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Dear Meghna

### **Third Party Intermediaries – Proposals for Regulating Non-domestic TPIs**

Thank you for the opportunity to respond to this consultation. After some introductory comments, we make specific proposals on how the Code should define a TPI, who should be covered by the code, the governance arrangements for the code and complaint monitoring. In summary, we consider that policy amendments are needed to address three significant issues:

- As currently proposed, the code is inequitable as it places greater burdens on TPIs than on a supplier's direct sales force;
- The proposed arrangements will have the effect of giving suppliers an administrative route to undermining a TPI's business; and
- The interests of TPIs and suppliers differ and should not be expected to be aligned.

We therefore propose the code is developed to include the following features:

- The scope of the code, and hence the definition of a TPI, should cover parties involved in placing energy contracts;
- The code provisions must apply equally to suppliers as well as TPIs;
- Consumers are the best placed to assess whether TPIs have acted reasonably and in their interests, so decisions on whether the code has been breached and on any potential sanctions should be made by a panel of consumer representatives;
- The code should be overseen by a board made up of equal numbers from the consumer, supplier and TPI communities, with board members acting in an individual capacity, rather than representing a constituency; and
- Aggregate complaint information should be published, based on provisions that ensure that the root cause of a complaint is correctly identified.

### **Introduction**

Energy Services Partnership is one of the leading TPIs in the country, working primarily for larger Industrial & Commercial customers. We received the award for Consultant of the Year for 2010 and

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2011 at the Energy Awards and last year we were named I&C Most Innovative Consultant at the Energy Live Consultancy Awards.

To date, we have been positive supporters of the Code, participating in Ofgem's working group, and believe that a well designed and implemented code can achieve the desired objectives.

However, we have two major concerns with the approach being put forward in this consultation paper. The code as currently constructed will place greater burdens on TPIs than on licensed suppliers. In particular, the scope of the code covers all business consumers, whereas equivalent regulation on the suppliers is limited to micro business consumers. Consequently, TPIs operating in the larger I&C sector will be more tightly regulated than suppliers' direct sales forces.

Secondly, the approach preferred by Ofgem will have the effect of giving suppliers the ability to undermine a TPI's business. This could occur through additional bureaucracy and uncertainty or through pursuing commercial objectives through the administrative channels that the Code will create.

The additional bureaucracy and administration will arise from how the code is applied. If a supplier has a licence obligation to use only TPIs that are accredited under the Code, it is reasonable to expect the supplier, as part of its strategy for ensuring compliance with its obligations, will review the requirements of the Code, how it expects TPIs to comply with the Code and communicate those expectations to TPIs. The issue is that each supplier is likely to come up with slightly different interpretations of the Code, such that TPIs will end up having to consider the requirements that multiple suppliers will seek to place on them. This will significantly increase the amount of work needed to comply with the Code and the uncertainty over how the requirements of the Code are to be met.

In addition, the business model for many TPIs is to approach multiple suppliers as part of securing the most appropriate offer for their clients. With this model, the interests of the TPI are more closely aligned with those of the consumer than those of a supplier. This misalignment means that in may be in a supplier's interest to challenge the operations and reputation of TPIs as part of a process of trying to secure direct sales. A supplier, for example, may claim a TPI breaches the Code when there is a threat of losing business through the TPI to another supplier. Accordingly, it is critical that decisions about compliance with the Code are handled by parties other than suppliers. The Code must not provide an administrative channel that can distort a commercial position.

### **Definition**

As the consultation paper points out, TPIs employ a number of different business models and can provide a range of services. This makes the definition of who is to be covered and what activities are to be covered a critical issue. We are not in favour of the first definition offered ("engaged in direct or indirect activities") as this is vague and a legalistic interpretation could have unintended consequences; for example, by including anyone providing advice about small-scale renewable energy installations.

We would suggest that in the light of the information provided by Ofgem about the issues prompting the intervention, issues relating to misrepresentation and misleading consumers can be covered by the powers Ofgem has under the Business Protection from Misleading Marketing Regulations 2008. Therefore, the core activity to protect is the establishment of supply contracts between suppliers and consumers. Accordingly, to focus the scope of the code on this activity, we would modify the definition of a TPI accordingly to

“an intermediary between a non-domestic consumer and an energy supplier that provides advice and assistance to the consumer in relation to placing their energy supply contracts with a supplier”.

We believe this definition applies whether the TPI operates a consultancy- or brokerage-style model and so avoids this potential loophole. Building on our earlier comments and to avoid creating loopholes, we believe that the code of practice should apply to all parties involved in placing energy contracts. Therefore, we do not support limiting the definition to face-to-face or telephone-based services and we would strongly urge Ofgem to apply the same standards across the entire non-domestic market to suppliers as well and set the scope so that it applies to any party that provides advice and assistance, not just intermediaries.

### **Options for Regulation**

We agree with Ofgem that maintaining the status quo will mean that the detriment identified will not be addressed and that establishing a licence regime for TPIs is not a proportionate response as a first step.

If the conclusion of this process were to be that a voluntary code of practice is to be established and promoted, we would give this serious consideration. We concur that the success of a voluntary code will depend on the number of TPIs that sign up, building the code brand and the governance arrangements, particularly the operation of any compliance and monitoring function.

We strongly disagree, however, with Ofgem’s preferred option to underpin the code of practice with a licence condition on suppliers. This will place a significant potential penalty on each supplier, which will make them cautious and risk averse. We expect this will lead suppliers to develop teams of people to review TPI activity, operating according to guidance from their legal departments. Each set of guidance is likely to have different elements, so that a TPI wishing to handle offers from a broad cross-section of suppliers will have to deal with multiple interpretations of the code, which will place a disproportionate burden on TPIs, particularly when, for larger I&C customers, the suppliers will not have to abide by the same standards.

We understand that the model of the Meter Asset Manager (MAM) Code of Practice has been put forward as a model for enforcing the TPI Code of Practice. However, there is a major difference between the MAM/supplier and TPI/supplier relationships, which we consider results in a fundamental flaw with Ofgem’s preferred approach. The purpose of a MAM is to provide services that are required for the supply industry systems to operate effectively. It places minimum standards on services so that, regardless of the service provider and the suppliers involved with a consumer, competition is facilitated. In practice, there is alignment across the interests of the suppliers and the MAM.

This alignment should not be expected to exist between TPIs and suppliers. Any TPI dealing with more than one supplier should be operating in the best interests of their clients, not suppliers. Many TPIs look across the market to find the best deal and push suppliers to improve offers. In these cases, the interests of the supplier and the TPI are at odds with each other. Consequently, establishing a regulatory regime where, in effect, suppliers can have influence over the operation of TPI businesses is likely to reduce, or even remove, a check and balance against suppliers and weaken competition. Arrangements where TPIs are beholden to stay on the right side of a supplier, for fear

of having their membership of the code challenged, runs the significant risk of emasculating a TPI's ability to gain better offers on behalf of the consumer from the suppliers.

While we appreciate that there are TPIs that do not behave in a desirable manner, we would also highlight our experience that many situations that cause difficulties for consumers are the product of suppliers' shortcomings. For example:

- Suppliers failing to process changes of tenancy correctly and then declining to backdate the solutions required from their failure;
- Long delays in providing meter data that the customer is paying for;
- Backbilling issues;
- An inability to provide all information required to validate bills, on the basis that the information (for example, a demand profile) arises out of an industry agreement;
- No prior publication of out of contract rates;
- Introducing a term in the terms and conditions when renewing a contract that the supplier could change any of the terms at any time during the life of the contract without the customer's consent; and
- A failure to even acknowledge a legitimate relationship between a customer and its chosen TPI; for example, by sending renewal offers directly to the consumer without copying the TPI into the correspondence at all, even though there is a letter of authority in place, or by offering different rates directly to consumers and via a TPI that in no way can be attributed to any commission sought by the TPI.

For clarity, all of these examples relate to consumers that are larger I&C users and in no way could rely on any of the protections available to micro business consumers.

The last bullet is significant. TPIs have gained a role in the market place and developed relationships with their clients. Those relationships, evidenced by appropriate letters of authority, must not be ignored by suppliers.

The purpose of these comments is not to support a case that there should not be a TPI Code of Practice. Instead, we would argue that suppliers should be signatories as well. However, this will reinforce the significant governance problem if the current favoured model for regulating TPIs is adopted.

Instead, the starting point needs to be that TPIs' and suppliers' interests should not be expected to be aligned and this non-alignment is an important part of ensuring effective competition amongst suppliers. Ultimately, it is the interests of consumers that need to be reflected and we would suggest that the best judges of that are consumers themselves. Therefore, we would propose that potential breaches of the code are investigated by a group predominantly drawn from consumer bodies, such as the Federation of Small Businesses, the British Chambers of Commerce, MEUC and Citizens Advice. This will provide consumers, through their representatives, with the opportunity to encourage the standards they expect TPIs and suppliers to meet. When a TPI or supplier falls short, a possible sanction, for micro business consumers, would be for Ofgem to review the conclusions of the investigation in the context of the standards of conduct licence condition, so that suppliers would have to review their ongoing relationships with failing TPIs.

### **Governance Arrangements**

We broadly support the division of governance arrangements proposed by Ofgem, with Ofgem retaining overall control of the content of the code of practice and approving or rejecting any code of practice change requests and an independent industry code board, supported by a code administrator, managing and monitoring the code. We consider that the board should have equal numbers of consumer representatives, TPIs and suppliers, probably only two or three of each for practicality's sake. However, it needs to be specified that each member of the board is there to bring their experience to the board, rather than be the representative of any particular constituency.

Further, we propose, as highlighted earlier, that the investigation of any potential breaches of the code should be handled by consumer representatives, although they may seek advice from the TPI or supplier communities when appropriate.

### **Complaints Monitoring and Information Sharing**

One of the comments raised through Ofgem's working group is that there is limited information about the performance of TPIs. The generally held perception is that there are a limited number of 'rogue' TPIs and that the issues are focussed around micro business consumers. We would suggest that publishing information on the aggregate number of complaints received, the types of consumer affected and a high level categorisation of the complaints will help to confirm or dispel this picture.

As our earlier comments show, there can be many situations where a complaint initially about a TPI could be the consequence of a supplier's actions, so any monitoring system and information published will need to focus on identifying the root cause behind the complaint, so that a fair picture of TPI performance can be realised.

We hope you find these comments useful. I would welcome the opportunity to discuss this matter in more detail with you.

Yours sincerely

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