Jonathan Blagrove
Microbusiness Strategic Review,
Vulnerability and Consumer Policy
Ofgem

By email to: cdconsultations@ofgem.gov.uk

23rd October 2020

Dear Jonathan,

Re: Microbusiness Strategic Review: Policy Consultation

The UIA is a trade association for third party intermediaries (TPIs) in the utility sector www.uia.org.uk . Our aim is to promote and enhance the reputation of TPI's so as to give confidence to business consumers who utilise their services. All Members of the UIA must agree and operate to the UIA Code of Practice which in addition to setting the standards to which our Members adhere to, provides redress for consumers should any member fall short of standards expected from them.

The UIA has endeavoured to answer questions within the consultation both as fully and candidly as possible however, and for completeness, we draw attention to certain aspects of this consultation that maybe are unintended consequences which we believe could have far reaching implications both inside and outside of the energy sector and could be questionable under law.

Question: What do you think the impact of our proposal to introduce a broker conduct principle will be? Are there any particular reasons why suppliers/brokers couldn't achieve the broker conduct principle?

We believe that this could potentially render the TPI as being an "Agent" for the supplier in law, irrespective of what supplier TPI contracts may try to define, English law always takes precedence. Once you are empowered to start prescribing how another will conduct their business model, audit that business model or set fee levels you become "responsible in some degree" for that entity. Under English law we believe that were it ever to be challenged in a court of law, this would be deemed an agency situation with all its legal obligations despite suppliers arguing the contrary in their TPI agreements.

Furthermore, a recent legal case against a broker by a customer [Stanton Social Club v Utility Alliance] found that the broker was acting as an Agent for the customer. A person or organisation cannot be an Agent for both parties where there is a conflict of interest i.e. a vendor and a buyer, yet this is exactly what will be created with these proposals.

This is a fundamental point in this consultation because it is never made clear in the consultation which entity pays the commission. Clearly the courts believe the customer does and also the supplier makes it clear in a number of their TPI contracts that the customer pays the commission. This means that under Agency Law as found in the court verdict, the TPI must work in the customer's interest without influence from the supplier.

Our understanding in simplistic terms, is that law falls into two categories one being that covering domestic i.e. general consumer law into which bracket we all, as individuals fall and business or commercial law for those who it is expected should possess a certain awareness or acumen. We believe that a 14-day cooling off period is most certainly the domain of general consumer law to allow time to reflect on the consequences of our decisions. It is our opinion that when you introduce this into a

business environment you are in fact transposing one law into another rather than making regulation fit existing law. This has two implications as we see it: 1) you discriminate against sectors of business within the energy market and 2) potentially open the flood gates for other parts of industry to do likewise. We ask on what authority does Ofgem act in this manner?

Most of the commentary from Ofgem is correct for a small minority of TPI's but these proposals affect everyone. Regulations should be proportionate, and we feel this is not. We anticipate that there will be some suppliers and TPIs who will choose not to work in the microbusiness sector, as the requirements to do so will be considered too burdensome and disproportionately loaded with risk.

This issue of TPIs has been under discussion for many years by Ofgem, in which UIA has played a major part. These discussions have always foundered because Ofgem does not have the necessary powers to do the job properly and rather than seek the necessary legal powers have always produced what can only be called a "fudge" using or manipulating the powers that exist.

The definition of a Third-Party Intermediary is extremely broad, capturing some of those for whom it was not intended and excluding others for which it was. The suggested definition of "Broker" does exactly the same thing and will open all sorts of alternative contracts which Ofgem already see or have seen in the past. The principle of the TPI invoicing the customer direct for their fees has much to commend it and done honestly would eradicate many of the problems requiring to be resolved. It is our opinion that Ofgem should explore certain practices incorporating direct charging methods that are already in use. They should also reflect on the problems caused with "shared commissions" whereby a supplier would issue a renewal price, a broker would then negotiate that price down and share any savings made with the customer and indeed; on occasion, with the supplier who adds it to the profit margin.

Ofgem should explore if problems could be avoided by **not** trying to define segments of the market by EU definitions then having to write rules for each but returning to a straight- forward volume definition for domestic and non-domestic consumers. We acknowledge that this is not perfect but may be better than what we currently have.

Please feel free to get in touch if you wish to discuss any of the points we have raised.

Yours sincerely

Rachael Gladwin

For and on Behalf of The Utilities Intermediaries Association

Appendix 2 - Consultation Questions

Awareness: Knowing about opportunities and risks

Question: What are the most effective ways to ensure that microbusinesses can access key information about the retail energy market?

Signposting on key websites: Ofgem, Government, CAB and Energy Ombudsman. Supplier and TPI websites should link to them.

Consider utilising Ofgem's reputation as a 'Trusted Source' to conduct targeted mailshot campaigns to MBC consumers?

Increase general awareness via media campaigns

Browsing: Searching for deals

Question: Do you agree with our proposal to strengthen the requirements to present a written version of the Principal Terms to customers?

Yes

Question: Do you agree with our proposal to require that suppliers disclose the charges paid to brokers as part of the supply contract, on bills, statements of account and at the request of the microbusiness customer?

No

Our key concern is that either covertly or overtly, suppliers will market the view that going direct will save the consumer money and this action will push a lot of brokers out of the market.

Competition will be further dampened with brokers adopting similar charges to each other (as seen with energy suppliers' Standard Variable Tariffs when the default tariff caps were introduced)

Consumers could be potentially mis-lead over how much commission the broker receives as some suppliers require that any commission be split. Likewise if there is an aggregator involved, they too require a portion of the charge. In those cases, a consumer will wrongly assume that the broker is claiming all the charges. Furthermore, any charges retained by the supplier would represent pure profit as they will have already factored in overheads and profit margin into their prices, not so for brokers or aggregators.

The commercial arrangements that exist between suppliers, their agents, aggregators, and brokers would be compromised. These are commercially sensitive contracts, with some TPI's using their bargaining power to extract more competitive rates (for the consumer) and better margins (for themselves). This is a process that the Competition Commission promoted with switching sites. The bigger volume of business given to the supplier the better the discount. Such arrangements could either cease, in which case the customer loses out, or happen behind the scenes beyond the sight and remit of the regulator with no benefit for the consumer.

Question: Do you think that further prescription or guidance on the presentation and format of broker costs on contractual and billing documentation would be beneficial? If so, how should broker costs be presented?

See our comments on Agents in the cover letter

Question: What challenges do you think suppliers and brokers may face implementing these proposals?

How broker charges are built into a contract can vary and a suppliers' ability to disclose them correctly on consumer bills and on contract paperwork may well be constrained by the systems they currently have in place. Suppliers will either make changes to their systems (which will inevitably incur a cost) or limit the options available to a broker resulting in a standardised approach to how commission is applied, creating barriers for more innovative models to be developed.

Commission is paid by the customer and as such permission should be sought by the supplier from each customer to declare it, as technically that information forms part of a confidential agreement between the broker and the customer.

Declaring commissions further reinforces the argument that the broker is an agent of the supplier, irrespective of what a supplier might say.

For the brokers, the challenge will be in ensuring that consumers are comparing like with like when it comes to comparing brokers. Those brokers that provide a purely transactional service will always look better on paper than those who provide a range of services as part of their fee.

Suppliers may have to deal with the fallout when commercial arrangements that exist between them and brokers become compromised. Price levels and margins will be in the public domain, and may consequently, flatten out.

Challenges for suppliers and brokers in identifying, segmenting, maintaining, and implementing these proposals for all microbusiness consumers within their portfolios.

Question: Do you have any comments on the associated draft supply licence conditions in Appendix 1 of this document?

Question: Do you think there are other changes which would better address the consumer harm that has been identified?

Remove the EU Micro Business Consumer definition and reinstate consumption-based criteria that would allow smaller micro business consumers the same protections as domestic both in regulation and Consumer Law. It would also mean that this section of microbusinesses would benefit from access to prices more readily available to domestic consumers as published online. Such a move would be consistent with the views espoused by Ofgem, CMA, CAB and Energy Ombudsman, that smaller micro businesses exhibit similar behaviours so require similar protections as their domestic counterparts currently enjoy. It will be an easier definition to implement, identify and for all parties to understand, furthermore as more supplies become smart metered, the information necessary to verify status would be readily available and indisputable.

Disclosing commissions at the point of sale quite frankly is too late if the intention is to prevent the customer from being exploited, it should be made clear by the supplier within their offer paperwork, and terms and conditions that the price may include a charge for the broker.

Contracting: Signing up to a new contract

Question: What do you think the impact of our proposal to introduce a broker conduct principle will be? Are there any particular reasons why suppliers/brokers couldn't achieve the broker conduct principle?

The UIA agree with the outcomes that Ofgem wish to achieve under the Broker Principle. However this is regulation by the back door and suppliers will be reluctant to take on yet more obligations. We suspect that there will be suppliers who will deem that the effort and added liabilities will not make it worth their while to either service this sector or to drastically cull the number of brokers they work with in order to streamline their costs/operations, servicing only those brokers that give them sizeable amounts of business.

The issue for brokers is how suppliers choose to interpret and action those principles where it comes to compliance and audit protocols. Any measures deployed must be non-invasive and proportionate and brokers should be able to call out practices that are deemed not so to Ofgem. There will also be a cost involved in doing this which will eventually land on the customer.

With so many suppliers and brokers active in the business market the prospect of multiple framework agreements would be burdensome and disruptive to both parties creating a lot of unnecessary repetition and duplication. A more sensible and cost-effective alternative would be for both parties to work and comply with one or more framework agreements that would meet the requirements under the Broker Principle. Certainly, the UIA Code of Practice would fulfil this obligation, with SoC's already enshrined in

its Code, but it would not preclude others from doing similar. The requirement would need to be mandatory.

Question: Do you agree that our proposal to introduce specific sales and marketing requirements on suppliers and the brokers they work with is important to help customers make more informed choices and increase trust in and effectiveness of the market? If so, do you agree that face-to-face marketing and sales activity should be covered alongside telesales activity under these proposals?

We agree with the principles but are concerned at how individual suppliers may decide to interpret and impose these requirements, with some seeing this as an opportunity to micro-manage some brokers and would want assurances from Ofgem such that any overbearing or disproportionate measures would be addressed.

We would ask that the two-year timeframe for keeping records be changed to mirror the contract period. We would also like guidance on the recording of verbal contracts made clear – all conversations relating to a contract must be recorded in their entirety to ensure that supplier and broker retain a duty of care beyond the scripted conversation and cannot plead ignorance to any dubious practices which may occur outside of it. This will also give security to suppliers and brokers as not all consumers are beyond doubt. Furthermore, it should be made a requirement that suppliers provide access to all records and recordings upon request by either the consumer or consumer appointed agent in a co-operative and timely manner. This would enable any potential issues to be investigated and remedied promptly.

Question: Do you agree that our proposal to introduce a cooling-off period for microbusiness contracts represents an effective way to protect consumers during the contracting process? If so, do you agree that the length of the cooling-off period should be 14 days?

No, allowing a 14- day cooling off period will open the floodgates to rogue TPI and supplier activity and encourage duplicitous behaviour from consumers, sending out the message that it is ok to break contracts. Such behaviour would prove time consuming and expensive for all parties involved.

Question: What challenges do you think suppliers and brokers may face implementing these proposals?

Significantly increases the supplier's exposure to risk which will negatively impact on consumer prices.

Increases the risk to the broker of secured deals not reaching fruition, and in turn will impact on their cost to serve. Brokers may choose to instate their own contractual agreements with their customers to mitigate for this or simply opt out of acting as a broker and become a TPI, so no longer required to fulfil any of the proposals listed in this consultation.

Question: Do you have any comments on the associated draft supply licence conditions in Appendix 1 or this document?

What is the position if a contract goes live within the 14 days cancellation period but the consumer cancels?

That Ofgem could potentially add further to the activities listed under the 'Broker Designated Activities' definition within the Broker Principle, over and above the obligations that apply to suppliers in respect of their own activities

Question: Do you think there are other changes which would better address the consumer harm that has been identified?

I see no reason why most customers cannot be presented with all the paperwork relating to a contract (TC's, Principle Terms, Contract Rates) straight away via PDF. Customer will only be deemed to have accepted a contract, verbal or otherwise once they have confirmed they have sight of the paperwork and

accepted the offer. This does create extra work for supplier/TPI, but I think preferable to a 14- day cooling off period.

The proposed Broker Contract Principle and ADR scheme should ensure that consumers are sufficiently protected.

Dialogue: Two-way communication services providers

Question: Do you agree that our proposal for a mandated ADR scheme represents an effective way to fill the existing consumer protection gap where a microbusiness has a dispute with their broker?

Yes but there should be only one scheme and Ofgem should own it (though they could appoint someone else to run it). The information gleaned from operating this scheme can then be used to provide Ofgem with a steer on future policy decisions and alert them (quickly) to areas of harm that need addressing.

Question: What challenges do you think suppliers and brokers may face implementing our proposal regarding dispute resolution?

Ensuring that the costs to join such a scheme are proportionate.

Question: Do you have any comments on the associated draft supply licence conditions in Appendix 1 of this document?

Question: Do you think there are other changes which would better address the consumer harm that has been identified?

Exiting: Switching away from an old contract

Question: Do you agree that termination notice requirements represent an unnecessary barrier to switching and should be prohibited? If so, do you agree that a prohibition on notification periods should apply to both new and existing contracts?

Yes, but believe should only apply to new contracts to allow suppliers time to prepare for this.

Question: Do you agree that our proposal to require that suppliers continue to charge consumers on the basis of the rates in place prior to a blocked switch for up to 30 days represents an effective approach to limiting the financial impact of switching delays? If so, do you agree that the time period should be 30 days.

Yes, as incentivises the supplier to use objections for legitimate purposes only

Question: What challenges do you think suppliers and brokers may face implementing our proposals regarding improving the switching experience?

We see brokers and their customers benefiting from these proposals, but for suppliers this will add further to their exposure to risks which will ultimately impact on their pricing.

Question: Do you have any comments on the associated drafts supply licence conditions in Appendix 1 of this document?

Question: Do you think there are other changes which would better address the consumer harm that has been identified?

P.O. Box 355
Tunbridge Wells
Kent TN2 9ED
t. 01622 738968
f. 01580 879839

www.uia.org.uk