

# Citizens Advice

## The role of Third Party Intermediaries (TPIs) in the GB SME and microbusiness energy supply sector

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# 1 Executive Summary

## 1.1 Background and overview

In 2010-11, Cornwall Insight provided a study to Consumer Focus on the role of Third Party Intermediaries (TPIs) in the energy market. This new 2018-19 report presents an update of Cornwall Insight’s original findings, including interviews with participants in the energy sector to gauge their views on the role of TPIs in the current market, the behaviour of TPIs, the potential need for regulation of the sector and the form that this regulation could take.

*The main findings demonstrate a strong strand of continuity between 2010-11 and 2018-19 reports. In other words, suppliers view TPIs as providing a beneficial, equitable and transparent service that generates value to them and to end users.*

*However, misconduct by a minority of TPIs continues to occur - risking wider customer detriment - and suppliers are of the opinion that some form of regulation is needed to address this.*

*While the number of TPIs active in the sector has increased in the period between the two reports, anecdotal evidence is such that this increase has led to a commensurate increase in misconduct, although it is difficult to quantify the scale of this behaviour.*

*TPIs themselves also expressed the need for regulation to prevent such misconduct, but that this should not be a “one-size-fits-all” approach and should instead be proportionate to the needs of the sector, i.e. the SME sector would require more prescriptive regulation than its industrial and commercial (I&C) counterpart.*

Research by Cornwall Insight has enabled us to identify which TPIs are used by which suppliers. While we do not expect that all the information presented will be up to date for all companies - and some may be dealing with some suppliers indirectly through aggregators - we believe that across a wide group

of TPIs the findings will be indicative of the ways different companies choose to engage with energy suppliers.

Against this backdrop, for the analysis period we noted the following for **TPIs**:

- Seven (7) TPIs stated that they worked with 26-30 suppliers;
- Eight (8) TPIs stated that they worked with 21-25 suppliers;
- Thirteen (13) TPIs stated that they worked with 16-20 suppliers;
- Eighteen (18) TPIs stated that they worked with 11-15 suppliers; and
- More than eighty (80+) TPIs stated that they worked with ten suppliers or fewer.

Such data indicates that TPIs capability to tap into the whole energy supplier pool is limited, whether due to choice or enforced by commercial realities.

From the **supplier** perspective, we note:

- Five (5) suppliers have agreements that enable them to work with more than 50 TPIs;
- Five (5) suppliers have agreements that enable them to work with 40-49 TPIs;
- Five (5) suppliers have agreements that enable them to work with 30-39 TPIs;
- Three (3) suppliers have agreements that enable them to work with 20-29 TPIs;
- Two (2) suppliers have agreements that enable them to work with 10-19 TPIs; and
- The remaining suppliers have agreements that enable them to work with fewer than 10 TPIs.

This again highlights the extent to which suppliers are able to make their quotes available through TPIs. However, it is again important to note that these and other suppliers would be expected to deal with many more TPIs through aggregators.

## 1.2 The role of TPIs in the SME market

The traditional business model for an energy TPI is based largely upon the core function of procurement and contract negotiation. As customer needs, technology and the energy sector itself have evolved, the TPI business model has responded with companies becoming wider energy consultants, offering a range of services including risk management and more data-driven products.

TPIs serve an important role in the SME energy market, with Cornwall Insight analysis indicating that they are responsible for the negotiation of just under a

third of the contracts in the sector, a ratio that has more than doubled since 2013-2014.

However, those energy suppliers contacted by Cornwall Insight for this report indicated that TPI channels typically provided more than 85-90% of their business, with some stating that they relied on them exclusively for securing customers. The disparity between the two figures mainly reflects the high proportion of disengaged customers in the market.

There has been a growing trend in the use of TPIs by suppliers, particularly at the smaller end of the supplier marketplace and for new entrants, where they effectively serve as a results-based channel to market. TPIs are often perceived to be a “trusted source” by consumers for a wider view of the energy market, thereby mitigating concerns about lack of information or understanding when dealing with a supplier directly.

As such, TPIs have assumed a greater importance in the energy sector, particularly in the SME market, in recent years. It should, however, be noted that the growing evolution of customer requirements in terms of wider energy service provision, e.g. consumption monitoring and analytics, metering services, etc. sometimes pitches TPIs and suppliers as competitors rather than serving in complementary roles.

This is because both suppliers and TPIs are increasingly offering these types of energy services, changing the nature of the tripartite relationship between a supplier, a TPI and their mutual end user customer.

The general view of suppliers interviewed for this report is that the majority of TPIs provide an effective and valuable service to both them and to customers, doing so in a transparent and equitable manner.

However, the misconduct of a minority of TPIs continues to cause detriment to end users with examples of such behaviour including: high pressure sales tactics; mis-selling of contracts; lack of transparency of the level of their commission or fees and how these are being recouped, and; misrepresentation of the extent to which a TPI has examined the whole of the energy market in obtaining a deal for a customer.

While Cornwall Insight have no direct evidence of this, a number of the suppliers contacted for this report indicated their experience of one or more

of the above actions. In addition, the TPI sector itself remains the subject of continuing media interest, with an August 2018 *Sunday Times* article<sup>1</sup> also highlighting instances of TPI misconduct similar to those reported above.

Building upon the above assessment, Cornwall Insight engaged with suppliers and TPIs alike to ascertain their views as to the role and operation of intermediaries in the energy sector. As stated above, while the view that **suppliers** held of TPIs was typically positive, there were problems experienced with a minority of companies operating in the sector.

As far as **intermediary** views of their own sector were concerned, those that expressed a preference were largely in favour of some form of mandatory regulation, provided it was relatively straightforward to comply with, was proportionate to the needs of the sector and the customer, and did not unduly affect competition in the sector. This, they believed, would address misconduct by the minority of their peers.

Reflecting the view of suppliers regarding TPIs, those intermediaries contacted for this report stated that they held suppliers in high regard overall, but that there were instances of problems for them and for customers – generally around service standards, account management and failure to pay commissions. Further information on the methodology used in this report is presented in the **Appendix**.

## 1.3 Conclusions and areas for improvement

It is evident that many TPIs provide a satisfactory service to customers, doing so as part of a productive tripartite relationship in conjunction with that customer's energy supplier. However, it is apparent that concerns exist regarding the conduct of a minority of TPIs, these being held by energy suppliers and TPIs themselves – as highlighted by some of the instances of misconduct indicated above.

Supplier interviewees expressed concern as to the balance of power in the customer-TPI-supplier relationship, and that TPIs were bearing comparatively little commercial risk in exchange for quite a large reward – at least as far as the difference in supplier gross margin and TPI commission rates was concerned.

As suppliers have become increasingly reliant on TPIs as a route to market, so their concern regarding the conduct of such companies has increased – particularly regarding the representation of their offers to customers and how they themselves are perceived.

- **Some form of mandatory TPI regulation or code of conduct would represent a means by which to improve wider confidence in the sector for suppliers and customers alike.** Ofgem has, having previously held back its work in this area during the Competition and Markets Authority (CMA)'s 2014-16 energy market investigation, expressed a renewed interest in moving forward with this – subject to an expansion of its remit.
- **Lessons could be learned from other sectors in introducing this regulation, whether this be in the form of direct oversight such as that provided by the FCA in financial services, or through standardised reporting.** Issues such as standardised letter of authority (LoA) templates or information disclosure requirements could serve as a soft-landing approach for wider regulation.
- **Existing voluntary codes of conduct could be used as a basis for mandatory regulation.** The experience with voluntary codes of conduct is mixed, although the Utilities Intermediaries Association (UIA) is well established as a network group for TPIs with its own code of practice. In addition, Electralink has recently sought to develop its Third Party Intermediary Code of Practice (TPICoP) at just the time that Ofgem is proposing the introduction of a new Retail Energy Code (REC). There is also precedent here in the form of the Confidence Code for price comparison websites (PCWs) at the domestic level

<sup>1</sup> <https://www.thetimes.co.uk/article/you-try-smiling-after-being-stung-by-an-energy-broker-9m7mtbq75>

which, given that microbusiness customers share commonalities with their residential counterparts, could also be used to support the microbusiness sector.

- **Regulation would need to be proportional to the sector of the market in question, with the expectation being that SME and microbusiness customers would require more prescriptive regulation than I&C customers.** Unlike financial services where there is a common cross-sector approach to regulation of intermediaries, as highlighted previously by Ofgem the nature of the SME and microbusiness sector lends itself to regulation more akin to that of the domestic supply sector. Here, the delineation between the two groups could be made upon an agreed definition or set of criteria, such as that currently employed by Ofgem for SME and microbusinesses<sup>2</sup>. However, some form of minimum standard or accreditation would be essential, particularly in the case of sub-brokers to support the contractual relationship between the sub-broker and the main broker.
- **Improved transparency on commission levels, their source, and the nature of the services being provided by TPIs would represent an immediate gain for customers. However, there are risks associated with this for suppliers and TPIs – as well as system and other requirements – that may render this impractical.**
  - Highlighted by a number of supplier interviewees – many of which also expressed willingness to have corresponding figures for their own businesses – the explicit presentation of the level of TPI commissions, the source of those commissions (e.g. are they being paid by a supplier), and details of the service provided was seen as an important information tool for customers and one that would help them to make informed decisions.
  - As noted in the Northern Ireland energy regulator’s decision to reject such a requirement on intermediaries operating in that market, there are a number of areas to be addressed to ensure

that this did not lead to customers making inefficient decisions, and that the costs of such a requirement were not too high.

- **Verification or confidence calls between the customer and the supplier upon the agreement of a new contract.** While widely employed by suppliers, the mandated use of such calls to ensure that the customer has been correctly informed of its contractual choice could reduce mis-selling and would reduce the reliance on telephone recording of conversations.
- **There is a wider information and education requirement for the SME sector as a whole.** There is anecdotal evidence of an asymmetry of trust as far as customer attitudes towards TPIs and suppliers are concerned, this being played upon by some intermediaries to lock customers into contracts that may not be the most economically advantageous option for them. Here, it is important that customers are appropriately informed as to the nature of the TPI’s role and what they are paying for.
  - Encouraging customers to demand transparency as a matter of course could, in the long run, be more effective than an obligation on TPIs to present their commission levels if it yields wider behavioural change in the SME sector and mitigates consumer inertia.
  - This could include customers requesting formal confirmation of the services that the TPI is providing and how their costs are being met, i.e. claims of “free” services should be challenged as a matter of course. Such *ex ante* behaviour should therefore avoid the perception among customers that instructing more than one TPI to simultaneously procure a contract on their behalf is an optimal outcome, as it risks increasing transaction costs and the potential for service problems such as unintended transfers.

<sup>2</sup> <https://www.ofgem.gov.uk/key-term-explained/micro-business-consumer>

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Ofgem has already highlighted the deficiencies of regulation in the TPI sector and recently expressed a desire for greater powers to address this. Citizens Advice can therefore undertake further activity to ascertain Ofgem's position on its future roles and responsibilities. However, as it is not a certainty that Ofgem will assume regulatory oversight of the TPI space, we would expect Citizens Advice to contribute to the wider debate on regulation and work with whichever body ultimately undertakes any such role.

However, there is a clear role for existing structures and institutions to serve as a basis around which such regulation could evolve, representing a means by which to achieve soft-landing for wider TPI obligations.

Against this backdrop, Citizens Advice can use its standing in the sector and its pre-existing research to inform the debate on this issue, and to work with Ofgem (or whichever body assumes regulatory oversight of this area) to ensure that the interests of SME and microbusiness customers are addressed.

In doing so, this should help to yield increased standards from all TPIs in the delivery of their services to SME and microbusiness customers, and also result in improved standards in the supplier-TPI relationship for the benefit of the industry as a whole.

## 2 Interview responses and supplier feedback

Cornwall Insight and Citizens Advice drafted a series of questions intended to assess the attitudes of both suppliers and TPIs<sup>3</sup> to the activities of TPIs. In the case of suppliers, the intention was to use these questions as the basis for interview discussions, while in the case of TPIs a brief online questionnaire was used to examine key areas that could be supplemented by interviews.

As agreed by Citizens Advice, their identity as the client and the fact that this report would serve as an update to the 2010-11 document was revealed to all potential supplier and TPI participants. The content of the interviews and questionnaires was approved by Citizens Advice on 19 November 2018 and actioned as presented in **Appendix 2**.

### 2.1 Survey interest and promotion

#### 2.1.1 Suppliers

In recent years, energy suppliers have put a lot of effort into developing and implementing systems to manage their relationships with TPIs. Reputational and regulatory risk can be incurred by the supplier if TPIs do not present or offer that company's products into the market properly. As such, suppliers also want to make it easy as possible for their chosen TPIs to work with them and present their products in an effective and transparent manner.

Most suppliers require the TPI to complete an application form which provides details of the company, including information about its customers and the

number of meters and amount of volume it procures, together with the TPI's financial information. Some suppliers also specifically outline their dedicated TPI support and their various online services available to TPIs.

Cornwall Insight promoted the Citizens Advice report through its Non-Domestic Energy Supplier Forum, this being a monthly event at which key market changes that could have material impacts for independent suppliers are discussed.

The focus upon smaller suppliers at the Forum was seen as particularly appropriate in this context, given that such companies are typically those that rely on TPIs to an above average extent.

The Forum has 18 members and is intended to serve as a platform for independent suppliers to exchange information and views, and to discuss common issues and concerns affecting energy policy, regulation and industry governance.

The ability to participate was promoted at the November 2018 and December 2018 meetings – the former of which was accompanied by a group debate among the attendees to examine concerns and areas of focus. This was followed up with an invitation to participate in a telephone discussion to provide additional detail.

In addition to the November 2018 group discussion, individual interviews were arranged with representatives from 10 suppliers, these being held in November and December 2018.

contract negotiation in the first instance – it is this aspect of TPI operations which is under examination here.

<sup>3</sup> The traditional business model for a third party intermediary (TPI) is based largely upon the core function of procurement and contract negotiation. In the context of this report – and given that SME customers are typically focused upon procurement and

Respondents were asked if they would like their comments to be anonymous, with all of those suppliers interviewed stating that this was their preference. All quotes from interviews are therefore presented under Chatham House Rules.

The findings of these discussions are presented in **Section 2.2**.

### 2.1.2 TPIs

Cornwall Insight promoted the report through its annual *TPI Satisfaction Survey (2018)*. This questionnaire is aimed at understanding how Third Party Intermediaries (TPIs), use and value the services they source from energy suppliers on behalf of their customers.

With contributions sought from over 100 TPIs, the focus of the survey includes (not exclusively):

- What TPIs are seeking from energy suppliers;
- Which energy suppliers are meeting those needs currently;
- TPI’s perceptions of the quality of and with which their offerings are provided; and
- How suppliers might improve the services they offer TPIs.

The findings of these discussions are presented in **Section 2.3**.

## 2.2 Supplier views on TPIs

*A recurring comment across the supplier engagement was that the overwhelming majority of TPIs provided a valuable, trustworthy and high-quality service.*

*However, respondents noted problems with a minority of TPIs and their business practices, while the issues seen as endemic to the TPI sector were the lack of transparency – notably on fees and commissions – and the absence of mandatory and enforceable regulation of the sector by Ofgem or another independent agency.*

### 2.2.1 Supplier reliance on TPIs for the placing of business

Suppliers were asked as to the extent to which they used TPIs for the placing of business. *Most respondents indicated that TPI channels typically provided more than 85-90% of their business*, with some stating that they relied on them exclusively for customers. Among the reasons noted for this were:

- The cost of using TPIs rather than establishing an in-house direct sales channel;
- The perception that customers prefer using TPIs as a “trusted source” for a wider view of the energy market rather than being contacted by the supplier directly;
- The use of the TPI as an effective marketing outlet, particularly for the newer suppliers; and
- The ability of TPIs to offer services other than purely energy procurement.

In the case of the merits of using TPIs rather than a direct sales channel, respondents noted that the former brought business to them as opposed to actively pursuing leads, with one respondent stating that TPIs had, “*done a very good job of getting rid of a lot of the suppliers’ direct sales operations*” due to the need for suppliers to reduce costs and attempt to retain their margins.

In the case of the new entrants to the SME marketplace, this was viewed as a means by which to help them compete with incumbent energy suppliers, but also seen as a problem as the growth in supplier numbers allowed TPIs to pick and choose the organisations with which they wanted to work.

*“Where we approach a broker, if they are already dealing with suppliers they are happy with, they do not see the need to work with us,”* one respondent commented

*“The bigger the supplier, the more clout they have. Competitive prices may not lead to more business if you do not have the cash to throw at the brokers...If you are an independent (supplier), you will always struggle,”* one supplier said of TPI’s attitudes to choosing with whom they choose to work.

This more selective approach from TPIs was noted by respondents as filtering through to their ability to seek specific terms and conditions from suppliers – notably on the payment of commissions. Interviewees commented that TPIs were happy to deal with certain suppliers if they were willing to agree to their payment terms, raising further questions as to the validity of TPI claims that they were examining the whole of the market when seeking quotes (see below).

*“They (the TPI) decided that they now wanted all payment upfront – we cannot do that...and it is in the customer’s best interest to have payment on a monthly volume,”* one interviewee commented, further alleging the TPI was *“making up expected annual consumption”* to serve as the basis for that upfront payment, and *“because we refused to pay that, they stopped working with us.”*

This highlighted another point raised by interviewees, namely the self-selection of suppliers by TPIs and vice versa due to commercial terms. Suppliers interviewed stated that this handed more power to intermediaries in this relationship given their role as *“gatekeepers”* to customers, meaning that a decision had to be made by the supplier as to whether to accept what it viewed as unfavourable commercial terms.

*“If you stop working with a broker, you are limiting your addressable market and committing commercial suicide. A lot of brokers are still practising the same lack of transparency that they have always done, although it is still the minority however,”* one supplier stated.

Another summarised their relationship with TPIs as, *“They have such control over the market, we can’t live with them and can’t live without them,”* rejecting the view held by Ofgem that suppliers could cease working with those TPIs whose practices they disagreed with.

In examining the customer-TPI relationship, respondents noted the perception held by end users that intermediaries were impartial. *“Customers like them,”* one supplier stated, *“and a large part of the broker fraternity offers a valuable service to customers, but customers need to go into this with their eyes wide open.”*

Here, suppliers noted that they were still seen as “the bad guy” in the tripartite relationship between supplier, TPI and customer – and that TPIs may look to take advantage of this by minimising customer-supplier contact.

*“TPIs play on this by effectively saying, ‘We’ll sort out all of these dodgy suppliers for you’,”* one supplier stated, describing the situation as suppliers being *“hostages to TPIs”* that could give a supplier as much or as little contact to a customer as they deem fit.

*“They (TPIs) are not all working in the customer’s best interest and are not comparing the market like they say they are,”* one supplier said of TPI’s whole-of-market statements to customers.

However, another supplier noted that there was a question as to whether there is an element of customer apathy regarding TPIs and suppliers. In other words, if a TPI can get them a contract that allows them to meet their budget with little real engagement, then the customer may be indifferent as to issues relating to fees and the depth of the market examined in obtaining that contract.

### 2.2.2 Transparency of TPI channels

Building on the above points, suppliers were asked for their views as to the transparency of TPI commission fees and levels, and the extent to which their offers were being presented to customers.

*Transparency of commission payments was stated by all supplier respondents as being the main problem they experienced in dealing with*

*TPIs, as well as the validity of TPI statements that they had examined the entire market to obtain quotes from suppliers.*

*Respondents were in favour of a centrally-mandated requirement on TPIs to have their commission rates stated on contract quotes as a means by which to ensure transparency.*

Most interviewees were of the opinion that it would be in the interests of consumers to have full visibility of TPI commission levels, but that this could not be undertaken by one or more suppliers on their own and that it would require a centralised obligation similar to that considered for the Northern Ireland energy sector (see **Appendix**).

*“It is the lack of transparency from their (the TPI’s) side, and as suppliers we would very much like specific commissions to be placed on the bill,” one supplier stated, adding, “If the customer knows what they are getting, then why would a TPI mind having it on the customer’s bill? We don’t have a problem in having our margin on the bill.”*

*“If the supplier became more transparent on their own, it would destroy the relationship not just with that broker but with all brokers,” one supplier stated, “It all depends on how a change like that is implemented and what the driving force is.”*

Suppliers expressed frustration at aspects of accountability when dealing with TPIs, particularly to the extent that they were accountable to Ofgem under their licences for the standard of service to the customer, but that there were aspects of the contract that were beyond their control when TPIs were involved.

Comments like this were also made in respect of a lack of clarity as to precisely what services a customer was receiving from a TPI, and that a lack of transparency in commissions compounded this problem. *“It is not that there is a lack of willingness on customers to pay, but they may simply not know what they are paying for,”* one supplier stated, given that

comparatively high commission rates may simply reflect a wider service package than simply tendering and securing new supply contracts.

Lack of a requirement on TPIs to disclose their commissions allowed them to *“be as vague as they want on the service that they offer and what the customer is paying for.”* This view was echoed by another respondent, who said, *“If a customer doesn’t know what they are paying, how can they know if they are getting value for money?”*

On the issue of margins, the differential between that of the supplier and that of the TPI was referred to on several occasions, particularly in the context of the former coming under increasing competitive pressure while the latter was – in the opinion of suppliers – not. However, noting the comments in **Section 2.2.1**, suppliers were of the view that they had no choice but to work with TPIs.

*“TPIs can completely distort the price signals that suppliers can provide to customers,”* one supplier stated, *“but if you don’t do the business, then another supplier will as you cannot circumvent the TPI.”*

Another added, *“I have seen a deal where the broker will make five times (the margin) what we will over a five-year period,”* continuing, *“Are they adding so much value to the customer? No way on this planet. Some brokers are doing other services, and the customer may be happy with that, but if I was a customer, I would want to know what I was paying for.”*

Looking at the validity of TPI comments regarding whole-of-market, while suppliers acknowledged that it may be impractical for all TPIs to obtain and assess offers from all suppliers, and that there was an inevitable element of editing of the supplier pool by TPIs, intentionally misleading customers or misstating the depth of offers sought was an ongoing problem.

It was noted that TPIs may seek to obtain specific payment terms from suppliers that not all suppliers may accept – therefore a whole of market commitment would not apply:

- This may include treatment of commission, timing of commission payments (upfront fees, front-loading of fees, incorporation of fees into standing charge elements to mitigate declining usage due to energy efficiency), such that some suppliers may not want to work with certain TPIs; and
- Cashflow and working capital commitments are particularly apparent for smaller suppliers, which can in turn limit which TPIs they can work with if such payment terms are imposed upon them.

“*Brokers absolutely work with preferred suppliers,*” one respondent stated, noting that this decision was likely to be made on decisions relating to payment terms such as, “*Give us an upfront payment on contract signature, otherwise you do not get the volume.*” One supplier stated that, if a customer had signed off on such treatment of their commission, then they would not have an issue with the practice – but this was not an area of which they had visibility.

An interviewee noted, “*One broker asked us to prepay on commission and said that they can guarantee us an amount of volume each year – how can this happen if the broker is looking at the whole of market?*”

While an element of commercial reality was acknowledged in the area of the number of TPIs and the number of suppliers, resulting in a degree of pre-selection, this was not necessarily seen as being in the interests of customers. “*Brokers are only working with a number of suppliers because of things like commission structure, time of payment, upfront payment of commission and so on,*” one supplier stated, adding, “*This is culminating in SME customers often not getting the best deal.*”

As a counterpoint, more than one interviewee noted that it would be impractical for a TPI to canvass all suppliers when seeking offers, and that making a selective judgement as to which suppliers to contact – based upon the knowledge and experience of the market that a customer was paying their TPI for – was a reasonable course of action. However, in such instances, such an editing process needed to be communicated to the customer, along with the reasons for doing so.

One supplier interviewed stated that their standard procedure was to undertake “*comfort calls*” with the customer, i.e. a post-sales call for contracts secured through an intermediary to ensure full understanding of the commercial terms of any deal. It also stated that it carried out calls with both its TPIs and the customer “*to ensure that the broker understands the products that they are selling*”.

“*We are in favour of tighter controls and central regulation of the broker market,*” one supplier said, “*Customers are not getting the level of service they should. We are one of the main suppliers in trying to identify and address these issues (but it is) very difficult without a central push to do this.*”

Here, central regulation by Ofgem through an enforceable code of practice was cited as the main means by which to achieve this. Participants stated that codes like that proposed by Electralink (see **Appendix**) would be difficult to work without Ofgem, but that such documents could be a vehicle to achieve mandatory regulation.

### 2.2.3 TPI commissions

SME TPIs continue to earn their fees almost exclusively from commissions paid by suppliers according to the volume of energy consumed, these commissions varying widely by supplier and product. Typically, suppliers are willing to pay greater commissions for multi-year, direct debit contracts with creditworthy end users.

Commissions have tended to be paid throughout the life of the contracts as energy is used. However, over recent years there has been an increasing trend of suppliers paying up to 80% or even all of a TPI’s commission upfront. This was initially a practice offered by some small and medium suppliers, but some large suppliers are also now known to have adopted this, as larger TPIs in particular seek to use their buying power.

Our understanding is that typical commissions for negotiating energy contracts are worth in the range of:

- 0.8p/kWh to 1.3p/kWh for electricity. The gap between commissions for new “acquisition” contracts and renewal contracts is being bridged, with commission offered for renewal contracts rising with some suppliers offering the same levels of commission for each contract type; and
- 0.4p/kWh to 0.8p/kWh for gas with commissions for new “acquisition”.

Cornwall Insight analysis indicates that commission levels for individual supplier campaigns are continuing to be bid up to levels of around 3.0p/kWh for electricity acquisition contracts.

Initially, this was a practice primarily conducted by small suppliers that were most reliant on TPIs for new customers, but anecdotal evidence suggests that some of the larger suppliers are now also offering such commission levels in a bid to remain competitive with other suppliers and therefore attract TPIs to place more business with them.

Some TPIs state that they take the same level of commission from all suppliers in order to remain transparent to their customers, which indicates that they feel the higher levels of uplift are unreasonable. Commissions are likely to be higher when the TPI is providing additional services.

## 2.2.4 Customer attitudes to TPIs

Suppliers were asked as to what they believed their customers thought of TPI activities on issues such as payment and contractual terms and conditions. Again, the view from respondents was that the majority of intermediaries behaved in a fair and equitable manner and communicated precisely what their customer was paying for, and how much they were paying for it.

*“(There is a) misunderstanding that the customer thinks that the broker is employed by us,” one supplier stated, while another noted that, “Some customers believe brokers are publicly owned.”*

The lack of clarity as to with whom the customer was dealing was also stated as a problem, particularly in terms of sub-brokers and other organisations. *“You will have an aggregator, then a sub-broker, and then maybe a sub of the sub-broker,”* one supplier said, *“If everybody was dealing with the supplier, then this would be much easier. The supplier has no appetite to deal with some bloke working out of his bedroom.”*

Aggressive sales tactics by TPIs were noted by suppliers, with a commonly cited situation being one where a customer has signed a deal through one intermediary but is then contacted by another and encouraged to break that deal in favour of what is claimed to be a better one.

*“I have heard recorded calls between TPIs and their customers where the TPI says, ‘Just claim mis-selling and you can get out of your contract.’”* adding, *“This happens half a dozen times a week and doesn’t just happen to us – it is a murky old world.”*

Such comments were not universal, with one supplier noting, *“There are a lot of very good brokers out there, give great customer service, have a great record on compliance, (but) for every one ethical broker, there are five unethical ones springing up.”*

Despite praise for TPIs overall, some of the problems experienced were attributed to *“general systematic and systemic behaviour by broker channels”*.

Different attitudes held by customers in terms of trust across TPIs and suppliers was again noted in response to this question, with suppliers typically seen as being less trustworthy than TPIs - and that this was being taken advantage of.

In conjunction with TPI demands on timing and level of commission payments, such a situation could lead to a sub-optimal outcome for consumers. One supplier stated of this, *“I have seen a growth in four or five year contracts, a few years ago it was two or three, and that’s because brokers are getting 90% of commission upfront.”*

One interviewee noted the situation whereby, prior to the 2008-09 financial crisis when wholesale energy prices were at peak levels, some customers were *“scaremongered”* by suppliers into signing long-term deals. The subsequent collapse in wholesale markets meant that such contracts proved to be, in hindsight, uneconomic. This, they stated, resulted in a situation

whereby energy buyers within companies were required by their senior personnel to use organisations with more market experience, i.e. TPIs.

*“This is the irony of the whole situation,” one supplier said, “Trust has eroded in energy suppliers and customers will be told by brokers that they are totally independent and offer them a completely free and impartial view of the market.” Another noted that this situation allowed TPIs to potentially misrepresent offers, such that, “a lot of customers sleepwalk into a situation where they are not told all of the facts.”*

Here, the fact that most customers also had a trusted intermediary rather than looking across the entire sector was also cited as a problem. One interviewee proposed *“a Trivago for energy brokers, or a comparison site for comparison sites”* This, it was noted, would encompass requirements on digital comparison tools and could improve transparency in the market.

A general view among suppliers was that there was an education and information angle that needed to be addressed as far as the general role of TPIs and how they obtain their fees was concerned. Specifically, claims of a “free” service by TPIs should, it was noted, be debunked as a matter of course.

## 2.2.5 Problems with TPIs experienced by suppliers

Instances of energy TPI mis-selling continue to emerge as awareness of poor behaviour by companies increases. Documented by mainstream and industry press alike, areas of concern presented range from the use of high-pressure sales tactics and general mis-selling of contracts that do not meet customers’ needs through to fabrication of signatures on letters of authority and fabrication of consumption data.

Further areas of note include the TPI misrepresenting their identity and whom they are representing, e.g. stating that they are calling from a supplier, or misrepresenting the extent to which they have approached the entire market in seeking a quote for a customer.

There are reports of companies having ceased trading as a result of having been mis-sold a contract by a TPI, and while Cornwall Insight have no direct evidence of such actions, such observations are consistent with claims of TPI misconduct made in an August 2018 *Sunday Times* article<sup>4</sup>. The prospect of such behaviours has, however, resulted in a number of developments in the energy sector, including (not exclusively):

- Those TPIs that are signatories to voluntary codes of conduct citing this on their websites and sales materials, as well as details of any audits undertaken under these codes;
- Energy suppliers establishing their own codes of conduct for TPIs and tightening up the contractual relationship between such TPIs to ensure suitable performance and behavioural standards;
  - For example, E.ON UK has announced that it has struck some TPIs off their own code of conduct, publishing details of such companies as “TPIs who fall short”;
- TPIs seeking to promote transparency of their own operations as a means to promote customer confidence in their business practices;
- Trade federations and other entities, e.g. the Federation of Small Businesses (FSB) and Citizens Advice, issuing media statements and reports promoting greater awareness of TPIs among their membership and the wider customer community;
- Anecdotal evidence of legal claims being brought by customers against TPIs for misconduct and/or mis-selling; and
- The establishment of at least one company operating on a “no-win, no-fee” basis to pursue claims of mis-selling of contracts by TPIs.

<sup>4</sup> <https://www.thetimes.co.uk/article/you-try-smiling-after-being-stung-by-an-energy-broker-9m7mtbq75>

These are in addition to the initiatives to promote wider and/or mandatory regulation of TPIs.

*Interviewees typically stated that they had experienced either the majority or all of these problems – notably when dealing with the smaller intermediaries. Further areas of note were the role played by sub-brokers (and the lack of transparency thereof), use of changes in tenancy (CoT) as a means to break contracts signed in good faith, and TPIs providing incomplete data on market trends to “scare” customers into signing long-term deals.*

In such instances, it was noted, there was little that the supplier could do to protect the customer, other than release the customer from their contract rather than go through a dispute process. However, it was noted that if all parties had acted properly and in good faith, then a supplier would be less likely to release a customer.

## 2.2.6 Regulation of TPI channels

*The consensus among all suppliers interviewed was that regulation was: (i) essential to address the problems referred to the preceding sections, notably transparency of fees; (ii) needed to be mandatory rather than a voluntary code; (iii) needed to be undertaken centrally by an independent agency (preferably Ofgem), and; (iv) needed to be subject to enforcement and penalties for non-compliance.*

Regulation of TPI channels was viewed by all supplier respondents as being of key importance and the most appropriate way to address instances of mis-selling, poor transparency and wider misconduct.

*“While the bad brokers are in the minority, there are endemic problems with the industry regarding the role of a largely unregulated, customer-facing function like brokerage,” one of the supplier interviewees stated.*

A comparator noted by interviewees were the activities subject to oversight by the FCA (see **Appendix**) as energy supply contracts are ultimately financially-based transactions (*“This is effectively handling financial information and TPIs cannot give guarantees as to whether the market is going up or going down”*), one supplier stating, *“You would not be allowed to be an intermediary in the financial services sector in the same way as the energy sector, so why is it allowed?”*

The most commonly stated option for addressing commission levels was through the introduction of a requirement to have these stated as a separate line item on a customer’s bill – reflecting the proposed approach being considered for the Northern Ireland energy sector.

*“This is a very simple way of doing this and the lowest cost, would achieve consumer benefits, and is a simple solution and the way to go,”* one supplier stated of the approach. *“The brokers that are providing a genuine service would still do so and there would be a competitive market,” they continued, acknowledging that “there would be some casualties,”* among TPIs.

*“They (customers) probably think that they get value from the brokers because they have saved money on their existing contract, but that is not necessarily true value in terms of the best offer in the market,”* one of the suppliers interviewed commented.

Such an approach was also stated as being a means by which to protect both customers and suppliers from inappropriate intermediary behaviour, given that it would reduce the likelihood of contracts being broken on fraudulent grounds and improve transparency of the actual cost of the supplier’s offer net of commissions.

To undertake such an addition to bills, it was proposed that this could be done through a supplier licence obligation to display this in a manner similar to the CMA’s Price Transparency Remedy (see Appendix). In doing so, this would effectively make the requirement mandatory and enforceable by Ofgem through the supply licence. As the main service offered by TPIs to SME customers relates to securing contracts rather than wider services, this should aid in the provision of transparency for customers.

This approach, however, was not seen as a panacea to the problems of TPI misconduct, given that this could have occurred before a supplier became involved with the contract process, such as sub-broker activity. As stated, the activities of such companies were seen as a problem for suppliers and one of which they have little or no visibility due to the commercial arrangements held by TPIs.

One supplier noted, *“Who will go after them (the sub-broker)? The broker (hopefully) won’t use them anymore, but the damage has been done to the customer, and there is no recourse. Trading Standards could go after the sub-broker, but they are likely much too small to be a real issue.”*

Despite this, it was seen as an important first step and one that could be supplemented by direct obligations on the TPIs themselves, e.g. to record telephone calls for deals, given that suppliers could not be held wholly accountable for the actions of TPIs.

Voluntary codes of conduct, although seen as being of merit, were described by one interviewee as being *“a race to the bottom”* in that those intermediaries that did sign up to them *“will end up having to act like those who do not just to win business”*. A similar comment was made by one interviewee on the use of external trade associations in the energy sector, while areas like the distance selling regulations were rejected also.

As an alternative to, or in conjunction with, the licence obligation to display TPI commissions, the role of Ofgem in the process saw mixed views. Despite recent comments from the regulator regarding the need for expanded powers to tackle the TPI sector (see **Section 3.1**), some suppliers questioned whether Ofgem had the resources, appetite or willingness to manage the area.

Supplier views on Ofgem regulating brokers included:

- *“Ofgem hasn’t shown the appetite for it”;*
- *“Ofgem is in no rush to regulate the broker space, and while an organisation like the FCA could get involved, this would add another layer of regulation to the sector”;*
- *“Ofgem don’t feel able or aren’t willing. Maybe a new body that deals with more than energy could do it?”;*
- *“It would be better if it was Ofgem. (Using a) licence condition has been kicked around in the past, but Ofgem got cold feet”;*
- *“Ofgem probably doesn’t fancy doing this because it is such a massive task.”*

The scale and number of active intermediaries was noted as an impediment to direct regulation and a reason why – in addition to a lack of powers – Ofgem had been reluctant to address this in the past. *“It will take ages to regulate TPIs, so just do it indirectly through the supplier,”* one interviewee stated.

The need to a supplemental layer of regulation was seen as the reason why Ofgem should be responsible for oversight of TPIs, while in terms of the prospect of this being the responsibility of another agency, one supplier said that regulation *“needs to be independent and the right people”*.

Interviewees commented on the fact that, amid the growing politicisation of the energy sector (particularly at the domestic level), the regulation of non-domestic TPIs had been largely overlooked. The alleged disparity between supplier margin levels and TPI commission levels was noted by a number of interviewees, typically alongside the introduction of the default tariff price cap.

*“The quality of the service (from brokers) has not gotten worse but there has been a shift in the collection of value towards the brokers for comparatively less work and risk compared to the supplier,”* one interviewee said. *“When you see the value that the brokers are taking out of the market, it doesn’t seem quite proportional.”*

*“Politicians love to hate energy suppliers – everybody loves to hate energy suppliers,” one supplier stated, “but how do I get the lowest price to a customer when I have to rely on a channel where I have no control over the price presented to that customer?”*

## 2.2.7 Conclusions

The overarching view among supplier interviewees was that the general standard of service from TPIs was high quality and added value to customers. However, the activities of a minority of companies in the sector was causing harm to the affected customers and damaging the suppliers themselves. To address this, central regulation was viewed as the desired approach, this being in the form of an Ofgem-backed requirement to explicitly state broker commissions in the first instance.

A number of interviewees expressed frustration at not having an agency that could effectively police TPIs, particularly in the face of customer detriment given that “outing” rogue operators would be “cutting your own throat” as other TPIs may be more reluctant to deal with them as a supplier as a result.

In the event of mis-selling by TPIs, one supplier stated, *“There is no-one to turn to because of the lack of regulation,” adding, “It is becoming more of a problem and will all come to a head with some form of scandal.”*

In terms of mis-selling, one supplier stated that the SME and micro-business market was *“now a very easy market to go after for TPIs (because) the I&C customers have gotten more savvy.”*

Other factors that were stated as opening the door to mis-selling were the declining use of dedicated sales forces by existing suppliers, newer suppliers not necessarily being able to afford such a resource, and the declining market share of the Big Six which has led to a greater number of contracts going out

to market. Such issues, one supplier noted, have *“empowered the brokers”* and led to more intermediary-driven switching.

In considering whether instances of misconduct had increased or decreased in recent years, responses were again mixed and included:

- *“It has got worse, but brokers have also become more commercially driven, and more greedy. Because brokers have more suppliers they can deal with, they can sell to the highest bidder – it is a more lucrative market for brokers than it was.”*
- *“New TPIs come onto the market and are real cowboys, as well as existing ones changing into something that we are not comfortable with.”*
- *“Overall, it has gotten better. The newer TPIs have become quite big and quite responsible. (We) still get the one-man bands but the bigger ones have got better processes, but transparency is still the biggest thing for us with the TPI.”*
- *“From what I have seen, it would go something along the lines of the established brokers recognising the importance of governance and effective control, and they are driving the discussion on codes of practice. They know they won’t survive unless there is a change.”*
- *“There are more brokers out there competing with one another, trying to take customers off one another. The market is more cutthroat with more wild west tactics. Competition and mutual hatred is driving bad behaviour in some areas. The number of brokers continues to grow, which poses its own challenge.”*

Looking ahead, one of the challenges for TPI regulation and supplier interaction is potentially the energy-as-a-service concept. With more of a two-way relationship between customer and supplier, and the greater scope there is for a third party to offer advisory services to facilitate advice to the market, customers may turn to an increasing number of third parties for help.

One supplier observed, *“There is a concern that faster switching will only make problems worse – (it) makes it harder for suppliers to object and for customers to be informed of the situation. Has this been considered? Probably not.”*

The provision of such wider (and possibly multi-utility) services risks making the energy sector more opaque rather than achieving the transparency sought by suppliers. Furthermore, potential changes to the supplier hub principle may lead to a root and branch review of the customer-supplier relationship, which could – in one supplier’s opinion – make it easier for TPIs to mis-sell.

*“What happens if you do away with the supplier hub<sup>5</sup> model? Will these problems in the TPI sector get worse?”* they stated, *“Customers only ever contact their supplier for billing or contract issues or distribution company if there is a power cut – if you have TPI mis-selling, where is the customer recourse?”*

One supplier noted that while there had been technological advances intended to make switching easier, *“This allows them (brokers) to do a deal more quickly and gives the customer less time to compare offers.”*

## 2.3 Intermediaries’ views of their own sector

*Mirroring the views of suppliers, those TPIs contacted for this report stated that they held suppliers in high regard overall, but that there were instances of problems for them and for customers – generally around service standards and account management.*

*TPIs that expressed a preference were largely in favour of some form of mandatory regulation, provided it was relatively straightforward to comply with, was proportionate to the needs of the sector and the customer, and*

*did not unduly affect competition in the sector. This, they believed, would address misconduct by the minority of their peers.*

### 2.3.1 TPI attitudes to suppliers

The general attitude that TPIs had regarding suppliers was overwhelmingly positive, describing them as a key – and in some cases exclusive – route to market. Such an attitude was founded upon collaborative working and the ability of suppliers to meet the requirements of the TPI and their mutual client alike.

This symbiotic relationship was, it was noted, a potential problem for smaller TPIs who may not have either the resources, the track record, or the contacts to foster such a collaborative approach. This, it was pointed out, may effectively constrain TPIs to a given number of preferred suppliers with which relationships were already in place.

In terms of a potential “wish list” from TPIs, one respondent noted, *“Suppliers that meet (our) needs are those that are timely, have good prices, spend time of returning what is required, use the CRM system the TPI uses, works to the TPI’s code of conduct and are prompt on resolving issues.”*

*“Those suppliers with which we have great relationships, we have that one point of contact, that dedicated account manager and they actually come to see us,”* one TPI representative said, adding, *“The suppliers that we don’t have good relationships (with), they place very little effort on communication.”*

On the issue of supplier incentives and recommendations to place business, those TPIs that expressed a view were largely dismissive of them, with one stating that each product is considered on its own merits as opposed to trying

<sup>5</sup> <https://www.ofgem.gov.uk/publications-and-updates/future-supply-market-arrangements-response-our-call-evidence>

to encourage a customer to choose a product that does not meet its needs. Another TPI stated that although incentives were offered, their staff were not informed of these in advance to ensure that they did not affect any decisions or opinions regarding products on offer.

For example, one TPI noted that they had experienced problems with certain suppliers failing to honour quotes that they had issued for acceptance by customers, making them reluctant to use that supplier in the future.

Instances of TPI dissatisfaction with suppliers that were noted included (not exclusively):

- Misrepresentation of contract prices;
- Failure to adequately explain fixed (for contract duration), set (for a specific period within a contract, e.g. a year) and passthrough elements of a contract offer;
- Withdrawal of contract offers at short notice and without explanation;
- Failure to adhere to service level agreements (SLAs) and then subsequent failure to compensate for this breach;
- Failure to pay commissions;
- Failure to send the customer accurate (or indeed any) bills; and
- Poor standards of account management for the customer and TPI.

The need to have a collaborative relationship between TPI and supplier to address the needs of their mutual customer was, it was suggested, potentially at risk as the “energy as a service” business model evolved. This is because intermediaries and suppliers could be competitors in the provision of services – a trend which is already evident in areas such as demand side response and smart enabled propositions.

*“Even though we operate in the SME market, we work with brands and associations, and the suppliers for the most part simply cannot meet the level of service that we require for our clients,”* one TPI said of their dealings with suppliers.

*“It’s becoming more and more of a grey area as brokers take on more supplier functions. You will see more broker on broker competition and supplier on broker competition,”* one interviewee noted. Such a trend, it was noted, could exacerbate the prospect of disintermediation and also make TPI commissions less transparent should their activities move increasingly away from “traditional” functions based around tendering and contract negotiation.

### 2.3.2 TPI attitudes to regulation of their sector

While some participants were of the view that regulation was not immediately required due to the extent of competition in the TPI sector, there was a concern among intermediaries as to the business practices of a minority of companies, and therefore that regulation could address this.

While the different aspects of mis-selling presented in **Section 2.2.4** were not immediately commented upon by those TPIs interviewed, points raised included the extent of competition leading to inappropriate business practices and the implications thereof.

*“It (the broker market) is probably overpopulated, leading to multiple phone calls per day, aggressive sales tactics, pitches that aren’t accurate and so on,”* one respondent noted. Another added that such actions were *“tainting the more professional end of the market where brokers are offering a genuine service.”*

*“(Regulation) would get rid of the bad apples or they would have to improve their standards,”* one TPI representative said, continuing, *“The industry does need to be regulated to some degree, even if it is just a qualification before they pick up a phone and speak to customer. That would be a start, would be easier to govern and should apply to suppliers as well as TPIs.”*

Mandatory regulation of some form was therefore advocated as a way to address such activities while giving customers confidence that their chosen

intermediary was acting in an accredited manner. Looking at the comments in favour of regulation from those companies within the sector, these included:

- *“I would like to be accredited. There are a lot of people doing it the wrong way. A code of practice would help force some of the more unscrupulous TPIs out of the market.”*
- *“Regulation has to reflect the different level of customer understanding, as smaller customers are generally less knowledgeable about the energy market (than I&C customers).”*
- *“We would be in favour of (mandatory) regulation as long as it was appropriately done – you would need a light touch approach to I&C end and more focus on the SME end, where there is an argument for it.”*
- *“The industry has to be regulated. Code of conducts aren’t too strenuous for brokers to take on.”*
- *“If done properly, sub-brokerage can be fine and a good way for a TPI to start out. It depends on the agreements and how they are set up.”*
- *“We were disappointed by Ofgem’s decision not to continue the code of practice. Suppliers should do more to regulate brokers. You should see every supplier make a commitment.”*

In addition to the potential for different tiers of regulation for SME and I&C customers, respondents did note that this should be a light-touch system of regulation to keep compliance costs down which would otherwise be passed on to customers. Potential ways to accomplish this could be self-certification by the end user as to which sector they believed they operated in or, to remove subjectivity, apply the Ofgem (or an alternative) definition of what constitutes a SME or microbusiness customer within the energy sector.

*“It (the TPI sector) is probably overpopulated, leading to multiple phone calls per day, aggressive sales tactics, pitches that aren’t accurate and so on. It is tainting the more professional end of the market where brokers are offering a genuine service,”* a TPI interviewee said of the sector. *“Customer perception of sector is not particularly positive due to unsolicited calls or past experience.”*

As the body behind one of the GB market’s voluntary codes of conduct for TPIs, the **Utilities Intermediaries Association (UIA)**<sup>6</sup> took a similar view as far as publication of commissions was concerned, describing this as a measure that *“will neither improve transparency or eliminate excessive charging... what it offers is a partial transparency which could prove more damaging in the long run”*.

The UIA point out that such a measure would not address the question as to whether some suppliers offer incentives to TPIs or have quotas with TPIs to place business with them. Transparency of these elements, as well as more detailed and itemised bills, would supplement the publication of TPI margins – although the group state that suppliers would object to the publication of their margins on the grounds of commercial confidentiality.

As with the comments made by Energy Management Systems, the UIA stated that *“suppliers should make clear at the outset that all offers may include a commission paid by the customer for the TPI”* and how this commission is structured.

In its decision document published in December 2018<sup>7</sup>, UR stated that it did not intend to move forward with a requirement to have TPI margins published, stating that there were *“a number of risks associated with such a measure which make it unsuitable for the Northern Ireland market at present”*.

<sup>6</sup> <https://www.uregni.gov.uk/sites/uregni/files/media-files/Utilities%20Intermediaries%20Association.pdf>

<sup>7</sup> <https://www.uregni.gov.uk/news-centre/decision-published-third-party-intermediaries-retail-energy-market>

### 2.3.3 Conclusions

While based upon a limited sample size, TPIs indicated that they viewed suppliers in general as working positively with them for the benefit of their mutual customer, but that account management issues and service standards – for the TPI and the mutual customer alike – were cited as a problem in the minority of cases.

Poor supplier conduct or standards of service, particularly as it impacted upon the TPI directly and the customer's perception of the TPI, were cited among the reasons why a TPI would decide against contacting a supplier in the future. This reflects the situation that poor supplier service is increasingly being both noted and remembered, resulting in long-standing reputational damage with TPIs.

Here, the resultant selection of suppliers by TPIs when seeking tender responses was attributed to the commercial realities of the need to have a successful tripartite relationship between the TPI, the supplier and their mutual customer.

TPIs indicated that they did not immediately work with the entire supply community when seeking contract quotes, but there was no indication as to whether that fact was communicated to their clients – this again being due to the small sample size for this element of the report.

The growing prevalence of energy-as-a-service offerings from suppliers and TPIs risks compromising the effectiveness of the tripartite relationship, should it result in greater competition between the two to provide complementary products and services to the end user.

On the issue of regulation of the TPI space, those TPIs that expressed a preference indicated that they were in favour of this as a means by which to address the misconduct of the minority of their peers. However, such regulation should not be implemented on a one-size-fits-all basis, with different tiers of regulation for SME and I&C-focused intermediaries implemented on agreed criteria as to which end users fit into which sector of the market.

## 3 Regulation of TPIs in the energy sector

### 3.1 Introduction

Energy TPIs are not specifically regulated by industry regulator, Ofgem. Oversight of TPI conduct is held indirectly by the regulator through the sales provisions on suppliers through their licences and Ofgem's being responsible for the energy aspects of the *Business Protection from Misleading Marketing Regulations* (BPMMRs).

The regulator has also had a longstanding project to develop a code of practice (CoP)<sup>8</sup> and created an early draft of this in 2014. This was, however, put on hold for the duration of the Competition and Markets Authority investigation into energy markets which ran for two years from June 2014.

As an example of Ofgem's use of the power under the supply licence, the regulator has sought information from suppliers on their use of TPIs including in late September 2016 a request for information on their service and financial arrangements with them. This move followed the publication of the CMA report and preceded the regulator deciding in October 2016 not to take forward its CoP, but instead use its existing powers under the BPMMRs to monitor TPIs to "build evidence base for future work".

At the time Ofgem said resourcing issues meant it could not focus on a CoP, given the need to implement CMA remedies, however, it also mentioned it felt there to be inadequate evidence of TPI malpractice.

<sup>8</sup> <https://www.ofgem.gov.uk/publications-and-updates/third-party-intermediaries-tpi-proposals-regulating-non-domestic-tpis>

<sup>9</sup> [https://www.ofgem.gov.uk/system/files/docs/2017/08/our\\_strategy\\_for\\_regulating\\_the\\_future\\_energy\\_system.pdf](https://www.ofgem.gov.uk/system/files/docs/2017/08/our_strategy_for_regulating_the_future_energy_system.pdf)

<sup>10</sup> <http://www.uia.org.uk/>

However, in its *Strategy for Regulating the Future Energy System*<sup>9</sup>, published on 4 August 2017, Ofgem stated that as part of its work to move to a smart, flexible energy system it is considering changes to clarify how it should ensure efficient consumer protections for consumers engaging with aggregators, i.e. intermediaries whose activities are typically synonymous with coordinating or aggregating demand side response (DSR) from individual consumers – either as direct customers or through the provision of services to TPIs – as opposed to consumption *per se*.

It said it has also been working on oversight of TPIs, adding that its work on principles-based regulation could form the basis for extending consumer protection to other intermediaries in the market. We would expect this work to start in the domestic market given the focus of Ofgem's other consumer protection work, but it does show that its work on the TPI market has not been forgotten and further developments could be in the pipeline.

In the absence of formal intervention from Ofgem, the industry has moved towards self-regulation in the first instance. The most high-profile voluntary TPI code of practice is operated by the Utilities Intermediaries Association (UIA)<sup>10</sup>. A code of practice previously operated by E.ON UK has effectively now become more widely recognised<sup>11</sup>, while there are also a range of other voluntary codes including one from the Energy Managers' Association (EMA)<sup>12</sup>.

However, regulation and representation during 2018 has re-emerged in the context of increasing concern from the regulator. In its response on the Future

<sup>11</sup> <http://www.tpicodeofpractice.co.uk/>

<sup>12</sup> <http://www.theema.org.uk/third-party-intermediaries-and-energy-brokers-code-of-practice/>

Supply Market Arrangements<sup>13</sup>, Ofgem said “many suppliers and consumer groups expressed concern about the detriment that poor conduct from intermediaries can create for consumers, and the more limited protections that apply to these activities”. It noted that concerns were most pronounced in relation to TPI dealings with microbusinesses.

The regulator further expressed strong support for the government’s Consumer Green Paper<sup>14</sup> proposal to extend consumer law fining powers to sectoral regulators, and it has additionally proposed that this is also extended to non-domestic protections. In its response<sup>15</sup>, Ofgem said it is now “engaging with the government to explore how additional powers to enforce consumer law that protects microbusinesses could help us to tackle misconduct from intermediaries in this area of the market”.

### 3.2 General consumer protection and competition rules

The general aspects of consumer protection law as applied to the GB energy sector are as follows:

- Consumer Protection from Unfair Trading Regulations 2008 (CPRs)
  - Intended to ensure that organisations do not undertake unfair, misleading or aggressive commercial practices;
  - Specific sections include Regulations 5 and 6 prohibit commercial practices which are misleading and which cause, or are likely to cause, the average consumer to take a different transactional decision than would otherwise have been the case, e.g. omission of information (whether intentionally or otherwise), the making of misleading claims and the depth of market coverage; and

- Ofgem (and the FCA and Ofcom) have the power to enforce the CPRs under Part 8 of the Enterprise Act 2002 (“the EA02”).
- Business Protection from Misleading Marketing Regulations (BPMMRs)
  - These apply when a PCW is used by a SME; and
  - Ofgem have powers to enforce BPMMRs in the energy sector.
- Competition Act
  - Used by Ofgem in accordance with the relevant sections of the 1986 Gas Act and the 1989 Electricity Act.
- Industry accreditation
  - For example, the Ofgem Confidence Code for price comparison websites (PCWs) and its comparator for the telecommunications sector managed by Ofcom.

In the context of TPI regulation, our focus is on industry accreditation and comparable methods.

### 3.3 Ofgem Confidence Code for PCWs

In the energy sector, the Confidence Code for PCWs is a successor to the scheme operated by Consumer Focus until 2013 (and energywatch from 2002 to 2008, at which point responsibility transferred to Consumer Focus), and is a voluntary scheme for eligible industry participants.

In line with the voluntary nature of the Code, there is no direct regulation of PCWs in the energy sector. This is unlike the situation for financial services, where the FCA regulates PCWs directly under the Financial Service and Markets Act 2000 (Regulated Activities) Order (SI 2001/544) for activities such as credit brokering and insurance mediation (see **Appendix**).

<sup>13</sup> <https://www.ofgem.gov.uk/publications-and-updates/future-supply-market-arrangements-response-our-call-evidence>

<sup>14</sup> <https://www.gov.uk/government/consultations/consumer-green-paper-modernising-consumer-markets>

<sup>15</sup> <https://www.ofgem.gov.uk/publications-and-updates/ofgem-response-government-s-consumer-green-paper-modernising-consumer-markets>

**Figure 1. Ofgem Confidence Code for Price Comparison Websites - Overview**

Detail	Response
Established	2000
Current members	11 (as at January 2018, only two of which are part of the PCW sector's "Big Five") Energy Helpline, Energylinx, Money Super Market, My Utility Genius, Quotezone, Runpath Digital, Simply Switch, Switch Gas & Electric, The Energy Shop, Unravelit and uSwitch
Affiliate members	No white labels at present, with responsibilities for code compliance held by the accredited white label provider DCTs need to maintain their own tariff database and calculator to be accredited
Fees	None
Assessment	Following audit
Enforcement	One external audit per year and a number of internal audits, as well as ad hoc checks for compliance Audit reports are confidential
Publishes decisions	No
Sanctions	No financial penalties in place Removal of accreditation No DCT sites have had accreditation removed
Accessibility	No specific provisions NB: Ofcom code requires accessibility for disabled users and also the requirement to offer advice offline
DCT charging policy	No fees imposed on customers for use NB: Ofcom code contains provisions for the levying of a "reasonable charge" on customers using the service
Updating requirements	State when offers were last updated Add new tariff information as soon as possible (and no later than 2 working days).
Accuracy of results	DCT takes responsibility for obtaining, updating and ensuring the accuracy of all data Must not be misleading or confusing
Quality of service	Can assign ratings to suppliers (but methodology must be reviewed by Ofgem), or use ratings by a recognised consumer organisation, e.g. Citizens Advice
Independence	Must manage and control own service Must be independent of suppliers and provide impartial advice Must clearly identify commission arrangements Commission must not influence information provided Where switching through the chosen supplier is not possible, must not recommend an alternative
Business model	Must describe business model if they take commission and explain if arrangements influence tariffs displayed.
Advertising	Supplier advertising must not be on the home or comparison page
Default	The default comparison period for tariffs must be 12 months, although other durations may be presented using filters
Presentation requirements	List on a single page at least 10 of the cheapest tariffs available in the region
Filtering	May provide opt-in filters so that consumers may search results based on different criteria selected by the consumer
Sorting	If sorted by price, this must be by the best (lowest) price for the contract period in question
Supplier coverage	All reasonable endeavours to include all available domestic tariffs (with some exclusions, e.g. social tariffs and historic tariffs) Advise Ofgem if asked by a service provider to remove a tariff that still exists
Supplier selection (for inclusion on the DCT)	Under review due to changes associated with WoM requirements
Complaints handling	Effective consumer complaint and enquiry handling procedure and respond within 7 working days Where a complaint is referred by Ofgem, Ofgem must be copied into any response to the consumer
Other	Provide signposting to independent sources of advice on energy efficiency matters

Source: Ofgem, Cornwall Insight analysis

The Code details the minimum standards that a PCW must meet to be accredited, this being awarded only after it has passed an accreditation process. Accredited PCWs must meet the relevant standards for customers, with failure to meet these standards potentially resulting in accreditation being withdrawn.

There is no separate intermediary mechanism between voluntary resolution and suspension or withdrawal, such as the ability to impose penalties for non-compliance.

In the case of PCWs which make their price comparison software available to third parties on a white-labelled basis, such white label entities must also comply with the Code if they reference the fact that they use the calculator or database of an accredited site. In this situation, it is the responsibility of the accredited PCW to ensure that its white-label counterparts are Code compliant.

A summary of the requirements of the Code is presented in **Figure 1**.

The Code has been subject to a number of revisions since oversight was transferred to Ofgem. The most significant of these are as follows:

- August 2014 consultation, changes taking effect 2015
  - The Code was restructured to provide additional security for customers and to reflect the outcome of Ofgem’s Retail Market Review (RMR);
  - Default partial views were banned;
  - Sites were required to show all tariffs available in the market (Whole of Market, WoM) unless consumers choose a partial view;
  - If a partial view was chosen, this should be clearly and transparently explained; and
  - Commission arrangements from suppliers should be transparent.
- Consultation and investigations 2016-17, changes taking effect 2017-18

- The next main change came in the wake of the Competition and Markets Authority (CMA) investigation into the energy sector, with the main change being the removal of the Whole of Market condition.

The outcomes from these changes are presented in **Section 3.6**.

## 3.4 Proposals for a non-domestic Confidence Code for TPIs

Prior to the CMA investigation commencing in June 2014, Ofgem had intended to expand the scope of the Confidence Code to the Third Party Intermediary (TPI) sector, having established a workstream for this in February 2013. However, with the regulator having suspended its workstream into a TPI code following the launch of the CMA investigation, it subsequently abandoned these plans completely upon the publication of the CMA’s report.

Echoing some of the elements of the previous Ofgem work, the concern raised by the CMA in its investigation was that some TPIs may not have the right incentives to give non-domestic customers the best possible deal – depending upon how they are paid and on whose behalf they operate – with a focus on the service provided to microbusiness customers.

Here, the CMA noted that Ofgem’s proposed code of conduct for TPIs would have been expected to have a positive effect on TPI behaviour (as far as customers are concerned), but that they also found “inconclusive evidence” of TPI malpractice concerning micro-businesses.

In addition, it noted that “more stringent disclosure requirements may be required in relation to incentives”, i.e. commission and other payments. As such, this may have necessitated further requirements on transparency etc. beyond those already being sought by Ofgem.

Largely mirroring the prevailing requirements of the Confidence Code for domestic customers, the specific proposals were:

- Introduction of a new requirement in the licences of retail energy suppliers to provide price lists for microbusinesses on their own

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websites and to make this information available to price comparison websites; and

- Introduction of rules governing the information that TPIs are required to provide to microbusiness customers.

This would require that TPIs provide microbusinesses with information on their incentives, including for example:

- The extent to which they cover the markets, i.e. highlighting which suppliers they have agreements with and which they do not;
- How they are paid for their services, e.g. by commission from energy suppliers; and
- Whether they will provide the customer with the cheapest quote(s) among those firms with which the TPI has an agreement to supply customers, or whether only a selection of quotes will be provided.

In the absence of a formal code, TPIs were told to take on voluntary practices to treat businesses fairly. As a result, a number of energy suppliers sought to develop their own code of practice for TPIs – making these a prerequisite for placing business through them.

The issue of supplier-dictated code of conduct terms for TPIs was cited by a number of respondents to Ofgem’s consultation on the issue as being detrimental to their business model. This reflects the broader definition of the term “Representative” as originally applied by Ofgem as part of its investigation to be synonymous with all intermediaries and digital comparison tools (DCTs) such as price comparison websites – irrespective of the underlying relationship between a customer and such an organisation.

The distinction is therefore between agencies that are paid a commission by suppliers to provide a route to market (these are the “sales or supplier agents” in Ofgem’s definitions) and those that are paid by customers to seek the best deal for them (which can be described as “customer agents”). Here, relationships between customers and the organisations that operate on their behalf are managed by contract law rather than regulation.

By definition, a TPI that is appointed by a customer to seek the best deal from the supply community will be diametrically opposed to that community, which

is itself seeking to maximise the revenue that it can obtain from the customer. However, this issue was negated by the change in stance from Ofgem and the CMA investigation.

In addition to the supplier-dictated codes, voluntary codes such as the EMA and UIA ones operate on the high-level provisions of treating customers in a transparent and equitable manner, and in the case of the UIA include:

- Being transparent, honest and truthful with clients at all times;
- Behaving in a manner that does not bring themselves or the UIA into disrepute;
- If operating on behalf of one or more suppliers, informing clients on whose behalf they are operating;
- The process for raising contractual issues;
- The complaints handling process (this being a reciprocal condition); and
- Provisions for dealing with older or vulnerable customers (if applicable to the contract).

There are also a number of financial provisions relating to code compliance, including fines, a return of any fees and the possibility of financial redress. In addition, TPIs are subject to audit to ensure that they remain compliant.

However, the voluntary nature of the codes and the fact that they are not subject to explicit external oversight (i.e. they are effectively industry self-regulation) has led to criticism that they are insufficient to ensure acceptable behaviour by TPIs across the sector.

While Ofgem has shied away from prescriptive regulation of TPIs, this is an issue that the CMA has recommended that Ofgem consider undertaking in its conclusions on the regulation of Digital Comparison Tools (DCTs, see **Appendix 3**).

## 3.5 Conclusions

Ofgem does not directly regulate energy intermediary activities, this being managed indirectly through supplier licences and through the regulator's enforcement of the energy aspects of the BPMMRs – these relating to general consumer protection.

While the regulator has, for many years, been examining the potential for a formal code of practice for energy intermediaries, this has been repeatedly delayed and partly superseded by aspects of the work undertaken by the CMA.

In making its decision to suspend work on these initiatives, Ofgem has indicated a lack of adequate powers to effectively tackle the issue – a view repeated in the regulator's submission to consultations on the Future Supply Market Arrangements for energy and the government's Consumer Green Paper.

Voluntary codes of conduct exist for TPIs in the energy sector, although these have been met with varying degrees of success and awareness. The latest of these has been proposed by Electralink (see **Appendix 3**), with the organisation looking to introduce this alongside its wider work on the Retail Energy Code.

Another aspect of the energy sector that is subject to a formal – albeit voluntary – code of conduct is the operation of domestic PCWs. However, despite the importance placed upon this by Ofgem and those PCWs that are accredited under the Confidence Code, research and anecdotal evidence indicates that the lack of Code compliance is not an immediate disadvantage.

This reflects a combination of low awareness of the Code, lack of financial and enforcement penalties associated with breaching the Code, and the voluntary nature of the Code itself – all factors that could well enter into consideration in developing mandatory TPI regulation.

The ability of larger non-signatory companies, e.g. Confused and Go Compare, to leverage off their existing products and pre-existing customer relationships is potentially more of an advantage than being Code accredited. This is reinforced by these companies' marketing and advertising strategies,

particularly for those PCWs that have a specific “hook” associated with their brand, e.g. Compare The Market. Furthermore, service providers used by non-signatories could be compliant with other forms of legislation and accreditation that is perceived to be of greater import.

This highlights the potential importance associated with customer loyalty superseding accreditation, and one of the challenges that a TPI code would need to address regarding awareness of accreditation and its benefits to the customer.

In addition, the Confidence Code does not have the same level of customer awareness as for example, the travel industry where ABTA and ATOL protection is given prominence in print and media advertisements.

In examining the regulation of TPIs in other sectors, in the water and wastewater supply market, Ofwat rejected a mandatory code of conduct on many of the same grounds that Ofgem gave for energy intermediaries - instead favouring a voluntary code.

As this approach largely mirrors the approach in the energy market, and with the potential for energy intermediaries expanding into the water sector, an element of commonality may therefore have been expected. In addition, we note that the application of a standardised letter of authority has been adopted by Electralink in their TPICoP

In the case of the Northern Ireland energy sector (see **Appendix 3**), the work undertaken by Utility Regulator for Northern Ireland (UR) notes the same problems experienced by Ofgem in its efforts to regulate the TPI space. Namely a lack of authority to do so under current legislation, complexity associated with such an action and the risk of legal challenge if it were perceived that suppliers effectively assumed responsibility for regulating TPIs.

As a result, it has adopted a light-touch approach to what is admittedly an embryonic sector of the Northern Ireland energy market, but – having ruled out a requirement to have TPI commissions published clearly on customer bills – it has not ruled out a more interventionist approach in the future.

Overseen by the Financial Conduct Authority (FCA), the GB financial services sector (see **Appendix 3**), by contrast, employs wide-ranging obligations on intermediaries in terms of the nature of fairness, transparency of reporting,

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and the advice that customers receive. It is also applied on an equal and proportionate basis across all intermediaries in the sector – whether they be sole advisers or large companies.

As presented in the interviews discussed in **Section 2**, the FCA's approach was held up as a possible template that could be employed in the energy sector.

## 4 Conclusions

In 2010-11, Cornwall Insight provided a study to Consumer Focus, the antecedent of Citizens Advice, on the role of TPIs in the energy market and the possible need for regulation of their activities in the SME and microbusiness sectors.

With this sector of the energy supply market representing over 90% of all business gas and electricity supply contracts, it is therefore important that customers in this sector receive effective and transparent advice from their TPI to ensure that they choose the most economically advantageous contract offer. For suppliers, this is also important given the extent to which some companies rely upon TPIs as a route to market, in some instances effectively serving as a replacement to an in-house sales team.

Echoing the conclusions of the 2010-11 report, Cornwall Insight analysis indicates that the vast majority of TPIs provide a beneficial and equitable service to their customers, but that misconduct by a minority of TPIs risks adverse economic outcomes for the affected customers. Here, examples of misconduct include:

- High pressure sales tactics by the TPI;
- Recommendation of contracts that do not meet the customer's needs;
- Misreporting or misrepresentation of financial and contractual aspects of the contract by the TPI and also their own fees;
- Fabrication of letters of authority and/or consumption data by the TPI; and
- The TPI stating that it has examined the whole of the energy market in obtaining a deal for a customer where it has in fact approached only a subset of the market.

Reflecting the fact that these represent long-standing problems for the sector, Ofgem has – since the early part of the decade – considered mandatory regulation of TPIs. However, it has repeatedly shied away from such an action citing issues such as a lack of resources and adequate authority to do so.

In the absence of mandatory regulation, voluntary codes of conduct for TPIs have emerged, experiencing mixed results in terms of customer awareness of their existence – and hence, mixed results in their effectiveness.

Energy suppliers interviewed by Cornwall Insight for this report were in favour of mandatory regulation to address TPI misconduct, while those TPIs that expressed a preference were also in favour of such measures – provided they were proportionate to the needs of the sector and not excessively onerous.

Here, such voluntary codes and existing agencies in the energy sector could serve as a basis around which such mandatory regulation could develop. In light of this, we note the following conclusions:

- Mandatory TPI regulation or code of conduct would represent a means by which to improve wider confidence in the sector for suppliers and customers alike and address the highlighted instances of misconduct;
- Lessons could be learned from other sectors in introducing this regulation, whether this be in the form of direct oversight such as that provided by the FCA in financial services, or through standardised reporting;
- Existing voluntary codes of conduct in the energy sector could be used as a basis for mandatory regulation;
- Regulation would need to be proportional to the sector of the market in question, with the expectation being that SME and microbusiness

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customers would require more prescriptive regulation than their I&C counterparts;

- Improved transparency on commission levels, their source, and the nature of the services being provided by TPIs would represent an immediate information tool for customers. However, there are risks associated with this for suppliers and TPIs – as well as system and other requirements – that may render this impractical;
- There is a wider information and education requirement for the SME sector as a whole. Encouraging customers to demand transparency as a matter of course could, in the long run, be more effective than an obligation on TPIs to present their commission levels if it yields wider behavioural change in the SME sector and mitigates consumer inertia;
- Verification or confidence calls between the customer and the supplier upon the agreement of a new contract could serve a similar *ex post* function;
- As Ofgem has already expressed a desire for greater powers to TPI misconduct, it may ultimately assume such responsibility, or – if it does not – that it will work closely with the organisation that does assume this role; and
- Whichever agency undertakes such functions, failure to comply with mandatory regulation should be accompanied by appropriate censure for those individuals and/or companies responsible, e.g. financial redress, being “struck off” any TPI register, or equivalent sanction.

It must be highlighted, however, that any changes to the obligations on TPIs would be occurring against a backdrop of ongoing change in the energy sector, notably in terms of the evolution of the tripartite supplier-TPI-customer relationship due to the growing prevalence of energy-as-a-service offerings. Here, suppliers and TPIs may emerge as competitors in the field of risk management, consumption monitoring and analytics, metering and other services – rather than serving complementary functions.

Further complications may emerge from Ofgem’s review of the supplier hub model and efforts to reduce customer switching times, both of which may

make it harder for customers that have been mis-sold a contract through a TPI to challenge such an outcome.

However, in the presence of an apparent desire for greater regulatory oversight of the TPI sector, Citizens Advice can use its standing in the sector and its pre-existing research to inform the debate on the above issues, and to work with Ofgem and/or any other agency which is granted regulatory oversight in this matter to ensure that the interests of SME and microbusiness customers are addressed.

In doing so, this should help to yield increased standards from all TPIs in the delivery of their services to SME and microbusiness customers, and also result in improved standards in the supplier-TPI relationship for the benefit of the industry as a whole.

# Appendix 1 Third party intermediaries in the SME and microbusiness sector

## A1.1 Definitions

### A1.1.1 What do we mean by third party intermediaries?

The traditional business model for a **third party intermediary (TPI)** is based largely upon the core function of procurement and contract negotiation.

As customer needs, technology and the energy sector itself have evolved, the TPI business model has responded with companies becoming wider energy **consultants**, offering services including (not exclusively):

- Procurement and tendering services;
- Market intelligence (pricing reports, industry news);
- Bureau services (invoice/billing, other);
- Risk management;
- Usage/management monitoring and analytics (online interface, audit, other);
- Efficiency audits;

- Flexible services (DSR, site optimisation, aggregation, other);
- Metering services;
- Infrastructure development support (generation, lighting, building services);
- Water services (bureau, water usage);
- Water procurement;
- Other business brokerage/procurement (telecoms, insurance, other); and
- Other business services (facilities management, other)

In the context of this report – and given that SME customers are typically focused upon procurement and contract negotiation in the first instance – it is this aspect of TPI operations which is under examination here. To confirm, such companies hereafter referred to as “**TPIs**” or “**intermediaries**”<sup>16</sup>.

It is assumed that they are independent, i.e. they do not represent a particular supplier, but instead represent multiple suppliers, researching and presenting offers from a range of suppliers to the customer<sup>17</sup>. This service is provided in

relationship being governed by the contract between the supplier and the broker, and the latter by a contract between the broker and the customer.

<sup>16</sup> Unless specifically referred to differently by interviewees in their comments on the sector

<sup>17</sup> We assume that such companies are neither employed by one or more suppliers, nor are they appointed by customers to operate on their behalf – the former

exchange for a commission payment, either from the customer to the broker, from the supplier to the broker, or both.

Other entities referred to in this report include:

- Sub-brokers, i.e. individuals or companies that operate independently from a primary TPI and are contracted by intermediaries as a supplemental route to market. Sometimes referred to by TPIs as “partners”, the contractual structure between the TPI and the sub-broker is commonly based upon a revenue-sharing approach to commission payments, with sub-brokers benefitting from dedicated portals and other support<sup>18</sup>; and
- Aggregators, i.e. intermediaries whose activities are typically synonymous with coordinating or aggregating demand side response (DSR) from individual consumers – either as direct customers or through the provision of services to TPIs – as opposed to consumption *per se*<sup>19</sup>.

Both effectively represent an additional level of intermediation above that provided by a TPI in its “traditional” procurement-focused role.

## A1.1.2 What do we mean by SME and microbusiness customers?

For the purpose of this report, our definition of a SME customer is as follows:

- Privately owned;
- Non-half hourly (NHH) metered electricity contracts with up to 10 meters and half hourly (HH) metered contracts up to 1 GWh with up to 10 meters; and

- Gas contracts of up to 10 meters where the typical meter consumes less than 732MWh (25k therms) a year

This is similar to Ofgem’s definition of micro-businesses<sup>20</sup> consumption levels, and therefore the term “SME” is used in this report for convenience as being synonymous with SME and microbusiness.

Ofgem’s microbusiness definition is a business that meets one of the following criteria:

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

The preferred contracts of these organisations are fixed price contracts of between one and three years in duration.

## A1.2 Size of the SME market

The coverage of Cornwall Insight’s annual report, *TPIs in the Business and Industrial Energy Supply Markets*, provides a benchmark of the growth in the number of TPIs and their presence in the SME sector. The 2013 version of the document profiled 35 individual SME TPIs, while the 2018 version looking at 131 SME TPIs – an approximate 375% increase.

Based on the 2018 edition, **Figure 2** shows the size of the SME energy market:

- 1.4mn contracts (91% of total) of business electricity contracts and 0.6mn (97% of total) of business gas contracts are related to SMEs;

<sup>18</sup> Many TPIs offer such sub-brokers a route to market, including Utilitywise (<https://www.utilitywise.com/partners/>), IU Consult (<http://www.iuconsult.com/broker-services/become-partner/>) and Love Energy Savings (<https://www.loveenergysavings.com/become-a-business-energy-partner/>)

<sup>19</sup> One such company is Online Direct (<https://www.onlinedirect.co.uk/>), which describes itself as offering “a platform which has enabled us to provide market access and support to thousands of brokers”.

<sup>20</sup> <https://www.ofgem.gov.uk/key-term-explained/micro-business-consumer>

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- 1.6mn meters (64% of total) of business electricity meters and 0.6mn (67% of total) of business gas meters are related to SMEs; and
- 30TWh (17% of total) of business electricity volume and 40TWh (17% of total) of business gas volume is related to SMEs.

These statistics show that the SME energy market is characterised by a very high number of low consumption contracts.

**Figure 2: SME energy market at 30 April 2018**

	Contracts (mn)	Meters (mn)	Volume (TWh)
<b>Electricity</b>	1.4	1.6	30
<i>Total GB business market</i>	<i>1.5</i>	<i>2.5</i>	<i>180</i>
<b>Gas</b>	0.6	0.6	40
<i>Total GB business market</i>	<i>0.6</i>	<i>0.9</i>	<i>250</i>
<b>Total</b>	2.0	2.2	70
<i>Total GB business market</i>	<i>2.1</i>	<i>3.4</i>	<i>430</i>

Source: Cornwall Insight Business Market Share Surveys. Contract assessments are rounded to the nearest 5000, meters to the nearest 5,000 and volume to the nearest 5TWh

## A1.3 TPI penetration of the SME market

**Figure 3** shows the number of energy contracts negotiated by TPIs each year. Overall, TPIs accounted for 33% of SME electricity and 31% of SME gas contracts, with the majority of those switching supplier rather than renewing.

With a figure of 32% on average, this represents a sizeable increase on the 2013 figure of 13%.

**Figure 3: SME energy contracts negotiated by TPIs each year**

(k contracts)	Electricity	Gas	All
Switching contracts by TPIs	260	85	355
Renewal contracts by TPIs	125	50	175
Longer term contracts with TPIs	70	30	100
<b>TPI total</b>	<b>455</b>	<b>175</b>	<b>630</b>
Total all contracts	1,385	570	1,955
<b>TPI share of all SME energy contracts</b>	<b>33%</b>	<b>31%</b>	<b>32%</b>

Source: Cornwall Insight. Figures have been rounded to nearest 5,000

**Figure 4: Breakdown of TPI'd SME energy contract durations**

Contract duration	(k contracts)	Proportion of TPI'd contracts
1-year contracts	335	60%
2-year contracts	175	30%
Longer contracts	100	10%
All contracts	630	100%

Source: Cornwall Insight. Figures have been rounded to nearest 5,000

Rising wholesale prices during 2018 made the renewal/switching process more challenging for suppliers and TPIs, while SME consumers looked to shorter term deals to enable them to move onto a lower price option should the trends of rising prices reverse, as illustrated in **Figure 4**.

The past few years have witnessed an increasing number of TPIs emerge in the energy market, although the larger end of the TPI market has experienced a recent period of consolidation, resulting in the emergence of a small number of larger companies with wide-ranging product and service capabilities. However, such organisations are more commonly associated with I&C customers than their SME counterparts.

There has also been an increasing number of suppliers entering the SME market, with numbers now at an all-time high. This means that there are greater opportunities for TPIs to reach the market through suppliers as the pool of suppliers available to work with increases.

Historically, TPI penetration of the SME energy sector has been much lower than that of the I&C market. TPIs and energy suppliers have struggled to engage with SMEs despite use of many sales channels including telesales, online and face to face.

In addition, low overall TPI penetration in the SME market has traditionally been down to the automatic renewal of contracts by suppliers. However, with the effective banning of auto-rollovers for micro-businesses resulting from the CMA investigation (see **Appendix 3**), this has become less of a factor.

In recent years, however, we have noted the growing market share held by relatively new suppliers in the SME and I&C markets, particularly from those partnering with TPIs to drive their customer acquisition rather than establishing their own direct sales teams. This is noted in the interview responses discussed in **Section 2**.

## A1.3.1 Role of TPIs in the SME market

Research commissioned by Ofgem found that TPIs were the most influential source in encouraging switching. The research found that 41% of those who had switched supplier cited TPIs as their main influence when negotiating their new contract, down slightly on the previous year's figure of 43%.

Ofgem's *Micro and Small Business Customer Engagement in the Energy Market 2018*<sup>21</sup> report found TPIs were the most widely used source when it came to choosing an energy deal (67%), with energy suppliers second (55% for their current supplier, 34% for other suppliers).

In the survey, the regulator defined "engaged businesses" are those that – in the preceding 12 months – had either switched supplier, switched tariff, compared tariffs or attempted to switch but were unable to do so.

Findings indicated that, while micro and small businesses are becoming increasingly engaged in the energy market (up two percentage points year-on-year to 68% in 2018), the largest of these businesses are more likely to have switched supplier in the past 12 months. In the previous year, 32% of small businesses with 10-49 full-time equivalent employees switched supplier, while only 22% of sole traders did so.

A rising number of companies surveyed by Ofgem re-negotiated their contracts over the 12-month period, rising from 39% in 2017 to 45% in 2018. There was also a greater awareness of contract end dates (up 3pp to 74%) and more respondents said they read their contracts in detail (up 6pp to 62%). While more companies renegotiated their contract compared to last year, supplier activity resulted in some disintermediation as suppliers went to customers directly.

Six segments were used to describe small business consumers according to the importance placed on getting the best energy tariff and energy spend:

<sup>21</sup> <https://www.ofgem.gov.uk/publications-and-updates/micro-and-small-business-engagement-survey-2018>. The survey involved 1,253 businesses and took place during December 2017 and February 2018.

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- Those businesses considered to be **Deeply Disinterested (15%)** have a poor understanding of pricing or contract terms and see little differentiation between suppliers. Ofgem said these consumers need to be shown how much they could gain from switching and how easy it is to switch;
- **Peevish Pragmatists (21%)** on the other hand view switching as a relatively easy process, but do not consider that there is much to be gained from regular switching;
- Ofgem considered **Steady Sceptics (12%)** as loyal consumers, but said they may need more education about the pricing differences between suppliers, as well as reassurance that nothing will go wrong if they switch;
- Businesses identified as **Receptive but Reactive (12%)** and **Shrewd Spenders (12%)** were considered highly engaged, with both likely to use intermediaries to get a good deal. According to the regulator, the former group tends to switch every two to three years and is characterised by high gas spend and value savings, whereas the latter typically have a higher than average electricity consumption; and
- The largest single segment, **Canny Considerers (27%)**, are sensitive to price increases despite a low energy spend. They are also highly engaged, with all members of this segment having switched tariff or supplier in the past year.

## A1.4 Energy supplier use of TPIs

The following information is derived from Cornwall Insight's annual and quarterly TPI profiles reports. Here, Cornwall Insight profiles what we believe to be the most notable TPI competitors in the SME and I&C markets.

They have been derived by Cornwall Insight from our existing knowledge, supplemented by information from the public domain including TPI websites, Companies House, social media outlets, trade press and the Utilities Intermediaries Association (UIA).

From the information collated by Cornwall Insight, we were able to identify which TPIs are used by which suppliers – this information being from the 2018 reports on SME intermediaries, for which approximately 130 companies were examined.

While we do not expect that all the information presented will be up to date for all companies and some may be dealing with some suppliers indirectly through aggregators, we believe that across a wide group of TPIs the findings will be indicative of the ways different companies choose to engage with energy suppliers.

In recent years, energy suppliers have put a lot of effort in to specifying and implementing systems to manage their relationships with TPIs. Reputational and regulatory risk can be incurred if TPIs do not present or sell the supplier's products in to the market properly. On the other hand suppliers also want to make it easy as possible for their chosen TPIs to work with them.

Most suppliers require the TPI to complete an application form which provides details of the company including information about its customers and the number of meters and amount of volume it procures together with the TPI's financial information. Some suppliers specifically outline their dedicated TPI support and their various online services available to TPIs.

These technological developments are also enabling further blurring of the lines between SME and I&C intermediaries services as technological developments enable smaller companies to tap into opportunities for larger customers and vice versa, potentially resulting in greater intra-sector competition.

## Appendix 2: Method and Background of Research

In 2010-11, Cornwall Insight provided a study to Consumer Focus on the role of brokers and third party intermediaries (TPIs) in the energy market – for the purpose of this report, such companies hereafter referred to as “**TPIs**” or “**intermediaries**”<sup>22</sup>. The specific areas of focus for this report were the SME and microbusiness markets<sup>23</sup>, examining:

- Future scenarios for TPI business development as demand for energy services increases;
- Possible risks to SME and microbusiness consumers if the sector remained unregulated; and
- Opportunities for the creation of or strengthening of an existing self-regulation code of practice and the potential for more formal regulation.

This report, “*Watching the middlemen: Brokerage services for micro-business energy consumers*”<sup>24</sup> determined that the (mis)conduct of a minority of intermediaries was sufficient to warrant efforts to improved standards of conduct and service across the sector as a whole.

<sup>22</sup> Unless specifically referred to differently by interviewees in their comments on the sector

<sup>23</sup> For the purpose of this report, our definition of a SME customer is as follows: privately owned; non-half hourly (NHH) metered electricity contracts with up to 10 meters and half hourly (HH) metered contracts up to 1 GWh with up to 10 meters; and gas contracts of up to 10 meters where the typical meter consumes less than 732MWh (25k therms) a year. This is similar to Ofgem’s definition of micro-businesses’ consumption levels (<https://www.ofgem.gov.uk/key-term-explained/micro-business->

This included areas such as improved education of SME and microbusiness customers as to the activities undertaken by TPIs, improved transparency of their commissions and regulation or accreditation of their activities.

As part of the group’s wider examination of the energy sector, in 2018 Cornwall Insight was commissioned by Citizens Advice<sup>25</sup> to undertake a project intended to better inform their awareness of the role of intermediaries in the energy supply sector – effectively serving as an update to the 2010-11 report.

Due to the need to keep the *TPI Satisfaction Survey* and the Citizens Advice separate to prevent cross-contamination of responses, at the end of the Cornwall Insight survey, TPIs were given the option of receiving further information about the Citizens Advice survey and participating.

Of the 43 respondents to the *TPI Satisfaction Survey* as at the start of January 2019, four expressed an interest in taking part in the Citizens Advice report – this being in the form of a telephone discussion rather than completing the online questionnaire.

[consumer](#)), and therefore the term “SME” is used in this report for convenience as being synonymous with SME and microbusiness.

<sup>24</sup>

<https://webarchive.nationalarchives.gov.uk/20130103091330/http://www.consumerfocus.org.uk/files/2011/03/Watching-the-middlemen.pdf>

<sup>25</sup> In 2014, the activities of Consumer Focus were transferred other entities, including Citizens Advice.

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As a result of the low level of responses, general comments from interviews undertaken for the 2017 *TPI Satisfaction Survey* in early 2018 have been used to supplement this report.

Respondents were asked if they would like their comments to be anonymous, with all of those TPIs interviewed stating that this was their preference. All quotes from interviews are therefore again presented under Chatham House Rules.

## Appendix 3: Regulation of TPIs in the energy sector - Supplemental

### A3.1 Regulatory developments affecting the TPI market

Under the CMA's Price Transparency Remedy<sup>26</sup>, suppliers are required to disclose the prices of all their available acquisition and retention costs (including out of contract and deemed contract rates) to certain micro-business consumers prominently on their website or via a third-party platform. The order and associated licence condition took full effect from 23 June 2017<sup>27</sup>. The effectiveness of the remedy will be assessed between August 2018 and April 2019.

The greater availability of pricing information may appear as a threat to TPIs if it incentivises businesses to transact direct with suppliers. However, TPIs still have the perceived advantages of greater market awareness plus technical expertise which they can use to help businesses. Businesses obtaining the new price information are still faced with a relatively laborious process to interpret and evaluate it.

Standard licence condition (SLC) 7D states that suppliers must disclose the required price information in the prescribed format promptly to each relevant micro-business customer on its website or on one or more third party online platforms. They also must disclose the unit rates and standing charges per fuel of all their out-of-contract contracts and deemed contracts that apply to a micro-business consumer.

The required price information is defined as:

<sup>26</sup>

[https://www.ofgem.gov.uk/system/files/docs/2016/11/cma\\_remedies\\_implementation\\_plan.pdf](https://www.ofgem.gov.uk/system/files/docs/2016/11/cma_remedies_implementation_plan.pdf)

- Each separate combination of standing charges, unit rates and other associated charges per electricity/gas meter which is available for a relevant micro-business customer to enter into a contract with the supplier and remains available for an identified period (subject to a successful credit check and terms and conditions that may apply);

A relevant micro-business customer in this instance is defined as:

- A non-domestic customer:
  - Whose metering point at the non-domestic premises is profile class 1, 2, 3 or 4 (electricity only);
  - Has an annual consumption of no more than 50,000kWh/ electricity meter or 73,200kWh/ gas meter; and
  - Has a relevant electricity metering arrangement (electricity only).

As at the implementation date of the licence condition, there were a number of suppliers yet to display any prices on their website at all. Subsequently there has been a varied interpretation of the new licence obligations between suppliers and hence quite a disparity in the information that has been published. Some suppliers are providing direct prices, telesales prices and intermediary prices, while others are splitting prices by contract length and

<sup>27</sup>

<https://assets.publishing.service.gov.uk/media/58513efb40f0b60e4a0000a2/energy-market-microbusiness-order-2016.pdf>

only providing acquisition prices. Where prices are provided, it is unclear whether commission is included in these.

The information is being provided in different formats by suppliers often with little guidance on how to use it. The amount of information from the business required to be entered to generate prices also varies, as some suppliers just ask for address and consumption, while others require personal details to be entered as well. In some instances, customers are directed to contact the supplier directly for a quote or they are required to complete a form for the supplier to contact them.

With the lack of consistent requirements for input information across suppliers, inconsistency in the way prices are displayed and the format these prices are displayed in, tariff comparisons are a time-consuming and difficult activity for business users. In many instances, this may encourage businesses to use TPIs as they might feel they lack the time, knowledge and expertise to find the most suitable contract themselves.

### A3.1.1 Auto-rollovers

As part of the CMA investigation into the energy market it was found that 45% of micro-businesses were on default tariffs (the supplier's most expensive tariff) and many of these businesses found it difficult to shop around and switch to cheaper tariffs as energy price information was not easily available. Micro-businesses also found themselves being rolled over onto these contracts when their original deal ended.

As part of its *Micro-business Order*<sup>28</sup>, the CMA prohibited suppliers from entering micro-businesses into auto-rollover contracts—or rolling over existing contracts—that restrict when a micro-business can give notice of termination during the initial period or roll-over period, or impose a fee on termination during the roll-over period.

<sup>28</sup>

<https://assets.publishing.service.gov.uk/media/58513efb40f0b60e4a0000a2/energy-market-microbusiness-order-2016.pdf>

When a micro-business gives at least 30 days' notice of their wish to end the contract, (during the initial period), suppliers should terminate the contract at the end of the period. If notice is given within 30 days, the contract must be terminated within 30 days of the notice being received. When notice is given during the roll-over period, suppliers must terminate the contract within the relevant notice period and may not increase any rates or changes.

The Order came into effect on 15 December 2016. Also, suppliers cannot enter into, or perform, an out-of-contract or evergreen contract that allows them to charge a termination fee where a micro-business consumer has given notice to terminate the contract.

Additionally, all existing auto-rollover, evergreen and out of contract contracts (at the time the order was made) had to be amended to comply with the auto-rollover remedy licence condition for micro-businesses by 23 June 2017.

The effect of the changes is effectively to stop suppliers automatically renewing customers on to new annual deals and lock them out of the market. This practice of auto-rollover was prevalent in the SME market in the years up to 2013 when there was a voluntary agreement by many leading suppliers to cease the practice. Most SME customers of these suppliers taking no action have subsequently moved to rolling monthly. The CMA's decision effectively mandated this practice across the remainder of the market.

### A3.2 Competition and Markets Authority (CMA) “Digital Comparison Tools (DCTs) investigation

An investigation was launched by the CMA into Digital Comparison Tools (DCTs) in September 2016 with the group's final report published in September 2017.

The investigation looked at the “traditional” PCW model, app-based comparison tools, collective switches and “concierge models”, i.e. those that offer switching advice and automatically undertake any switch on behalf of the customer, such as Flipper and Labrador.

While the focus of the investigation was such services on a general basis, there were specific comments made in respect of those organisations operating in the energy sector.

At the outset of the probe, the CMA said that its objectives were produce a full assessment of the role of DCTs for general use that would examine both their merits and demerits, identify how to maximise the benefits of DCTs and reduce barriers to the effective functioning of DCTs, and ensuring that the regulation of DCTs is both proportionate and well-designed.

The government’s initial response on the report, published in December 2017, described DCTs as “mostly a force for good” as a means by which to promote customer engagement and competition, in turn leading to lower prices. With a full response due from the government in spring 2018, it stated that this will place its feedback “into the wider consumer context”, and although direct regulation of DCTs is not ruled out, it is described as “one of the many options” available and one not encouraged by its own Principles of Better Regulation.

### **A3.2.1 CMA recommendations for the Ofgem Confidence Code**

While the CMA reiterated pre-existing recommendations regarding issues such as the CARE (Clear, Accurate, Responsible and Easy to use) code and cross-sector cooperation, it noted that the regulatory framework for the energy sector was less effective than would otherwise be the case, citing a regulatory focus on suppliers and the specific nature of the energy sector.

The CMA note that DCTs can and do yield benefits to energy customers, e.g. by promoting awareness of new entrants, particularly those smaller companies that have become increasingly prevalent in the sector in recent years. However, there is also criticism of the currently regulatory structure.

The CMA describe the situation in energy as being “quasi-mandatory” as far as DCTs are concerned, this reflecting the general practice by suppliers of seeking accreditation under the Confidence Code by DCTs before agreeing terms with them.

However, this creates complications from a regulatory perspective as suppliers are subject to specific licence and compliance obligations which are enforceable, while DCTs are subject to detailed rules but without the enforcement from a regulator.

Indeed, collective switches and automated “concierge services” may face no such need to seek accreditation, while there is also a large number of non-accredited PCWs. There is therefore a lack of consistency in the regulatory and compliance framework which may have adverse consequences for customers.

The CMA recommended that the government require Ofgem to bring intermediaries under direct regulatory review, thereby ensuring a consistent approach across different service providers engaged in similar activities, as well as aiding in compliance and enforcement.

The issue of compliance is particularly relevant for those providers that are carrying out services directly on behalf of suppliers, where a commercial relationship exists between the two with an intermediary effectively serving as a part of the supplier’s marketing operations.

These are referred to by the CMA as “boundary issues”, where suppliers are required to comply with specific elements of regulation, but due to the prescriptive nature of the regulation, their interpretation of these same rules to DCTs operating on their behalf is different to their approach in complying with them directly.

The CMA therefore note that an expansion of regulation will be important as the DCT business model evolves, potentially moving to a system more akin to that of the financial services sector, where the application of the regulatory rules is based upon the functions of a company rather than the type of organisation it is.

Given that this type of regulation is one that Ofgem has previously shied away from, the CMA proposed progressive incremental alterations to the Confidence Code as the energy sector evolves. These were:

- The first recommendation is one that is already being undertaken by Ofgem, i.e. removing the whole of market (WoM) requirement on price comparison websites, and instead require the extent of market coverage to be clearly identified by DCTs, thereby allowing customers to make their own choice<sup>29</sup>; and
- Secondly, Ofgem should either ensure that voluntary schemes remain voluntary rather than becoming quasi-mandatory, or if the latter approach becomes the norm then it should ensure that any obligations placed on DCTs are not too prescriptive or too onerous.

Thirdly, limit the requirements on the more prescriptive compliance obligations, such as default rankings or a requirement to display results in a certain manner.

### A3.3 Perceived importance of the PCW Confidence Code

Despite Ofgem highlighting the role that the Confidence Code plays in providing assurance to users that a PCW is accredited and operating on a best practice basis, research into the attitude of users themselves to the code indicates relatively low awareness and importance being assigned to it.

<sup>29</sup> The Whole of Market obligation saw all suppliers listed by all DCTs, meaning that – in the opinion of the CMA – there was no incentive on customers to review more than one DCT. In addition, the CMA stated that suppliers would have no incentive to engage commercially with DCTs in order to have their products listed on them, thereby resulting in lost revenue for DCTs from contracts foregone.

<sup>30</sup> “Intermediaries in Consumer Markets: Research report,” March 2017 <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/36479CitAIntermediariesdraftv2.7.pdf>

In the context of possible wider TPI regulation, this is of crucial importance in terms of promoting the reasons for such regulation and its wider implications and benefits for customers.

A study undertaken by Illuminas for Citizens Advice<sup>30</sup> stated that there was “very little awareness or understanding” of codes such as that managed by Ofgem. Furthermore, the research noted that the presence of accreditation had no impact on consumers’ confidence in the site due to a lack of understanding of what this meant.

This finding is echoed by a study undertaken by Consumer Futures<sup>31</sup> which found a lack of recognition of Ofgem. The research noted that only 16% of those surveyed that had used a PCW in the preceding two years claimed to be aware of voluntary accreditation schemes. However, the same survey also found that an industry regulator like Ofgem or the Office of Fair Trading would be most trusted to run such a scheme, with the regulator achieving the same score (35%) as a consumer group such as Which?

In addition, the report found:

- 36% of those users aware of these voluntary accreditation schemes said that its existence influences their choice of PCW “a little”;
- 34% of those users aware of these voluntary accreditation schemes said that its existence has a “strong” influence on their choice of PCW;
- 76% of those users who were unaware of voluntary accreditation said that it would either “slightly” or “strongly” influence their choice of

<sup>31</sup> “Consumer Futures, Price comparison websites: consumer perceptions and experiences: A report by RS Consulting for Consumer Futures,” July 2013 <http://webarchive.nationalarchives.gov.uk/20140408192819/http://www.consumerfutures.org.uk/reports/price-comparison-websites-consumer-perceptions-and-experiences>

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PCW in the future (this classification was split evenly across the responses); and

- The lowest level of trust in a managing body would be government, an industry body or self-regulation.

Accreditation was seen as providing a degree of legitimacy and confidence in the PCW and its outputs, particularly given the lack of a human interaction associated with the use sites. However, the study also noted that not only did consumers not actively seek out accreditation, they did not necessarily notice if a PCW was accredited.

The Illuminas study noted that for such accreditation to be effective, the following criteria would need to be met:

- Greater awareness and recognition of the body or regulator responsible for the code and of the code itself;
- The code body should have “clear authority” over those organisations covered by it, and would need to be able to take punitive measures in the event of code breaches;
- Such penalties should act as a deterrent to non-compliance; and
- Code schemes would need to be compulsory, not voluntary.

The Illuminas study also showed that, among those respondents that were confident in using PCWs, the site operators themselves were viewed as being more trustworthy than the energy suppliers whose tariffs were presented.

The CMA’s investigation into DCTs<sup>32</sup> reported trust and confidence in “well known” PCWs given past experiences and their brand, the latter reflecting their advertising. This was judged to reflect the fact that PCWs had a reputation to protect and an implicit assumption that there was some form of verification or validation process for the sector. As a result, users trusted the fact that the input of accurate data would yield an accurate outcome.

The fact that PCWs are a commercial business raised an expectation that there would be some additional charge for their services, or that revenue would be earned by them from other sources. For insurance in particular, the CMA noted that the sale of personal data was a risk, as was the possibility of some insurance companies cutting prices to reach the top of the price comparison rankings – irrespective of whether the policy wholly matched customer requirements.

In conclusion, research and anecdotal evidence indicates that the lack of Code compliance is not necessarily a disadvantage due to a combination of the following reasons:

- Lack of awareness of the Code and its purposes;
- Lack of awareness of the body responsible for the Code;
- Lack of trust in the body responsible for the Code;
- Lack of financial redress in the event of Code breach;
- Lack of enforcement penalties;
- The code is voluntary, not mandatory;
- Customer confidence in non-Code compliant organisations due to prior experience of service provision, e.g. insurance;
- Code compliance is not seen as a barrier to entry for a PCW, with brand loyalty, trust and customer awareness seen as a greater impediment;
- Greater advertising or brand awareness of non-Code compliant organisations, e.g. Compare the Market, Go Compare, such that the provider is trusted rather than the Code;
- Existing PCWs offering non-energy services can leverage off existing brand awareness to expand into energy; and

<sup>32</sup> “Digital comparison tools market study – Final Report Paper A: Consumer views,

behaviour and experiences,” September 2017  
<https://assets.publishing.service.gov.uk/media/59c9356bed915d7bd5d75dda/paper-a-consumer-experiences.pdf>

Although energy comparison services are outsourced, this is not immediately visible or displayed prominently, such that users may perceive they are dealing with that PCW directly rather than using outsourced software.

### A3.4 Electralink's proposed TPI Code of Practice (TPICoP)

Electralink currently provides network communications and code governance services in the energy industry, including the electricity Distribution Connection and Use of System Agreement (DCUSA) and the gas Supply Point Administration Agreement (SPAA).

In February 2018, it set out its recommendations for establishing effective governance for the new Retail Energy Code (REC) that the regulator Ofgem proposes to establish<sup>33</sup>. The regulator considers its programme to deliver faster and more reliable switching is an opportunity to bring together parts of the gas and electricity code governance framework with respect to retail operations and switching arrangements that are currently fragmented across different codes.

Alongside this, in July 2018 the company announced its plans to develop an independent Third Party Intermediary Code of Practice (TPICoP), and that it was seeking participation from suppliers, TPIs and independent third parties from across the energy sector to do so<sup>34</sup>.

Following this, in November 2018 Electralink issued on its plans for the code structure and core principles of its proposed TPICoP, and published a draft version of the document which set out expected TPI behaviours<sup>35</sup>. Unlike oversight by Ofgem, energy suppliers or the TPIs themselves, Electralink has positioned itself as an independent agency in the development of its code, and is looking to build upon its existing code governance commitments in doing so.

<sup>33</sup> <https://www.electralink.co.uk/wp-content/uploads/2018/02/ElectraLink-REC-Vision.pdf>

<sup>34</sup> <https://www.electralink.co.uk/2018/08/electralink-introduces-third-party-intermediary-code-practice-line-of-gems-latest-thinking/>

Expected to launch in January 2019, the ElectraLink code will initially be a voluntary CoP targeted at TPIs and suppliers. TPI signatories will be required to undergo a pre-enrolment audit, as well as annual and mid-term audits. ElectraLink states that "it is the aim to increase membership over time as clauses set out in the code become adopted as common practice".

The code measures are segmented across eight key areas:

- Transparency (including clarity that the customer is talking to a TPI and outlining the level of remuneration);
- Independent Advice;
- Fair and Appropriate Selling;
- Training;
- Accurate Contract Information;
- Prevention of Erroneous Transfer;
- Dispute resolution; and
- Data protection.

Signatories would be required to provide transparency to their customers, offer independent advice, and ensure fair and appropriate selling. They must also arrange training to ensure pressure selling techniques are avoided and that the requirements of the code are followed.

The draft code sets out requirements for TPIs to ensure accurate contract information, to collect sufficient information to prevent erroneous transfers, and to establish a complaints procedure that is easily accessible for customers.

They would be supported in this by Electralink providing them with access to Estimated Annual Consumption Data from the industry central database,

<sup>35</sup> <https://www.electralink.co.uk/2018/11/electralink-launches-new-consultation-on-third-party-intermediary-code-of-practice/>

though customer data would need to be handled in line with relevant data protection regulations.

The code also sets out assurance provisions which would be used to hold TPIs accountable for their actions, with non-compliances potentially leading to the expulsion of the party from the code.

Electralink plans to establish a TPICoP Company as a corporate vehicle to procure the necessary services needed to support the code, which includes the Code Manager, Governance Panel, auditors, and legal support. The company would also provide a funding channel through which subscriptions are collected from parties. A fixed annual subscription of no more than £10,000 is proposed.

In December 2018, the company published a summary of the consultation document on the TPICoP<sup>36</sup>. In this, Electralink indicated a generally positive response to the TPICoP as follows:

- Participation
  - There was a general acceptance among respondents that supplier input was needed in the development of the code;
- Voluntary vs. Mandatory implementation
  - Electralink indicated that they viewed the TPICoP as a baseline around which the industry could operate, should the code be accredited by Ofgem;
  - However, they stated that they would also like to maintain the independence of the code, and which could serve as “an independent framework accessible to TPIs, suppliers and end-customers with an appropriate level of ongoing rigour delivered through the annual TPI re-assurance model”;
- Transparency

- Those TPIs that responded to the consultation “widely accepted” the requirement to disclose their commissions, and that while no such similar obligation was to be placed on suppliers, “this may be an issue that requires additional consideration as the code evolves or as and when Ofgem considers additional supplier measures in this part of the market”;
- Compliance
  - Electralink is looking to make participation and accreditation as streamlined as possible, with TPI compliance managed through the TPICoP Governance Panel and the Code Manager;
  - As such, issues such as the raising of observed non-compliance and a possible ‘Gold, Silver, Bronze’ accreditation scheme have not been discounted;
- Letter of authority (LoA)
  - An industry standard LoA was agreed as a requirement although the content and structure of this was not;
  - As a result, Electralink indicated that this would be the responsibility of the Governance Panel once it had itself been established;
- Funding and membership
  - The subscription costs will be subject to annual review and are expected to decline as more companies sign up for membership;
  - Those TPIs that wish to become a “founder member” of the TPICoP must comply with the Code prior to taking a seat on the code’s Governance Panel.

<sup>36</sup> <https://www.electralink.co.uk/2018/12/our-review-of-the-third-party-intermediaries-code-of-practice-tpicop-consultation-responses/>

Electralink also noted that, while challenging, the proposed implementation of the code early in 2019 remained its objective.

## A3.5 Regulation of intermediaries in other sectors

### A3.5.1 England & Wales non-domestic water sector

In May 2016, water sector regulator Ofwat published a paper in which it stated that the ability to take action against non-domestic TPIs in the event of behaviour that causes consumer detriment was “an important element of customer protection”, but that such activities were – at that time – beyond their remit. This followed an initial workshop held by the group in January of that year, one of the outcomes from which was a view that any such regulation of TPIs would need to be on the basis of a voluntary code of conduct in the first instance.

In February 2017, Ofwat launched a consultation on the possible role for TPIs in that sector in the anticipation that they would assume an increasingly important role as non-domestic water competition evolved. The catalyst for this review was that the regulator expected that TPIs that were active in the energy sector would expand into the water sector to offer a multi-utility service, and that they would be “an important contributor to the successful functioning of the water business retail market”.

In undertaking the consultation, Ofwat stated that the risk of consumers not being aware of the retailer-TPI relationship was such that “business customers should have the same level of protection whoever supplies them”. In the absence of direct regulation of TPIs, the regulator proposed principles for voluntary code of conduct for TPIs as a means by which such companies could demonstrate the same level of commitment to customer protection as licensed retailers.

This resulted in the following principles for TPIs (published in March 2017) to adhere to:

1. TPIs shall be fair, transparent and honest.

2. Communication with customers (business, charity and public sector) shall be in plain and clear language.
3. All information provided to customers by a TPI shall be reliable, accurate, complete, timely and not misleading. Such information shall be made through appropriate channels and enable customers to make informed choices.
4. TPIs shall not offer products that are unnecessarily complex or confusing.
5. TPIs shall not sell a customer a product or service that is not fully understood by that customer, nor sell a product or service that is inappropriate for that customer’s needs and circumstances.
6. TPIs shall not exaggerate the savings that could be achieved by switching, but shall be as accurate as possible.
7. TPIs shall inform any micro-business customers that they have a 14 day cooling off period.
8. TPIs shall cancel any mis-sold contract without penalties.
9. TPIs shall respond to customers in an appropriate and timely manner.
10. Customer service arrangements and processes shall be accessible to and effective for customers.

*Source: Ofwat*

Direct regulation of TPIs, enforced through licence conditions, was rejected for a number of reasons, namely:

- It was beyond Ofwat’s powers at that time;
- It could result in TPIs being forced out of business if they refused to sign up to a mandatory code of conduct, with their decision to refuse to sign having nothing to do with any poor service issues;
- It could limit market entry and competition in the TPI sector; and

- It could result in cost burdens associated with compliance that would be passed onto customers.

It also rejected the possibility that TPIs be required to sign up to an Alternative Dispute Resolution Scheme (ADR) in the event of customers experiencing any problems with their services – this being a requirement for water and wastewater retailers under their licences.

In making their decision, Ofwat cited costs and complexity involved in creating and administering such a scheme” and that it could reduce the attractiveness of the water sector to TPIs. Furthermore, such provisions may lead to TPIs preferring codes which include dispute resolution as a requirement – a move that could lead to them being more attractive to certain TPIs.

However, it did recommend – and provide a template for – a standardised letter of authority for intermediaries operating on behalf of micro-business customers. This enabled customers to state if the TPI was authorised to undertake functions such as (not exclusively): obtain historic consumption data; obtain billing and invoicing information; receive contract quotes for suppliers; undertake negotiations with suppliers, and; accept and terminate contracts.

### A3.5.2 Northern Ireland non-domestic energy sector

While the use and prevalence of TPIs in the Northern Ireland business energy market is much lower than in its GB counterpart, the sector regulator – the Utility Regulator for Northern Ireland (UR) – undertook an examination of their activity in May 2018<sup>37</sup>, following this up with a consultation document in July 2018<sup>38</sup>. The primary concerns that the regulator noted were largely the same as for the GB market, i.e.

- Lack of transparency around the operation of TPIs, commission levels and how they are charged, and the range of energy suppliers that TPIs approach on their customers’ behalf;
- The use of letters of authority, specifically the perceived duration of any authority and precisely what responsibilities the customer was delegating, and potential falsification of these letters (i.e. criminal fraud);
- Lack of market-specific knowledge to enable TPIs to operate effectively in the Northern Irish market with suitable confidence; and
- General issues associated with intermediaries, such as poor service, misrepresentation, aggressive or misleading sales tactics, high commissions, customer data security and repeated/excessive levels of contact.

With prevailing legislation not allowing UR to directly regulate intermediaries nor to impose a voluntary code of conduct – in addition to there being no comparable trade association like the UIA in the Northern Ireland market, more prescriptive regulation was largely discounted.

On a fundamental level, UR noted that the scale of TPI activity in the Northern Ireland market was not on a par with its GB counterpart, and while it may never reach the same level of penetration, supplemental regulations may stifle such growth and risk consumer benefit being foregone.

The general view from respondents to the May 2018 document was that existing business protection legislation were also insufficient to protect customer interests, and therefore the regulator proposed a scheme of information gathering and reporting to be undertaken through the country’s Trading Standard Service (TSS) and the Department for the Economy (DfE).

In making this recommendation, it noted that the BPMMRs had only limited coverage as far as the activities of energy TPIs were concerned, i.e. they

<sup>37</sup> <https://www.uregni.gov.uk/sites/uregni/files/media-files/Third%20Party%20Intermediaries%20in%20the%20Retail%20Energy%20Market%20Position%20Paper%20May%202018.pdf>

<sup>38</sup> <https://www.uregni.gov.uk/news-centre/third-party-intermediaries-retail-energy-market-consultation>

would not cover commission levels but would provide protection where customers had been intentionally misled.

UR also rejected the possibility of a licence condition that would mandate suppliers to work only with accredited TPIs, and also an obligation on suppliers to establish suitable customer protection for TPI activity.

The regulator did note, however, that it was seeking to further address concerns regarding transparency of commissions and would be following up the summer 2018 documents with a consultation on whether suppliers should be required to publish TPI commission payments on customer bills.

It also noted that it would consider whether the extent to which suppliers used TPIs should be included in each supplier's Retail Energy Market Monitoring (REMM) submissions – these incorporating various provisions on contracts and the supplier's own retail margins.

Specific issues raised in respect of customer understanding of intermediary commissions included:

- Energy suppliers receiving questions from customers as to whether their rates included such a fee, potentially indicating a lack of disclosure by the TPI, with one supplier highlighting “inconsistent charging including commission, finders’ fees and unit rate add on”;
- The lack of a consistent approach to the charging of commissions by customers, e.g. per unit, flat fee, staged payment terms, upfront payment etc., could make them more difficult to compare and report on;
- The lack of a common approach to payment, i.e. supplier-pays or customer-pays, given that if the customer paid the TPI directly then the supplier may have no visibility of the amounts involved and hence may not be able to report on them; and
- If a requirement was introduced on suppliers to publish TPI commissions on their bills, this may necessitate widespread changes

to supplier billing systems and other processes which could lead to additional costs on consumers.

In its decision document published in December 2018<sup>39</sup>, UR stated that it did not intend to move forward with a requirement to have TPI margins published, stating that there were “*a number of risks associated with such a measure which make it unsuitable for the Northern Ireland market at present*”.

These included:

- By introducing a requirement on TPIs without establishing a comparable obligation on suppliers to display their own margins, this could lead to a negative view of intermediaries and adversely affect their business;
- The publication of TPI commissions could be used by suppliers as a means by which to renew a contract directly through them, as opposed to taking the contract to tender either through an intermediary – the latter resulting in disintermediation – which may lead to a less economically advantageous outcome for the customer;
- Introducing the requirement may confuse consumers as to the relationship between the supplier and the TPI, specifically in terms of revenue collection by the former on the part of the latter;
- Introducing the requirement would require upgrades to supplier billing systems, necessitating investment at a cost that would likely be passed on to customers to some degree; and
- A pence per unit commission may not reflect the full extent of the service provided by the TPI, and therefore displaying such a figure may be an oversimplification;
- As commissions are commonly charged on a pence per unit basis, the introduction of the requirement could result in intermediaries altering

<sup>39</sup> <https://www.uregni.gov.uk/news-centre/decision-published-third-party-intermediaries-retail-energy-market>

their charging structure to an alternative structure which could be less transparent to the customer.

As a comparator to the views above, we note the consultation responses submitted by TPIs to the UR in consideration of its potential introduction of TPI regulation.

- **BJG Consultancy**<sup>40</sup> indicated that while it did not understand lack of integrity displayed by some of their peers, it was not in favour of the publication of its commission rates, stating that, “*we should not suffer due to the failings of others within the TPI/Broker market in NI.*”
- Instead, it proposed the introduction of a register of instances of misconduct and a requirement on suppliers to publish details of those brokers they worked with. Such information could then be used to help establish a cross sector charter or framework established by all stakeholders that detailed clear entry and operational requirements for all participants in the NI energy sector – not just TPIs.
- **Energy Management Systems**<sup>41</sup> stated that their preference would be mandatory regulation or the establishment of a formal code of practice for all TPIs. The company also noted that they had seen “*a significant increase in TPI activity in recent years, particularly from GB based energy consultancies and brokerages*” with these companies operating largely through telesales, and making what the company judged to be inaccurate claims regarding their independence and depth of market coverage.
- The company was also against the publication of commission on bills on the grounds that such a move was “*too late in the overall process*” and that this could be displayed earlier in the sales process through some form of mandatory reporting obligation. The definition of “*commission*”, they added, would also need to be clear and

unambiguous to avoid any possible confusion on the part of the customer.

- In their response, **Power 2 Business**<sup>42</sup> said that they would support the publication of their commission rates, provided that it was done on a standardised basis. This approach, it added, was necessary “*so as not to give suppliers the freedom to create wording that could give rise to a negative perception that consultants whom bring value to their clients are acting in some way unfairly or underhand*”.
- They continued that it was important that TPIs not be viewed by customers “*as being the sector of the industry whom are the cause of their energy costs*”. The company stated that publication of commissions was one part of a wider need for transparency on the issue of costs. “*We have seen in the last few weeks one particular supplier, whom we have anecdotal evidence does not work with indigenous consultants, revoking their customers fixed energy contracts and changing their terms and conditions to be quite onerous in comparison to others,*” the submission noted, “*Suppliers acting in this manner will clearly damage the reputation of the industry.*”

In making its decision, the UR stated that it would look to review its decision 18-24 months after the initial May 2018 consultation, indicating that no immediate change to its stance is on the horizon.

### A3.5.3 Financial service provision in the GB market

The Financial Conduct Authority (FCA) regulates a wide range of functions in the financial services sector. In the case of intermediaries, two key functions covered by the agency relate to the provision of insurance and mortgages.

<sup>40</sup> <https://www.uregni.gov.uk/sites/uregni/files/media-files/BJG%20Consultancy.pdf>

<sup>41</sup> <https://www.uregni.gov.uk/sites/uregni/files/media-files/Energy%20Management%20Systems.pdf>

<sup>42</sup> <https://www.uregni.gov.uk/sites/uregni/files/media-files/Power%202%20Business.pdf>

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The primary customer-facing aspects of these relationships are contained in the FCA “consumer outcomes” that it expects when customers use intermediaries. These are:

- Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture;
- Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly;
- Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale;
- Where consumers receive advice, the advice is suitable and takes account of their circumstances;
- Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect; and
- Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

*Source: Financial Conduct Authority*

These outcomes are linked with the regulatory responsibilities that companies in the financial services sector must provide, with the FCA stating that firms must “pay due regard to the interests of its customers and treat them fairly” – a requirement that also extends to those companies that do not have direct contract with retail customers. The argument here from the FCA is that poor performance and risk can cascade down the value chain to customers.

The FCA also defines some of the key elements associated with fairness, including:

- Ensuring that fairness is a part of the business;
- Taking account of consumers' legitimate interests in respect of contracts;
- Not focusing on “narrow technical arguments” to justify a contract that may be retrospectively challenged or objected to; and
- The FCA’s definition of fairness is “indicative and non-exhaustive” and therefore while an action may not immediately reflect the definition, that does not mean that it may not be considered to be unfair.

This wide-ranging approach to what may be considered as an unfair activity when it comes to consumer engagement is therefore intended to protect consumers to the greatest extent possible rather than taking a relatively prescriptive stance. In addition, the FCA requires intermediaries to “give clear and fair information” to customers and to ensure that such information is not misleading.

These core requirements apply across sole advisers (similar to the energy sector’s so-called “one-man band” TPIs) and large firms alike, although it notes that the level of responsibility should be “proportionate and relevant” to the size of the company. To place this into context, the FCA’s latest assessment of the financial intermediary sector<sup>43</sup> notes that there were 2,466 sole adviser organisations registered with the FCA – this being more than any other type of firm examined<sup>44</sup>.

In terms of commission fees, a financial intermediary is required to include “all forms of remuneration from any arrangements it may have”. This can include areas such as profit-sharing, payments due from a given volume of sales and payments associated with arranging finance. This, and in the reporting obligations associated with the financial services sector under the Retail

<sup>43</sup> “Data Bulletin”, June 2018 (<https://www.fca.org.uk/data/retail-intermediary-market>)

<sup>44</sup> There were 2,238 companies with 2-5 advisers, 529 with 6-50 advisers, and 38 with more than 50 advisers.

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Mediation Activities Return (RMAR), enables the FCA to present a breakdown of revenue by company type and by function<sup>45</sup>.

This is clearly in contrast to the energy sector, where no such obligations on financial reporting exist, with the FCA data including commission and other fees specifically broken out in their reporting.

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<sup>45</sup> These are broken down as: mediation of retail investments, mortgage and non-investment insurance

## Control sheet

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