

Microbusiness Review Policy Consultation

Energy UK Response

23 October 2020

Introduction

Energy UK is the trade association for the energy industry with over 100 members spanning every aspect of the energy sector – from established FTSE 100 companies right through to new, growing suppliers and generators, which now make up over half of our membership.

We represent the diverse nature of the UK's energy industry with our members delivering over 80% of both the UK's power generation and energy supply for the 28 million UK homes as well as businesses. The energy industry invests £13bn annually, delivers £31bn in gross value added on top of the £95bn in economic activity through its supply chain and interaction with other sectors, and supports 738,000 jobs in every corner of the country.

This is a high-level industry view; Energy UK's members may hold different views on particular aspects of the policy consultation. We would be happy to discuss any of the points made in further detail with Ofgem or any other interested party if this is considered to be beneficial.

Executive Summary

Energy UK supports actions being taken to better protect microbusiness consumers, particularly from poor practices by unregulated energy brokers. We welcome the principles behind many of the measures put forward by Ofgem in this consultation and fully support the intention to improve outcomes for microbusiness consumers where Ofgem has identified detriment, and ensure that they have a better customer experience when engaging in the market via brokers.

We do believe, however, that the manner in which Ofgem is seeking to regulate brokers via suppliers will not be the best approach for customers, suppliers or brokers. Ofgem's proposals around broker conduct and commission transparency have the potential to improve the experience of microbusiness customers compared to the status quo, but risk a great deal of complexity and added costs to suppliers and brokers without delivering a robust system for ensuring broker compliance, as suppliers are not best-placed to police all the multitude of individual brokers operating in the market. It is only feasible for suppliers to monitor brokers that they have a direct contractual relationship with. It is not feasible for suppliers to monitor sub brokers over which they have no oversight. We are concerned about how Ofgem will implement this, especially regarding how Ofgem will enforce against poor practice by a broker. In particular, whether Ofgem would enforce against all suppliers who have sold through that broker, or apply prioritisation, and if so, what form that takes.

While we welcome that this policy package looks to provide improvements for microbusiness customers against the status quo, Ofgem should seek to work with BEIS to develop an appropriate system of direct regulation of brokers (and all other relevant third-party intermediaries across the domestic and non-domestic markets). Ofgem should also look to make greater use of existing general consumer protections laws, as well as the powers at its disposal to protect business from brokers' misleading marketing.¹

¹ <https://www.ofgem.gov.uk/press-releases/ofgem-gains-new-powers-protect-businesses-misleading-marketing>

We would also highlight that the proposals span many areas, which will have impacts across processes and systems for all suppliers. It would make sense to take a stepped and steady approach to measures and implementation of these to test if they have the desired effect. The proposals are set out as individual entities, with no real sense of the overall benefit on customers. It would be helpful if Ofgem were able to show the customer journey with these actions considered as a whole.

Awareness: Knowing about opportunities and risks

Energy UK welcomes Ofgem working collaboratively with leading consumer groups to improve awareness levels amongst microbusiness customers. However, the proposal in the consultation lacks sufficient detail on exact measures to provide greater feedback at this stage.

We would urge Ofgem to ensure it seeks input from suppliers, as well as leading consumer groups, when exploring how best to plug awareness gaps to ensure that any approach taken forward learns from suppliers' experience of engaging with their customers.

Browsing: Searching for deals

One of the more effective ways to improve transparency remains to establish an independent central price comparison service. This could be most efficiently implemented by extending the existing domestic Citizens Advice price comparison tool (<https://energycompare.citizensadvice.org.uk/>).

Ofgem acknowledges its evaluation of the Price Transparency Remedy (PTR) found that it has to date been *"ineffective in creating a fully transparent market, and that some aspects of the remedy are not working as well as they could."* Not all suppliers follow the transparency requirements, and Ofgem has not prioritised enforcement in this area. However, Ofgem is not proposing any follow-up actions to address these deficiencies, which make it harder for microbusiness to effectively browse deals and results in them finding it easier to go via brokers. This lack of action will reinforce weaknesses within the existing market model which sees the majority of engaged microbusiness customers switch via brokers, rather than addressing the underlying issue of improving transparency for disengaged microbusinesses. Overall, Energy UK believes that Ofgem should prioritise directly addressing transparency through brokers and TPIs, rather than simply tackling the secondary symptoms through this package of policy proposals.

Principal Terms

On the specific proposals themselves, we would welcome clarity on whether the written Principal Terms would need to be provided pre-sale, as there may be a large impact to those brokers and suppliers that initially agree terms verbally, which is not uncommon in the market.

Overall, Ofgem's proposals should avoid unnecessary administration and complexity. Neither the customer nor suppliers will necessarily know if a broker has provided principal terms in order to start the cooling off period and suppliers need to build their systems and processes around known events and rules.

Broker Commission Transparency

Energy UK supports Ofgem's intent to improve protections for microbusiness consumers, particularly in ensuring there is greater transparency for microbusiness customers in the commission being paid to brokers for their energy contracts.

Implementing Ofgem's proposal for disclosing commission will have a number of complexities, and therefore costs, due to the wide range of commission and funding models used by brokers across the market. The best methodology for how to present this information, whether through prescription or more flexible principles, is something that will be impacted by the commercial arrangement between our members and brokers. Therefore, Energy UK's members are best placed to respond directly on this point in their individual responses.

However, there will be benefits for ensuring that suppliers have flexibility regarding when they provide brokers commission fees to their microbusinesses. As the customers journey is a supplier area of

expertise they are better placed to decide when providing this will have most benefit for customers (e.g. point of sale or renewal). Flexibility could also future-proof requirements by enabling supplier innovation and changes to customer communications. Requiring that suppliers place the broker commission on each bill may not necessarily always be useful to the customer. Broker commissions are not always aligned with customer billing and commission structures vary widely in the market, and it may be counterproductive or confusing to add additional complex information onto every bill in all circumstances.

Ofgem should also ensure that within any final licence condition drafting there is clarity that it applies only to financial remuneration directly linked to the contract, and of which the supplier is aware. There is a concern that the term “benefit of any kind” introduces a level of vagueness that could lead to different interpretations of the requirement by suppliers. In order to avoid this vagueness Ofgem should, as a minimum, define key terms including ‘commission’ and ‘benefit in kind’.

Contracting: Signing up to a new contract

Broker Conduct Principle

Energy UK supports Ofgem’s intent to improve protections for microbusiness consumers, particularly from the poor behaviours of disreputable brokers as Ofgem highlights in the evidence it highlights from Citizens Advice, and we recognise that the proposed changes have the potential to be an improvement on the status quo in the short-term.

However, we believe that Ofgem’s proposal to regulate brokers via suppliers is inappropriate for the market, and will have a number of detrimental unintended consequences that should be avoided by moving towards direct broker regulation by Ofgem sooner rather than later. This would be the model that Citizens Advice has previously advocated for, with numerous benefits for customers outlined.² We believe that Ofgem should prioritise developing a system of direct regulation of brokers, and securing for itself the necessary powers to do so from Government if it does not already have them.

It is also not clear how Ofgem will implement this principle in practice, especially how Ofgem will enforce against poor practice by a broker. In particular, whether Ofgem would enforce against all supplier who have sold through that broker, or apply prioritisation, and if so, what form that takes. The Standards of Conduct were used to improve the culture within suppliers, but suppliers do not have the market power to force brokers (especially poorer brokers) to improve their compliance culture. It might be appropriate for Ofgem to explore the idea of a ‘safe haven’ approach whereby a supplier would not be considered responsible for a breach by a broker acting on its behalf if (i) the broker has signed up to an Ofgem-approved Code of Practice (and not been suspended for non-compliance with the code) and (ii) the supplier has not contributed to the breach by its actions or omissions.

One unintended consequence of the current broker conduct principle is the risk of creating a power imbalance between suppliers and brokers as a result of the proposals. Ultimately, the principle will be hard for suppliers to enforce, as brokers will be able to seek out a more lenient supplier, or a supplier with a different interpretation of the principle with which to work. If one supplier is more lenient when judging a broker’s activities, then this risks a race to the bottom for standards across the market and the creation of a tiered market:

- i. Risk-averse suppliers working with “good” brokers.
- ii. Riskier suppliers continuing to work with unscrupulous brokers.
- iii. Customers who pay brokers directly receive zero protections [Indeed the proposed approach could influence brokers to change their business model so this becomes more prevalent].

Ofgem should also be aware that sub-broker networks exist, where a broker contracts with several smaller brokers, and that regulation through suppliers can only ensure that standards are applied to the broker with whom a supplier has a direct contractual relationship. We would welcome Ofgem providing more clarity on the definition of Broker so it is explicit that the new requirements only cover conduct of the broker directly contracted by a supplier. Suppliers would not have visibility of any sub-brokers with whom the principal broker engages, and so will be a complex area for the supplier to assume responsibility.

² [“Stuck in the Middle”](#), *Citizens Advice*, March 2020

All suppliers policing all brokers will also be a large, and costly, undertaking for suppliers to achieve successfully – a cost that would ultimately be passed onto customers. Similarly, with no common compliance standard, brokers will have to adopt interpretations of the requirements by every supplier they work with, further increasing the cost of participating in the market. If progressed, a greater level of prescription or standardisation may be beneficial to suppliers and brokers. For example, if it is clear what brokers can and cannot do, or how they should be doing things, then suppliers will not be left to develop complex processes and make judgement calls on a broker's activities which may result in lower standards and higher costs. However, this would still not be as beneficial as a direct approach to broker regulation.

Sales and Marketing Practices

The record keeping element of this proposal represents another departure from the principle-based regulation that Ofgem has previously been committed to. A requirement to keep records for 2 years may be disproportionate, as the vast majority of issues linked to the contract will arise well before that point. This may better be implemented as a principle-based requirement, with suppliers deciding for themselves the most appropriate way to record evidence. We would welcome Ofgem reviewing the proportionality of the requirement, and whether the timeframe could be reduced to 1 year, in line with other industry obligations, e.g. COT flag evidence in the MRA.

Cooling Off Period

We would welcome clarity with regards to the 14-day cooling off period and when that period would start, for example, in instances where principle terms were sent via post. The 14-day cooling off period is unlikely to be a future-proof regulatory change, as in its current form the proposal would be very complicated to comply with once Faster Switching comes in effect. Non-domestic suppliers have not factored cooling-off into their internal programmes for Faster Switching, nor has the programme itself, and doing so now will increase costs and likely delay readiness to undergo industry testing. Ofgem should undertake an impact assessment on the developing requirements of Faster Switching and how this will affect changes that suppliers will need to make. Ofgem also needs to consider how this extension of domestic protections to microbusiness will work in practice, as microbusinesses are not approaching the market in the same way as domestic customers, with many using brokers.

Ofgem should also consider the risk of proactive brokers continually seeking to move customers onto new deals within cooling-off periods, and explore what appropriate protections could be put in place to ensure that the measure is not able to be gamed by brokers at suppliers' expense.

Dialogue: Two-way communication with service providers

Alternative Dispute Resolution

We would welcome clarity on how the Alternative Dispute Resolution service will be approved by Ofgem and would look for consistency in terms of the ADR scheme application, standardising requirements meaning that it is not open to interpretation and confusion. Ofgem should engage with suppliers and brokers to determine the right requirements for the ADR scheme. In addition, Ofgem will need to specify how decisions by a broker's ADR service will impact upon the customer-supplier relationship. For example, if the contract was ruled as mis-sold by the broker, would this allow the customer to exit without penalty? In addition, more clarity is needed on how a finding against the broker would impact upon the supplier's compliance with the broker conduct principle.

We are also concerned that, depending on the exact details of the ADR scheme/s available, there may be perverse incentives to be lenient to brokers as their funding model may rely on the widest possible broker participation in their scheme. This may lead to sub-optimal outcomes for consumers. The current drafting of proposed condition 20.5B suggests that brokers can be signed up to any ADR scheme that meets the minimum standards, and not necessarily a scheme that has been vetted and approved by Ofgem. If this is the case, this would lead to suppliers having to make assessments of a broker's ADR scheme to ensure that it is compliant, creating further additional cost and complexities. We would welcome clarity as to whether brokers will be allowed to sign up to any ADR scheme, or if it will be restricted to those approved by Ofgem as meeting the requirements.

Energy UK believe that it would be essential for Ofgem to include a mechanism for suppliers to be made aware of the outcome of ADR disputes that involve the brokers they work with, so that they can enforce any breaches of contract. It would also be useful to understand how Ofgem intend to use any output from the ADR scheme, and in particular what Ofgem will do if a broker is consistently being referred to the scheme.

Exiting: Switching away from an old contract

Contract Termination Notification Requirements

We are concerned that the current drafting may be interpreted as allowing microbusiness customers to switch at any point during a fixed-term contract. This would represent a major change to the workings of the market, which risks unintended consequences across the market to the detriment of microbusiness consumers. We welcome the confirmation that Ofgem provided at its 14 October stakeholder workshop that this was not its intention. We would encourage Ofgem to ensure that its licence condition drafting is clear and is accurately reflective of the confirmed intent of the proposal.

Together with the termination notification prohibition, relying on the gaining supplier's notification to begin the switching process limits opportunities for suppliers to talk to their customers, check it is a valid switch, and discuss any issues that the customer may be experiencing with the current contract. For example, if the customer had agreed to move supplier at the end of the current contract, but the gaining supplier had erroneously switched the customer too early, there would be little recourse for the losing supplier to rectify the situation with the customer and potentially lead to a substantial exit fee for the customer.

We would welcome clarity on whether the losing supplier in a switch could block it if the customer has not paid the required exit fee. If not allowed, this could lead to many instances of suppliers have to chase microbusinesses for accumulated debt, and add further complexities to the process.

Contract Extension Period

With regards to the proposed 30-day contract extension period, we are concerned that Ofgem is proposing to implement a change which will be very costly for suppliers to implement in their systems, and where clear consumer detriment has not been proven. Ofgem has not established a theory of harm or provided clear evidence of consumer detriment which supports these proposals. Ofgem should work to understand what costs there will be to implement this proposal and consider whether it is in the interests of all customers before progressing. If a detriment is found, we would suggest any such requirement should only apply where the supplier has objected erroneously, as we see no reason why a supplier should be financially penalised by the obligation applying in the event a supplier's objection is valid.

If you would like to discuss the above or any other related matters, please contact me directly on 020 7747 2931 or at steve.kirkwood@energy-uk.org.uk.