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20 June 2019

Dear Sir/Madam,

**Opening Statement: Strategic Review of the microbusiness retail market**

I write in response to your request for views and evidence on the theories of harm and areas of consumer detriment as part of your Strategic Review of the microbusiness retail market. We recognise the similarities between domestic customers and microbusinesses and the issues they can face and would like to thank you for the opportunity to comment. Microbusinesses work in a competitive energy retail market and we consider they deserve the levels of protection similar to that of domestic consumers.

From April 2018 to April 2019 we received approximately 45,697 cases in the energy sector, of which 41,738 involved a domestic consumer and 3,959 involved a microbusiness consumer – 9% of the total energy cases. Of those microbusiness cases approximately 2,227 (56%) involved a billing complaint and 597 cases (15%) related to sales.

As part of the tripartite working between Ofgem, Citizens Advice (including the Extra Help Unit) and Ombudsman Services data and insights about the issues that affect or are being complained about by microbusinesses are looked at. This generally backs up the premise that to a large extent microbusinesses act in a similar way to domestic consumers when engaging or not with the energy market and face many of the same issues.

We understand that any definition of a microbusiness has a limit on the size of business covered and that there has to be a cut-off point, resulting in many small businesses falling outside the definition; we think that the issues faced by many of those small businesses, within the energy market are the same as domestic and microbusiness consumers. Yet those small businesses do not have the same or even similar protections or access to free independent redress as domestic and microbusiness consumers do.

In the financial sector, the Financial Conduct Authority (FCA) consulted on the definition of Small and Medium sized Enterprises (SMEs) with regard to access to the Financial Ombudsman Service (FOS) last year. The FCA, as of 1 April 2019, expanded its definition to enable more SMEs with a complaint about a firm that is regulated by the FCA to be eligible to take their complaint to the FOS. That definition covers any SME that falls below all of the following thresholds:

- an annual turnover of £6.5 million or below;
- an annual balance sheet below £5 million; and
- fewer than 50 employees.



This new definition is a significant widening - the FCA use to have a definition of micro business that was similar to the current Ofgem definition (fewer than 10 employees and an annual turnover or balance sheet of less than €2 million). The move to the wider definition to include more SMEs was in recognition that SMEs face many of the same issues as domestic consumers and like domestic consumers do not have the financial management or legal resources to take complaints forward if there isn't access to free independent redress. The FCA estimates that widening the definition in this way will enable an additional 210,000 SMEs to access free redress via the FOS.

Ombudsman Services Energy Workplan for 2018 to 2019 includes conducting our own systemic investigations into:

- Independent energy brokers – are they independent?
- Gaining a deeper understanding of how price comparison websites (PCWs) work with energy suppliers. Who is responsible for what? If there are areas for which the price comparison websites are solely responsible, and there is potential for consumer detriment, is regulation / prescribed independent redress required?
- How many SMEs would utilise free independent redress if available? Is there a need? What do our statistics show regarding outside terms of reference complaints based on size of business? Are there enough protections in place for SMEs as the Licence Conditions cover domestic and microbusiness in the main?

We would welcome working with Ofgem and other stakeholders on these areas.

Appendix A to this document contains general information about Ombudsman Services and attached at Annex A is general data on complaint numbers, complaint types, ombudsman decisions made, whether microbusinesses are signposted to the Energy Ombudsman, and two case studies involving microbusinesses complaining about brokers.

We have responded to each of the questions set out in the Strategic Review below:

**1) Do you agree that our theories of harm represent the most significant and impactful areas of consumer detriment?**

We agree that the theories of harm do represent the most significant and impactful areas of consumer detriment. We share the view that the three overarching theories of harm of effective engagement in a complex market, the higher costs of disengagement for microbusiness in comparison to domestic consumers and barriers to accessing, using and sharing consumption which prevents them from benefitting from technological innovations are key areas for concern. Likewise, we see the harms highlighted within the key customer journey areas vitally important and in need of attention to improve the levels of protection and encourage transparency and fairness for all microbusinesses.

Issues that we see in the complaints that we receive include:

- There are challenges for microbusinesses when trying to identify the cheapest deal, not only because the majority of suppliers are not listed on price comparison websites (PCWs), but also because the best prices may only be negotiated after calling up. In addition, the savings shown on PCWs may reflect deemed rates instead of the better prices negotiated with the supplier. It can also be confusing to compare quotes from suppliers when they bill differently with some showing pass through charges separately while others increase the kWh rate to include it. Smaller or newly established microbusinesses may not be in a strong negotiating position and as there are a high number of sales completed by unregulated brokers, driven by commission, customers may end up on expensive, unsuitable deals.
- We think that microbusinesses are unaware of the significant differences between fixed and deemed contracts, expecting that it will operate like the domestic market. Microbusinesses can end up being charged a higher rate for long periods of time while negotiating a fixed term contract. We see these differences as potentially contravening section 7.4 of the Standard Licensing Conditions which does not allow unduly onerous deemed contracts.

Between April 2018 and April 2019 for complaints in which a consumer raised a complaint directly relating to deemed contracts (67 cases), we recorded nearly 90% of these complaints as maintained (37.3%) or upheld (49.3%). This shows that in cases directly relating to deemed rates, the consumer genuinely had a reason to

raise a complaint. In addition, a large number of these required our intervention to correct the issue, which is concerning when considering the impact to the consumer had they not brought the matter to our attention. The two main areas of complaint related to the fairness of the deemed rate and if the application of a deemed rate was reasonable. In most of the cases, we agreed with the consumer to the extent that the deemed rate was either unsuitable or it was unfair to be applied to the account.

- Microbusinesses need to have the same access to technological innovations to help them budget effectively and use energy efficiently. They often need to negotiate prices based on consumption with penalties for predicting incorrectly. This can be difficult for new microbusinesses, and also difficult for established microbusiness due to the demands of the business, and/or changes in premises. This may lead to larger bills and financial difficulty.
- We agree with the theory of harm that there is a lack of awareness of the opportunities presented by the market including rights and obligations. We see this as a lack of awareness of the impacts of the decisions being made by customers at the time of moving into a property and agreeing contracts with brokers. In addition, there can be confusion with understanding bills and charges, ensuring adequate supply, understanding P272 and knowing what they need to do to make a complaint and get redress when things go wrong.
- As highlighted in the first theory of harm, the market is complex and so even with price comparison tools available there are challenges for microbusinesses to identify the best deals. This can be complicated further by misleading broker deals.
- There are areas for improvement with regards to contracting and Third-Party Intermediaries (TPIs) and we see this covered in the sixth and seventh theories of harm. Some consumers end up on unsuitable, costly contracts, even after engaging with brokers who they trust to get them a better deal. Access to redress can be difficult for microbusinesses as there is no mandatory requirement on TPIs to provide access to independent redress. For those complaints that come to us, where microbusinesses allege mis-selling and we uphold those complaints, we may void contracts where they have been mis-sold or instruct the most practical beneficial action, as on occasion, a mis-sold contract does not bring financial detriment. However, our decisions can only affect energy suppliers as we have no remit to cover TPIs. We think this is an area in need of a review, with better regulation and redress and we have provided more information on this in our answer to question six.
- We see a difference in the way domestic and microbusinesses are treated regarding debt management. The licence conditions require suppliers to help domestic customers at the first sign of trouble, but the focus is on collecting payment for microbusinesses, with warrants and disconnections being sought more quickly, which may exacerbate the problem as a business unable to trade will be unable to pay bills.

## **2) Are there any other key areas of consumer harm that should form the focus of our review?**

We see the theories of harm as comprehensive and reflective of the issues faced by microbusinesses. In addition to these, we think that it is important not to overlook the challenges faced by microbusinesses when there is a change of tenancy, particularly in cases where a previous tenant had debt. For example, when a microbusiness moves into new premises, they can struggle to get suppliers to accept that the tenancy has changed. This also occurs in instances where the business continues to operate, but it is under new ownership. Understandably in some situations, some suppliers can act with suspicion when the new owner's name is similar to the previous owner if there has been a large debt built up. However, we have seen suppliers continue to follow collection procedures, threaten disconnection or even disconnect while the microbusiness is trying to convince the supplier that the tenancy has changed hands. This can also impact the time the microbusiness is paying a higher deemed contract rate and we

think consistent guidelines around what information a new microbusiness needs to provide to prove their authenticity would benefit the industry.

Another area of consumer harm, albeit a general one, is that the term microbusiness covers a vast range of different consumer types. This can include very small business to relatively large ones. This can result in a particular approach or rule being applied to a wide range of consumer types when a more customised approach might work better.

**3) Do you think awareness raising materials/initiatives would be of significant benefit to microbusinesses? What key information should any new materials focus on and how they best be delivered to microbusinesses?**

We think there would be benefit from awareness initiatives which focus on some of the key touch points for microbusinesses and suppliers and that these could be aligned to the areas outlined in your customer journey model. These could be focused on subjects such as what to do when moving into a property, when to contact your supplier and as mentioned above, change of tenancy processes. We think that microbusiness would benefit from information on how to predict and manage their consumption, deemed contracts, how to get the best deal and how to use brokers for securing that deal. It also seems appropriate to provide microbusinesses with information around improving energy efficiency, debt advice and how to complain when things go wrong.

Looking at how this information might best be delivered to microbusinesses, this could involve a range of organisations signposting to the information, which may be hosted by Ofgem, on the Gov.com website, microbusiness and SME membership bodies such as the Federation of Small Businesses, energy supplier websites, TPI websites, consumer and debt advice agencies websites as well as the Energy Ombudsman. We think that information to microbusiness consumers should be provided along similar lines as it is to domestic consumers.

**4) Our evaluation of the CMA's price transparency remedy (published alongside this document) has identified a number of issues at this stage of the customer journey. What do you see as the most impactful issues hindering microbusinesses attempting to effectively browse the market in search of an improved deal/service offering? Please provide quantitative and/or qualitative evidence demonstrating why you believe these issues to be the most impactful**

As we highlighted earlier in our response, many of the financially attractive deal and tariffs are offered at the point of negotiation and are bespoke to the consumer. This means that a microbusiness consumer cannot use a comparison website or the internet to compare prices. While there are certainly advantages of suppliers of microbusiness customers not offering off the shelf tariffs, for example, when successful a consumer can achieve a rate that is customised and preferential to their needs, this approach does limit the information available to a consumer at the point of agreeing a contract. Coupled with this is the fact that there isn't a cooling off period for microbusiness contracts as there is for domestic contracts, this means that a consumer can often find a better deal, but it is too late to take advantage of this.

**5) What do you see as the key issues microbusinesses face when they come to enter into a new contract for their energy supply? Please provide quantitative and/or qualitative evidence demonstrating the extent and impact of the consumer harm caused by these issues in the form of both financial and non-financial detriment.**

As we highlight earlier in our response, due to the nature of the tariffs for microbusinesses, they are not always in a position of being able to make an informed decision when presented with a new contract. What we mean by this is often microbusiness has very limited resources to establish if the deal presented is the best that they can obtain.

Therefore, when the sales agent or broker informs the microbusiness that the tariff offered is beneficial, they accept this in good faith as being true.

While it would be possible for a microbusiness to shop around to find a good deal, we find that microbusiness, at the time when they would undertake this action, are tied into an expensive deemed contract. This means that agreeing a new contract may be financially beneficial in the short term but could be financially detrimental in the long term.

Our data shows that we maintain or uphold around 70% of complaint where the microbusiness is directly complaining about a new contract (between April 2018 and April 2019 we received 198 cases about new contracts). This means that in the majority of complaints relating to this subject are valid and required corrective action from the supplier following our investigation. Complaint of this nature relate to a variety of matters, including, but not limited to:

- Financial impact of setting up a new contract – due to prolonged periods of a deemed contract in place.
- Agreeing the 'cheapest deal', only to find out that they could have obtained a better deal elsewhere.
- Agreeing a contract, but not being informed about pass through charges.
- Disputing the agreeing of a contract (liability).

Mis-selling, as an overall complaint, ranked high in the reasons for a new contract complaint. The reasoning for mis-selling varied, but most of these were in relation to the rate not being the cheapest or being based on misleading information. Very few cases relating to mis-selling were where the microbusiness claimed to be being charged a different rate to that which was sold to them. One of the problems we have in investigating mis-selling complaints, is that the complaint relates to a conversation during a telephone call, which has not been recorded. In most cases of mis-selling, we are presented with the sales call, but this is only the part of the call where the microbusiness is confirming that they agree. This is not the actual sale, when the new contract is offered, explained and the microbusiness is convinced to proceed. We think the requirement of a full call recording for a sale or a set cooling off period would offer some protection for microbusinesses.

Another aspect that we see, which is linked to the lack of a cooling off period, is where the microbusiness disputes the validity of a seemingly valid contract. The situation here is where the terms of the agreement are not in dispute, so it is not mis-selling, but the microbusiness claims that the person that agreed the contract on their behalf was not authorised to do so. In cases like this, the person in question is usually associated with the microbusiness; an employee for example. Due to the financial impact to suppliers of cancelling a contract, they are often reluctant to do so, which is understandable when there is lack of evidence of any wrongdoing.

**6) Do you have evidence *demonstrating the extent and impact* of malpractice by brokers dealing with microbusinesses? We are seeking both qualitative and quantitative evidence demonstrating consumer harm in the form of both financial and non-financial detriment**

Most complaints about brokers relate to sales in relation to either new contracts for new customers or new contracts as part of a renewal. The types of misleading information customers allege include:

- misrepresentation of competitor prices;
- being told that a particular supplier is offering the cheapest deal;
- stating they have searched the whole market when they have not; and
- stating that only a select few suppliers are able to supply the customer.

As highlighted in our response to question five, we do not see a huge amount of complaints relating to mis-selling from brokers in the true sense, but complaints we do see are more around being mis-sold that the tariff is the best available. We often see cases where the supplier will try to suggest that the mis-selling or misinformation is a third party dispute between the broker and the microbusiness. Our position here is that a supplier should not be benefiting from a contract where malpractice has occurred. While we will not directly fault the supplier, we will look to correct the

situation for the microbusiness. As we have explained earlier in our response, we have no remit over brokers (or any TPIs) and there is no requirement on brokers or TPIs generally to provide access to independent redress, for example through an ombudsman. We think this should be a requirement on brokers and other TPIs along with regulation.

Complaints where the microbusiness directly references a broker are reasonably common, with this direct reference being in 382 cases, around 10% of the overall complaints we received during April 2018 to April 2019. Of these, there is an uphold decision of around 46%, which means nearly half of the complaints of this nature we receive, the customer is in a detrimental position and the supplier has not acted in a reasonable way to correct this. Roughly 30% of complaints on this subject in the same period had no merit and were not upheld.

We are aware that there have been consultations in the past on this area and that there is currently a voluntary Code of Practice in the market – the Confidence Code. However, the fact that malpractice by some TPIs continues suggests that the current regulatory rules are not enough to protect microbusiness consumers. Although there is a recognised voluntary TPI code of practice it seems very few TPIs and suppliers are signed up to it. For a code of practice to have the desired effect, it requires uptake from all TPIs. That said, even if there was greater uptake by TPIs and suppliers, with no obligation to do so, some companies can continue to operate outside of any accountability. Furthermore, the low uptake by TPIs and suppliers adds weight to the argument that a voluntary code is not effective.

With all that in mind, our view is that a code of practice underpinned by a Licence Condition would provide greater protection for consumers. We note that Ofgem has previously considered this as a preferred option as a way of regulating TPIs in the energy sector during the consultation from 2014.

**7) Can you provide evidence demonstrating the extent and impact of any consumer detriment caused by providers approaches to dialogue with consumers about debt management issues? We are seeking both qualitative and quantitative evidence demonstrating consumer harm in the form of both financial and non-financial detriment.**

It is evident that suppliers approach debt management for microbusiness in a different way than they approach debt management for domestic consumers. We understand some of the reasoning behind a different approach, as these are very different consumer types and financial impact to a business is deemed less directly impactful to that of a domestic consumer. In addition, a working business should incorporate utilities into its financial practices, something domestic consumers cannot do. However, there are indications that the current approach by some suppliers on debt management of microbusiness consumers can be detrimental. As mentioned earlier in our response, the definition of microbusiness consumers covers a wide range of business types from very small to quite large businesses. Therefore, a singular debt management approach operated by suppliers is unlikely to work for all microbusinesses and may well cause different levels of detriment to them.

Debt management issues made up nearly a fifth of all complaints (481 cases) between April 2018 and April 2019; this was either the sole or part complaint raised. Of these cases, we upheld over 60%, meaning that without the matter being referred to us these issues would not have been adequately addressed. Less than 15% of the total number of complaints about debt management were not upheld, meaning over 80% of them carried a valid issue that required some action.

**8) Are you aware of microbusinesses facing significant and impactful issues when they come to exit a contract with their provider?**

A significant issue we are aware of is when microbusinesses try to switch supplier and there is a problem with the new supplier taking over, this can result in the consumer being charged uncompetitive deemed rates with the

previous supplier. This can also happen when suppliers have objected to a cancellation request outside of the window or when a microbusiness is in debt and the supplier refuses to offer new rates and/or refuses to let them leave. In these cases, we find that suppliers charge uncompetitive, 'out of contract prices' which consumers have not agreed to and over which they have no control. The microbusiness falls further into debt and as the supplier considers these are not deemed contracts, does not allow the consumer to leave.

We consider prices imposed by the supplier, which the consumer has not agreed to, as deemed prices and we often determine that the supplier should have allowed the microbusiness to leave. Suppliers do challenge this position on the basis that the original fixed term contract explained that the supplier could refuse to offer fixed prices and impose 'out of contract prices' if the consumer is in debt. We do not see this as fair to consumers who would have not been aware the prices would be uncompetitive or able to fully anticipate future difficulties.

**9) Please provide evidence of the extent and impact of consumer detriment caused by issues you have commented on in response to the above question. We are seeking both qualitative and quantitative evidence demonstrating consumer harm in the form of both financial and non-financial detriment.**

Regarding the issues we mentioned in the above question, while nearly half of cases we see directly relating to exiting a contract are upheld, complaints on this area are relatively low, for example, as mentioned earlier in our response, complaints about deemed contracts accounted for 67 cases from April 2018 to April 2019. However, while the number might be low, the detriment impact is high. This can be the difference between a microbusiness agreeing a favourable contract with a new supplier or agreeing a further less favourable contract with the current supplier, due to not wanting to be held to expensive deemed rates.

Please do not hesitate to contact us if you would like further information regarding our response.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'M. Vickers', with a long horizontal flourish extending to the right.

Matthew Vickers  
Chief Executive and Chief Ombudsman

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## **Appendix A**

### **About Ombudsman Services:**

Ombudsman Services is a not-for-profit private limited company established in 2002 which runs a range of discrete national ombudsman schemes across different sectors including energy and communications. Each scheme is funded by the companies under our jurisdiction and our service is free to consumers. In 2017 we received 172,865 initial contacts from complainants and resolved 92,110 complaints.

We are:

- to our consumers, the people they can turn to for impartial advice and solutions that's fair;
- to our partners, the people they look to for knowledgeable and insightful ways to help them reduce complaints by enabling them to make the changes they need to deliver better customer services;
- to our regulators, champions in protecting rights as well as partners in information sharing, we share our analysis so that regulators and business partners can make improvements; and
- to our people, here to enable them to deliver clarity to consumers and partners through meaningful work.