Jonathan Blagrove
Microbusiness Strategic Review, Vulnerability and Consumer Policy

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Sent by e-mail

Dear Jonathan

Microbusiness Strategic Review: Policy Consultation

We welcome the opportunity to provide views on Ofgem's policy proposals for the microbusiness retail market. This response represents the views of SSE Business Energy (SSE Energy Supply Limited).

SSE Business Energy agrees that Microbusiness Consumers (MBCs) should receive appropriate protections when engaging in the energy market. We welcome the steps that Ofgem has taken to better understand MBCs and we support the commitment Ofgem has made to address issues that affect them.

We are pleased to note that Ofgem's evidence gathering has confirmed that the market is working well with engagement levels 'relatively high', and MBCs able to access 'bespoke contracts that suit their needs … competitive prices' and 'good quality of service from the best performing suppliers'.

We recognise that Ofgem note that some customers have negative experiences of 'procedural barriers, opacity and poor practice', but note that Ofgem indicates that these issues mostly relate to consumer dissatisfaction with a 'minority of brokers' and their commission rates, rather than consumer dissatisfaction with their energy supplier. As Ofgem recognise, suppliers are not party to the consumer's choice of broker, with any contract for broker services being directly made between consumer and broker, and any eventual contract for the supply of energy being entirely distinct from the consumer's contract with the broker.

Therefore, to make suppliers responsible for addressing consumer issues that arise in respect of broker contracts, would be entirely incongruous and sets a concerning precedent that indirectly regulated market participants may avoid full responsibility for their own activity, including potential poor business practices, because the regulatory burden ultimately lies with an entirely separate party.

We have set out more detailed responses to each of Ofgem's Policy Consultation questions in Annex 1 (below) and Ofgem's Draft Impact Assessment questions in Annex 2 (attached – please note this

information is confidential). However, our key considerations relating to Ofgem's policy proposals are as follows:

- We support action being taken by Ofgem to improve customer outcomes. However, we do not agree that the introduction of additional rules into the licence conditions to require suppliers to supervise brokers is the right or proportionate solution to remedy the issues Ofgem has identified.
- We consider that it is important to identify the right solution to the issues Ofgem has identified and to set out the steps needed to deliver this. Our view is that direct regulation is the most appropriate regulatory framework for the broker market, avoiding many of the unintended consequences of the current proposals and offering the model which provides the most effective route to consistently deliver the customer outcomes Ofgem is seeking to achieve.
- We understand that Ofgem discounted the option of direct regulation in 2014 for similar reasons as those provided in the current consultation and draft impact assessment (e.g. cost, time and complexity). We consider that the supplier model proposed would be more costly, time-consuming and equally complex to implement.
- We do, however, recognise that direct regulation would take time to implement and, therefore, support the implementation of some of Ofgem's proposals whilst a direct regulation model is developed and implemented to more fully protect customers in their contractual relationship with their broker.
- We therefore support the provision of greater transparency around broker commission, and the provision of a route for consumers to pursue redress via an independent Alternative Dispute Resolution service.
- We consider that the implementation of these proposals, used in conjunction with Ofgem's existing powers under the Business Protection from Misleading Marketing Regulations 2008 ('BPMMR'), would improve customer outcomes until such time as a direct regulation model can be introduced.
- We do not agree that it is necessary to introduce a cooling off period given the possible unintended consequences, including the potential impact on the design work suppliers are currently progressing as part of the Faster Switching Programme.

We do not believe that placing additional obligations on suppliers would lead to significantly improved consumer outcomes but would, instead, further delay the inevitable step towards direct regulation.

As we previously stated in our response to Ofgem's Draft Forward Work Programme 2020-2022, we would encourage Ofgem to evaluate the merits of a robust, long-term solution to regulate broker service providers. This was the view shared by several suppliers during the CMA investigation[1], the joint BEIS/Ofgem consultation on 'Flexible and responsive energy retail markets'[2,] and remains the view held by Citizens Advice[3]. It also ensures that brokers remain well placed to support the energy industry on its transition to net zero.

[1] https://assets.publishing.service.gov.uk/media/576bccf740f0b652dd0000ba/appendix-17-4-third-party-intermediary-code-of-conduct-remedy-fr.pdf
[2] https://www.ofgem.gov.uk/publications-and-updates/flexible-and-responsive-energy-retail-markets
[3] https://www.citizensadvice.org.uk/Global/CitizensAdvice/Energy/Citizens%20Advice%20-%20Closing%20the%20protection%20gap.pdf

We would be happy to meet with Ofgem to discuss our response further and would welcome bilateral engagement ahead of the expected issue of a statutory consultation in Winter 2020/21.

Yours sincerely,

Megan Coventry
Senior Regulation Analyst – Customer Solutions GB

Annex 1

Awareness: Knowing about opportunities and risks

Question 1: What are the most effective ways to ensure that microbusinesses can access key information about the retail energy market?

We support the proposal that Ofgem work collaboratively with leading consumer groups to build awareness of and access to key information for Micro Businesses. As a supplier we strive to engage according to our customers' preferences and provide a variety of ways customers can locate the most frequently sought information, understand their energy supply services and make informed choices.

We would be happy to work with Ofgem and consumer groups to support the development and availability of key general information for microbusinesses to improve the customer journey in this way.

Browsing: Searching for deals

Question 2: Do you agree with our proposal to strengthen the requirements to present a written version of the Principal Terms to customers?

We agree that customers should be provided with clear and accurate Principal Terms. Supply Licence Condition (SLC) 7A.9, when read in conjunction with SLC 7A.4, currently requires that suppliers must take all reasonable steps to provide Principal Terms in writing. Given a broker is acting as the customer's agent, and therefore the contract for energy supply remains between the customer (as principal) and supplier, the current licence condition requirements are already clear. We consider that the existing requirements remain appropriate and already ensures that Principal Terms are likely to be provided in writing (including by a broker) except where this is impractical (e.g. during a verbal sale). The proposed removal of the 'all reasonable steps' wording from the legal text, and the amendment to specify that provision of Principal Terms applies to both supplier-led and broker-led sales (i.e. that suppliers are obligated to ensure brokers convey the Principal Terms to the customer) is not necessary to improve outcomes for consumers.

Question 3: 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?

We support Ofgem's aim to ensure transparency of broker charges as this could help inform consumer choices. However, we do not agree that it is appropriate to provide this information on every bill or statement of account.

As Ofgem recognise in its TPI Factsheet, a "TPI will charge for the services it provides you. This could be a direct charge paid by you to them (e.g. a flat fee, a charge per trade made on your behalf) or indirectly. For indirect payments, the TPI receives a payment from the supplier, which is added to your bill."[4] The contract for these services is negotiated and agreed between customers and brokers directly and is distinct from the energy supply contract. In addition to contractual obligations in broker contracts (between brokers and customers), brokers (as agents of the customer) also have fiduciary duties under the law of agency (including to disclose all material facts/not to make a secret profit) and a legal obligation under the Business Protection from Misleading Marketing Regulations 2008 ('BPMMR') to ensure they do not mislead customers. As such it is the responsibility of brokers to be transparent about their charges, and these should be provided to the customer directly by their broker.

If brokers are not fulfilling their contractual and legal obligations towards customers, then it is appropriate that Ofgem should seek to act. In 2013, Ofgem were granted powers to enforce the BPMMR and noted in 2013 that "business consumers need to feel confident that they know – and get – what they're paying their broker for. Brokers could now face investigation by Ofgem if they fail to treat their business customers fairly."[5] In this context, we note that Ofgem has not set out either within the policy consultation or draft

[4] Ofgem, Third Party Intermediaries: what your small business needs to know, May 2015, https://www.ofgem.gov.uk/sites/default/files/docs/2015/03/481_tpi_facsheet_may15_web.pdf
[5] Ofgem gains new powers to protect businesses from misleading marketing, 20 November 2013, https://www.ofgem.gov.uk/press-releases/ofgem-gains-new-powers-protect-businesses-misleading-marketing

impact assessment what impact the granting of these powers has had nor how it has sought to use these. We would urge Ofgem to provide greater transparency on the number of cases assessed under these powers, together with the challenges it has found when pursuing these cases, to ensure the market understands how the proposed remedies will resolve any defects identified.

Notwithstanding the above points, we recognise that the BPMMR do not confer on Ofgem the ability to set standards that brokers must follow. However, we do not agree that the introduction of additional rules into the supply licence conditions is the right or proportionate solution to remedy the issues Ofgem has identified and would urge Ofgem to reconsider its approach to direct regulation. We note that, in 2014, Ofgem stated that it did "not rule out this option in the long term if the need for further invention arises" and we would, therefore, urge Ofgem to reconsider its approach to direct regulation.[6]

We understand that Ofgem discounted the option of direct regulation at that time for similar reasons as those provided in this current Microbusiness Strategic Review consultation and impact assessment (i.e. direct regulation will be too difficult due to the number of TPIs in the market making a licencing scheme 'potentially complex and costly to establish', and due to the requirement for 'appropriate changes to be made to Ofgem's existing vires' not being achievable in the short to medium term), stating that:[7]

'3.19. Whilst this option may appear as the strongest in inspiring consumer trust we are mindful of the unintended consequences this may have on the TPI market (…) The process of applying for new licensable activities also means this option would take longer to introduce than other options. Based on recent experience of legislation passed to create a new licensable activity for the smart metering Data and Communications Company, this process could take more than 18 months.'

As we have set out in our responses to this consultation, we consider that the remedies as proposed in this Microbusiness Strategic Review consultation would require at least a similar amount of time, if not more, to implement the changes proposed.

However, we recognise Ofgem's concern that direct regulation would take time to achieve. Therefore, a temporary requirement to disclose broker charges (that the supplier applies on behalf of the broker as part of the procurement process) via the sales process could support customers whilst a direct regulation model is developed and implemented to more fully protect customers in their contractual relationship with their broker. We do not agree that this should be provided on every bill or statement of account and have given further consideration to how this might be achieved in response to Question 4 below. We would also highlight that there may be other broker charges applied directly to the customer or other indirect charges for other utilities or services which a supplier is not aware of – these are governed entirely separately by the contract between the broker and the customer, and as such a supplier would not have that information or be able to disclose it.

[6] Ofgem, Proposals for regulating non-domestic Third Party Intermediaries, 14 February 2014, https://www.ofgem.gov.uk/sites/default/files/docs/2014/02/tpi_non-dom_condoc_final.pdf
[7] *Ibid*

Question 4: 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?

As we have noted in our response to Question 3, suppliers are not a contractual party to the agreement between a broker and a customer and, therefore, any obligation in respect of how this contract is negotiated and presented should be placed on brokers. We recognise that Ofgem has identified evidence that broker costs are not being transparently provided to customers in all cases. Whilst we do not agree that the introduction of additional rules into the licence conditions is the right or proportionate solution, we recognise that direct regulation would take time to achieve and that some customers would continue to experience unsatisfactory outcomes in the meantime. We would, therefore, support proportionate action being taken by Ofgem to develop a proposal to ensure customers receive this information whilst a direct regulation model is developed and implemented to more fully protect customers in their contractual relationship with their broker.

We would propose Ofgem could consider improving transparency in the following ways.

1. Suppliers are currently under an obligation (SLC 7A.4) to "take all reasonable steps to bring the following to the attention of the Micro Business Customer… (a) a statement to the effect that the licensee is seeking to enter into a legally binding Contract with the Micro Business Customer". We would propose that this could be amended to include an additional requirement to provide to the customer in plain and intelligible language a statement to the effect that the licensee will pay fees and commission to the Broker (as agreed between the consumer and Broker) in exchange for the introduction services the Broker is providing to the licensee, and that the customer understands that these fees will be passed through to the customer indirectly (via their agreed supply rates) and form part of the legally binding contract.
2. Whilst we would expect that most brokers would be happy to share their charges with customers at any point during the contract, Ofgem could introduce an additional obligation requiring Suppliers to provide this information 'on demand' (e.g. within 28 days of a request from a customer). SSE Business Energy will already provide this information where requested and, as a result, we consider that this would ensure all customers are able to obtain this information.

We agree that Ofgem could be prescriptive about the format of these statements to ensure that customers are given consistent information.

In addition to our response to Question 3, we are concerned that Ofgem's proposals to introduce prescriptive requirements to include broker costs on every bill could make bills more complex and unwieldy for customers to interpret. This may also cause increased contact or complaints by customers with regards to the commission information that suppliers cannot support, resulting in an increasing proportion of customer contact being redirected to the relevant broker. In addition, the cost and complexity to change supplier billing systems to include additional information to microbusinesses on all customer bills would likely be significant and is further complicated by the current licence condition definition of a Micro Business Consumer which remains cumbersome to apply in practice.

Question 5: What challenges do you think suppliers and brokers may face implementing these proposals?

Suppliers will face significant increased costs, in particular with regard to quotation, sales and billing systems and process changes, and differentiation within the system to apply these changes to Micro Business Consumers only. This is further complicated by the current licence condition definition of a Micro Business Consumer which remains cumbersome to apply in practice. We would recommend that Ofgem should amend the definition of a Micro Business Consumer to focus on energy volumes only. In addition, as Ofgem recognise, broker fees are not all consistent, which would make reporting (and consistency of reporting) challenging for suppliers, require significant billing system changes, and make bills complicated for consumers. For example, broker charges via the energy supply contract can include charges linked to consumption (p/kWh), fixed transaction fees, service fees for a term (e.g. per year), call off services depending on the customer (e.g. a base fee, plus extra for energy efficiency advice, surveys, bill validation, etc). Brokers could charge some or all of the above, and these rates may not all be split out (i.e. some brokers may provide the supplier and consumer visibility of one overall cost, rather than an itemised list). Accordingly, many of these changes would also be extremely time-consuming to introduce given the understandable rigour required to amend complex billing systems.

Increased contact and complaints from consumers may result from confusion over inclusion of broker commission data in supply bills. Contact centre resource will likely be impacted by having to field broker commission related enquiries. A supplier will only be able to answer a customer enquiry with respect to broker fees the supplier is aware of, not other direct or indirect charges for other products and services a broker may provide a customer through the separate broker/ customer contract. Therefore a customer will not get a complete view of broker charges via contact with their supplier, with the customer potentially requiring to be redirected to their broker. It would be simpler, and more conducive to a better customer experience, for brokers to be required to provide transparent information and receive customer enquiries direct as they can provide a clear summary to the customer of all broker charges per product/service. There is potential for a complicated, dissatisfactory experience for customers, especially those who have to contact multiple suppliers and be redirected to brokers due to having multiple contracts across utilities, for example.

We also note that the recently proposed supplier licence condition changes relating to the implementation of the EU Clean Energy Package (Directive 2019/944) originally proposed that bills should be set out in a specified format. Should this be implemented as originally proposed, the addition of broker commission into microbusiness consumer bills would appear to be contrary to the intention of the Directive.

We would expect that brokers are better-placed to offer views in response to this question on the impacts they will face. However, it is important to recognise one of the challenges brokers may face is a lack of awareness of these proposals and that some may find themselves reliant on indirect notification via suppliers to make them aware of new requirements which could significantly impact their business models. In addition, should the proposals be implemented, we would expect that brokers who provide extra value-add services may cease to offer these to ensure they do not appear over-priced compared to other brokers (especially since brokers will be unable to provide this break down of information via supply statements or bills themselves which will encourage customers to make comparisons based on price only without taking into account the value being offered by the different services provided by brokers). It may be an unintended consequence of this proposal that such service offerings reduce, and that this creates a negative impact

on broker competition and innovation. This could result in less variety of services being made available to customers.

Question 6: Do you have any comments on the associated draft supply licence conditions in Appendix 1 of this document?

We note that the current drafting for amends to supply licence condition 7A.4 around provision of Principal Terms does not explicitly specify that these should be written Principal Terms. We have considered this further in response to Question 2 above.

As noted in our responses above, we do not agree that the introduction of additional rules into the licence conditions to require suppliers to supervise the conduct of brokers is the right or proportionate solution to remedy the issues Ofgem has identified. Notwithstanding this, the removal of 'must take all reasonable steps' and replacement with 'must bring, and ensure that any broker brings' in SLC 7A.4 puts an incredible burden on suppliers to monitor and ensure 'any broker' provides a legally binding Contract statement and Principal Terms to the Micro Business Consumer. With thousands of brokers in the market, this becomes an unachievable licence condition which puts suppliers at heightened risk of non-compliance if significant resource is not dedicated to broker monitoring activity. This could deter smaller suppliers from entering the market, as to carry out this activity has hitherto been unexpected by suppliers, and the labour intensive nature of the task may be unfeasible for some. To monitor the broker market in this way is much more sensibly and efficiently achieved through direct regulation, where the dedicated resource, experience of market monitoring and enforcement provide a ready set up under the Regulator to achieve broker compliance with such a condition. We consider it likely that monitoring broker conduct will have a very high cost to industry due to each individual supplier monitoring and auditing broker conduct, on an ongoing basis. It could be anticipated that direct regulation of the broker market by Ofgem, with one centralised system of governance applied to monitoring broker conduct, would cost significantly less than the aggregated cost for the industry and result in much less burden i.e. Brokers and TPIs could undergo one audit per year rather than being audited annually by every supplier they work with.

We note that the definition of 'Broker' as proposed for the standard conditions in the consultation document implies that brokers are engaged as marketing agents of the supply licensee in consideration for a fee, which is not correct. The broker is acting as an agent of the customer and will present the customer with multiple contract options from various suppliers as part of the broker services. The licensee will only pay an introduction fee/commission to the customer's broker if the customer enters into a contract with that particular licensee. The contractual structures and arrangements between broker and customer are completely separate to those between the supplier and customer, and this should be clearly reflected in the definition to avoid confusion and error in application of the licence.

As noted in our response to Questions 3 and 5 above, a supplier will only be able to disclose or answer a customer enquiry with respect to broker fees the supplier is aware of, not other direct or indirect charges for other products and services a TPI may provide a customer through the separate broker/ customer

contract. As such, the proposed drafting for SLC 7A.10C.1 will need to be amended to explicitly refer to fees and commission which are directly charged in relation to the microbusiness supply contract.

The addition of supply licence condition 7A.10C.2(a) requiring suppliers to display broker fees and commission on each bill is unduly onerous and it is not clear that this will benefit the consumer experience. As set out in our response to Question 4, we support the principle of transparency and propose, instead, that suppliers take all reasonable steps to provide clear statements to customers at the point of contract signing, and to provide information on broker costs on demand. Should Ofgem conclude that it is necessary to include this information on bills, we would recommend that suppliers are provided with the flexibility to include this "on or with" bills. These options would ensure the commission information can be provided in a clear and accessible way without further complicating bills themselves. However, we would reiterate that additional information on bills will result in significant costs and time required to amend complex billing systems, and request that Ofgem fully take this into consideration.

Question 7: Do you think there are other changes which would better address the consumer harm that has been identified?

Ofgem identifies in both the consultation and impact assessment documents that 'the majority of the consumer harm faced by microbusinesses arise from poor practice by a minority of brokers'. We are concerned, therefore, that the remedies proposed are disproportionate to the harm identified. As noted in our response to Question 3, Ofgem has the power to clamp down on brokers and other organisations that mis-sell to business customers.[8] It is not mentioned in this policy consultation or impact assessment how these powers have been utilised to date, and why they are not sufficient going forward to address the poor practice identified by a minority of brokers. We would urge Ofgem to provide greater transparency on the number of cases assessed under these powers, together with the challenges it has found when pursuing these cases, to ensure the market understands why further remedies are necessary.

Ofgem has also previously proposed introduction of a mandatory code for non-domestic TPIs.[9] This also receives no further mention in this policy consultation and impact assessment. Ofgem should present evidence-based assessment of this option as part of its justification to proceed towards an alternate model for indirect regulation of brokers via supplier licence conditions. We note that Electralink has previously proposed a voluntary TPI Code of Practice,[10] but this has failed to be fully developed. We consider that this was impacted by industry concerns that a voluntary code could create a two-tier system, providing a poor outcome for consumers and difficulties for suppliers supportive of the voluntary code who then would be excluding themselves from part of the market i.e. from working with brokers not participating.

Accordingly, we consider that Ofgem already has powers to deal with the harm identified in many respects and that Ofgem should implement only those remedies that are absolutely necessary to improve customer outcomes until such time as it is able to introduce a direct regulation model. We recognise that Ofgem believe the cost and effort to implement central regulation is high. However, we consider that the cost to

[8] Ofgem gains new powers to protect businesses from misleading marketing, 20 November 2013, https://www.ofgem.gov.uk/press-releases/ofgem-gains-new-powers-protect-businesses-misleading-marketing
[9] https://www.ofgem.gov.uk/sites/default/files/docs/2014/08/non-domestic_tpi_cop_openletter_publish.pdf
[10] https://www.electralink.co.uk/2018/11/electralink-launches-new-consultation-on-third-party-intermediary-code-of-practice/

industry to implement decentralised regulation would be much higher and more difficult to introduce to supplier systems and processes in both the short and long term. Our view is that direct regulation provides the most effective route to consistently deliver the customer outcomes Ofgem is seeking to achieve.

Contracting: Signing up to a new contract

Question 8: 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?

Introducing the broker conduct principle into the supply licence will have a significant impact on supplier operations, and there remain several possible unintended consequences. In particular:

1. Suppliers are not party to the consumer's choice of broker, with any subsequent contract for broker services being directly made between consumer and broker, and any eventual contract for supply of energy being entirely distinct from the consumer's contract with the broker. Therefore, a supplier cannot be made responsible for addressing consumer issues that arise in respect of broker contracts. To obligate suppliers through their licence to do this, would be entirely incongruous and sets a dangerous precedent for unlicensed and/ or indirectly regulated market participants to be able to operate without the incentive to take responsibility for governance of their own activities, because the responsibility ultimately lies with an entirely separate party via an overarching licence obligation. It should remain a broker's responsibility to provide transparency to their customers in line with their existing contractual and legal obligations.
2. SLC0A may cause consumers to seek redress from suppliers rather than utilising their contractual rights to seek redress from their broker. This reduces the incentive on brokers to be compliant. Any remedy which requires Ofgem to take enforcement action against a supplier in the anticipation that this will lead to suppliers taking action against brokers is likely to be inefficient and ineffective. Indeed, given enforcement action would be against named suppliers (and not brokers who, as unlicensed entities, would not be party to the enforcement action) it is unclear how enforcement action would provide any credible deterrence for other brokers.
3. It will be very challenging for multiple suppliers to supervise the conduct of hundreds of brokers, with TPIs themselves not under the same risk of regulatory intervention. There will inevitably be inconsistent interpretation of rules between suppliers and brokers, in addition to different levels of risk appetite within the sector. This will not lead to consistent outcomes for consumers. Direct regulation, by contrast, offers more consistency.
4. Suppliers will need to price the implementation of processes to manage broker conduct, into their own products and services, ultimately meaning a higher overall cost to consumers. This will likely cost more to implement than a direct regulation model.
5. In the event a supplier identifies inappropriate conduct, it will (as it does currently) have the option to terminate the contractual relationship with the broker. Whilst the additional risk of regulatory enforcement action may make this a more likely outcome it does not (and cannot) prevent other suppliers continuing to use this broker. This severely undermines the policy intent to ensure that customers are protected and provides less protection for customers than currently exists under the BPMMR given any injunction/undertaking agreed by Ofgem with a broker would apply to all customer interactions (instead of those with one particular supplier).
6. It has the potential to stifle innovation within the broker market at a crucial stage of the journey to net zero. Brokers provide a range of services to consumers and are likely to see innovation as critical on the path to net zero. Introducing requirements for brokers to be supervised by suppliers has the potential to hinder innovation rather than foster it given suppliers will need to be assured that any proposed innovation does not present a risk of enforcement action.

In other words, it is not the right solution for the problems Ofgem has identified. We consider that Ofgem needs to identify the best solution as part of this policy consultation and then set out the steps that are necessary to achieve this – the industry should aim to 'do this once but do it right'.

We do not agree that the introduction of a broker conduct principle within supplier licence conditions is the right model to address the root causes of poor conduct. The proposal burdens suppliers with a trilemma of close monitoring thousands of broker/ customer interactions, declining customer business through brokers they deem to be poor providers or have been rejected by the ADR scheme, and puts them at increased risk of direct enforcement action related to a broker's conduct at any point, whether ADR scheme member or not.

We consider that direct regulation represents a more effective solution. This was the view shared by several suppliers during the CMA investigation,[11] and remains the view held by Citizens Advice.[12] We recognise Ofgem's concern that direct regulation would take time to achieve, and therefore agree that it may be necessary to implement some of the proposals set out in this policy consultation in the interim whilst a direct regulation model is developed and implemented to more fully protect customers.

Question 9: 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 that consumers should be protected from poor sales and marketing practices.

However, the existing SLC0A Standards of Conduct and specifications around treatment of Micro Business Consumers in SLC 7A, provide appropriate requirements to ensure suppliers act in a 'fair, honest, transparent, appropriate and professional manner' and take all reasonable steps to provide full and clear information during the sales process. We therefore consider Ofgem already has the power to intervene in cases where suppliers use high pressure sales techniques or do not make appropriate recommendations. As such, introducing further licence requirements on suppliers is unnecessary duplication.

As we have set out in our response, we do not agree that the introduction of additional rules into the licence conditions to require suppliers to supervise the conduct of brokers is the right or proportionate solution to remedy the issues Ofgem has identified. Notwithstanding this, applying requirements on suppliers relating to broker face-to-face and telesales activity is particularly onerous given that brokers will contact their customers to discuss energy generally, only referencing particular suppliers and products when customer requirements are known. The contract for these services is negotiated and agreed between customers and brokers directly and is distinct from the energy supply contract. It is a confidential commercial arrangement

[11] CMA, Energy market investigation - Appendix 17.4: Third party intermediary code of conduct remedy, 24 June 2016, https://assets.publishing.service.gov.uk/media/576bccf740f0b652dd0000ba/appendix-17-4-third-party-intermediary-code-of-conduct-remedy-fr.pdf

[12] Citizens Advice, Stuck in the middle, 3 March 2020, https://www.citizensadvice.org.uk/Global/CitizensAdvice/Energy/TPIs%20report%20-%20FINAL%20(1).pdf

between the customer and broker which the supplier would have very limited access to in order to understand all the interactions, marketing and advice that has been provided, let alone to assure it. It would be incredibly difficult for every supplier to put in place a system of assurance to monitor not just the contracts won, but also the sales and marketing processes for quotes lost. This has the potential to hinder enforcement action (e.g. Where Ofgem consider a broker has mis-sold an energy contract, will it hold the supplier that 'wins' the energy supply responsible for this conduct or all suppliers who have a contract with the broker? Will it ask all suppliers to demonstrate the processes in place to monitor brokers and then open an enforcement case against those who could not demonstrate that effective processes were in place?). We consider that this proposal is likely to be difficult to effectively monitor and implement and, as a result, should be addressed as part of a direct regulation model. Whilst we note that the proposal would confer broader powers on Ofgem by comparison to the BPMMR, we also consider that Ofgem currently has the power to act under the BPMMR in some of the instances set out in the proposal.

Question 10: 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?

The benefit of introducing a cooling off period to Micro Business Consumer contracts is not clearly evidenced. We appreciate Ofgem's aim is to protect consumers who may feel they have been mis-sold, however if a contract offer and Principal Terms are presented to the customer in advance of contract signing, so that they may make an informed choice and compare offers in detail, mis-selling should not occur and there is no further need for an additional period to cool off. We receive a relatively low number of complaints about TPIs and, as such, we believe that this remedy is disproportionate to the harm identified.

We also consider that the introduction of a cooling-off period could in fact result in the unintended consequence of brokers seeking to utilise the cooling-off period as a winback opportunity in order to win contracts. Within the evidence Ofgem presents in the consultation document on poor telesales practices, it is suggested that unsolicited calls from brokers to microbusinesses are a key factor in disengagement in recent years. We consider this proposal could lead to an increase in the number of unsolicited calls and that this could cause consumers to disengage further from the market. We do not believe Ofgem's other proposals would prevent this.

Notwithstanding the implementation challenges set out in our response to Question 11 (in particular the introduction of considerable commodity price risk to suppliers), we consider that Ofgem's existing powers under the BPMMR used in conjunction with proposals to ensure greater transparency of commission and a right for redress remove the need for customers to be able to cancel their supply contract with a supplier.

Question 11: What challenges do you think suppliers and brokers may face implementing these proposals?

Introducing a cooling-off period would significantly increase administrative costs for suppliers who will need to provide more quotes and manage the release of more contracts. This will increase suppliers' cost-to-serve.

There will also be an ongoing material uncertainty that will impact supplier hedging. In order for suppliers to manage their exposures and costs effectively in a market where customers 'fix' their energy contract at the point of sale (and particularly for non-domestic energy supply contracts, which typically are fixed for a longer period of time than domestic contracts), it is prudent to hedge that energy at the point the contract is agreed (whereby the customer, having had Principal Terms and costs explained in advance, is achieving a market reflective price which is driven by competition given that there is no incentive for suppliers to provide out-of-market pricing in a way that disadvantages customers, as they would win no business). Therefore, the customer pays what the supplier pays for the energy.

If cooling-off periods were to apply, it is arguable that in a volatile market like energy the driving factor for a customer (or broker) to invoke the cooling-off period is a drop in the cost of energy for future periods. If that were to happen en masse, this could create a scenario where suppliers have to sell energy they have purchased for contracting customers back into a falling market (taking a Mark to Market hit). This is likely to result in scenarios where suppliers take a more speculative approach to purchasing energy for committed contracts (which they are entitled to do) with the unintended consequence of a short position in a rising market and/or pricing in the risk of X% of contracts cancelling. In either outcome, the ultimate result would be increased consumer costs either at the time or in future (or consequential supplier losses / failures if mis-calculated).

In addition, it is important to recognise that non-domestic suppliers have already begun the process of designing and building solutions towards implementation of the Faster Switching Programme. The timing of a new microbusiness cooling-off period proposal being brought to market could mean those solutions need to be redeveloped at great expense. Suppliers need certainty on the specifications for large industry change programmes, and introducing new requirements at a late stage in the Programme would be complex and costly to implement.

We would expect that brokers are better-placed to offer views in response to this question but expect many of the challenges set out in our response to Question 6 to apply here also.

Question 12: Do you have any comments on the associated draft supply licence conditions in Appendix 1 of this document?

As noted in our responses above to questions relating to the introduction of a cooling-off period, we do not agree that there is a need to add a cooling-off period requirement to the supply licence conditions, and in fact believe that it could inadvertently lead to worse customer outcomes rather than the intended consumer benefit of providing a right to cancel.

Notwithstanding this, should Ofgem continue to implement this proposal, we consider the licence condition drafting needs to clarify when the proposed 14 day cooling-off period would start and end. The proposed

drafting for SLC 7A.13E.3 suggests that the cooling-off period could be longer than 14 days if linked to the date on which Principal Terms are issued to the customer. The impact will be significantly different depending on whether the cooling-off begins at contract signing-date/ issue of Principal Terms (and ends after 14 days or ends at a future dated supply start date).

As also stated in our response to Question 9, the supplier Standards of Conduct that already exist in SLC 0A and specifications around treatment of Micro Business Consumers in SLC 7A provide appropriate requirements to ensure suppliers act in a 'fair, honest, transparent, appropriate and professional manner' and take all reasonable steps to provide full and clear information in the offers process. As such, introducing further licence requirements on suppliers is unnecessary duplication.

As set out in our response to Question 6, we do not agree that the introduction of additional rules into the licence conditions to require suppliers to supervise the conduct of brokers is the right or proportionate solution to remedy the issues Ofgem has identified. Applying requirements on suppliers relating to broker face-to-face and telesales activity is particularly onerous given that brokers will contact their customers to discuss energy generally, only bringing particular suppliers and products to consider when customer requirements are known.

In addition, the draft wording proposed under the 'Informed contract choices - contract comparability and marketing' for new licence conditions is extremely broad in scope, particularly the following:
'[X] The licensee must not, and must ensure that Brokers do not mislead or otherwise use inappropriate tactics, including high pressure sales techniques, when selling or marketing to Micro Business Consumers.'
This potentially captures any sales or marketing carried out by brokers, whether relating to the energy contract, broker's own services or otherwise.

Finally, the requirement that suppliers "must ensure that brokers" adhere to this obligation puts an incredible burden on suppliers to monitor the conduct of every broker. With thousands of brokers in the market, this becomes an unachievable licence condition which puts suppliers at heightened risk of non-compliance if significant resource is not dedicated to broker monitoring activity. This could deter smaller suppliers from entering the market, as to carry out this activity has hitherto been unexpected by suppliers, and the labour intensive nature of the task may be unfeasible for some. To monitor the broker market in this way is much more sensibly and efficiently achieved through direct regulation, where the dedicated resource, experience of market monitoring and enforcement provide a ready set up under the Regulator to achieve broker compliance with such a condition.

Question 13: Do you think there are other changes which would better address the consumer harm that has been identified?

As set out in our responses to the questions above, we do not agree that the proposals set out in this section are necessary. We consider that Ofgem's existing powers under the BPMMR used in conjunction with proposals to ensure greater transparency of commission and a right for redress remove the need for customers to be able to cancel their supply contract with a supplier

In addition, as set out in our response to Question 8, we consider that direct regulation represents a better solution for the problems identified.

Dialogue: Two-way communication with service providers

Question 14: 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?

We agree that it is important that customers can access a dispute resolution service. We recognise that Ofgem has identified some evidence where customers have been unable to obtain suitable redress and we also recognise that the BPMMR do not confer powers on Ofgem to ensure customers receive suitable redress.

Whilst we do not agree that the introduction of additional rules into the licence conditions is the right or proportionate solution, we recognise that direct regulation would take time to achieve and that some customers would continue to experience unsatisfactory outcomes in the meantime. Whilst we consider that further information is available on the detail of the scheme we would, therefore, support proportionate action being taken by Ofgem to develop this proposal to ensure customers have access to appropriate dispute resolution whilst a direct regulation model is developed and implemented to more fully protect customers in their contractual relationship with their broker.

Question 15: What challenges do you think suppliers and brokers may face implementing our proposal regarding dispute resolution?

We agree in principle that the ADR scheme could benefit consumers, however it is not clear what role a supplier would be required to take once a broker has signed up to adhere to the scheme rules. We would expect that any decisions of the ADR scheme provider relating to broker conduct would be binding on the customer and broker only, and that any requirement to make redress payments would also only apply to the broker. This would reflect and remain consistent with the existing contractual and legal relationship between the broker and customer.

It is also not clear what rules the ADR will be enforcing when it receives a complaint – we consider that this needs careful consideration to avoid confusion for customers, brokers and suppliers.

It would also be difficult for suppliers to know in ‘real time’ which brokers are members of the scheme or whether a member has been ejected from the ADR. Given that this represents a compliance risk for suppliers, we would urge Ofgem to ensure the ADR scheme provider maintains a clear list of members and is obliged to notify suppliers of any updates.

Accordingly, we consider that more information is needed to understand how the scheme would be expected to work.

Question 16: Do you have any comments on the associated draft supply licence conditions in Appendix 1 of this document?

As set out in our response to Question 15, we consider that more information is needed to understand how the scheme would be expected to work. We do not, therefore, consider that it is possible to adequately answer this question at this time.

Question 17: Do you think there are other changes which would better address the consumer harm that has been identified?

As set out in our response we consider that direct regulation represents the most appropriate solution to the issues that Ofgem has identified. We recognise that direct regulation would take time to achieve and that some customers would continue to experience unsatisfactory outcomes in the meantime. We would, therefore, support proportionate action being taken by Ofgem to develop this proposal to ensure customers have access to appropriate dispute resolution whilst a direct regulation model is developed and implemented to more fully protect customers in their contractual relationship with their broker.

Exiting: Switching away from an old contract

Question 18: 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?

Whilst we consider that termination notices can provide a useful engagement opportunity for customers, we agree that a termination notice does not need to be provided by customers coming to the end of their contract and proactively switching provider, either directly or through a broker. However, we anticipate that the implementation of this proposal will require changes to be made to complex supplier billing systems and processes. Suppliers will likely require an appropriate lead time to implement this proposal. As such, we believe that the prohibition would more appropriately apply to new contracts from implementation, considering application to existing contracts would also require changes to contract terms and related customer communications to be delivered.

As we have set out in our response to Question 21, we consider that the licence condition drafting on this proposal is not clear. We note Ofgem's verbal confirmation during our bilateral meeting on 28 September 2020, and at the subsequent Stakeholder Event on 14 October 2020, that the intent of this change is to remove the requirement for customers to provide written notice of termination at any point during their fixed term contract, and not to allow customers within the 'Initial Period' to terminate their contract before the conclusion of this fixed term period.

Question 19: 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?

In principle, we understand Ofgem's intention is to protect customers from high out of contract rates due to switching delays that arise outwith a customer's control. However, we do not agree that the proposal is an effective approach to improve the customer experience given it does not address the root cause of 'incorrect' objections.

We would urge Ofgem to undertake further analysis of available evidence to understand the proportion of switches that may be impacted in this way (e.g. proportion of switches reported as part of Ofgem's Market Monitoring that occur outwith the licence condition requirements for invalid reasons). It is our understanding that most blocked switches are caused by correct objections when a customer is still within the fixed term of their contract or due to outstanding debt issues on the account. There are some customer objections caused by the gaining supplier or broker applying the incorrect start date to a contract. This seems to be an issue for a proportion of blocked switches, but it is unclear to the losing supplier why the incorrect date has been applied. Where objections are raised a customer is informed via letter in accordance with SLC 14, informing them of the objection and reason(s) why. This gives the customer the opportunity to address the matter so that a new application can be made if required. Despite this, it is not uncommon to receive multiple applications on one supply requesting registration dates prior to the contract end date despite a customer's contract end date being clearly stated on each bill, in accordance with the current SLC 7A.10B.

We consider that it is important that this proposal is supported by a robust evidence base given its introduction will be costly due to the need to amend complex billing systems (or to set up manual administrative processes). There also remains the potential for unintended consequences – whilst suppliers will adopt different approaches to contract hedging, it may be necessary for some suppliers to consider the impact of this proposal on their approach to pricing. A fixed term contract is priced to reflect the underlying cost of providing energy over the period of the fixed term – a one-month extension to an unknown number of contracts for reasons that may be outwith the losing suppliers' control will be challenging to forecast and may lead to pricing strategies evolving to reflect this. Accordingly, whilst we agree with the principle that a customer should not be financially impacted by unnecessary delays to a customer switch, we do not believe there is sufficient evidence to demonstrate that this is a necessary or proportionate measure to introduce.

Instead, we recognise that Ofgem has already demonstrated that it is willing to take action against suppliers who do not take sufficient action to improve switching systems. We consider that taking appropriate action where issues are identified is a more proportionate approach to resolving those issues and to improving the customer experience. We also consider that it is important to consider the benefits of this proposal in the context of the Faster Switching Programme given that this should significantly reduce the period of time a customer spends on Out-of-Contract rates – in other words, the financial impact of this proposal should be assessed against the future switching regime and not existing processes.

Question 20: What challenges do you think suppliers and brokers may face implementing our proposals regarding improving the switching experience?

The practicalities of implementing a possible 30 day extension to all contracts would mean significant system and process changes for suppliers. We have set out considerations in relation to this in our response to Question 19.

Question 21: Do you have any comments on the associated draft supply licence conditions in Appendix 1 of this document?

As set out in Question 18, we consider that the licence condition drafting on this proposal is not clear.

We note that, within Appendix 1 'Working draft supply licence conditions', that Ofgem confirms that "deletions are in red strikethrough". It is not clear, therefore, whether the changes proposed for SLC 7A.11 onwards are additional to the existing licence conditions or would be expected to replace the existing wording.

We note Ofgem's verbal confirmation during our bilateral meeting on 28 September 2020, and at the subsequent Stakeholder Event on 14 October 2020, that the intent of the proposed Termination Notice proposal is to remove the requirement for customers to provide written notice of termination at any point during their fixed term contract, and not to allow customers within the 'Initial Period' to terminate early

(although this would remain at a licensee's discretion and could be subject to a termination fee). However, the proposed drafting for SLC 7A.11 reads as if the customer does not need to provide a termination notice even if they want to terminate and exit the contract before the end of the fixed term period (the 'Initial Period').

We would recommend that SLC 7A.11 be reworded to read:
'In relation to a Micro Business Consumer Contract that contains a fixed term period, the licensee must terminate the Micro Business Consumer Contract at the end of the Initial Period unless paragraph 7A.12A applies.'

Question 22: Do you think there are other changes which would better address the consumer harm that has been identified?

It would be helpful for Ofgem to understand more about the quantity and reasons for objections to microbusiness consumer switches, and what proportion of these are a result of an unnecessary delay to the switch caused by suppliers or brokers. As stated in our response to Question 19, it is our understanding that most blocked switches are caused by correct objections when a customer is still within the fixed term of their contract or due to outstanding debt issues on the account.