofgem.gov.uk](mailto:Thirdpartyintermediaries@ofgem.gov.uk). Alongside the consultation we will continue with stakeholder engagement. Following the close of this consultation and subject to responses we intend to consult on final proposals in autumn this year.

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<sup>11</sup> TPI Conference; October 2013; Minutes

<sup>12</sup> TPI Open letter; October 2013

<sup>13</sup> TPIs: what your business needs to know factsheet; October 2013

## 2. Rationale for intervention in the TPI market

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### Chapter Summary

We present our current understanding of the non-domestic TPI retail energy market including multiple business models. We also outline the current regulatory framework and our case for intervention.

**Question 1:** Do you agree with the definition of TPIs? Please provide any suggestions along with supporting information.

**Question 2:** Do you agree with our list of proposed TPIs that could be covered by any regulation we introduce?

**Question 3:** What types of organisations should be exempt from our TPI scope definition and why?

### Overview of the non-domestic TPI market

2.1. TPIs are organisations or individuals that operate within the energy market and act as an interface between consumers and energy suppliers. Since the deregulation of the energy market, their presence has grown. More recently we have observed innovative TPI business models offering useful services to specific types of consumers.

2.2. A number of business consumers use TPIs to engage with the market. We estimate that there are over 1,000 TPIs operating in the market<sup>14</sup> TPIs accrue an estimated total revenue of £200m<sup>15</sup> per year, in terms of fee opportunities, from negotiating non-domestic energy contracts.

2.3. Our recent quantitative survey<sup>16</sup> covered 1,300 respondents across all sizes of business consumers. It showed that business' views on energy brokers (a type of TPI) are almost evenly split between positive and negative.<sup>17</sup> Generally respondents appear to be much more dissatisfied with brokers than they are with other aspects of the market. Medium and larger business consumers were generally more satisfied than smaller businesses. However, micro businesses were less likely to use brokers and so their perceptions were not always based on direct experiences. Instead they may have based their negativity on the sales approach used by brokers.

2.4. TPIs can play a crucial role in empowering consumers to engage with the market, facilitating competition. The roll out of smart meters also presents an opportunity for TPIs to offer innovative products and services, providing consumers with more choice and helping them to engage. The importance of TPIs means we need appropriate regulatory standards.

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<sup>14</sup> This is based on information received from stakeholders.

<sup>15</sup> Report on energy brokerage in the business and industrial energy supply markets; Cornwall Energy, April 2013 (page 7).

<sup>16</sup> Element Energy :Quantitative research into Non-Domestic Consumer Engagement in the Energy Market; December 2013;

<sup>17</sup> Element Energy: Quantitative research into Non-Domestic Consumer Engagement in the Energy Market; December 2013: section 6.2 (page 56) overall views of energy brokers amongst non-domestic consumers was 34% positive and 31% negative.



These will let TPIs continue to offer a valuable service to consumers, and the consumer can be confident with the services that TPIs offer.

## Definition of a Third Party Intermediary (TPI)

2.5. TPIs have a range of business models ranging from large organisations to one-man operations. Regardless of the size of the TPI, most will receive a fee for their services.<sup>18</sup> The table below shows a non-exhaustive list of TPI business models. This is based on information gathered through our research and stakeholder engagement. We think the models listed below will fall within the scope of our TPI definition.

**Table 2.1: Potential TPI types within the scope of the TPI definition**

Type of TPI	Brief description
Broker or consultants	Research and present offers from a range of suppliers to the consumer. Consultants are similar to brokers, but may also provide information on energy efficiency measures.
Sales/Supplier agent	These companies may be employed directly with the sole interest to represent the supplier to the consumer. Some agents work for a single supplier, known as primary agents, whereas others may represent multiple suppliers, known as secondary agents.
Price comparison website	Service to help consumers search and compare energy deals online.
Bundled services providers	Where consumers purchase multiple services from a single provider. For the purpose of this code we refer to bundles that include but are not limited to energy.
Umbrella/Franchise sites	Organisations that operate under a large brand name (not their own)
Aggregators	Companies who manage or work with a number of third parties for arranging energy contracts for a volume of consumers. They may also interact with consumers as a TPI.
Energy advice companies	Offers energy advice to consumers

2.6. However, to date there is no universally accepted legal definition of a non-domestic TPIs. Through our work described in the above chapter and in particular the June 2013 consultation and our working groups, we have developed the following draft definition, which received broad stakeholder support:

**“a non-domestic TPI is an intermediary engaged in direct or indirect activities between a non-domestic consumer and an active energy supplier”**

2.7. We have developed the regulatory proposals outlined in this document with this definition in mind. However, we recognise that further consideration of the definition of a

<sup>18</sup> Third Party Intermediaries: exploration of market issues and options consultation; June 2013, executive summary

TPI and therefore the scope of any intervention is necessary. The definition developed through the working groups is fairly broad and there are arguments for a narrower definition such as:

**“an intermediary between a non-domestic consumer and an energy supplier, providing advice and assistance to the customer in relation to their energy supply needs”**

2.8. We have also heard arguments that the definition should be narrowed further. In this light, we would welcome views, in particular on:

- Whether the code of practice should only apply to face to face/telephone based services? We have heard arguments that the issues relating to price comparison websites are different to those with brokers.
- Whether the proposed regulatory approach risks not covering those TPIs who do not contract directly with a supplier? We have heard arguments that some TPIs operate by being paid on a consultancy basis by the customer.
- Whether the definitions above may capture TPIs offering energy efficiency advice to customers and not advice on negotiating their energy supply. We are aware of emerging types of organisations, include data collection organisations and TPIs offering smart metering products, who may fall within scope of the definition. While there may be a case for extending the scope in the future, the focus at the discussions to date has not covered these future roles and the issues involved are likely to be different.

2.9. There may also be a need for potential exceptions to this TPI definition, such as charitable and not-for-profit organisations. It is our current position that if a TPI is receiving a fee from the supplier for their service it should fall within the scope of the definition.

## **Rationale for intervention**

2.10. Whilst there is wide recognition of the positive role that TPIs play in facilitating competition and consumer empowerment, there is evidence that some TPIs are unprofessional and misleading in their conduct and offerings. This leads to poor consumer experience and negatively impacts future consumer engagement. Further, we note that an increasing number of TPI organisations offer innovative services. Whilst competition and innovation are to be welcomed, this needs to be balanced against any risk to consumers. In the following sections we set out our rationale for regulatory intervention.

### **Need to improve consumer engagement with TPIs**

2.11. Stakeholders and consumers have expressed concerns regarding the conduct of some TPIs. This has been widely reflected through our stakeholder engagement.

- Respondents to the RMR consultation<sup>19</sup> noted that poor behaviour included mis-

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<sup>19</sup> The Retail Market Review – Findings and initial proposals (Ref:34/11), March 2011; <https://www.ofgem.gov.uk/publications-and-updates/retail-market-review-findings-and-initial-proposals>

representation, lack of transparency about commission charges and poor quality customer service from TPIs and inconsistent advice.

- Consumer bodies such as Consumer Futures (CF) and the Citizens Advice Consumer Service (CACS) have also flagged these concerns. CACS reported that 40% of contacts from businesses about alleged mis-selling referred to the involvement of TPIs. The cases generally involved micro business consumers.
- Information from our quantitative survey published in December 2013<sup>20</sup> also suggests some worrying themes. Only around half of all respondents agreed that 'accurate information about the services they offer' had been provided by the broker<sup>21</sup> and responses were particularly polarised on whether the broker had been 'upfront about whether there was a cost for their services'<sup>22</sup>

### **Need for improvement in complaints logging**

2.12. Currently there is no central complaints handling body for energy complaints about TPIs<sup>23</sup> and there is no consistent industry standard for recording TPI complaints. This not only results in customer frustration, potentially reducing future engagement, but also makes it difficult for regulatory authorities and consumer bodies to gather accurate complaint data.

2.13. While licensed energy suppliers are subject to rules on recording and handling complaints and micro businesses have the right to take their complaints to the Ombudsman if it is not satisfactorily resolved, these rules do not apply to TPIs. In some cases it can be unclear where the fault lies between the supplier and the TPI and the customer may be unable to access redress if the supplier argues the TPI is at fault.

### **Current legislative framework and coverage of the code of practice**

2.14. We do not currently licence TPIs. In addition, while TPIs are subject to general consumer protection regulations, these mainly offer protection to domestic consumers.<sup>24</sup>

2.15. As previously mentioned, Ofgem gained specific powers to enforce the Business Protection from Misleading Marketing Regulations 2008 (BPMRs) in November 2013. This now allows us to take action against entities that market energy products and services to businesses in a misleading manner.<sup>25</sup> Our powers under the BPMRs include allowing us to seek and accept an undertaking that a party will comply with the regulations. In addition,

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<sup>20</sup> Element Energy: Quantitative research into Non-Domestic Consumer Engagement in the Energy Market; December 2013.

<sup>21</sup> 49% agreed, 21% disagreed out of 821 respondents; - Element Energy: Quantitative research into Non-Domestic Consumer Engagement in the Energy Market; December 2013: page 7

<sup>22</sup> 38% agreed, 31% disagreed out of 821 respondents; - Element Energy: Quantitative research into Non-Domestic Consumer Engagement in the Energy Market; December 2013: page 7

<sup>23</sup> The Office of Fair Trading and Trading Standards is the relevant government body if a consumer has a complaint regarding a TPI.

<sup>24</sup> For example, the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) is a key piece of consumer protection legislation which applies primarily in respect of individual consumers. The CPRs place a general duty not to trade unfairly and seek to ensure that traders act honestly and fairly towards their customers.

<sup>25</sup> Ibid 11, p.6.

we can apply to court for an injunction where there has been, or is likely to be, a breach of these regulations.

2.16. Whilst the BPMMRs will be an effective tool in addressing misleading marketing activities, we consider that current general consumer protection regulations do not fully address all of the issues identified with regard to non-domestic energy TPI activities. Therefore, our proposals (set out in chapter 3) will help to enhance and extend the protections offered to business consumers within the energy market.

## 3. Options for regulation of non-domestic TPIs

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### Chapter Summary

In this section we present the key options considered to address non-domestic TPI issues. We propose putting in place a licence condition on suppliers to work only with non-domestic TPIs signed up to a code of practice that is governed by an independent board.

**Question 4:** Do you agree with our recommended option for regulating non-domestic TPIs?

**Question 5:** Do you agree with our proposed governance recommendations?

**Question 6:** Please provide your views on the appropriate representation for members of the proposed independent code board.

### Overview of the code of practice

3.1. As mentioned in previous chapters, we have developed a draft non-domestic code of practice for TPIs through a series of workshops with industry and consumer bodies.<sup>26</sup> The proposed code of practice includes a range of measures aiming to ensure that accredited non-domestic TPIs act in a fair, honest, transparent, appropriate and professional manner. It also supports best practice on issues like the provision of information before and after any agreements are made between the customer and the TPI, training and complaint handling.

3.2. Whilst this code of practice is yet to be finalised, it targets specific market concerns such as:

- **Complete and clear information** – TPIs must offer complete and clear information on every aspect of their service to customers (and in particular the fees involved and other ‘principal terms’);<sup>27</sup>
- **Honest marketing tactics**– TPIs must always ensure that they treat prospective customers with the highest degree of professionalism;
- **Effective monitoring** - TPIs must have effective monitoring arrangements to provide effective service to their customers.

3.3. These ‘standards of service’ were described in our open letter published in October 2013. This was accompanied by a call on TPIs to follow these principles in conducting their

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<sup>26</sup> The current version of the draft code of practice and the minutes of these workshops are available on our website.

<sup>27</sup> These are defined in the draft Code but would include significant terms, such as those relating to charges, price variations, the duration of the contract and termination rights and fees.

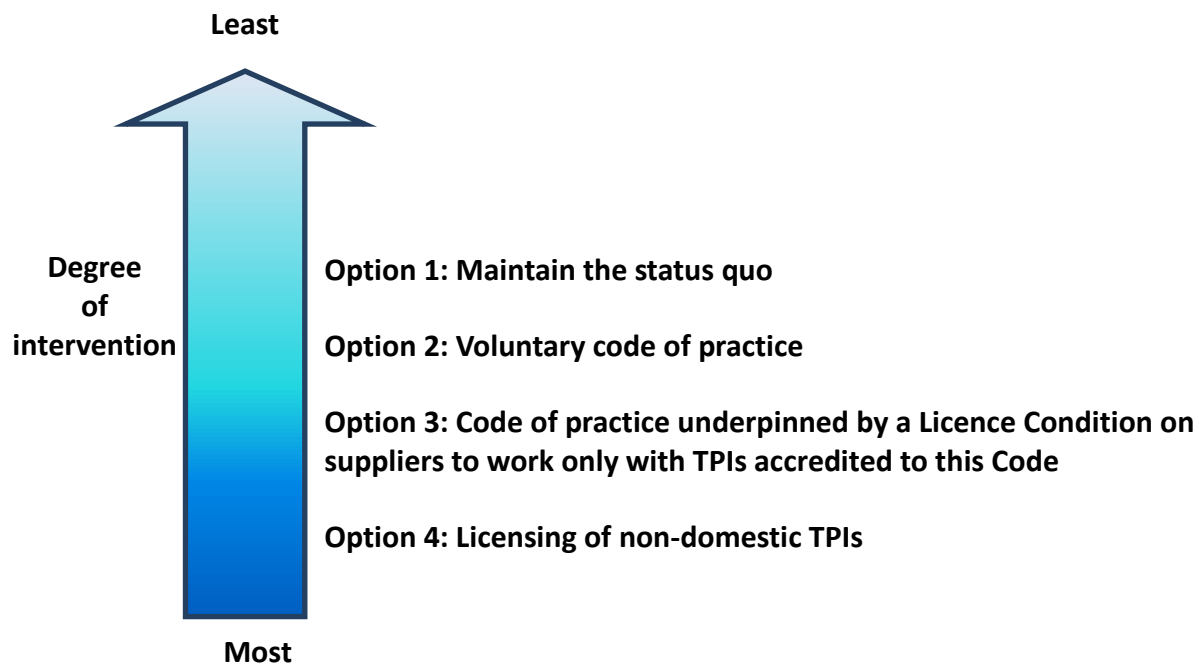
business.<sup>28</sup> We think this code of practice (once finalised) will improve TPI industry standards, increase industry accountability and improve consumer trust and engagement.

3.4. This code of practice, and its principles, are the basis of our regulatory options presented in the following sections. We are aware of some voluntary codes of conduct that exist in the non-domestic market. Whilst these codes of conduct may have resulted in improvements in TPI behaviour and consumer confidence, our analysis suggests that these alone will not be sufficient to meet the concerns raised by business customers and in particular micro-businesses. This issue was discussed in our working groups.<sup>29</sup>

## Regulatory Options

3.5. We have taken into account the current state and scale of non-domestic TPIs, the application of current regulations to non-domestic TPIs and the likely impact on consumer engagement and on industry. A draft Impact Assessment (IA) of the potential costs and benefits is included in appendix 1. The diagram below shows the four options we have considered, arranged by the degree of regulatory intervention they involve.

**Figure 3.1: Potential regulatory options and degree of intervention**



<sup>28</sup> TPI Open letter; October 2013

<sup>29</sup> Notes from the second working group, March 2013 <https://www.ofgem.gov.uk/ofgem-publications/39800/tpi-working-group-oft-code-summary-group-discussion-2-2b.pdf>

## **Option 1: Maintain the status quo**

3.6. As explained in chapter 2, TPIs in the non-domestic market are subject to limited sector-specific regulation. This includes the BPMMRs, which Ofgem were granted powers to enforce in November 2013. This offers protection to non-domestic consumers within the scope of certain misleading practices and considers the lawfulness of certain selling practices. Additionally, TPIs are subject to regulation under Ofgem's standard licence conditions in scenarios where they act as the representative of the supplier. However, there are no specific licence obligations relating to marketing to non-domestic consumers and some of the other areas of the draft code of practice.

3.7. In addition, many existing consumer laws, which address a range of other unfair practices, provide protection to domestic consumers only. If we maintained the status quo, non-domestic TPIs would continue to be governed by existing legislation. On the basis of our earlier research, analysis and stakeholder feedback, we do not think maintaining the status quo would be in the best interests of consumers and industry. Whilst we have not yet tested the extent of the impact of our new BPMMR powers on any consumer detriment, we still consider scope exists to provide increased protections to non-domestic consumers in areas that the BPMMRs do not address. Under this option, we would continue to monitor the TPI market and re-consider intervening if deemed necessary.

## **Option 2: Voluntary code of practice**

3.8. Under this option, Ofgem would finalise the content of the code of practice through consultation. Upon finalisation of the code of practice, we would expect to run the code of practice as a fully voluntary scheme as we do now for the Confidence Code for domestic switching sites. TPIs could choose to sign up to become a member of the code of practice through an accreditation process. The arrangements would include a compliance and monitoring function and may be audited by an independent external organisation. Given Ofgem does not have the powers to recover costs incurred for running an accreditation scheme from TPIs, industry would be required to bear any costs associated with accreditation.

3.9. This option represents a low level of regulatory intervention. It relies on there being incentives for suppliers to choose to work with accredited TPIs in order to protect their reputation with their customers. In turn, this could encourage TPIs to become code accredited.

3.10. However, the full success of this option will depend on building of the code brand and the number of TPIs signing up to the code of practice. This in turn will determine the attitude of suppliers. Individual suppliers may be unwilling to restrict their options in terms of which TPIs they work with, if they perceive other suppliers are not doing so. This may give some suppliers an advantage over others despite there being benefits in terms of consumer trust by only working with accredited TPIs. Furthermore, TPIs who are not behaving in a desirable manner are unlikely to change their behaviour and seek accreditation, so this option may create burdens on those TPIs who are already comply with the principles of the code of practice.

3.11. The ability to impose sanctions in response to any breach of code of practice provisions by accredited TPIs would depend on the governance and enforcement structure. However, there are limits on the sort of sanctions that an independent body could apply. The role of Ofgem or the code of practice's governing body (as applicable) may extend to highlighting problems to TPIs and potentially issuing a formal notice to organisations that are not performing appropriately. This could result in withdrawal of accreditation in appropriate cases. However, this would not have any legal consequences.

### **Option 3: TPI code of practice underpinned by a licence condition on suppliers to work only with TPIs accredited to this code**

3.12. In this option a licence condition would oblige suppliers to only work with TPIs accredited to the code of practice. This would place equal responsibility on industry participants (suppliers and TPIs) to work together in order to improve consumer engagement and address key concerns. This will have the effect of creating a more level playing field and presents a better balance between the need for enhanced consumer protection and burden on the industry. Whilst this will have cost implications on TPIs and suppliers, we think it will improve consumer trust, by setting enforceable standards for TPI behaviour and suppliers and enhancing market engagement. We have been made aware of potential competition implications of this option given the existence of other voluntary codes of practice for TPIs in the non-domestic market. It is our view that our proposal is a proportionate response and our proposed independent governance arrangement will mitigate any such risks.

3.13. A key advantage of this option is that it will cover all TPIs. This will assure consumers that they can use TPIs with confidence and trust that the TPI will act in a fair and transparent manner. This will promote competition in the market. Some stakeholders have voiced their support for this type of option. Their support will aid the success of this regulatory intervention, which will depend on industry buy-in and effective publicity to educate the market. This option could be put into effect more quickly than a licensing regime on TPIs and is a more proportionate approach to problems identified.

3.14. Non-compliance by suppliers with the licence condition could be investigated in line with our Enforcement Guidelines.<sup>30</sup> In appropriate cases, where a licence condition has been breached or is likely to be breached, this could result in an enforcement order being made. In addition, where there has been a breach, Ofgem would have the power to impose a financial penalty and/or consumer redress order on suppliers. We expect that this option would therefore provide a more robust underpinning to the code of practice requirements which would, in turn, incentivise both suppliers and TPIs to ensure compliance. The sanctions on TPIs for breaches of the code of practice would, as with option 3, depend on the governance and enforcement structure within the code of practice. However, under this option withdrawal of accreditation would be more serious as suppliers would no longer be able to work with that TPI.

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<sup>30</sup>Enforcement Guidelines: <https://www.ofgem.gov.uk/publications-and-updates/enforcement-guidelines-complaints-and-investigations> . As part of our Enforcement Review, revised guidelines are expected to be consulted in 2014.



#### **Option 4: Licensing of non-domestic TPIs**

3.15. Some respondents to the 'Third Party Intermediaries: exploration of market issues and options' paper supported licensing of non-domestic TPIs as the appropriate regulatory intervention. Ofgem does not currently licence TPIs. Under this option we would make an application to government to make TPI activity licensable on grounds of public interest. If Ofgem were granted the necessary powers, all TPIs would have to acquire a licence from Ofgem to operate in the non-domestic retail energy market. This licence regime would be comparable to the one that Ofgem has for energy supply licensees.

3.16. The licence could either require TPIs to comply with a code of practice or set other new licence conditions. Any such licence conditions would encapsulate the code of practice principles outlined previously such as professional conduct, transparency of information provided, monitoring and complaint redress.

3.17. For us to apply to government for new licensable activities, we would consult for 28 days. Following this consultation process, assuming there were no objections and we did not consider it appropriate to investigate further, we would apply to the government by describing the activities we consider should become licensable and the conditions we expected to be included as standard conditions in relevant licences. Any potential order creating new licensable activities would need to be approved by both Houses of Parliament.<sup>31</sup> The order would be able to make consequential changes, including to legislation and existing licences if needed.

3.18. Non-compliance with the licence condition by suppliers could be investigated in line with our Enforcement Guidelines. In appropriate cases where a licence condition has been breached, we would have the power to impose a financial penalty in line with our statement of policy on penalties.

3.19. Whilst this option may appear as the strongest in inspiring consumer trust we are mindful of the unintended consequences this may have on the TPI market particularly as this option is likely to result in barriers to market entry and development. This could frustrate market innovation. We are also mindful that this measure may be particularly burdensome for some smaller TPIs. The process of applying for new licensable activities also means this option would take longer to introduce than other options. Based on recent experience of legislation passed to create a new licensable activity for the smart metering Data and Communications Company, this process could take more than 18 months.

3.20. Given the potential impacts of this measure, we think this may not be a proportionate response as a first step and will not drive industry to take responsibility to improve TPI behaviour as we wish. However, we do not rule out this option in the long term if the need for further invention arises.

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<sup>31</sup> Section 56A(8) of the Electricity Act 1989 and section 41C(8) of the Gas Act 1986

## **Our recommendation**

3.21. In view of the relative pros and cons and analysis included in the draft IA (appendix 1) we recommend option 3. Our analysis shows that this will :

- contribute to transparency, fairness and effectiveness of TPIs
- increase the scope for TPIs to offer the best possible service to consumers
- ensure shared accountability between TPIs and suppliers
- improve consumer engagement and trust
- will not restrict the ability of TPIs to offer innovative products and services

## **Code of practice governance options**

3.22. In order to put in place an enduring framework for the code of practice, a number of different activities need to be undertaken which can broadly be grouped under the heading of "governance". These roles can be undertaken either by Ofgem or industry parties and the most appropriate body may differ for different activities. The activities include:

- Keeping the code of practice under review. The code of practice will need to reflect market development. Therefore, clear processes should be in place to make code changes.
- Publicising the code of practice to TPIs and consumers.
- Registering TPIs who want to sign up to the code of practice including any initial checks that might be required.
- On-going monitoring of compliance with the code/self reporting depending on the arrangements that are agreed and set out in the code of practice.
- Taking disciplinary action against TPIs for breaches of the code of practice.

3.23. We have set out below two broad options for the governance of the code of practice. However, the options could be adapted if respondents felt that specific activities were more appropriately dealt with by Ofgem or industry. Further detail of our assessments of the options is set out in the Impact Assessment in appendix 1.

## **Governance option A: Ofgem responsible for all aspects of governance of the code of practice**

3.24. This option would place responsibility for all aspects of governance with Ofgem, including finalising the code of practice, managing any amendments to the code of practice and relevant monitoring and enforcement. The compliance and audit activities for the code of practice could be conducted by an independent body, which would report regularly to Ofgem and in the event of a suspected breach.

3.25. Whilst a number of stakeholders have indicated their preference for the code of practice to be run by Ofgem, it is our understanding that their primary desire is that any governance structure should be 'independent', but not Ofgem-led per se.

3.26. We have some experience in managing similar codes, such as the Confidence Code<sup>32</sup> although the number of domestic switching sites is much lower. However, in this case, we think that Ofgem may not be best placed to run the code of practice. Aside from the cost implications, and the inability for Ofgem to charge TPIs to recover its costs, we see an opportunity for the industry to work together in finalising the draft code of practice and take responsibility for its management.

3.27. In view of the scope of the non-domestic TPI market, and the expectation that this market will evolve due to changes such as the rollout of smart meters, we consider that a governance option which incorporates the wider industry is the ideal solution. Industry needs to work together to deliver an effective framework to drive a positive customer experience and support consumer engagement. Industry is closer to the practical day-to-day issues that impact consumers engaging in this market.

## **Governance option B: Independent board responsible for code of practice governance with Ofgem as an approval body**

3.28. This option proposes that code of practice governance be undertaken by an independent industry code board, similar to that established for the Smart Metering Installation code of practice (SMICOP).<sup>33</sup> Under this approach we would pass on our current draft code of practice for finalisation to an independent board, which would also provide the necessary framework for code of practice management, monitoring and compliance.

3.29. We propose that this independent code Board would consist of representatives from across industry such as suppliers, TPIs, trade associations as well as consumer bodies. We expect these representatives to have voting rights and for Ofgem (Gas and Electricity Markets Authority)<sup>34</sup> to retain overall control of the content of the code of practice and to approve or reject any code of practice change requests. This option will ensure independence of the code of practice management, through the balance of representation

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<sup>32</sup> The Confidence Code: <https://www.ofgem.gov.uk/information-consumers/domestic-consumers/switching-your-energy-supplier/confidence-code>

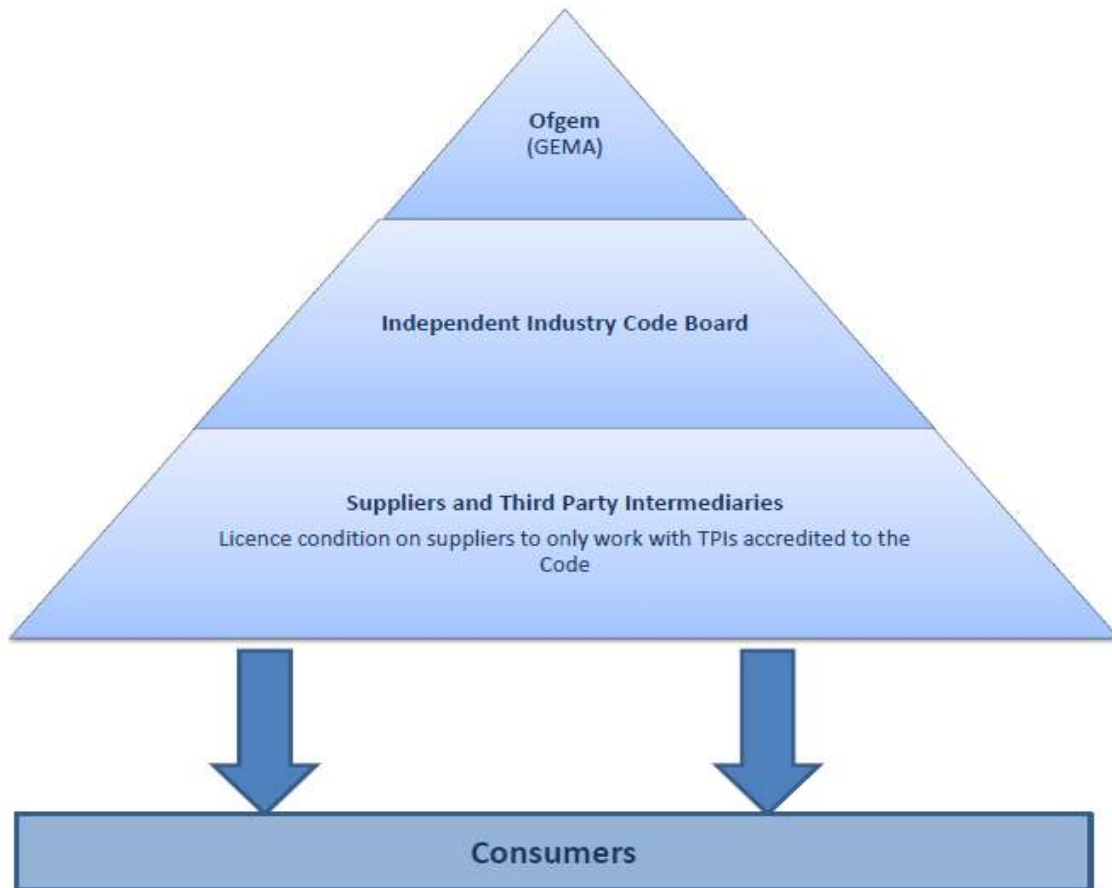
<sup>33</sup> Smart Metering Installation code of practice: <https://www.ofgem.gov.uk/ofgem-publications/57321/smartmeteringinstallationcodeofpracticev1-00.pdf>

<sup>34</sup> Ofgem is governed by the Gas and Electricity Markets Authority : <https://www.ofgem.gov.uk/about-us/who-we-are>

on the Board. It will also provide an appropriate balance between industry accountability and Ofgem’s involvement in key areas, including the ability to veto any changes to the code of practice.

3.30. The proposed governance structure for this option is shown diagrammatically below:

**Figure 3.2: Independent code of practice governance structure**



**Proposed role of the independent code board**

3.31. We propose that the independent code Board should be structured as followed:

- **Representatives** from across industry (TPis, suppliers and trade associations) and from consumer organisations with voting rights;
- An independent **code administrator** to support the day to day functioning of the board and to be the secretariat for the code board and any established sub-groups;

- An independent **code of practice chair** (potentially non-voting) who would sit above the code Board. We anticipate the Chair would closely liaise with the code Administrator to ensure all meeting secretarial requirements are met. Furthermore, the Chair would be permitted to invite relevant observers to code Board meetings;
- We propose that **Ofgem** retain overall control over the code of practice scope, content and the ability to prohibit or limit any changes; and
- Any code of practice changes may be processed by a **Change Advisory group**, following guidance from the code Board and independent code Chair. In that scenario the Change group would be appointed by the code board and approved by Ofgem.

### **Recommended governance option**

3.32. Our recommended approach is that the code of practice governance should be passed to industry (governance option B). By allowing industry and consumer bodies to develop and maintain the code of practice, with support and guidance from Ofgem, we consider that this will provide the best governance arrangements. Successful collaboration between suppliers and TPIs is pivotal to the success of this model. Ofgem will need to be satisfied that code of Practice is addressing the key issues and having a meaningful impact on the market. The governance arrangements will be considered in more detail alongside this consultation.

3.33. This approach to governance would place greater responsibility on industry to improve consumer experiences in the energy retail market and similar approaches have proven to be successful in other areas, such as the Energy Ombudsman.<sup>35</sup>

3.34. It is our view that our recommended approach, coupled with the powers we have under the BPMMRs, will provide appropriate consumer safeguards and address key concerns. Over a period of time we expect that this model will achieve high standards for TPI activity without compromising on innovation.

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<sup>35</sup> The Energy Ombudsman services: <http://www.ombudsman-services.org/energy.html>

## 4. Next Steps

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### Chapter Summary

This chapter details our next steps to the TPI project including market monitoring and information sharing in the TPI market.

**Question 7:** Do you agree that there is scope for improving complaints monitoring and information sharing? Do you have any further views?

### Next steps

4.1. In this document we have set out our recommendations for regulatory reform in the TPI market and the associated governance. This consultation is an opportunity for you to contribute your views and support Ofgem through your feedback, information and data in finalising the appropriate policy. In particular, we welcome views on the key issues around the best regulatory measure for the market, the development of a potential a TPI code of practice and the best associated governance structure.

4.2. The success and pace of our policy development will significantly depend on the collaborative spirit of TPIs and suppliers. In the meantime, we will continue our stakeholder engagement and explore ways to develop a potential framework for the proposed independent board as well as drive forward our considerations for TPI market monitoring. Whilst our proposals are going through the consultation process, we encourage and expect TPIs to follow the principles included in our draft code of practice and earlier open letter. This will help to promote consumer trust and transparency in the market at the earliest opportunity.

4.3. Following this consultation, and subject to the need to amend our proposals in the light of responses, we will draft and consult on the drafting of the necessary supplier licence conditions. It is our intention to have the code of practice and licence conditions in place later this year.

4.4. Alongside this work, we will also engage with stakeholders to continue the development of the code of practice and explore some of the practical issues around creating a new governance structure for the code of practice.

### TPI market monitoring: Complaints monitoring and information sharing

4.5. It is our view that there is considerable scope for improving complaints monitoring and information sharing. Information sharing in the TPI market is often undocumented and inconsistent. In our stakeholder engagement discussions, some key points<sup>36</sup> about information sharing and complaints were highlighted. These were:

- Where, when and how would this information be published?

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<sup>36</sup> TPI Stakeholder conference minutes; October 2013

- What information could/would be published?

4.6. We agree that these points are important and would like to invite specific views on whether ahead of the code of practice coming into effect there is information that would be helpful to publish, without causing any onerous effects to organisations operating in the market. Similarly, we envisage the code of practice will cover these issues, so responses can be taken into account as these sections are developed.

4.7. We have started engaging with government bodies and consumer organisations such as DECC, Consumer Futures,<sup>37</sup> and the Citizens Advice Consumer Service,<sup>38</sup> about enlisting their support for a new market monitoring regime for TPIs. They have all been supportive to date and have expressed a desire to be involved.

### **Market awareness**

4.8. We are keen to ensure that TPIs across the energy retail market are fully aware of this consultation. We invite as much stakeholder feedback as possible to ensure our proposals are fully informed.

4.9. To help ensure the success of our policy proposals, we will aim to reach and inform as many industry participants about our proposals as possible. We are keen to work closely with industry to maximise the benefits of our proposals and minimise any onerous effects which may arise from policy implementation'

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<sup>37</sup> Consumer Futures work on behalf of consumers in the general economy;  
<http://www.consumerfutures.org.uk/about-us>

<sup>38</sup> Citizens Advice Consumer Service – provides free, confidential and impartial advice on consumer issues;  
[http://www.citizensadvice.org.uk/index/getadvice/consumer\\_service.htm](http://www.citizensadvice.org.uk/index/getadvice/consumer_service.htm)

# Appendix 1 – Draft Impact Assessment

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## Overview

The Gas and Electricity Markets Authority (GEMA) are required by their statutory duties (Section 5A of Utilities Act 2000)<sup>39</sup> to carry out an Impact Assessment (IA) for any proposal that is considered important. A proposal is deemed important whereby it involves a major change in the activities we carry out or would have a significant impact on industry stakeholders, the environment or the general (or a part of) the public of Great Britain. It is our assessment that the work we are carrying out in the non-domestic arena falls within the scope of this criteria. This is because, as previously outlined in Chapter 2, the vast majority of contracts in the non-domestic market are negotiated through TPIs and any regulatory intervention is thus likely to impact on the wider retail energy market.

## Key objective of this IA

1.1. This IA sets out the potential impact of our policy proposals on non-domestic consumers, the market (non-domestic suppliers and TPIs) and on general competition. It also presents likely impact on other areas that are part of Ofgem's statutory duties. The analysis in this IA is considered against a base case of maintaining the status quo (not introducing any regulatory solution) and covers both qualitative and quantitative analysis. However, we acknowledge that the status quo is now subject to Ofgem having gained powers under the BPMMRs in November 2013. Given this is a recent development; it has not yet been possible to make a full assessment of the impact of Ofgem having these new powers.

## IA structure

- Section 2 - Includes analysis of potential impacts of our proposals.
- Section 3 – Sets out assessment of likely direct costs.
- Section 4 - Presents a brief outline of risks and unintended consequences
- Section 5 - Conclusions and next steps.

1.2. This IA is based on available data and our assessment of a case for change. In October 2013 we consulted on changes to Ofgem's IA guidance and the revised guidance was published on 1 October 2013.<sup>40</sup> As much of our policy development had taken place before the revised guidance was published, this IA has been drafted in line with our previous guidance.<sup>41</sup> We have incorporated, wherever possible, the key themes from the October guidance.

1.3. Since this is a draft IA, we would like to invite stakeholders to offer their views including cost data. This will help to enhance our assessment and finalise policy. Please

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<sup>39</sup> Utilities Act 2000; <http://www.legislation.gov.uk/ukpga/2003/30/section/6>

<sup>40</sup> October 2013 IA guidance is available on our website; <https://www.ofgem.gov.uk/publications-andupdates/impact-assessment-guidance>

<sup>41</sup> December 2009 IA guidance is available at: <https://www.ofgem.gov.uk/publicationsandupdates/guidance-impact-assessments>



provide any relevant qualitative and quantitative information on this IA no later than 9 May 2014.

## 2. Impact of Ofgem’s recommendations in the non-domestic TPI energy market

2.1 As previously mentioned in our case for intervention (chapter 2 of the consultation document) the non-domestic energy TPI market is significant and plays a crucial role in the wider retail energy market. Research has shown that 80% of major energy users and 30% of smaller businesses use TPIs as their primary source of energy contracts.<sup>42</sup> With the wide scope of the market, coupled with the concerns that stakeholders have raised, we have considered a wide range of options to address the issues of concern in the TPI market (as outlined in chapter 3). The four regulatory options considered, and two associated options for governance are presented below:

**Table 1: Summary of regulatory options**

<b>Option</b>	<b>Brief description</b>
<b>Option 1:</b> maintain the status quo	Do nothing approach where TPIs continue to be governed by existing general consumer protection regulations and Ofgem would continue to monitor the TPI market.
<b>Option 2:</b> Voluntary code of practice	Upon finalisation of the draft code of practice, TPIs could sign up to become a member of this code of practice through an accreditation process.
<b>Option 3:</b> Code of practice underpinned by a licence condition on suppliers to work only with TPIs accredited to this code of practice	Ofgem will impose a licence obligation on suppliers to only work with code of practice accredited TPIs.
<b>Option 4:</b> Licensing of non-domestic TPIs	Ofgem would apply to government to make TPI activity licensable on the grounds of consumer interest. Under this option TPIs would be unable to operate in the market without a licence from Ofgem.
<b>Governance Options</b>	<b>Brief description</b>
<b>Option A:</b> Ofgem responsible for governance of the code of practice	Under this option, Ofgem would be responsible for the full management of the code of practice including code of practice management, amendments and enforcement.
<b>Option B:</b> Independent industry board responsible for code of practice governance	Code of practice finalisation and governance, including code of practice enforcement, will rest with an independent industry board. Ofgem will have overall control and veto powers on any code of practice changes.

2.2 In view of the concerns and future opportunities identified in this market (chapter 2 of the consultation document) we recommend regulatory option 3 along with governance option B. Our draft code of practice has been designed to promote honest, transparent and effective services by TPIs and we anticipate that our proposals will have an overall positive

<sup>42</sup> Datamonitor Energy Buyer Research H1 2013.

impact on both consumer engagement and the market. These proposals will put in place clear standards for TPI conduct and place accountability on TPIs and suppliers to provide a better service to consumers. We present below our likely considered impact of each proposal on consumers, industry and competition.

## Impact on consumers

2.3 A summary of the likely effects of each proposal on consumers is considered below:

Option	Likely impact on consumers
<p><b>Option 1:</b> maintaining the status quo</p>	<ul style="list-style-type: none"> <li>• This would offer no solution to the problems identified (chapter 2) and would be counter to the call from industry to make improvements.</li> <li>• Issues around lack of transparency, misrepresentation and lack of awareness would continue. This would negatively impact consumer confidence and thereby market engagement and would have a subsequent effect on the competitive pressures on TPIs.</li> </ul>
<p><b>Option 2:</b> Voluntary code of practice</p>	<ul style="list-style-type: none"> <li>• Potentially have some positive impact on consumers as those signed up to the code of practice would be committed to being more professional in their conduct and transparent in disclosing information relevant to consumers.</li> <li>• Due to the voluntary nature of this measure, a number of TPIs may choose to not sign up to the code of practice. This would likely fail to capture those TPIs that are most harming the market and we would have limited powers to tackle any poor behaviour.</li> <li>• This approach will not be fully effective in addressing the concerns identified in our case for change and in view of stakeholder feedback this approach may be deemed too 'light touch'. This could, in the long-term, have a negative impact on consumer experiences when using TPIs.</li> <li>• As only some TPIs will choose to operate in the framework as set out in the code of practice (e.g. to be transparent and provide clear and full information) this will cause inconsistency across the TPI market and cause possible confusion to consumers.</li> </ul>
<p><b>Option 3:</b> Code of practice underpinned by a licence condition on suppliers to work only with TPIs accredited to this code of practice</p>	<ul style="list-style-type: none"> <li>• The mandatory nature of this option makes this a more robust option in enforcing change. This is likely to inspire greater consumer confidence. As under our governance recommendation code of practice governance would be held by an independent body (whether Ofgem or the independent industry code Board), this will ensure that consumer protection remains the primary objective of the code of practice and thereby guaranteeing its independent credibility.</li> <li>• It is not our intention for cost burdens to be placed on to consumers but we recognise that industry may pass on costs to their customers. It is our view that any costs passed through on to consumers will be outweighed by the consumer benefits in the form of clear and enforceable TPI standards of service including transparency of information and professional conduct.</li> </ul>
<p><b>Option 4:</b> direct licensing of TPIs</p>	<ul style="list-style-type: none"> <li>• This could have the biggest impact of the options considered on consumer trust in TPIs.</li> <li>• It would be the most resource intensive measure relative to other options as this would take a long time to implement (due to applying to government for the powers to do so) which could mean that that identified consumers concerns would not be addressed for some time.</li> <li>• Some of the small scale TPIs who may be offering excellent goods and services to non-domestic (particularly SME) consumers may be frozen out of the market, unintentionally, as a result of the costs of this measure</li> </ul>

(which could impact on consumer choice).

## Impact on industry

2.4 A summary of the likely effects of each proposal on industry is considered below:

Option	Likely impact on industry
<p><b>Option 1:</b> maintaining the status quo</p>	<ul style="list-style-type: none"> <li>• No costs of implementation or for changing internal processes to ensure organisations are compliant with any new regulatory measure.</li> <li>• However, industry feedback has indicated a strong desire for Ofgem to intervene in the market as a matter of urgency.</li> <li>• By allowing the status quo to continue, this could impact on the perception of the wider TPI market which could have a negative impact on those TPIs who do choose to operate and function in a more favourable manner.</li> </ul>
<p><b>Option 2:</b> Voluntary code of practice</p>	<ul style="list-style-type: none"> <li>• A voluntary code of practice would cause less disruption to the market, when compared against other regulatory proposals.</li> <li>• Ensures that all industry bodies are taking a proactive approach to achieving higher levels of non-domestic consumer satisfaction.</li> <li>• A voluntary code of practice by TPIs would be easier to implement than a mandated option. There would be limited costs to suppliers and TPIs would bear the costs of accreditation. There would be lower responsibilities on suppliers and TPIs alike. However this will not release TPIs and suppliers from their current obligations which govern the consumer-TPI experience.</li> <li>• The success of a voluntary code of practice would be dependent on the level of sign-up by TPIs. If sign-up to a voluntary code of practice is low, this will mean that the TPI market will continue to operate as it is, thereby, the problems that consumers face, will remain. TPI organisations may also use branding and accreditation as a marketing tool to consumers, but may not align themselves to the code of practice's principles in practice, which could be harmful to the industry overall.</li> <li>• Stakeholder feedback has indicated that this would be detrimental to both consumers and industry.</li> </ul>
<p><b>Option 3:</b> Code of practice underpinned by a licence condition on suppliers to work only with TPIs accredited to this code of practice</p>	<ul style="list-style-type: none"> <li>• A mandatory code of practice will have a direct impact on TPI and supplier costs while they implement the code of practice and change any necessary internal processes. Any associated accreditation process will require resources to be allocated accordingly (e.g. additional staff training), in addition to any changes to business processes that may be required to match the principles of the code of practice.</li> <li>• A mandatory code of practice should result in an increase in the trust non-domestic consumers place in TPIs, which will have a positive impact on business activity in this market thereby increasing overall competition.</li> <li>• Where TPIs decide not to become accredited to any final code of practice, suppliers will be prohibited from working with them. This could impact on the ability of such TPIs to operate in the market.</li> </ul>
<p><b>Option 4: direct licensing of TPIs</b></p>	<ul style="list-style-type: none"> <li>• If TPIs are required to follow a set of licence conditions, this will allow for enforcement action<sup>43</sup> in situations where TPIs are found to be misbehaving.</li> <li>• However, the costs to TPIs of keeping their practices in line with any licence condition imposed on them could be substantial and impact on the</li> </ul>

<sup>43</sup> Ofgem's enforcement approach is described in the Enforcement Guidelines available at: <https://www.ofgem.gov.uk/publications-and-updates/enforcement-guidelines-complaints-and-investigations> . As part of our Enforcement Review, revised guidelines are expected to be consulted in 2014

	<p>ability of some TPIs to compete in the market.</p> <ul style="list-style-type: none"> <li>• This option would take considerable time in implementing enhanced protection measures for the non-domestic energy consumer.</li> </ul>
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## Impact on competition

2.5 A summary of the likely effects of our proposals on competition is considered below:

Option	Likely impact on competition
<p><b>Option 1:</b> maintaining the status quo</p>	<ul style="list-style-type: none"> <li>• A 'do nothing' approach would mean there is little stimuli for competition and there will be a continuation of information asymmetry amongst consumers.</li> <li>• In the absence of clear standards/obligations, the activities of some TPIs could have a long term negative effect on competition and market engagement. This could potentially harm consumers in the long-term as TPIs who fail to operate within the desired boundaries would continue to misbehave and thus, contribute towards causing consumer detriment.</li> <li>• If increasing numbers of consumers have negative experiences in using TPIs, distrust in the market will grow and engagement will decrease which could decrease competitive pressure on organisations. This is evidenced in the non-domestic research published by Ofgem in December 2013<sup>44</sup>. Overall, there were polarised views about brokers amongst the 1,300 respondents surveyed. Just over a third (34%) had a broadly positive view, whilst 31% were broadly negative. Micro businesses were less likely to use a broker. They therefore are more likely to be basing their views on the sales approaches of brokers, rather than any direct experiences.</li> </ul>
<p><b>Option 2:</b> Voluntary code of practice</p>	<ul style="list-style-type: none"> <li>• This approach is unlikely to provide a sufficient amount of encouragement to TPIs to maintain a high level of service.</li> <li>• A certain lack of trust has already been identified in the TPI market, and without the right regulatory incentives on TPIs to encourage high levels of service, this lack of trust is likely to continue.</li> <li>• Ultimately this may increase engagement and competitive pressure in the market compared with the do nothing option, the impact is less than for the mandatory code of practice options.</li> </ul>
<p><b>Option 3:</b> Code of practice underpinned by a licence condition on suppliers to work only with TPIs accredited to this code.</p>	<ul style="list-style-type: none"> <li>• The mandatory pressure placed on suppliers and TPIs ensures that there will be an increase in the transparency, fairness and effectiveness of TPIs and their services. This will contribute towards increased consumer confidence which will have a direct impact on consumer engagement. This will enable more competitive pressure on TPIs to offer the best possible services to consumers.</li> <li>• With the governance of the code of practice being passed onto a variety of industry and consumer representatives, the objective is that any code of practice will not favour any particular industry players as this will be fully independent. Ofgem retaining overall control of the code, provides additional reassurance that it will be fit for purpose and encourage competition.</li> </ul>
<p><b>Option 4:</b> direct licensing of TPIs</p>	<ul style="list-style-type: none"> <li>• This will ensure robust consumer protection as the regulations will be compulsory and we will have the ability to take enforcement action<sup>45</sup> against any mis-behaving TPIs.</li> </ul>

<sup>44</sup> Element Energy: Quantitative research into non-domestic consumer engagement in the energy market (published Dec 2013)

<sup>45</sup> Ofgem's enforcement approach is described in the Enforcement Guidelines available at: <https://www.ofgem.gov.uk/publications-and-updates/enforcement-guidelines-complaints-and-investigations> . As part of our Enforcement Review, revised guidelines are expected to be consulted in 2014

	<ul style="list-style-type: none"> <li>• This should mean that consumers may feel more confident in using TPIs and activity in this area may consequently increase. This could also increase pressure on TPIs to offer more competitive goods and services within a fair, honest, transparent and appropriate framework.</li> <li>• As well as impacting on existing TPIs, this measure could act as a barrier to entry and expansion by new TPIs as it could potentially force some TPIs out of the market, thereby reducing competition in the overall TPI market. This would be due to the cost implications that this measure could place on TPI business models.</li> </ul>
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### **Impact on security of supply**

2.6 We do not consider our proposals to have any significant impact on security of supply. However, we are aware of organisations operating in the wholesale market that also operate in the TPI market. We invite stakeholder views on this point and whether there are any specific issues that we should be considering in our analysis and policy development.

### **Impact on sustainable development and the environment**

2.7 We consider there could be potential social benefits to businesses whose services are supported by community level intermediaries. Some TPIs models support consumers' decision making around energy efficiency and financial management. A well-functioning TPI market is more likely to deliver benefits in these areas. In addition, we expect that our code-based model, by facilitating consumer trust and assurance, could help to promote growth of businesses and TPIs in particular.

2.8 We do not expect our proposals to have any negative impact on sustainable development and the environment. However, we invite stakeholder views on our overall assessment.

### **Distributional effects**

2.9 We do not consider that our proposals will have cause wider geographical or supply chain issues but we invite views on this or any other distributional impacts that stakeholders envisage arising as a direct consequence of our proposals.

### **Impact on Health and Safety**

2.10 We do not consider our proposals to have any significant impact on health and safety. However, we invite stakeholder views on this.

**Question 1: Do you agree with our assessment of likely impact on consumers? Is there any other issue/s we should be considering?**

**Question 2: Do you agree with our assessment of likely impact on industry? Is there any other issue/s we should be considering?**

**Question 3: Do you agree with our assessment of likely impact on competition? Is there any other issue/s we should be considering?**

## Question 4: Are there any distributional effects that our policy proposals could cause?

### Post implementation review

2.11 We believe that by setting clear standards for TPI conduct we will clamp down on existing and potential problems. We envisage a strong governance process to bring positive changes across the non-domestic TPI market. Additionally, part of the code of practice's requirements will include aspects such as complaints handling by TPIs. Through measures like this there will be improved monitoring of TPI practices. Ofgem will closely monitor the implementation and governance of this code of practice to ensure that the benefits of this regulatory measure are realised by consumers and industry.

## 3 Direct costs of our recommendations

3.1 Ofgem has previous experience in the implementation and maintenance of code of practices: the Meter Asset Manager code of practice<sup>46</sup> (MAMCoP) in 2005 and currently the Confidence Code<sup>47</sup> for domestic price comparison websites and the Smart Metering Installation code of practice ('SMICOP'<sup>48</sup>). This has provided us with the assumptions to approach a quantitative assessment. We have also researched other areas of work, such as the introduction of consumer protection legislation and the telecommunications sector whereby Ofcom, in 2008, introduced a general condition to protect consumers from mis-selling of mobile telecommunication services. Ofcom had previously implemented a voluntary code of practice but a subsequent review indicated that the desired effects were not being realised and that further action was required.

3.2 Whilst our analysis of potential costs has involved engaging with stakeholders and regulatory parties from outside of industry in an attempt to obtain an approximate estimate of costs for our proposals, we presently lack concrete quantitative data that would better inform our cost implications. It is with this in mind, that we request respondents to this consultation to provide us with more accurate cost data, as outlined below. This data will enable us to conduct a more robust cost-benefit analysis before introducing our final policy decisions.

3.3 In particular, we welcome information (for TPIs and suppliers) in relation to implementation costs, accreditation costs and other costs associated with governance of the code of practice (for example monitoring, compliance and enforcement costs

3.4 We are keen to hear from smaller suppliers and TPIs who could be impacted by any potential measure introduced in the market, as to the cost implications any proposal could have on their business models.

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<sup>46</sup> Meter Asset Management code of practice (2004) <https://www.ofgem.gov.uk/publications-and-updates/ofgem-code-practice-gas-meter-asset-managers-mamcop-mamcop-scheme-management-board-terms-reference> [2004]

<sup>47</sup> The Confidence Code, further details are available on our website.

<sup>48</sup> The Smart Metering Installation code of practice (Nov 2013); <http://www.energy-uk.org.uk/policy/smart-meters/-smart-metering-installation-code-of-practice.html>

**Question 5: To better inform our cost-benefit analysis, please provide us with financial/costs data on the following:**

- **Initial (one-off) costs: including costs to your business models and costs for familiarisation to the code of practice (this includes, costs to understand your obligations and relevant staff training and any costs to change internal processes as necessary);**
- **On-going costs: this includes resourcing implications of the introduction of a code of practice to your organisation and any other expense that you think may be incurred (for example, monitoring compliance).**

## **4 Risks and unintended consequences**

4.1 As with any new regulatory intervention, there may be risks and unintended consequences that could arise from implementation. We identify below our assessment of these risks and unintended consequences and mitigating measures.

### **Effect on competition**

4.2 We recognise that any new regulatory burden could place increased responsibility on industry participants. This will be easier for some business models than others. Whilst it is not our intention to dislodge any organisation from the market, we appreciate the risk that some TPIS may struggle to meet any new obligations. This could also restrict the ability of smaller organisations to enter into the market in the future, should mandatory regulation be implemented, whereby suppliers only work with accredited TPIS or should the direct licensing of TPIS be introduced.

4.3 We have also been made aware of potential competition implications of our proposals given the existence of other voluntary codes of practice for TPIS in the non-domestic market. In order to lessen the impact of this potential risk, our preferred governance structure, whereby industry will continue to develop the code of practice and put in place any associated framework for implementation and enforcement, will be expected to consider the practicalities of any proposals and the likely impact on those affected. It is our view that our proposals are proportionate and our proposed independent governance arrangement will mitigate any risks. This will help to ensure that any unintended consequences on competition in the TPI market are mitigated.

### **Impact on innovation**

4.4 Whilst we are aware of the potential impacts our proposals could have on innovation in the market, overall we consider that our proposals are proportionate and will have no significant effect or limit the products or services that TPIS can offer to their customers. We consider that our proposals will in the long-term promote better choices for non-domestic consumers and provide them with the confidence to easily navigate through the wide array of goods and services available to them.

4.5 Our proposed code of practice (associated documents) places a requirement for TPIs to be transparent in the fees and commission involved in the goods and services they are offering. This is intended to provide information to consumers on the costs they are likely to incur in using TPI services. Concerns have been raised in the past that such proposals could impact on TPIs retaining their competitive advantage over larger organisations. We are not looking for TPIs to disclose their full cost models to consumers but to provide them clarity: (i) whether the service is free or chargeable and (ii) if there is fee/price for the TPI services what is that amount? We do not consider such disclosures to be harmful to TPI businesses and consider these necessary in providing clear and useful information to consumers in making decisions.

**Question 6: Do you have any additional comments on the risks and unintended consequences outlined above? Are there any other risks or unintended consequences that have not been considered? Please provide as much information as possible.**

## 5 Conclusion and Next Steps

5.1 This document has set out the potential impacts on both consumers and wider industry of proposed regulatory intervention in the non-domestic TPI energy retail market. Whilst our commitments require further data in order to fully inform our analysis, our qualitative analysis indicates that, in view of the rapid rate of development of services and goods offered in the energy TPI market, our proposals and intervening now are likely to provide an overall benefit to both existing and future consumers.

5.2 Whilst our proposals for regulatory intervention have cost implications and possible risks and unintended consequences associated with them, stakeholder feedback and our subsequent analysis indicates that the benefits to consumers outweighs these risks. As outlined throughout this consultation, we anticipate that a non-domestic code of practice underpinned by a licence condition on suppliers will provide increased protection to consumers. This should, in turn, lead to increased levels of confidence and trust when non-domestic consumers use energy intermediaries.

5.3 We recognise that it may be easier to make quantitative assessments of the costs involved with the regulatory proposals, than to quantify the significant benefits we expect to flow in terms of a better functioning market, increased transparency for consumers, additional competitive pressures and raised standards of service, all of which lead to an improved consumer experience. We will need to consider all the relevant information together in the round following this consultation.

5.4 The call for evidence in this IA will run alongside the overall consultation for 12 weeks and we invite responses by 9 May 2014. Following the close of the consultation period, we will review all stakeholder feedback and submitted data and conduct further internal analysis in order to better inform our policy development and subsequent proposal for regulatory intervention. We expect to consult on our final policy proposal later this year.



## Appendix 2 – Summary of questions

Chapter	Question
<b>1</b>	N/A
<b>2</b>	<p><b>Question 1</b> : Do you agree with the definition of TPIs? Please provide any suggestions along with supporting information.</p> <p><b>Question 2</b> : Do you agree with our list of proposed TPIs that could be covered by any regulation we introduce?</p> <p><b>Question 3</b> : What types of organisations should be exempt from our TPI scope definition and why?</p>
<b>3</b>	<p><b>Question 4</b>: Do you agree with our recommended option for regulating non-domestic TPIs?</p> <p><b>Question 5</b>: Do you agree with our proposed governance recommendations?</p> <p><b>Question 6</b>: Please provide your views on the appropriate representation for members of the proposed independent code board.</p>
<b>4</b>	<b>Question 7</b> : Do you agree that there is scope for improving complaints monitoring and information sharing? Do you have any further views?
<b>Appendix 1</b>	
<b>1</b>	N/A
<b>2</b>	<p><b>Question IA1</b>: Do you agree with our assessment of likely impact on consumers? Is there any other issue/s we should be considering?</p> <p><b>Question IA2</b>: Do you agree with our assessment of likely impact on industry? Is there any other issue/s we should be considering?</p> <p><b>Question IA3</b>: Do you agree with our assessment of likely impact on competition? Is there any other issue/s we should be considering?</p> <p><b>Question IA4</b>: Are there any distributional effects that our policy proposals could cause?</p>
<b>3</b>	<p><b>Question IA5</b>: To better inform our cost-benefit analysis, please provide us with financial/costs data on the following:</p> <p><b>Initial (one-off) costs</b>: including costs to your business models and costs for familiarisation to the code of practice (this includes, costs to understand your obligations and relevant staff training and any costs to change internal processes as necessary);</p> <p><b>On-going costs</b>: this includes resourcing implications of the introduction of a code of practice to your organisation and any other expense that you think may be incurred (for example, costs of undertaking any necessary enforcement actions, monitoring compliance).</p>
<b>4</b>	<b>Question IA6</b> : Do you have any additional comments on the risks and unintended consequences outlined above? Are there any other risks or unintended consequences that have not been considered? Please provide as much information as possible.
<b>5</b>	N/A

# Appendix 3 – Glossary

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## A

### Aggregators

Companies who manage or work with a number of third parties for arranging energy contracts for a volume of consumers. They may also interact with consumers as a TPI.

### Authority

The Gas and Electricity Markets Authority.

## B

### Barrier to entry

A factor or circumstance that limits a firm's ability to enter a market.

### Broker

Research and present offers from a range of suppliers to the consumer. Consultants are similar to brokers, but may also provide information on energy efficiency measures.

### Bundled Services

Where consumers purchase multiple services from a single provider. For example, telecommunications and energy.

### Business Protection from Misleading Marketing Regulations (BPMMRs) 2008/2013

The Business Protection from Misleading Marketing Regulations 2008 (BPMMRs) prohibit businesses from advertising products in a way that misleads traders and set out conditions under which comparative advertising, to consumers and business, is permitted.

## C

### Consultant

Research and present offers from a range of suppliers to the consumer. Consultants are similar to brokers, but may also provide information on energy efficiency measures

### Consumer Protection from Unfair Trading Regulations (CPRs) 2008

The Consumer Protection from Unfair Trading Regulations 2008 introduce a general duty not to trade unfairly and seeks to ensure that traders act honestly and fairly towards their consumers. They apply primarily to business to consumer practices (but elements of business to business practices are also covered where they affect, or are likely to affect, consumers).

## D

## Department for Energy and Climate Change (DECC)

The UK government department responsible for policy in the fields of energy and climate change.

## Domestic consumer

A consumer that uses energy for non-commercial purposes.

## E

## Energy Advice Companies

Offers energy advice to consumers

## I

## Intermediary

An organisation that intermediates between an organisation and a consumer.

## N

## Non Domestic consumer

A consumer that uses energy for commercial purposes.

## Non domestic retail energy market

Market which serves non domestic business consumers

## O

## Office of Fair Trading (OFT)

The body established by the Enterprise Act 2002 (which replaced the Office of Director General of Fair Trading) with functions that include enforcing consumer protection law and competition law, reviewing mergers and conducting market studies.

## Ombudsman Services: Energy

Ombudsman Services: Energy means the Ombudsman Services provided to Energy Suppliers and Energy Network Operators. The Ombudsman's principal aim is to receive complaints made by complainants in accordance with the Ombudsman's Terms of Reference and to consider and, where appropriate, investigate such complaints in order to encourage and/or facilitate the terms of their resolution, settlement and/or withdrawal.

## S

## Sales/Supplier Agent

These companies may be employed directly with the sole interest to represent the supplier to the consumer. Some agents work for a single supplier, known as primary agents, whereas others may represent multiple suppliers, known as secondary agents.

### Smart meter

A meter that provides measured gas or electricity consumption data for multiple time periods, and is able to provide the relevant supplier with remote access to such data.

### Smart Metering Installation code of practice (SMICOP)

code of practice of practice governing the installation of smart meters

### Standard Licence Conditions (SLCs)

The legally binding conditions that licensed gas and electricity suppliers must meet to supply to domestic and non domestic consumers, in accordance with the Gas Act (1986) and Electricity Act (1989).

### Switching site/price comparison website

Service to help consumers search and compare energy deals online

### Telesales

A method of direct marketing in which a salesperson solicits prospective customers to buy products or services over the phone.

### Third Party Intermediaries (TPIs): Non-domestic

Third Party Intermediaries (TPIs) are parties who engage in direct or indirect activities between a non domestic consumer and an energy supplier to assist consumers with their energy supply needs.

### Trading Standards

Trading Standards enforce consumer related legislation, legislation which is vast and constantly evolving and changing

## U

### Umbrella/Franchise site

Organisations that operate under a large brand name (not their own)

## Appendix 4 – Feedback questionnaire

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1.1. Consultation is at the heart of good policy development. We are keen to consider any comments or complaints about how this consultation has been conducted. We're keen to hear your answers to these questions:

1. Do you have any comments about the overall process, which was adopted for this consultation?
2. Do you have any comments about the overall tone and content of the report?
3. Was the report easy to read and understand, could it have been better written?
4. To what extent did the report's conclusions provide a balanced view?
5. To what extent did the report make reasoned recommendations for improvement?

1.2. Please add any further comments and send your response to:

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