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Dear Ms Tewari

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

Utilyx welcomes the opportunity to comment on Ofgem's Proposals for regulating non-domestic Third Party Intermediates (TPIs).

Utilyx is one of the UK's leading energy consultancies and part of MITIE, the FTSE250 strategic outsourcing company.

We provide a full range of integrated energy solutions, ranging from procurement to development of on-site generation facilities, and work with many of the UK's leading companies and public sector organisations. We also assist generators and developers in selling renewable power on long-term contracts. In 2006, we became the first energy consultants to be regulated by the Financial Services Authority, now part of the Financial Conduct Authority.

### **Summary**

Although we broadly support moves to improve consumer engagement in the business energy market, we believe it is important that the current proposals specifically focus on the relationships between TPIs, suppliers and customers in relation to the procurement and management of energy supply contracts. We fundamentally believe that for too long, end users have been denied transparency on TPI charging and that this must change. Unless TPIs are able to demonstrate they have carried out a comprehensive market comparison to find best value for a customer, then they should reveal any commission paid to them by a supplier. We believe this transparency of brokers' fees and charges either on the supplier's bill



or the underlying contractual documentation is *the* most important point (over and above the 'Code' itself) to drive the right behaviour for the benefit of end user customers.

The more complex and sophisticated energy services provided by consultants should not come under the proposed regulation measures.

These services, which extend to areas such as financing of on-site renewable generation installation and negotiating long-term contracts for the sale of excess electricity, are playing an increasingly important role in helping businesses maintain competitiveness and reduce carbon emissions. These services are bespoke, highly tailored solutions with informed buyers. We are of course FCA regulated which means we already meet high standards of conduct towards our customers. It is important that the terminology used under the proposals does not enable procurement activity to be masked by using other service line descriptions. Procurement should be clearly distinguished from other services,

We also believe the proposals need to directly address the specific issue of 'invisible fees' – that is to say the practice where commissions are included in the price the customer pays and paid to the TPI by the supplier without the customer's knowledge. Often this may be in addition to what the customer is already paying the TPI. We propose some straightforward ways to address what we consider to be the central issue undermining confidence in the market.

#### **Question 1: Do you agree with the definition of TPIs?**

We believe the draft definition in the consultation (*'a non-domestic TPI is an intermediary engaged in direct or indirect activities between a non-domestic consumer and an active energy supplier'*) is too broad and could capture services which are quite separate to those which Ofgem is seeking to address.

The definition should specifically refer to relationships between TPIs, suppliers and customers with regards to the procurement of standard energy supply contracts sourced from the wholesale market (whether this is fixed price fixed term or 'flex'). It is not envisaged that this should include supply tied directly to assets, either grid connected or private wire.

It is important to recognise that there is a broad spectrum of work carried out by companies in the energy services sector. The majority of these companies focus on the procurement and management of energy contracts but a number also have much more complex and far-



reaching relationships with clients.

These include negotiating on behalf of clients in areas such as financing and Power Purchase Agreements for on-site generation which can often be more than 10 years in length.

It would be very difficult - and also not in the interests of customers - to include these more sophisticated services in any intervention and we firmly believe they should fall outside the scope of the current proposals.

If the narrower definition in the consultation was to be adopted (*an intermediary between a non-domestic customer and an energy supplier, providing advice and assistance to the customer in relation to their energy supply needs*), by simply adding 'as sourced from wholesale markets' would make it clear that it is referring specifically to customers' everyday energy supply needs sourced from the wholesale market. This would ensure more complex services provided as part of a long term energy strategy are not included.

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

In line with the concerns we expressed in response to Question 1, it is important that where appropriate, the potential TPI types identified recognise the fact that some consultants provide a much wider range of services that the supply contract procurement and management which this consultation is looking to address.

This point is particularly relevant to the 'broker or consultants' category of TPIs highlighted in the list of potential TPI types.

As a wider observation, in a market where there are a number of different business models and hundreds of participants we believe that transparency for consumers is vital to ensure they are very clear about who they are dealing with and the nature of a TPI's relationship with suppliers in relation to their energy supply contract.

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

Although Utilyx would be happy to be bound by Ofgem's final proposals for the TPI market with regard to the provision of procurement services for energy supply contracts, we believe complex, bespoke negotiations around structured long term agreements involving capital



expenditure should be excluded.

These are clearly of a very different nature to the comparatively straightforward issues around the procurement and management of energy contracts.

It is also worth noting that only a very small number of brokers providing these specialist services, including Utilyx, have accreditation from the Financial Conduct Authority (FCA).

This reflects the complex financial nature of some of the services provided in relation to a client's energy strategy including advising on investment instruments such as Contracts for Difference and contractually-based investments.

FCA accredited firms have to report and record a high level of information about their business and its activities for monitoring purposes.

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

Fundamentally, as a business regulated by the FCA, we believe in direct regulation of TPIs. We also believe that such a step is now necessary to ensure healthy competition and transparency in a market where the balance of power has shifted too far away from customers. We don't believe the scale of change required can be achieved by a licence condition alone.

We do not believe that regulation is the enemy of innovation as is suggested by the consultation, but rather the lack of regulation can lead to the wrong type of innovation. A code which aims to promote fairness and transparency for customers doesn't have to be at odds with innovation and flexibility.

We appreciate the time it would take to implement direct regulation is considerable and therefore support your recommendation to regulate TPIs through suppliers as an *interim* measure.

While we understand there may be concerns from suppliers over the additional cost and administration implications of a licence condition, it will be a step in the right direction. But we would be concerned that even with a licence condition on suppliers, this option is unlikely to stamp out all the disreputable behaviours that currently exist within the sector. Without direct regulation the opportunity exists for such behaviour to continue.



We believe direct regulation would also encourage competition by putting customers in control as opposed to a situation where suppliers could limit choice by deciding which TPIs they wanted to work with. In our opinion regulation through suppliers is potentially a way of allowing suppliers to pick winners based on a criteria that is not transparent, and we believe that the role of picking winners should be the preserve of customers and competition.

We would however add a further licence condition to suppliers which we believe addresses the most significant TPI issue, that of 'invisible fees. Unless TPIs are able to demonstrate they have carried out a comprehensive market comparison and have presented a range of offers to customers, then they should reveal any commission paid to them by a supplier.

This should be separated out either as an up-front statement to the customer or as part of a line item on the bill where it is included in the rate the customer pays.

This should not be, as suggested in the current draft Code of Practice 'upon request', but should be mandatory where a full market comparison cannot be demonstrated. This would give complete transparency to the customer as to what the TPI has been paid and indeed if they have been paid twice, once from the customer and once from the supplier. We recommend making this a further licence condition.

Lastly, given the cost pressures already facing consumers who are likely to ultimately bear at least some of the costs of regulation; it is important that regulation does not pose a significant cost burden as that would be counter-productive to the aims of Ofgem's proposals to improve consumer engagement. To that end we recommend that any measures to demonstrate compliance to a code are standardised so all suppliers and TPIs operate to the same regime.

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

Yes, we broadly agree with the proposed governance arrangements for the code of practice but would stress the importance of customer involvement and representation, not just consumer groups.

Without such involvement there would be a risk that the governance structure would serve the interests of the industry and those vested interests that circle it. Such 'regulatory capture'



could provide opportunities for companies to act against the best interests of consumers.

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

As mentioned above, we would welcome some form of customer representation on the proposed independent code board and agree with the proposal to include consumer groups in addition to suppliers, TPIs and trade associations. We believe these different interest groups should have equal voting rights.

An effective balance of representation on the proposed board should ensure independent management of the code of practice management.

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

We agree that there is scope for improving complaints monitoring and information sharing but we believe this needs to be developed alongside proposals for an enforcement framework.

There needs to be clear incentives to ensure adherence to the code as well as appropriate sanctions.

It is also important that realistic timescales are set out to enable industry to plan for the changes.

Many thanks for the opportunity to respond to this very important consultation. If there is anything you would like to follow up on then please feel free to contact my office.

Yours sincerely

Giuseppe Di Vita  
Director, Corporate Development & Strategy