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

Dear Meghna,

SmartestEnergy welcomes the opportunity to respond to Ofgem's proposals for regulating non-domestic TPIs. In particular we welcome the distinction that has been made between the domestic and non-domestic sectors of the market as more targeted policy is better able to address the issues.

SmartestEnergy is an aggregator of embedded generation and a supplier in the HH and NHH electricity retail market serving large corporate and group organisations. Tenders for supply contracts using TPIs are common in this area of the market.

Please note that our response is not confidential.

### Overview

Customer reliance on TPIs is increasing due to the increasing complexity of the energy market. We believe consumers should be fairly treated at all points of engagement in the industry and we agree that more than just a voluntary code of practice for TPIs is required to protect consumers against misleading practices.

Option 3 (code of practice underpinned by a Licence Condition on suppliers to work only with TPIs accredited) is a sensible first step. However, we are cautious of what the supplier's licence condition will mean in practice. It is not appropriate to make suppliers liable for TPI compliance with the code of practice (where those TPIs are independent of the supplier) and effectively force suppliers to regulate TPIs as a substitute for direct regulation by Ofgem. The success of the intervention should be annually reviewed with clear metrics to help assessment. Direct licensing and regulation by Ofgem should be pursued if the intervention is not deemed successful.

It is important that the proposed obligation on suppliers is not onerous otherwise it will increase barriers to entry for both suppliers and TPIs as well as making interactions with TPIs more costly which will have an impact on what consumers eventually pay. A simple register of accredited TPIs which suppliers can check before entering into contracts should suffice. The licence condition should be explicit in stating the extent of suppliers' obligation to prevent unjustified liabilities for the supplier.

Ofgem also need to clarify what penalties suppliers will face if they work with non-accredited TPIs. We note that the consultation says Ofgem "would have the power to impose a financial



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penalty in line with [their] statement of policy on penalties" but we are awaiting the finalisation of Ofgem's revised statement (<https://www.ofgem.gov.uk/publications-and-updates/consultation-ofgems-statement-policy-respect-financial-penalties-and-consumer-redress>).

We also think that there needs to be more work regarding the following:

- Detecting non-compliance with the code- we would welcome central audits paid for by participants to demonstrate on-going compliance.
- What the stages are in deciding whether the TPI has lost its accredited status- there should be a remedy/appeal period to protect against unnecessary sanctions.
- The process and consequences when a TPI is made unaccredited- we believe a notification email should be sent out to all suppliers so that they are aware of the change to the list. We assume that the impact would be that the TPI could conduct no more work with suppliers until it achieves accreditation again and the process of re-entry into the code needs to be set out. Also the state of existing contracts with the TPI who has lost its accreditation status needs to be considered as the supplier could be seen to be still working with the TPI but the needs of the consumer, who may be happy with the individual contract, must be considered.

## Answers to specific questions

We answer the specific questions in the document below:

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

The document first suggests: "a non-domestic TPI is an intermediary engaged in direct or indirect activities between a non-domestic consumer and an active energy supplier". The document then suggests a slightly narrower definition: "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". Whilst it is right to identify that a TPI works for the customer we think that both are still too broad and the definition should be tightened. We suggest an additional reference to the TPI receiving a direct or indirect commercial benefit for the service should be included. The definition of a TPI should not include agents who work for a sole supplier and who could be viewed as an outsourced marketing department. We believe such a distinction is necessary so that agents may be regulated through the licensed entity (i.e. the supplier) whereas TPIs should be regulated separately. Another approach may be to list exclusions from the definition (such as managing agents).

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

With regards to "Umbrella/Franchise sites" insofar as this relates to consumers who have a certain structure for buying energy we do not think it is appropriate that different parts of



what is effectively the same company need to be regulated to interact with each other. If they were to act as a TPI for companies independent of the group then that is another matter for which compliance with the code should be sought.

The real issue here is that Ofgem are attempting to create a broad definition which will enable a single solution. However, it would be appropriate to make a distinction between agents and TPIs, and due to the ambiguous way in which suppliers may be made responsible for TPIs through the licence this is all the more important. We see the need for two groupings: 1) Sales/Supplier agents and umbrella/franchises of a supplier who could be subject to regulation through the supplier 2) Others (basically independent) who should be regulated separately preferably through option 4, but possibly through option 3.

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

We can think of some examples where there could be confusion, for example managing agents may play a role in maintaining an energy supply to a particular portfolio of properties, sometimes contracting directly with the supplier and sometimes contracting on behalf of the landlord. These organisations do not receive payment from the supplier for facilitating the supply and do not receive payment from the customer solely for energy procurement. They represent neither the customer nor the supplier. They should therefore be exempt.

Also, as suggested above, managing agents for suppliers should also be exempt as they are already covered by existing laws.

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

Our preference is for Option 4 because ultimately TPIs should be responsible for their own behaviour. Option 3 seems a practical compromise in some ways as it is quicker to implement, it places more of the obligation on TPIs, and the suppliers are locked in to using compliant TPIs through the licence. However, we do not agree that this means that there is or should be an "equal responsibility."

We agree that Ofgem could pursue Option 3 Code of Practice underpinned by a Licence Condition on suppliers to work only with TPIs accredited to this Code but our agreement is predicated on the following conditions:

- The licence condition should be clear that suppliers are only required to check that the TPI is listed as accredited before entering into commercial collaboration with them.
- The penalty should be based on whether this check was carried out.
- The supplier should not be liable for the TPI to actually be compliant with the Code of Practice.
- Following this, suppliers should not be required to complete any auditing of the TPI (neither initial checks nor ongoing checks). Otherwise this would limit the number of TPIs that suppliers would be able to work with, would undermine the purpose of the



Code of Practice, would increase the cost of business and would increase the time it took to serve customers engaging in the market through TPIs. It would be inefficient for each supplier to have to conduct their own audit with different requirements and it would be burdensome on TPIs to have to go through it with each supplier they wanted to work with.

- Notification emails should be sent to suppliers when a TPI has been 'struck off' the list of accredited TPIs and can no longer be worked with so that the supplier can ensure no further contracts are signed. It needs to be considered what happens to existing contracts signed with/through TPIs and ongoing commission payments that are due to be paid to the TPI on behalf of the customer.
- It needs to be defined what is meant by "working with TPIs". For example, some TPIs contract with the customer and receive payments directly, will suppliers be prevented from giving a price quote to such TPIs if they are not on the list of accredited TPIs or is the restriction limited to handing over commission or signing contracts with their involvement?

The consultation states that "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." We think that keeping the intervention under review is a sensible plan but we would like to see more detail regarding how Ofgem intend to review the success of the Code of Practice. What is the timing of a review and what are the metrics used to consider whether the intervention has been successful?

We would support the direct licensing of TPIs if a review showed a need for greater intervention.

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

We are not opposed to the independent code board structure that Ofgem favours as it duplicates current industry practice with other codes. However, in the consultation document Ofgem has not addressed how the independent code board will carry out the relevant monitoring and enforcement activities. We would suggest that a similar approach to the BSC is adopted in that audits are conducted centrally (by the Code Administrator) and the costs smeared across participants.

It must be remembered that regardless of whether Ofgem or industry governs the Code of Practice there will be costs. It needs to be considered in both governance options how these costs will be managed and funded. Costs should be kept to a minimum to ensure the best deal for consumers and to prevent new entrants from being deterred. Ofgem could make it a condition of being a member of the code that the party contributes to the cost of the scheme to overcome the issue of cost recovery.

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

We think it is sensible to have representatives from TPIs, suppliers and consumer organisations. It is worth considering both the balance between the different groups and within them to ensure a variety of views is represented fairly. Each group should have equal voting power.





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

We believe that a list of TPIs should be clearly published online. A page on Ofgem's website would be easily accessible for both suppliers and consumers. Ofgem already advises consumers on TPIs (such as "Third Party Intermediaries factsheet - what your business needs to know") and this could be strengthened by including which TPIs have signed the Code of Practice. TPI complaint information could be displayed in a similar fashion to this supplier complaint performance page on Ofgem's website <https://www.ofgem.gov.uk/about-us/how-we-work/working-consumers/supplier-performance-consumer-complaints> and the page should give consumers direction on whom they can escalate their complaint to.

Should you require further clarification on this matter, please do not hesitate to contact me.

Yours sincerely,

Jo Alexander

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