



Report on TPI Misconduct in the Non-Domestic Energy Market.

Prepared for: OFGEM

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Date: December 2019

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Background

In November 2019, Business Energy Claims Ltd ('BEC') provided Ofgem with their comments and evidence of mis-selling in the commercial energy market in England, Scotland and Wales.

Since May 2018, Business Energy Claims Ltd have been dedicated to helping businesses that have been mis-sold energy by a Third Party Intermediary (TPI), otherwise known as energy brokers or energy consultants. BEC are a blended team of energy and legal experts with a combined total of 25 years' experience of working in the energy sector. This combined experience, as well as a panel of law firms BEC work alongside, ensures businesses are given the opportunity to seek an appropriate remedy to the injustice they have faced.

From their inception to date, BEC have spoken to 5249 businesses personally via telephone to discuss in depth their interactions with TPI's and to attempt to help each business right the wrongs they have suffered.

BEC has been collating evidence of poor TPI behaviour for over 18 months now and additionally has 25 years collectively of experience working in the energy broking industry and draws upon this wealth of knowledge, experience and evidence of mis-selling when preparing this report.

What We See In The Energy Market

There are an estimated 3,000 energy brokers / Third Party Intermediary's in the UK each offering their services to UK businesses¹.

Although Ofgem own published information suggests 57% of UK businesses² use a TPI, we consider this figure to be inaccurate based on the mushrooming of the number of TPIs entering the market. There are few barriers to entering the market.

Our experience leads us to believe this figure is much higher and based on our experience the number of businesses using TPI is 94%³. Irrespective of how high the percentage of businesses using TPIs are, at least a large majority of businesses are using the services of a TPI to find them a contract for their gas and electricity supplies.

BEC see widespread mis-selling taking place in the TPI industry. In our experience, over 90% of business energy contracts that have been sold by a TPI have been mis-sold in at least one aspect although most involve several aspects of mis-selling (see our later comments as to how this mis-selling manifests itself).

Most business customers are unfamiliar with energy market with well over 40 suppliers available to them each offering a large variety of different tariffs. Frequently they assume a level of regulation that is simply not present for commercial energy supply. They also assume energy prices are fixed by the suppliers and that the TPIs do not fix prices but their (the TPI's) knowledge is necessary to identify the supplier(s) with the lowest rates. As a result, almost all businesses put their trust in TPI's believing them to be able to identify suppliers with the lowest rates.

The reality is very different. Most suppliers have similar rates and frequently there is little, or no skill or knowledge involved in selecting the supplier (which are usually selected on the basis of familiarity and/or levels of incentives the supplier is offering the TPIs). As a result, TPIs usually fix the rates by deciding how great a price they can persuade the businesses to accept thereby fixing their own commission. Although suppliers incentivise as well as facilitate both the collection and payment of commission, only in relatively unusual situations do they limit the level of commission.

Business customers are approached extremely frequently through unsolicited calls, face to face field sales agents and other forms of marketing, to the extent that consumers can receive up to 10 calls or approaches daily from energy companies. This is especially the case when a customer is approaching their contract end date with their existing supplier, where the number of approaches from TPI's looking to win their business increases dramatically.

¹ Source: The Telegraph "Energy broker Utilitywise's troubles grow as founder dumps stake" by Jillian Ambrose 10/11/2018

² Source: Micro and Small Business Engagement in Energy Markets, Prepared by: Steve Lomax, Research Director and Emma Parry, Associate Director, BMG Research Ltd, March 2015

³ Source: calculated from Business Energy Claims' database, December 2019

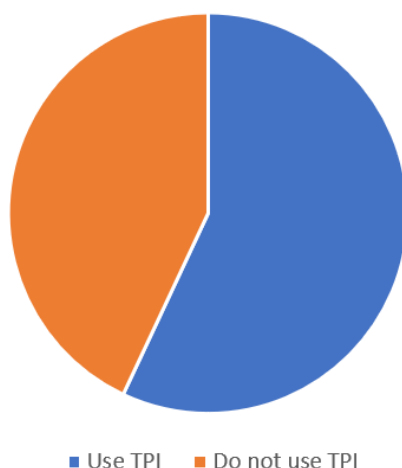
Based on the cases the consultants at BEC have come across over the last five years (most of which has been whilst in the broking industry) it is BEC's collective experience that mis-selling involves businesses of all sizes and whilst this is more prevalent in SMEs micro-businesses or even charities, ignorance of the energy market and how prices are fixed is very widespread and may account for 90% of energy contracts .

The cost of energy to a business customer can occupy a significant proportion of their overheads. The levels of undisclosed commission and the extent of other aspects of mis-selling has meant we have seen instances of customers going out of business or being at risk of going out of business as a result of the sharp practice employed by TPI's.

There is also a considerable amount of concealment in the industry both from TPI's and from suppliers. This results in most business customers not actually being aware that they have been mis-sold. The perception of the consumer generally is that they have received a good deal on their energy because of the misdescriptions made by a TPI and a lack of disclosure both on their part and on the part of the supplier. In our experience most suppliers will assist in the hiding of the secret commissions earned by a TPI and the subsequent losses incurred by the end user.

Insight

According to Ofgem 57% of businesses use a TPI to source their energy contracts. In Business Energy Claims' experience this figure is considerably higher.



This figure is likely to be considerably higher when factoring in businesses who have previously used a TPI to source their energy contract but who are now dealing with suppliers directly for their energy requirements.

Businesses, charities and public bodies spend £25 billion per annum on energy⁴.

This means according to Ofgem's own figures the energy spend within the TPI market is an estimated £12.25 billion. When one allows for the fact that high consumers are slightly less likely to be mis-sold from our experience of the widespread use of TPIs, we estimate it to be closer to £15 billion. Our experience tells us that on average approximately 15% of a consumer's energy spend is occupied by commission earned by TPI's which is built into the energy spend of the consumer. Subsequently, the TPI market is worth an estimated £1.84 billion (on our estimates this is over £2.25 billion) and in our experience over 90% of businesses have been mis-sold in at least some form meaning potentially £2billion + is being paid for little or no added value and is recoverable for UK businesses.

Further analysis is detailed below relating to the proportion of BEC cases that have included the main hallmarks for mis-selling and misconduct illustrating the extent of the issue.

⁴ Source: https://www.ofgem.gov.uk/system/files/docs/2019/11/20191030_state_of_energy_market_revised.pdf

% of BEC cases	10-20%	20-40%	40-60%	60-80%	80-100%
Were not disclosed to					✓
Were informed they were receiving 'best price'				✓	
Were informed TPI searched 'whole of market'				✓	
Serious misconduct/fraud	✓				
Other misdescriptions				✓	

Customer Experience of TPI's

Business customers are initially approached through various means deployed by TPI's. The most common method is through telesales, usually based in the UK, however we are now experiencing a larger volume of overseas telesales operations. These companies are not registered in the UK, a fact customers are often not aware of, and therefore customers have limited redress against these overseas companies. TPI's can also use field sales and various other forms of marketing. It is very rare for the customer to initiate contact with a broker. Typically, a TPI will engage with businesses offering to get them the best deal on their gas or electricity supplies, or a better deal than their current contract.

The customer typically puts their trust in the TPI relying upon the fact that they are an expert in the industry with a far greater and superior level of expertise than the customer, the customer has no reason to doubt them and they do not have the knowledge to source and evaluate quotes or contracts from the whole of the market themselves. Frequently the customer entrusts the TPI because they offer to find the customer a good deal on their energy and misleads them into thinking that it will cost the customer nothing (i.e. it is absorbed into what they assume is a fixed rate charged by the supplier), or that their service is 'free of charge'.

The majority of TPI's mislead the customer into believing they are searching the whole (or at least a substantial proportion) of the energy market and suppliers and that they will be sourcing them the best deal on their energy. In our experience this is virtually never the case and TPI's generally promote suppliers with whom they have better commercial or payment terms with, rather than based on the competitiveness of their product/price.

TPI's, once they have gained the trust of the client, request that a letter of authority is signed enabling them to obtain the customer's relevant supply information allowing them to quote. In some cases, this authority may be given verbally. The TPI will then revert back to the customer with options usually limited to only 2 or 3 different suppliers who typically would not be the most competitive for the client. These are presented as being the best or most appropriate quotes for the customer.

The customer has no reason to doubt that they are receiving the best deal from the TPI and will accept. In doing so they can be subjected to extreme pressure from the TPI who leads them into believing the deal being offered will not be available the following day and will warn them of price hikes that may not necessarily be upcoming.

Furthermore, in BEC's experience we find that TPI's tend to promote long term deals i.e. 3, 4, or 5 year deals. Although this is often presented as being a safeguard against rising prices, in fact it is often not in the customers interest to accept such long terms particularly if the contracts include excessive commission. The reason why longer term are promoted by the TPIs is because a substantial proportion of the commission they receive is usually paid up front by the supplier, so if a 1 years contract would earn them (say) an upfront payment of £20,000 then a five year contract on the same commission would earn them an upfront payment of £100,000.

Further, TPI's prise the consumer away from their existing broker or supplier by offering them a saving on their existing deal. This saving will be made against a prior contract which also involved excessive pricing or alternatively the customer may be paying out of contract rates. Almost any contract can be presented as a saving despite excessive commission. This creates a perpetual issue in that the customer is never truly receiving accurate information and is unable to evaluate the propositions being put to them.

In our experience, consumers are especially heavily targeted where they have recently taken ownership of a business and a 'change of tenancy' has been submitted. Change of tenancy data is widespread across the industry and TPI's can easily become aware of a new business moving into premises. They are then bombarded with pressured sales calls and are pushed into a new energy deal occasionally with false threats e.g. their electricity being cut-off if it is not dealt with immediately.

As described previously, most business consumers do not realise they have been mis-sold due to the misdescriptions and misrepresentations being made by TPI's and the fact that the brokers and the suppliers do not provide details of any commission earned. The impression given is that the TPI's do not charge for their services and it is exceedingly rare to find a TPI that explains what it stands to earn from within the unit rates themselves.

Mis-Selling / Misconduct

Mis-selling / misconduct by TPI's can take many forms, and the level of misconduct can vary in each case. Detail on the types of mis-selling / misconduct by TPI's is included below (although is not limited to):

5.1 Hidden Commission / Secret Profit

As has been previously explained, TPIs very rarely explain the commission they are earning and usually refuse to disclose it when requested. This fact is exacerbated by the suppliers who never voluntarily disclose the commission hiding behind a claim that it is 'confidential'.

BEC has taken several opinions of counsel who unanimously opine that TPI's in their dealings with the consumer normally act in the capacity of an agent of the consumer. As a result, agents owe a number of duties to the consumer including fiduciary duties. These duties include that the TPI must act in the best interests of the consumer, who have entrusted them given their knowledge and understanding of industry. Another duty of an agent is not to make a hidden commission or secret profit. In over 90% of TPI sales to consumers there is a hidden commission. TPI's will either aver that their service is free of charge, state that there is a commission but not explain the detail of it or not mention it at all. In the uncommon cases where a TPI makes it clear it is receiving a commission from the supplier it is virtually never made clear that the unit price is usually wholly dependent on the commission the TPI elects to add. It is the clear and unqualified opinion of counsel that the inclusion in the unit rates of the consumer's contract is the making of a hidden commission and that this is a clear breach of these duties.

5.2 Wrong Supplier

TPI's regularly mislead the client into believing they have sourced the best or most competitive deal for them from the best or most competitive supplier and as a result the consumer puts their trust in the TPI and agrees the offer. TPI's will often favour suppliers with whom they have better incentives, relationships and payment terms with, promoting and pushing these to the consumer rather than suppliers who are the most competitive for the client and in doing so are in breach of these duties. In BEC's experience TPIs rarely seek more than 3 quotes if indeed they seek that many (bearing in mind there are potentially 50+ to canvass).

5.3 Wrong Product / Misdescription

It is not uncommon to find TPIs being incentivised to sell particular 'products' (an example of which is 'pass through contracts') and those contracts or 'products' are then sold to unsuitable consumers often with misdescription.

5.4 Misrepresentation

Misrepresentation can take many forms. Generally, the less straightforward a contract or 'product' is the greater the likelihood of misrepresentation. However, there are certain

misrepresentations that occur in a large number of cases usually relating to TPI's who have claimed they have searched the whole of the market or that they are getting the 'best price'. In fact, many TPI's only work with a handful of suppliers and very rarely check every single supplier for the best deal.

5.5 Negligence

Although the majority of the wrongful actions BEC comes across involve deliberate or knowing action on the part of the TPIs, some of their actions may constitute negligence i.e. failure to take sufficient care in their advice.

5.6 Serious Misconduct / Fraud

Whilst this does not occur on a regular occasion, some TPI's are guilty of serious misconduct / fraud. This can include a number of forms, but mainly will relate to creating fabricated supplier rates (in an attempt to favour the TPI's preferred choice), fictional price comparisons, agreeing contracts without the consumer's consent and even fraud.

Role of Business Energy Claims

Business Energy Claims are currently the only organisation tackling mis-selling by TPI's and offering redress to business consumers in recovering monies for them. We have considerable knowledge and experience of the energy sector blended with legal expertise to assist the consumer. Business Energy Claims use a series of well-established legal authorities and work closely with firms of solicitors to bring claims on behalf of clients to recover the losses they have incurred through the entering into of energy agreements.

Business Energy Claims have unrivalled knowledge of the industry which enables us to assess the merits of each case and the likely sums that are recoverable. Business Energy Claims seeks to transform the way in which the TPI market operates to ensure a transparent and ethical service is provided to consumers.

Business Energy Claims have sought comprehensive legal advice from several quarters including Counsel who have all reaffirmed the legal position and the strength of the legal arguments being brought as a result of the misconduct on the part of TPI's. Thus far, no case has been lost and there have been no persuasive legal defence put forward that clearly defends the position of the TPI in the misconduct we see.

Initially Business Energy Claims engage with the consumer to carry out a fact-find to understand the detail of the energy agreements they have been entered into, establish which hallmarks of mis-selling/misconduct have applied and the likely sums recoverable for the consumer. There have been few instances following this initial fact-find which have resulted in there not being a claim. In our experience at least one hallmark of misconduct exists within the dealings between a TPI and the consumer.

Business Energy Claims or the customer under BEC's guidance, will then contact the consumer's TPI and suppliers to establish further information regarding the agreements entered into including disclosure of the commissions that were earned by the TPI. At this stage, there is usually increased concealment on the part of **both** the TPI and supplier. The excuse usually given is that it is claimed that the information is confidential. Where this applies, Business Energy Claims are able to rely upon industry information and expertise to estimate the likely sums of commissions that have been applied and later seek disclosure as part of legal proceedings. Save in exceptional cases BEC's estimates are usually accurate within a 10% margin.

Within this process, Business Energy Claims seeks to find a resolution for the consumer and have the monies owed returned to them. We also work very closely with a panel of law firms who assist us in finding a solution and who are able to conduct legal proceedings if necessary.

Business Energy Claims take cases on a conditional fee arrangement, meaning consumers only ever pay us a percentage of the monies recovered for them. It is therefore compelling to a consumer to have the monies recovered to them as they are not exposed to any risk relating to excessive legal costs.

There are many consumers who are not clearly aware that they have been subject to mis-selling or misconduct on the part of their TPI, and so BEC are able to impart our expertise and identify where this has occurred. This equips the consumer for their future dealings with TPI's to become aware of what to look out for.

Legal Analysis

The selling of non-domestic energy by brokers or third party intermediary's (TPI's) is not regulated by an official body. As a result, non-domestic customers who have been mis-sold energy in any way must pursue the matter via legal proceedings.

7.1 Agency Law

The main area of law that applies in situations regarding a broker's misconduct is that of the law of agency. TPIs act in almost all cases in a capacity as agent of the customer. This is a matter on which we have several counsel's opinion but in addition to this, frequently the TPIs actually describe themselves as such or are required by suppliers to act in that capacity.

Bowstead and Reynolds on Agency (21st Ed.) para. 1-001 provides the following definition of agency:

"Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to that manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party."

This definition essentially states that a relationship is established in law between a broker and a customer, with the broker being the agent and the customer being the principle. Any supplier the customer is ultimately contracted with is defined as a third party.

The legal relationship of agent and principle can take effect in various ways. The customer may expressly appoint the broker as their agent by giving the broker permission to act on their behalf i.e. via a Letter of Authority or verbally stating they give permission for the broker to act. The legal relationship can also be implied by the behaviour of the broker and the customer i.e. the broker entering the customer into an energy contract and therefore affecting the customer's relationship with a supplier. It is not necessary for a broker to define themselves as an agent at any point during their working relationship with the customer for them to be deemed an agent under law.

The following case law supports the assertion that an energy broker is an agent:

- *Plevin v Paragon Personal Finance Limited [2014] UKSC 61*
- *Norton Finance [2015] EWCA Civ 186*
- *Nelmes v NRAM plc [2016] EWCA Civ 491*

Upon the establishment of an agency relationship, the agent/broker is subjected to fiduciary duties. The case of *Bristol and West Building Society v Mothew [1996] 4 All ER 698* states that:

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty.”

The case then goes on to list a number of duties that an agent must abide by:

- A duty to act in good faith;
- A duty to not make a profit out of his trust;
- A duty to not place himself in a position where his duty and his interest may conflict; and
- A duty to not act for his own benefit or the benefit of a third person without the informed consent of his principal.

This was not intended to be an exhaustive list, and has since been expanded to include the following:

- A duty to use reasonable skill and care;
- A duty to avoid conflicts of interest; and
- A duty not to make secret profits or take bribes.

Brokers are bound by all of the above fiduciary duties; however, they continually fail to act in line with the same particularly in respect of not making secret profits i.e. undisclosed commissions. For a profit to not be deemed secret it must be disclosed to the customer in a completely full and frank way. The customer must be aware of the fact that a commission will be paid to the broker, the amount of the commission the broker will receive, exactly how that commission will be paid to the broker i.e. a lump sum payment from the supplier or via the unit rate of the customer's energy contract and finally when the broker will be paid. Brokers rarely offer this level of information regarding the commission they will receive, if any information at all. The resulting fact is that brokers routinely breach their fiduciary duties towards customers and therefore can be held liable in a court of law for the same, allowing customers the opportunity to recover their losses in the form of damages.

However, customers are not just subjected to brokers solely breaking their fiduciary duties. Brokers also legally fail their customers by continually mis-selling them their energy contracts via negligence and misrepresentation.

7.2 Negligence

A consequence of the agency relationship between a broker and a customer is that a special relationship arises, meaning the agent owes a duty of care to the principle. The case of *Hedley Byrne v Heller [1964]* describes the characteristics of this special relationship as follows:

1. The relationship will exist if one party exercises skill and judgment and the other party acts in reliance of this skill and judgment
2. The person making the statement must possess skill in relation to the particular statement that is made and should realise that the other party will act in reliance upon the statement

3. The party to whom the statement is made must have acted in reliance with that statement in the circumstances where it was reasonable for them to rely upon the statement

The case of *Caparo Industries PLC [1990]* further states a duty of care will be established if there is a sufficient proximate relationship between the parties and it is just and reasonable in all the circumstances to impose a duty of care. The relationship of principle and agent successfully fulfils these criteria.

The principle of duty of care is well established in tortious law and cannot be avoided or set aside. As a result, it must be satisfied to the broker's best ability however in many cases the duty of care is repeatedly breached.

In order to satisfy the duty of care owed to a customer, a broker must fully inform the customer of all the terms surrounding their energy contract to the best of their ability and skill. This includes any terms regarding commission payments however broker's repeatedly fail to inform the customer that commission is forming part of their energy contract, never mind the terms surrounding the commission payment. By omitting to disclose the full terms of the energy contract, brokers are causing the customer to suffer a financial loss that is, for a broker, completely foreseeable.

The broker's actions in failing to explain the full contract terms to the customer means the duty of care they owe has been fundamentally breached. As a result, the broker has acted negligently when procuring the customer's energy contract and again the customer is entitled to damages based upon the financial loss suffered as a result of the broker's negligence.

7.3 Misrepresentation

Claims for misrepresentation are governed by common law and the Misrepresentation Act 1967. Misrepresentation is defined as an untrue or misleading statement of fact made by one party which induces another party to enter into a contract. Agents can be held liable for any statements they have made which later are found to have been untrue when procuring contracts on a principle's behalf. As such, brokers can be held liable for any statements made by them during their interaction with customers which have influenced the customer's decision to enter into the energy contract presented that are later found to have been misleading or untrue. These statements can include but is not limited to:

- The broker's service is completely free
- The broker has searched the whole of the energy market
- The contract price presented is the best price

There are 3 categories that a misrepresentation can fall in to:

- Fraudulent Misrepresentation
- Negligent Misrepresentation
- Innocent Misrepresentation

Fraudulent Misrepresentation

Fraudulent misrepresentation is defined in the case of *Derry v Peek* (1889) 5 T.L.R. 625 as a statement made either:

- A. knowing it to be false,
- B. without belief in its truth, or
- C. recklessly, careless as to whether it be true or false

In these circumstances a customer is entitled to have the energy contracts rescinded and may claim for damages under the tort of deceit.

Negligent Misrepresentation

This is where the misrepresentation was made without the representor having reasonable grounds for believing its truth, as per section 2(1) of the Misrepresentation Act 1967. This section allows the customer to again claim for the energy contracts to be rescinded and also claim for damages.

Innocent Misrepresentation

Innocent misrepresentation is where an untrue statement is made however the representor can prove they had reasonable grounds to believe the statement was in fact true. In cases such as this the customer is entitled to have their energy contract rescinded or request damages in lieu of rescission in accordance with section 2(2) of the Misrepresentation Act 1967.

Case Studies / Evidence

8.1 Case Study 1

The client is a manufacturing firm using approximately 2gwh per annum of electricity. The client engaged with a TPI who was offering to source a good deal for them.

In proposing quotes/offers to the consumer, the TPI provided a cost comparison for the consumer to review. This cost comparison contained fabricated renewal quotes of the client's existing supplier which the TPI had not actually obtained. As expected this fabricated quote was considerably higher in cost than the only other offer put forward to the client. The TPI proffered an offer with a supplier which was significantly lower in cost than what is actually the case and failed to disclose hidden charges relating to a pass-through contract. As a result, the client agreed to this, putting their trust in the TPI, to later find that the costs are substantially higher, and a series of non-commodity charges are being passed-through to the client without their being aware.

The client agreed to a 36 month contract, which is later extended for a further 18 months without the client's consent. The extended contract was signed by an employee of the TPI on behalf of the client but without their knowledge. The client only discovered the existence of the extended 18 month contract upon submitting a complaint to the TPI. It was also during the course of this complaint that the client became aware of the hidden commission built into both energy contracts.

Both agreements contain misrepresentation, misdescription, negligence and hidden commission which has resulted in a claim worth £150,000.00.

8.2 Case Study 2

The client is a golf club using approximately 135,000kwh per annum of gas. The client is a micro-business and engaged with a TPI who again was offering to source a good deal for them.

In proposing quotes/offers to the client, the TPI only provided the client with one supplier option and averred that upon searching the market it was the most competitive deal for them. The offer given to the client contained a hidden commission of over 50% of the client's energy spend, a fact which was later disclosed to Business Energy Claims.

Furthermore, the agreed contract was for a duration of 5 years, which multiplies the commission earned by the TPI by 5. At no point was the client made aware of this fact but was informed that this was the best option for them. As a result, the client is owed £24,000.00 in respect of hidden commission.

8.3 Case Study 3

The client is a church with a secret commission of 1.44p/kwh which was later disclosed to Business Energy Claims which equates to losses of £3,200.00.

The client was contacted by the TPI via an unsolicited telephone call and during the course of this conversation repeatedly told the TPI that they did not make decisions regarding the church's energy and that the relevant person would need to be informed before any agreements could be reached. The TPI has pressed on with attempting to secure the client's business regardless.

The TPI has stated that they were only interested in securing the best rate for the client and to do so would search the energy market, misleading the client into thinking that they not only would search the entire energy market but also worked alongside the client's energy provider at that time. Business Energy Claims has since uncovered that the TPI did not have a business relationship with the client's energy provider at the time of this call.

Ultimately a 36 month contract was entered into, a contract the client does not recall agreeing to. This contract is again subjected to hidden commission built into the unit rates that was not disclosed or explained to the client at any point during their conversations.

8.4 Case Study 4

The client is a charity comprising of several sites that obtained the services of a TPI for both their gas and electricity contracts. During the course of their claim Business Energy Claims was able to obtain confirmation from the TPI that a secret commission had been applied to each contract ranging from between 1.0p/kwh and 1.5p/kwh.

The client was informed that the TPI would be sourcing them the best deal having searched the market to obtain the same. Following some analysis by Business Energy Claims it has transpired that a different supplier, named on the TPI's website as a supplier they work alongside, would have been able to provide cheaper rates for each contracted site in respect of both the gas and electricity. However, this quote was never relayed to the client by the TPI despite the representations made by the TPI that they would procure the best deal for them.

As a result, the total losses incurred by the charity is £8,300.00. This sum is built into the energy contracts over the course of three years.

8.5 Case Study 5

Business Energy Claims has successfully reached an agreement with a TPI on behalf of a care home based in Suffolk. The client was again only provided with one quote by the TPI despite their representation that they would source the best deal. The client entered into long term contracts believing that they were receiving the best deal and then discovered the fact that commission had been built into their unit rates. This fact was not disclosed by the TPI to the client within their engagement.

Business Energy Claims contacted the TPI in question and outlined to them their fiduciary duties as the client's agent and the misrepresentations that had occurred. Following negotiations an agreement was reached and the client recovered sums in excess of £10,000.00.

8.6 Case Study 6

Business Energy Claims are also working with a number of clients who produce electricity on-site and have entered into contracts to sell their generated electricity to suppliers via TPI's.

One particular case involves a TPI who approached the client and averred that they would be able to source the client the best deal through their access to the market and their expertise in PPA's (Power Purchase Agreements). The TPI sourced an agreement with a supplier assuring them that it offered the best option in terms of the energy that was being sold.

There were several areas of misconduct and misrepresentations made. These include hidden costs, hidden commission, and assurance that the price at which the client was selling their energy would fluctuate depending on the market movement throughout the contract. The client was advised they would benefit from this fluctuating price however to date this has not been the case.

Following an extensive review by Business Energy Claims it has come to light that the client is owed several hundred thousands of pounds.

8.7 Case Study 7

The client entered into energy contracts following the intervention of a TPI on over 200 sites based upon the misrepresentations made by them. At the time of being approached the client was already in an agreement with a different TPI that expressly stated commission would be paid by the client to the TPI for a set monthly fee per meter.

The client was told by the new TPI that they could source a better price for them resulting in savings on their overall expenditure. The client enquired about a fee arrangement and was given a number of different and separate options to choose from. The client ultimately chose to continue with a similar arrangement to the monthly arrangement it had previously but under a new price.

It has since been discovered that the client has not only been paying this monthly commission directly to the TPI, which they was consequently told would be the only commission received by the TPI, the client has also been paying a secret commission built into each of the 200+ contracted sites unit rates.

The client is owed sums totalling over half a million pounds in secret commission.

Role of Supplier

Due to the extent to which the TPIs effectively control the commercial electricity and gas markets, suppliers face substantial commercial pressure to work with TPI's and rely upon them for finding them new customers. As a result, the vast majority of UK suppliers compete to work with TPI's and incentivise TPIs to direct business to them. This includes allowing them to use their pricing to promote to the consumer and not questioning nor disclosing the extent of their commissions.

The barriers to enter the TPI market are now extremely low and should a new TPI not be able to establish relationships with the suppliers directly themselves (which is rare), then they will instead utilise the services of an 'energy aggregator' who sit between the TPI and the supplier. It is the aggregator who has all of the relationships with the suppliers.

Historically, there were tight controls in place implemented by suppliers. The commission amount that could be applied to a consumer's base price of energy was capped. Depending on who the supplier was, this was previously in the region of 0.5p to 0.8p/kwh. As a result, TPI's were unable to exploit the situation and would typically earn a modest fee.

In recent years however, the amount of commission that can be applied to the consumer's base price as obtained by the TPI has been uncapped across many suppliers. The result of this is that the TPI can add a substantial amount of commission to the consumer's energy bill. In some cases, this can occupy more than 50% of the consumer's bill / energy spend and there is often little and usually no value added services being provided to the consumer over and above the sourcing of the energy agreement itself. In addition, BEC only knows of one supplier who insist on the TPI both disclosing the existence of commission AND the value of the commission to the consumer or that they will even be receiving one.

Another development in recent years is that suppliers are offering lengthier contracts. Many suppliers are now offering contracts up to 5 years in length, on some occasion even slightly longer. Historically, contracts have been capped at 3 years in length by suppliers. Whilst contracts of this length can add budget certainty to the consumer it is now being exploited by TPI's who are typically only offering long-term contracts whilst promoting them as being the most competitive to the customer. By only promoting contracts of this length the TPI is cashing in on the fact that most commission is paid in advance and thereby allowing them to receive lump sum payments potentially 5 times higher (for a five year contract) than would be the case for a one year contract.

In addition to TPI's adding an uncapped level of commission to a consumer's bill, suppliers are now offering extremely attractive terms to TPI's in order to incentivise them to place business with them. In some circumstances, the suppliers pay TPI's very significant cash advances (sometimes up to 7-figure sums) in exchange for volumes of new business. Alternatively, a large number of suppliers pay TPI's up to 80% of the full contract commission upon signature of that contract. In other words, a TPI could source an agreement on behalf of a consumer 12-18 months in advance of the supply going live and the supplier will pay the TPI 80% of that contract's commission amount upon receipt of the

signed contract. Other suppliers will either pay the same upon live date of the contract or quarterly/monthly depending on who the supplier is.

As a result, there are potentially enormous and quick financial benefits for TPI's to achieve sale for the suppliers, who typically will promote suppliers to consumers with whom they have better payment

The auditing relating to compliance checks on TPI's carried out by suppliers are very rare. Some may spot-check a small proportion of sales scripts but there is otherwise freedom for the TPI to make misleading statements without consequence.

Within the process Business Energy Claims undertakes in offering a solution for consumers who have been subject to a TPI's misconduct or mis-selling, the concealment from suppliers is very common and further illustrates the extent of the mis-selling that takes place in the TPI industry. As previously outlined Business Energy Claims will write to both the TPI and supplier to request information relating to the agreed energy contracts and will also request details of the commission earned by the TPI be disclosed. In most cases, the supplier refuses to co-operate and will generally provide unhelpful responses averring that the information regarding the commission paid is confidential. Even in circumstances where this information is requested directly by the consumer themselves the supplier is not co-operative and will typically refuse to provide the commission amount to the consumer. Suppliers will again use confidential information as the reason, despite the information specifically relating to the consumers' contract. This further vindicates the complicity of the suppliers who conceal the misconduct of the TPI's.

In addition, certain suppliers share in the hidden commission that is applied by a TPI to the base rate of the consumer's contract. This would usually be for suppliers who have paid cash advances to TPI's or who pay upfront commissions. In some cases, suppliers will take up to 50% of the commission added by a TPI, and in doing so are aware that this commission is not being disclosed to the consumer. Subsequently, the client is being further overcharged as a result.

Ultimately, it is the supplier who is collecting the monies from the consumer for the hidden commission that has been applied to a consumer's energy agreements. By this we mean whatever proportionate commission has been applied is being invoiced to the client according to the billing terms of the supplier. In doing so the suppliers are aware that the commission is a hidden commission and as a result the consumer is being overcharged and incurring a loss. Essentially the TPI is setting the price that is paid by the consumer as a result of the commission that they apply, and the supplier is billing the consumer for it. As stated above, this can sometimes account for a significant chunk of the consumer's energy spend.

Micro Businesses

Misconduct and mis-selling by TPI's can affect businesses of all sizes, from small sole traders to large multi-site organisations.

Micro Businesses account for approximately 96% of UK businesses⁵, of which there are were circa 5.7million in 2018, although it is believed that around half of these would not qualify as prospective energy customers. That means there are approximately 5.4million micro businesses in the UK almost all of which will use or have used TPIs.

A CMA (Competition & Markets Authority) investigation in 2016⁶ concluded that micro and small businesses are not getting the most out of the energy market. The research highlights ongoing issues for consumers in the energy market and micro and small businesses need urgent reform to ensure they are able to engage in the energy market to get the best deals.

Theoretically microbusinesses have greater protection in that the supplier's licence Condition OA 'Treating Micro Businesses Fairly' requires (amongst other obligations) suppliers to act in a way that is fair, honest, transparent, appropriate and in a professional manner and to ensure all communication provided by them is complete, accurate, and not misleading (in terms of both information provided and omitted). This condition applies to "Designated Activities" which include (amongst other things) any written or oral communications regarding Billing or Contractual Information and any Customer Transfers and the majority of TPIs dealings with microbusinesses involve a Customer Transfer.

In the experience of BEC, the very opposite occurs. BEC has yet to encounter a situation where a microbusiness has been treated substantively any differently to other larger businesses. This is illustrated by suppliers:

- refusal to draw attention to the existence of the commission paid to the TPIs;
- failure to explain that energy prices are usually fixed by the TPI rather than the supplier; and
- refusal to disclose the quantum of the commission paid to the TPI even when requested (other than in very rare circumstances).

BEC's experience is that when suppliers provide any justification for the failure to explain commission (and this is rare) they explain their decision on the basis that:

- the information regarding commission is 'confidential' and/or
- the obligations to provide information on this subject don't apply as the supplier's obligations to be fair, honest etc are limited by licence Condition OA.5 which

⁵ Source: Business Statistics – House of commons Library by Chris Rhodes 21/12/2018

⁶ Source: <https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf>

provides that the obligation does not extend to the amount of any charges for [energy] or any other type of charge, fee, applied or waived.

BEC believe this to be a deliberate obfuscation - if the TPI acts as the agent of the customer (as most suppliers stipulate) then as a matter of law the TPI has an obligation to disclose this information. Secondly regarding licence Condition OA.5 BEC considers that this limitation is not intended to exclude payments to third parties and given that 'Designated Activities' includes (amongst other things) any written or oral communications regarding Billing or Contractual Information and any Customer Transfers, suppliers ought to be providing information of both the existence and quantum of commission.

It stands to reason that suppliers conduct in disguising and concealing thus commission could not be said in any reasonable interpretation of the words 'fair' or 'transparent' to be such. Indeed BEC believes that the failure to explain how the prices are determined in neither providing complete information and is by the omission of this information misleading in that it fails to give the microbusiness the information it needs to make informed decisions.

Ofgem's attention is drawn to the definition of 'Fair' in the suppliers licence Condition OA which states 'the licensee would not be regarded as treating a Micro Business Consumer Fairly if their actions or omissions give rise to a likelihood of detriment to the Micro Business Consumer, unless the detriment would be reasonable in all the relevant circumstances'. It is hard to conceive of an argument where this detriment could be said to be reasonable.

Many ongoing cases are micro businesses, in fact the vast majority. Smaller businesses may still have a substantial level of energy consumption and are heavily targeted by TPI's as their consumptions influence the amount of commission that can be earned. It is worth noting that to qualify as a microbusiness only 1 of 4 sets of criteria need to be met and they include:

- employs fewer than 10 employees (or their full time equivalent) and has an annual turnover or balance sheet no greater than €2 million; or
- uses no more than 100,000 kWh of electricity per year; or
- uses no more than 293,000 kWh of gas per year.⁷

As a result, the consumer can still have a fairly large consumption of either gas or electricity but still qualify as a microbusiness.

In BEC's collective experience (involving approximately 5249 microbusinesses), microbusiness consumers of energy are typically no more knowledgeable than a domestic consumer. They have little or no knowledge of either the available rates or the remuneration structures used by the suppliers and TPIs who are approaching them. Subsequently they can be vulnerable and subjected to considerable misconduct and malpractice. As a result, far greater protection of micro businesses is required to ensure the

⁷ Source: <https://www.ofgem.gov.uk/key-term-explained/micro-business-consumer>

consumer is being dealt with in a fair and transparent manner and receiving the best out of the energy market.

Solution

There should be greater controls in place, ideally both on the part of the TPI and the supplier, to ensure transparency of charges and fees and to allow easy comparisons to be made with rates being charged. It is simply unrealistic to expect businesses other than the largest and best resourced to be able to engage with an industry that has become structured in a way that heavily incentivises fast profit-taking and poor standards.

BEC considers that there should be full and frank disclosure of the commission that is being earned by the TPI (not simply the existence of one), and no concealment of such commission. This could be done by simply requiring the suppliers to clearly identify the commission in writing at the outset (potentially with other comparative information) and allow a cooling off period following disclosure.

In BEC's experience, this would help eradicate much of the misconduct adding much greater protection to the customer. Indeed, BEC does not wish to appear as though it objects to TPI's being entitled to a commission as a result of the service that they offer. However, this should be fully disclosed to the customer and be in line with the service that has been offered.

BEC considers that TPI's should disclose the number of suppliers that they work with AND the names of the suppliers that they have approached for quotes. This would alleviate other aspects of misconduct so as not to give the consumer the impression that the TPI has searched the whole of the market. The TPI presenting these quotes to the consumer, acting in good faith, will ensure that the consumer truly is receiving an informed position. Disclosure of the fact the contract duration influences the TPI's commission and does not necessarily provide the consumer with the best option in terms of contract duration will likely add significant transparency for the consumer so that they fully understand what they are agreeing to.

Ideally most of the problems with TPIs would be best tackled by regulation of the TPI market however we understand the extent and cost of such intervention and accept that a quicker and easier route to providing support to British businesses would be to use the mechanism of the conditions within the supplier's licence.

In summary, BEC also recommends that through the mechanism of conditions within the supplier's licence, suppliers are required to:

- clearly identify the commission paid to TPIs in writing at the outset (potentially with other comparative information) and allow a cooling off period following disclosure;
- combine this with an obligation on suppliers to satisfy themselves that any TPI have made a full written disclosure of commission and how this is calculated;
- ideally there should be a mechanism to ensure TPI's disclose the number of suppliers that they work with AND the names of the suppliers that they have approached for quotes;

- ideally there should be a mechanism to require the suppliers to require TPI's to record all discussions with customers and disclose all supply contracts or call recordings if requested by a customer;
- (although this overlaps with the bullet points set out above) guidance could be immediately issued to the suppliers in relation to micro businesses that, in order to treat them in a fair honest and transparent way, there is a need to provide information in advance of both the fact that commission is being paid to a TPI and the amount of any such commission.

A considerable intervention in ensuring that the TPI's and suppliers behave in a fair and transparent manner would tackle the vast majority of misconduct and mis-selling in the marketplace and would no longer cost UK businesses billions of pounds.