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REGULATION OF THIRD PARTY INTERMEDIARIES IN THE ENERGY SECTOR

citizens advice

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EXECUTIVE SUMMARY

1. This report looks at the regulation and potential regulation of third party intermediaries ("**TPIs**") operating in the retail energy market from a legal perspective. It compares the present regulatory protections provided to consumers engaging with the market directly through a licensed energy supplier, or indirectly via a TPI.

2. In contrast with the energy regulatory regime and licensed energy suppliers, at present there is no specific regulatory regime for TPIs. As such, a comparison of the protections offered to consumers when engaging with TPIs or suppliers requires an examination of the general consumer protection regime applicable to both TPIs and suppliers and the specific energy regulatory regime applicable only to suppliers. The presence of a TPI does not remove the need for a supplier and the services offered by different TPIs may vary widely. This report also looks at industry-led voluntary TPI codes in the energy sector and at potential future regulation of TPIs.

3. This report looks at present law and regulation and, in broad terms, at options for the potential future models for the regulation of TPIs. However, there are already potential changes on the horizon potentially affecting the regulation of TPIs and suppliers. For example, changes to EU law requirements on access to alternative dispute resolution in the energy sector, the government's Smart Data review, implementation of the European Electronic Communications Code, the results of the joint government and Ofgem review of the future regulation of the retail energy market and plans to introduce financial penalties for breaches of general consumer protection law are all briefly referred to in this paper.

The general consumer protection regime applicable to TPIs and suppliers

4. The general consumer protections applicable to TPIs and suppliers give protections relating to misleading or aggressive advertising, marketing and sales, rights to information about the trader and services, transparency on contract terms and prohibitions on unfair contract terms. The regime generally protects individuals (domestic consumers in the terminology of the regulated energy sector). Business consumers are protected from misleading marketing and have some limited rights and protections against unfair standard business terms and poor quality services.

5. Individual consumers can rely upon the rights and protections in any dispute with a trader, if necessary in court. There is not, however, a compulsory alternative dispute resolution scheme for out of court resolution of consumer complaints.

6. Where breaches are affecting consumers more generally, enforcement agencies including Ofgem, the Competition and Markets Authority ("**CMA**") and Trading Standards can apply to court for orders stopping the breaches and requiring compensation and other redress measures. They can also accept undertakings, which are legally binding promises from a trader to take steps, removing the need to apply for court orders. The present law allows for one or more new enforcers to be designated to take action under general consumer protection law and in respect to TPI failures.

7. As the regime is designed for general application and contained in general legislation it is not open to Ofgem or any other regulator to develop protections or rights in order to

address any specific policy concerns in respect to TPIs. If Ofgem were to enforce general consumer protection law against TPIs it would need to do so using the court process.

Contrast with energy sector regulation of suppliers

8. Consumer protection in the energy sector is in addition to the general consumer protection regime. It provides a mixture of (some) higher standards compelling professional behaviour, greater prescription on contract requirements and the provision of information to consumers, price controls (at present[1]) and alternative "sectoral" enforcement options.

9. In contrast to general consumer law, microbusiness consumers are given specific protections, albeit fewer protections than their domestic consumer counterparts.

10. Sectoral regulation is based upon a defined category of "supplier" as a business which requires a licence. Companies need to meet criteria set by Ofgem and obtain a licence before operating; otherwise they are committing a criminal offence. Standard Supply Licence Conditions ("**SLCs**") are attached to a licence and can be amended by Ofgem and government relatively easily to give effect to policy around specific consumer protection in the energy sector. Additional sector specific requirements on complaints handling, compulsory and binding alternative dispute resolution, and guaranteed standards on certain industry activities are also based on a defined category of licensed suppliers. The complaints handling and alternative dispute resolution (energy ombudsman) requirements make it easier for consumers to resolve issues with a licensed supplier than in comparison to a TPI that only complies with the minimum requirements of the general consumer protection law. In particular, a customer of a supplier does not need to use the courts to enforce their rights.

11. Ofgem's enforcement powers include financial penalties, orders to compel compliance and consumer redress measures. In practical terms, it can achieve broadly the same outcomes as it can in respect to the general consumer protection regime, but with additional powers to impose financial penalties. However, unlike the general consumer protection regime, Ofgem enforces sectoral regulation using its own rules and decision makers, with limited grounds of appeal to the courts against an Ofgem decision. In practice, it is therefore easier for Ofgem to enforce sectoral regulation because the procedural requirements upon it and the costs involved are less.

12. From a legal perspective, comparative analysis of TPI and supplier regulation does not vary depending on the various models (or potential models) of TPI. Certain types of TPI may, however, become members of voluntary codes that provide for "good practice" minimum standards and prescription around key sector activities. The voluntary codes lack the force of law, but do have powers for example to remove accreditation for repeated serious breaches.

[1] The present pre-payment meter price cap expires in 2020, but CMA has recommended an extension of this. The default tariff cap expires in 2020, but may be extended to a longstop date of the end of 2023.

Alternative models of TPI regulation?

13. Levelling up within the current general consumer protection regime, so that microbusiness are given the same protections as domestic consumers seems practically impossible at present because of the difficulties in amending the definition of "consumer" in a large number of provisions, most of which implement EU Law and an EU definition of "consumer". Changes to deal with energy TPI issues would include redefining the definition of a (protected) consumer across the whole economy. Levelling up in the energy regime is much easier, but only adds to protections and rights against suppliers, not TPIs.

14. Enforcement of general consumer protection law without the courts is achievable. Ofgem already enforces a regime that is otherwise outside of the established sectoral regulation "as if" it were part of the Electricity Act 1989 ("**EA89**") enforcement regime. However, this would not deal with the lack of individual consumer protection in respect to TPIs, complaints handling and alternative dispute resolution (ombudsman) access. It also would not change the substantive consumer protections, which at present do not deal with any specific emerging or future TPI concerns and which cannot be easily amended to do so.

15. The powers already exist to make operating as a TPI in connection with energy supply a licensable activity (with its own SLCs), similar to licensed supply. This would give Ofgem powers to develop rules and to enforce them without the courts. However, it would not on its own deal with the lack of a compulsory complaints handling and alternative dispute resolution (e.g. energy ombudsman) regime for TPIs. Licensing may not easily deal with cross-sectoral TPIs (operations, for example in the telecoms and energy sectors) and licensing may not be the best way to regulate a market with a very large and diverse number of participants. Requirements to obtain a licence may deter some TPI activity which might otherwise have been helpful to consumers and may stifle innovation.

16. An authorisation regime would avoid the problem of trying to license a large and diverse TPI market. It could offer flexibility and regulation proportionate to the TPI activity, but careful drafting of rules would be required. The legislation creating the regime could give Ofgem powers to develop rules to reflect emerging concerns (as it can with suppliers and SLCs) and the new regime could be enforced "as if" part of the established sectoral regime. The new regime could provide for alternative dispute resolution of consumer complaints, if proportionate. An authorisation regime for TPIs, whilst retaining licensing for suppliers, would create two different approaches to regulation of consumer protection in the energy sector.

17. A cross-sectoral authorisation regime would allow for regulation of TPIs operating in more than one market. This could be done by identifying a body of TPI activity where a new regime with a lead regulator could deal with issues of common concern across sectors. This may already be emerging in relation to consumer data access and protections in regulated markets. A modular rulebook could complement either a new licensing or authorisation regime, by making the application of rules dependent upon the TPI activity undertaken. The rulebook could therefore be proportionate and relevant to the potential consumer detriment. The rules would require careful drafting so that the right rules applied at the right time.

18. Voluntary industry codes provide protections over and above general consumer protection in respect to activities where Ofgem does not have specific regulatory powers. These codes do not have the legal power of the general consumer protection regime or (energy) sectoral regime, but they do have provisions for sanctions and for dealing with complaints. They

promote good practice and provide additional requirements on areas of particular concern, for example provision of information to consumers.

The consumer perspective

19. From a consumer's perspective, at present:

    a. Engagement with a TPI means some protections, for example against mis-selling and unfair terms. Those protections and rights are ultimately enforceable by a consumer through private litigation in court. An enforcement agency may take action where the failings of the trader are affecting a group of consumers, in which case it can go to court to prevent further breaches and obtain an order that remedial steps are taken by the trader.

    b. Engagement with a supplier means heightened protections, in particular around issues of regulatory concern in the energy sector (for example tariff information and billing). The consumer can more easily rely upon those protections, because of the compulsory complaints handling and energy ombudsman regimes. There is a designated regulator (Ofgem) that can develop specific rules to protect consumers, that monitors compliance and which can relatively easily take action on any breaches.

    c. The consumer has the same protections – in theory at least - in respect to the supplier, whether they engage directly with it or via a TPI. However, if they engage via a TPI then the additional services provided by the TPI are not regulated in the same way as the supplier's activity. Depending upon the TPI model, the consumer may not have direct contact with the supplier and this could raise questions as to how effectively the consumer can enforce their rights and protections in practice.

20. Under alternative models of potential TPI regulation:

    a. Enforcement of the general consumer protection regime for Ofgem, the CMA or any other enforcer, without the courts, would not make it any easier for the individual consumer to rely upon their individual rights and protections in their dispute with a TPI. Ofgem (or other enforcer) *might* be more likely to take action in response to consumer complaints about TPI failings that impact upon a group of consumers. The enforcer probably would find it easier to take action, but the outcomes for the consumer in terms of remedial actions and redress would not be materially different.

    b. Licensing of TPIs would mean specific protections could be developed to protect consumer and could be enforced relatively easily by Ofgem to protection consumers. *If* the requirements on complaints handling and membership of the energy ombudsman scheme were also extended to TPIs then consumers would be able to enforce their new rights and protections without having to go to court.

    c. An authorisation regime of regulation, in which the TPI was subject to specific regulation by virtue of the activities it undertook, but without licensing of TPIs, would again mean specific protections for consumers engaging with TPIs. Again though there would also need to be an extension of the complaints handling and

alternative dispute resolution (energy ombudsman) regimes to give consumers the ability to enforce and rely on the protections easily and without ultimately having to use the courts.

d. Variations potential regimes, based on cross-sector regulation or modular regulation, may mean protections that are more targeted (or limited) to the consumer's specific engagement with the TPI. This may have benefits, for example by allowing TPIs to develop alternative service offerings. However, it may also mean increasing complexity in the "rulebook" so that it is harder for the consumer to know what their rights and protections are.

CONTENTS

A: INTRODUCTION

1. This report provides a legal analysis of the regulation of third party intermediaries ("**TPIs**") in the retail energy market. In particular, it looks at the following questions and issues:

    a. What are the key protections in place for consumers engaging with the retail energy market directly through a licensed supplier and indirectly via a TPI?

    b. How do the protections offered to consumers differ depending upon whether the consumer is engaging with a TPI or supplier?

    c. A high-level consideration of the legal and regulatory issues and potential impacts associated with alternative models of future TPI regulation.

Methodology and structure

2. The following steps were undertaken, by way of legal research and analysis:

    a. Mapping the existing general consumer protection regime (which applies to TPIs and licensed energy suppliers).

    b. Mapping the existing energy sector regulatory regime insofar as it relates to the protection of consumers on matters that provide a helpful comparison as between TPIs and suppliers. This means matters such as marketing, contractual information and complaints handling were looked at, but not regulation relating to the role of licensed suppliers in the functioning of the integrated energy system. We have not, for example looked at smart meter roll-out, balancing and settlement, or the delivery of environmental schemes. There is no specific TPI regulatory regime to map in addition to the general consumer protection regime, although we have noted where proposed regulatory developments on consumer data rights and protections have been discussed from a TPI perspective (the government's "Smart Data" review).

    c. Mapping the present substantive protections and rights given to consumers, for example protections against unfair terms, as well as which consumers benefit from these protections (domestic, microbusiness *etc*), how rights and protections are enforced by individual consumers and enforcement agencies, and the scope for development of the protections in the future to deal with any particular policy concerns around TPIs.

    d. A side-by-side comparison of the substantive protections currently offered to consumers under the general consumer protection regime and, over and above this, by the energy sector regulatory regime during the consumer life-cycle from advertising and marketing, to the delivery of services, to the end of any contractual relationship.

e. Additional analysis of the position of voluntary codes in relation to TPI regulation, with reference to three existing codes.

f. Analysis of the potential for the development of the existing regulatory regimes, to deal specifically with any issues related to consumer protection and TPIs.

g. Analysis, at a high-level, of some of the legal and regulatory issues related to potential models of future TPI regulation.

3. **Part B** outlines the general consumer protection regime.

   Part C outlines the regime in the energy sector, including the voluntary TPI codes looked at. Parts B and C set out the legal framework, the key pieces of legislation or regulation providing consumer protection, who is protected, the legal and practical scope for development of the substantive protections and how rights and protections are enforced.

   The **appendix** to this report gives further detail on the substantive protections and records the results of the side-by-side analysis of the protections through the consumer life-cycle.

   Part D of the report provides a summary and analysis of the comparison of the general consumer protection regime and the energy specific regime, additionally noting the voluntary codes.

   Part D also considers how protections differ if engaging with TPIs or a supplier.

   Part E provides a high level analysis of six models for potential future TPI regulation.

Scope of the report

4. This report compares the regulation of a typical supplier with the regulation applicable to a TPI.

5. This report assumes that there will continue to be, for the foreseeable future, licensed energy suppliers who will be the only business permitted to "supply" mains gas and electricity to consumers. Suppliers will continue to be subject to regulation. It is open to suppliers to start providing ancillary services, some of which may overlap with TPI activities.

   Equally, a TPI may choose to become a licensed supplier. However, in either case there remains a distinction between the regulation of licensed supply activities and presently unlicensed TPI activities.

6. "**TPI**" is taken to mean any business that in some way or other mediates between a consumer and the retail energy market and is an addition to the ongoing role of the licensed supplier, even if some future TPI models may mean that most direct consumer contact is with the TPI and not the supplier.

The precise functions and business model of a TPI may vary widely, from a provider of price comparisons (only), to a business advising on a wide range of energy matters in the course of which it buys and/or sells energy for the consumer.

7. This report looks at the main consumer protection measures and related regimes insofar as they illustrate the differences in how consumers are protected when engaging directly with suppliers or via TPIs. It does not look at areas where there is no difference (or no material difference) in how consumers are protected, for example the general data protection regime (but does note some areas of consumer data regulation with particular applicability to energy suppliers and TPIs).

   It does not look at consumer protections in respect to non-retail parts of the energy market, for example consumer engagement with network operators although consumers and networks may have more direct engagement in future "smart" and decentralised networks.

8. This report focusses on **domestic consumers** and **microbusinesses**, whilst also noting protections that may apply to other (SME) business "consumers". It does not analyse the industrial and commercial supply market.

9. For the purposes of analysing potential future regulation, this report looks at the high-level consideration attached to broad models of future regulatory regimes. There are already potential changes on the horizon affecting the regulation of TPIs and suppliers. Specific policy proposals on the future development of substantive consumer protection or rights generally or in relation to the energy sector (for example in relation to consumer's digital rights), have not been analysed in detail.

   However, changes to EU law requirements on access to alternative dispute resolution in the energy sector, the government's Smart Data review and implementation of the European Electronic Communications Code, and the joint government and Ofgem review of the future regulation of the retail energy market are all briefly referred to in this paper and included in the wider comparative analysis of consumer protections when engaging with TPIs and suppliers.

10. This report is a legal analysis written for Citizens Advice. It is not intended to provide legal advice to any third party, should not be relied upon as legal advice in respect to any particular matter and is not an exhaustive statement of the law. The law referred to is the law as at the date of this report. Brexit implications have not been analysed, beyond to note that for the present EU derived consumer protection law continues to have domestic effect. All references to legislation are to legislation as amended. This paper is not written as a piece of policy analysis or in support of any particular policy outcome.

Findings

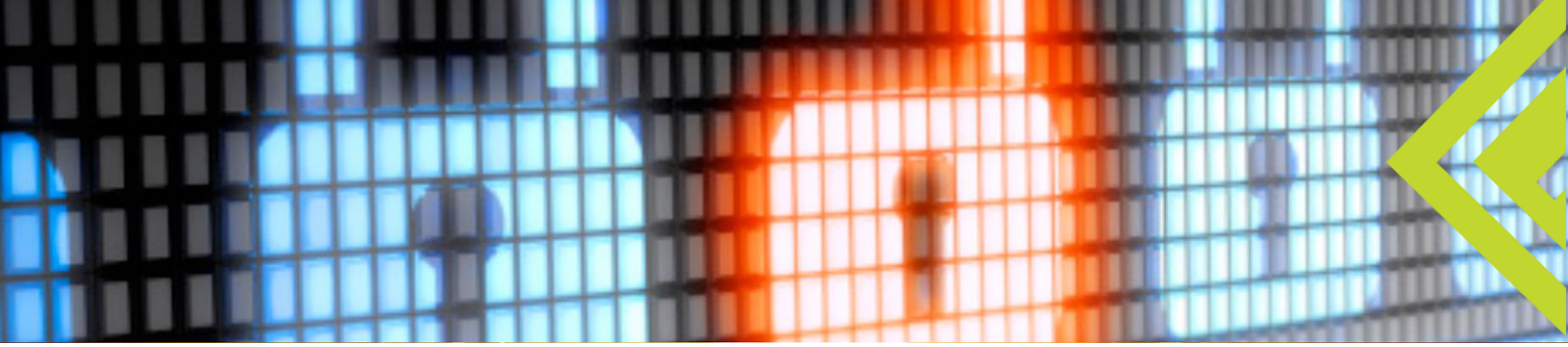
11. Each of the following parts of this report begins with a summary setting out the key findings, in respect to:

Part B – Key features of the general consumer protection regime, for the purposes of considering how consumers are protected when engaging with TPIs and suppliers; what rights and protections are provided, the scope for future developments; who is protected; and how are rights and protections enforced by individuals or enforcement agencies.

Part C - As with Part B, but looking at the energy sector regulation of suppliers and TPI voluntary codes.

Part D – A comparison of how consumers are protected at present when they engage with the energy market directly through a licensed supplier and indirectly through a TPI.

Part E – A high level analysis of six models of potential future TPI regulation.



B: THE GENERAL CONSUMER PROTECTION REGIME

Summary

General consumer protections apply to all traders, including TPIs, engaging with consumers. The regime gives protections relating to misleading or aggressive advertising, marketing and sales, rights to information about the trader and services, transparency on contract terms and prohibits unfair contract terms.

There is no compulsory additional consumer protection that applies to TPIs by virtue of them being TPIs. There are many models of TPI or potential TPI. Online business, for example, may be subject to specific provisions regarding online trading. In respect to data, new regimes are likely to introduce requirements on TPIs as a result of activity in other markets (telecoms) and because of consumer data usage (Smart Data). However, these measures do not apply requirements on TPIs simply by virtue of them being TPIs. A TPI may choose to offer additional levels of service and it may choose to be a member of a voluntary code or scheme, but this is not a legal requirement.

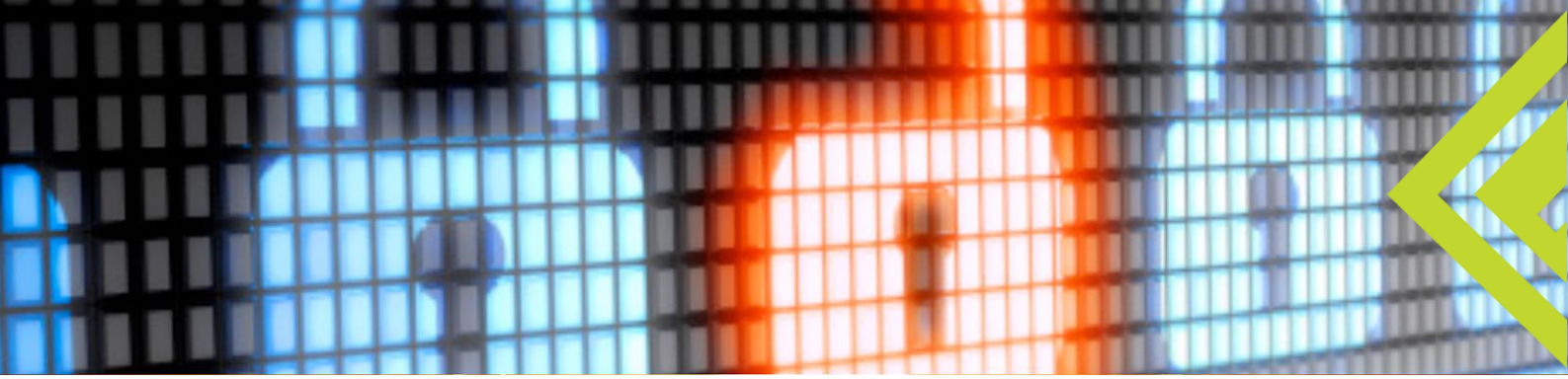
The regime generally protects individuals (domestic consumers in the terminology of the regulated energy sector). Business consumers are protected from misleading marketing and have some limited rights and protections against unfair standard business terms and poor quality services.

Individual consumers can rely upon the rights and protections in any dispute with a trader, if necessary in court. There is not, however, a compulsory alternative dispute resolution scheme for out of court resolution of consumer complaints.

Where breaches are affecting consumers more generally, enforcement agencies including Ofgem can apply to court for orders stopping the breaches and requiring compensation and other redress measures. Whilst the enforcers can accept undertakings, ultimately enforcement of the general consumer protection regime is not a process Ofgem, or other enforcers control. The enforcers do not decide cases or make binding decisions on the interpretation of the law.

Aside from Ofgem, there are other enforcers including Trading Standards and CMA, although they lack a specific mandate and focus on energy consumers. Additional enforcers of general consumer protection law, including non-public bodies, can be designated.

As the regime is designed for general application and contained in general legislation, it is not open to Ofgem or any other regulator to develop protections or rights in order to address specific policy concerns, for example in respect to TPIs.



What is the regime?

12. To the extent that consumers have a contract with a provider of goods or services then they will generally be able to rely upon the general law to enforce the terms of that contract, for example that the services paid for will be provided. Similarly, tort law, in particular the law of negligence, may provide some protection against service provision that has been so poor that it has caused damage to the consumer.
13. However, this report is not looking at the general economic laws of contract or tort. It looks at the additional protections provided to consumers.
14. General consumer rights and protections, as well as the mechanisms for the enforcement of those rights and protections, are contained in a mixture of primary legislation (Acts of Parliament), secondary legislation (regulations) and two advertising codes.

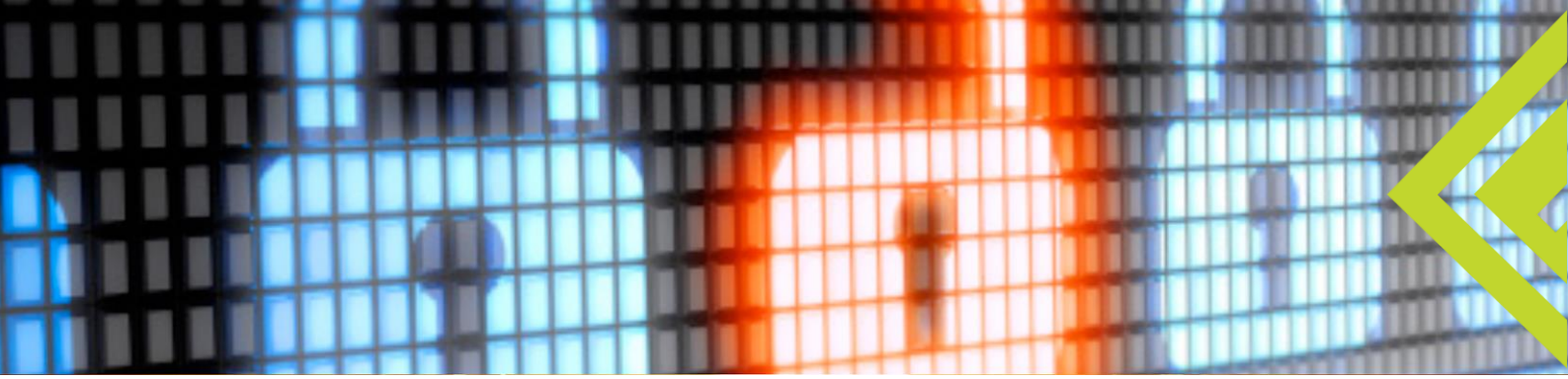
Rights and protection in relation to what? Services and digital content, goods, and advertising

15. The list of legal provisions which, in some way or other, provide for consumer protection and consumer rights is potentially extremely long and very wide in its application. The focus of this paper is on consumer protections in respect to the **provision of services** and **digital content** and related matters such as billing, pricing and information provision which are connected to the supply of electricity and gas.
16. In this context, the relevant general consumer protection provisions covered in this report are the:

    - Consumer Rights Act 2015 ("**CRA**")
    - Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("**CCRs**")
    - Consumer Protection from Unfair Trading Regulations 2008 ("**CPUT"**)
    - Consumer Rights (Payment Surcharges) Regulations 2012 ("**PSRs**")
    - Business Protection from Misleading Marketing Regulations 2008 ("**BPMMRs**")
    - Enterprise Act 2002 ("**EA 2002**") Part 8 in respect to enforcement

    and, briefly:

    - Electronic Commerce (EC Directive) Regulations 2002
    - Provision of Services Regulations 2009
    - Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (**ADR Regulations**)



- UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (**CAP Code**)
- UK Code of Broadcast Advertising (**BCAP Code**)

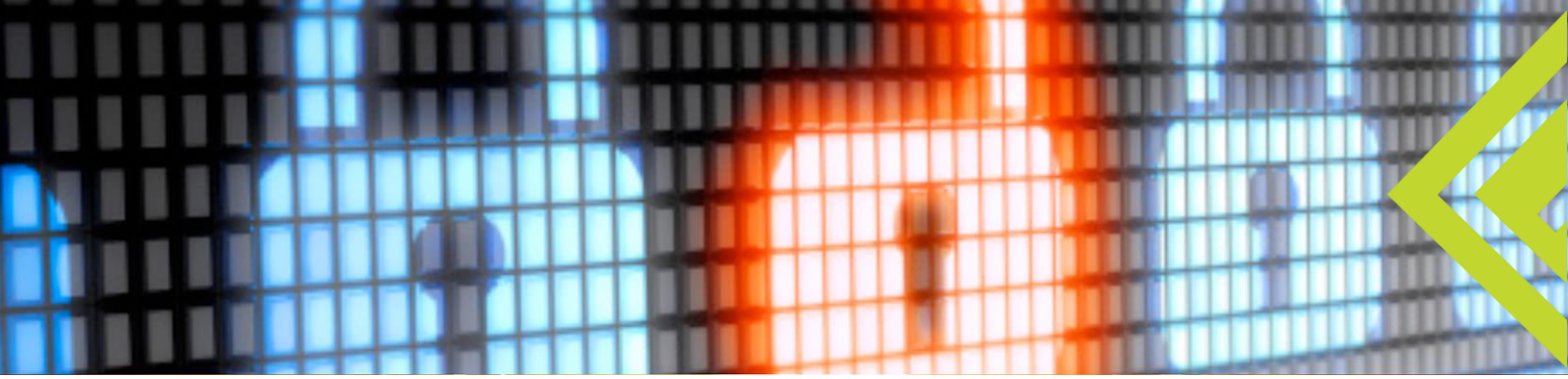
17. A summary of the protections given to consumers and in particular in relation to the **provision of services and digital content** is set out in the **appendix**. The appendix also summarises how those protections apply at different points of the engagement between a consumer and a service provider. General consumer protections in respect to services and digital content are:

Sales and marketing

- Protections from misleading advertising.
- Services and digital content will be as described.
- Consumers will be able to understand the terms of any contract.
- Consumers will be provided with information about the trader's identity, complaint handling policy, timings, duration and termination of contract and key terms of the contract including the price and a description of the services/digital content.
- Consumers will not be subject to "unfair practices" such as misleading the consumer, aggressive sales practices, or inertia selling.
- Consumers have a right to a cancellation period, "in distance" or "off-premises" contracts.
- Businesses are not generally protected as consumers, but they are specifically protected from misleading marketing.
- Online traders and self-employed traders are also subject to regulations specific to their status

The provision of services and digital content, the contract and payments

- Consumers are protected from unfair terms, which create a significant imbalance in the rights of the consumer and trader. Terms must be transparent.
- Services and digital content must be as described, of reasonable quality and fit for purpose.



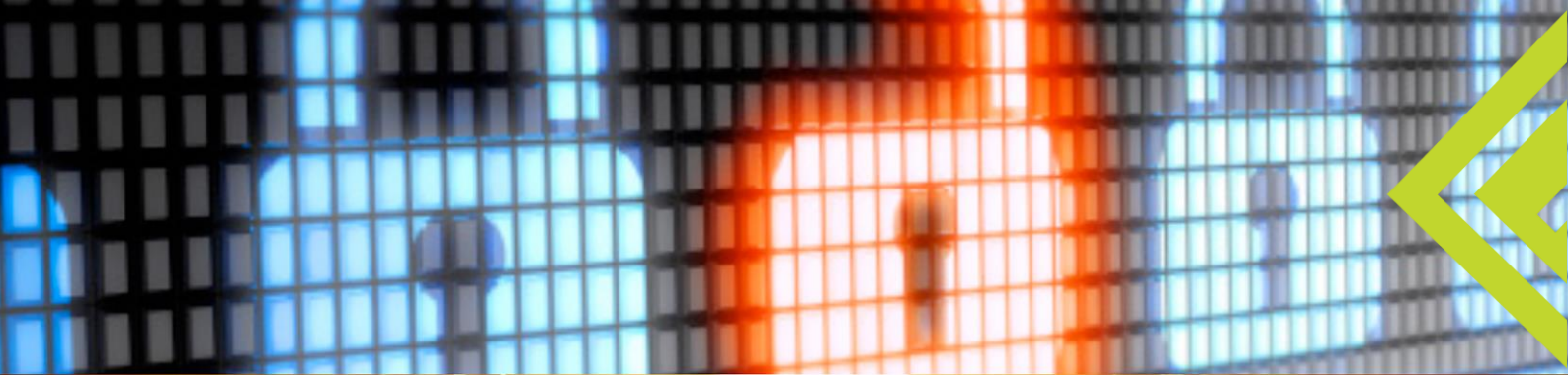
- Additional charges cannot be imposed after contracting. If no price is agreed in advance, then only a reasonable price is payable. (What is "reasonable" is ultimately for a court to decide, if not resolved between the trader and consumer).
- A consumer cannot be charged more for making a payment that the cost to the trader of receiving that payment.
- Traders' unilateral powers to dissolve, terminate, vary or roll-over contracts are limited.

18. The provision of **goods** has not been analysed in detail because the essence of a TPI's business will be a service (and potentially digital content) offering. Suppliers and TPIs are not regulated differently in relation to the supply of goods generally.[2] However, for completeness if goods are provided by a TPI or supplier (other than mains gas and electricity) then this will be subject to requirements that those goods will, for example, be fit for purpose and as described.[3]

19. **Advertising**, is another regulated area that may have an important impact upon consumer protection. It is not considered in great detail here as it is not an area in which there is any difference between regulated energy suppliers and TPIs. It may, however, provide consumers with protection against misleading or otherwise harmful advertising by TPIs, suppliers or other businesses. Therefore, the **UK Code of Broadcast Advertising (BCAP Code)** and the **UK Code of Non-broadcast Advertising and Direct and Promotional Marketing (CAP Code**) are both briefly outlined and included in the appendix. Their protections against misleading advertising are briefly considered in the analysis below.

[2] The physical characteristics of the gas and electricity supplied by a supplier are highly regulated, as is the supplier's role in the delivery of those particular goods. However this is outside of the scope of this report which also does not look at the potential for TPIs to take on functions currently reserved for suppliers.

[3] In respect to goods generally, see CRA Part 1, Chapter 2 and Supply of Goods and Services Act 1982 sections 4, 11D and 11J for goods contracts not covered by CRA. The Sale of Goods Act 1979 (as amended) provisions continue to regulate contracts beyond CRA including an implied term that goods sold in the course of business will be of satisfactory quality (section 14(2)) and elements of the Trade Descriptions Act 1968 continue in force, in respect to mis-describing goods. All of these can be enforced in private disputes. They can also be enforced by enforcers via Part 8 EA 2002 where protecting the collective interests of "consumers" (see enforcement of rights).



Data

20. **Data** protection and data rights are areas of increasing importance for the protection of consumers. Data protection and data rights, as a distinct regime separate from general consumer protection and energy regulation is beyond the scope of this report and *per se* is not an area in which consumers have differing levels of protection depending on whether they engage with suppliers or TPIs. Beyond this data section, the rest of the discussion in this Part B focusses on the general consumer protection regime relating to matters such as contractual rights and protections against mis-selling where there are differences in how suppliers and TPIs are regulated.

21. However, specific issues in relation to the regulation (or foreseeable regulation) of energy TPIs and as regards consumer data is a current topic of policy development and probable future regulatory development. In addition to this section, "data" as an energy supplier or TPI specific issue is therefore touched upon, where relevant, in Parts C (energy sector regulation), D (comparison of protections) and E (models of future TPI regulation).

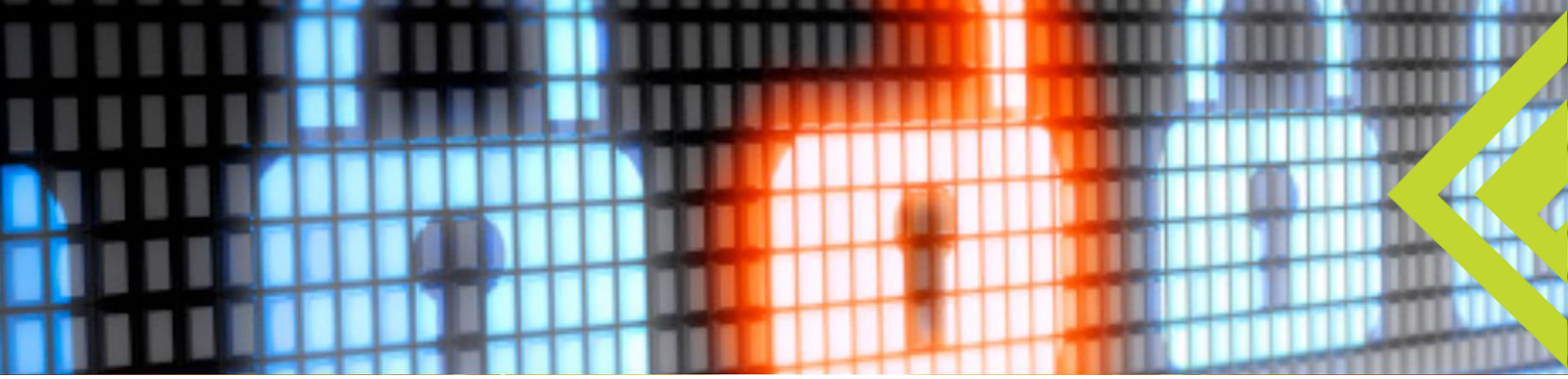
22. The government recently consulted on the future regulation of "**Smart Data**" in a consumer protection context.[4] The government consulted on the need for new regulation in respect to access to, and control over, consumer data, in order to facilitate consumer choice and the development of new services, which could include energy TPI services that rely upon access to consumer data. Proposals include adding to existing general data rights ("data portability" rights and the ability of a consumer to ask for their data to be shared with a TPI), for example with an "Open Communications" initiative led by Ofcom and requirements on communication providers to share consumer and product data (and see below in respect to the European Electronic Communications Code and potential energy TPI impacts).

23. The Smart Data consultation recognises that where there are specific sector concerns, these will continue to be subject to relevant sector specific regulation. So specifically "energy" issues will continue to be subject to energy regulation if they are regulated beyond general consumer protection law.

24. However, TPIs are expected to operate in more than one regulated sector in the future (for example offering bundled services related to water, energy and telecoms). At the same time, most Smart Data concerns are not limited to one regulated sector. Issues on access to consumer data, how this is managed and consumer protections apply in water, telecoms and energy equally, for example.

25. Smart Data regulation would therefore include accrediting TPIs, whatever regulated sector(s) they were operating in, for the purpose of them accessing consumer data and regulation of

[4] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808272/Smart-Data-Consultation.pdf



data sharing. One aim for regulation would be to protect and empower consumers in a vulnerable situation.

26. Given the cross-sector nature of these issues and TPI activity, the government states that it wants to avoid duplication and over-regulation. As regards the role of TPIs as interfaces between consumers and regulated markets and which are (or would like to be) accessing and using consumer data, government is considering creating a cross-sector authorisation regime, potentially with a new Smart Data regulator (or with this function given to an existing regulator like Ofcom). This would provide for additional Smart Data protections and rights over and above the existing general data law regime. Any energy specific regulation would remain for Ofgem.

27. The European Electronic Communications Code ("**EECC**")[5] is a sectoral regulation measure aimed at electronic communications providers. However, requirements on contract information, transparency, contract duration and termination, and switching are to apply to all elements of a bundled product or service and not only those parts otherwise regulated by EECC (see article 107). The government has suggested that EECC protections will largely be implemented by Ofcom, as the communications sector regulator and using its sectoral regulation powers (EU member states are required to implement EECC via domestic law by the end of 2020). As the government has also noted, implementation of EECC and article107 could give rise to Ofcom, in practice, regulating business activity in other sectors, including energy sector activity by TPIs. The government has recognised that this creates the potential for "regulatory clash", with Ofcom setting rules in respect to areas that would otherwise normally be for Ofgem to regulate. The government has stated that it believes this can be managed, although it has not explained in detail how.[6]

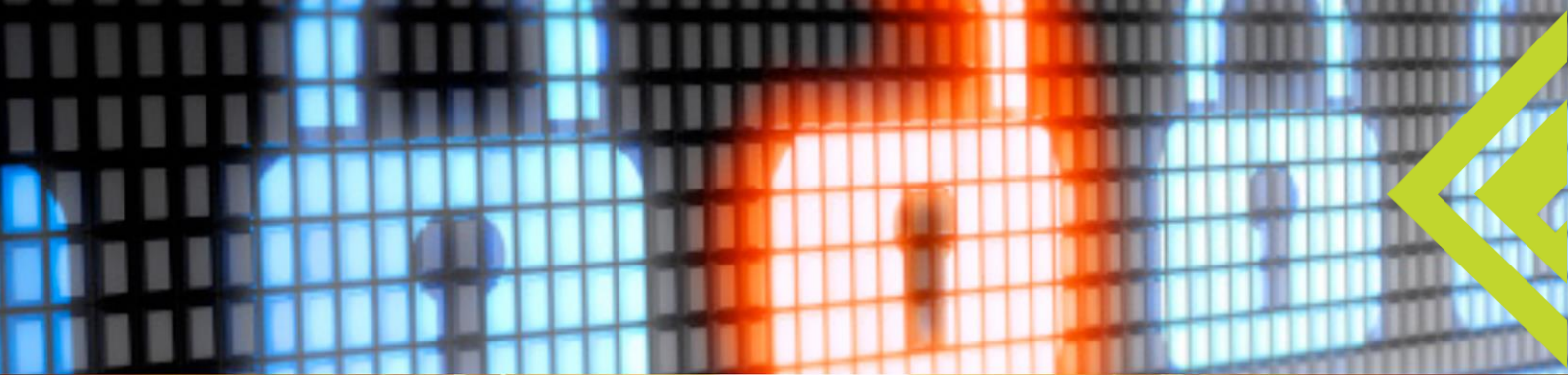
Scope for development of rights and protections in the general consumer protection regime

28. The general consumer protection regime is designed for universal application. For example, consumer rights not to be misled during the sales process are designed to apply equally whether the consumer is engaging with a provider of services in the energy sector or any other part of the economy. It is not sector specific in terms of the consumers who are protected even if some measures are targeted towards, for example, online businesses, distance sellers or business-to-business marketing.

29. This is important because:

[5] Contained in EU Directive 2018/1972

[6] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819964/EECC_Consultation_-_Publication_Version__4_Updated_.pdf and in particular pages 36 and 37.



- There is less specific detail to tell consumers or traders what is or is not acceptable in any particular situation, as compared to sector-specific regulation which can be written to address sector-specific concerns.
- The general consumer protection regime sets minimum standards across all sectors of the economy. It does not provide any heightened levels of protection in relation to services that might be seen as essential to consumers. For example, it does not provide for additional protections or rights in relation to payment options, debt and disconnection of energy supplies.7
- Due to the difficulty in amending a provision in a way that deals adequately with very particular problems associated with one particular type of trader or market (for example energy TPIs), whilst at the same time keeping that general law provision relevant for all other economic sectors, it is very hard to see how the general consumer protection regime can be used as a vehicle for dealing with sector specific concerns.

30. In addition, the legislative basis of the regime means that it is not open to any one regulator, for example Ofgem, to amend or add provisions to deal with any specific concerns that might arise in respect to TPIs. The CRA (as well as UCTA and SGSA) are Acts of Parliament and the substantive consumer protections can only be amended through further primary legislation requiring government and parliamentary prioritisation and time.

31. All of the consumer protection regulations looked at in this report implement European directives or regulations[8]. Whatever may happen in the future, at present Ofgem and other regulators do not have the powers to amend the substantive protections in the regulations. Making changes, for example to deal directly with TPI-specific concerns or to give regulators the power to do so, would require future legislation by Government and Parliament.

32. This is in contrast to sectoral regulatory regimes, in which a regulator has powers to develop specific, focussed, regulation to deal with specific policy concerns. This may be as a result of the specific powers the regulator has to directly impose requirements. Alternatively,

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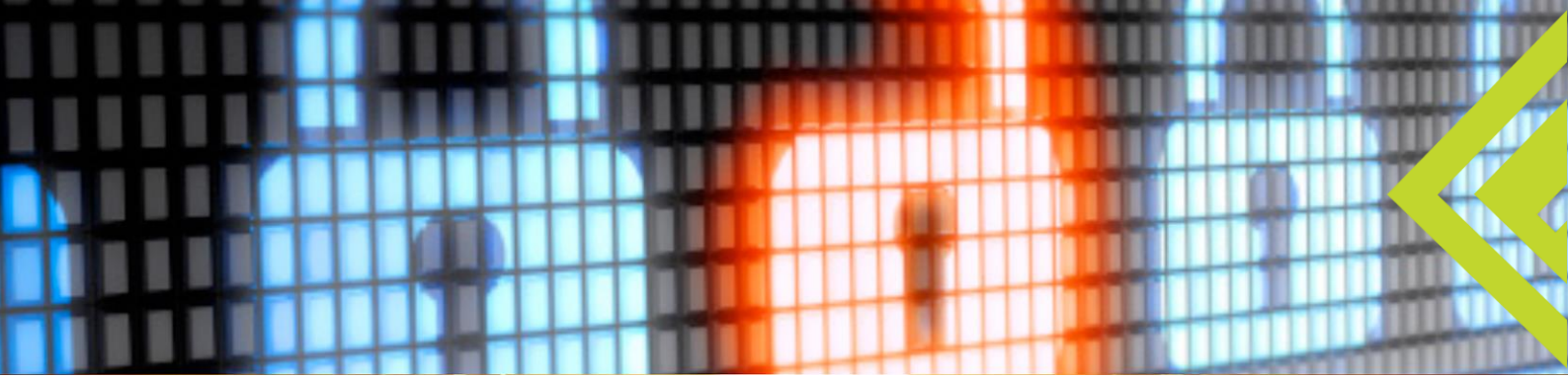
[7] There are some limited exceptions to this. For example, the protection against misleading marketing to domestic consumers is assessed against whether the actions have the potential to mislead an "average consumer". If a supplier or TPI were targeting its sales activities to a particular group, such as the elderly, then the "average consumer" would the average consumer in that group. In the event that a consumer wanted to rely on these protections, or an enforcement agency wanted to take action, then the decision on what the "average consumer" was, and whether they would have been misled, would ultimately be for the courts to decide.

[8] The provisions in the regulations were largely, but not exclusively, introduced using powers in section 2(2) of the European Communities Act 1972. For the purposes of this report, it is assumed that as per section 2 of the European Union (Withdrawal) Act 2018, EU-derived consumer protection legislation will continue to have effect in domestic law for the immediately foreseeable future, as it does at the time of writing.



legislation often gives powers to government to, relatively easily, make new sector specific regulations (and see the next part of the report for the energy sector regime).

Who is protected?

33. With a few exceptions, under general consumer protection law a "consumer" is defined as "*an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession*."[9] Therefore, **domestic consumers** are protected, with the potential for some **microbusiness** to also benefit if they are an unincorporated sole trader.

34. The **BPMMRs** are the notable exception to this, with "traders" benefitting from protections against other traders.[10] The Unfair Contract Terms Act 1977 and Supply of Good and Services Act 1982 ("**UCTA"** and "**SGSA")** give some basic protection for those who are not "consumers" for the purposes of CRA (i.e. business consumers).

How are those protections and rights enforced?

Enforcement by the consumer

35. The following remedies can be enforced privately by a consumer, if necessary in the courts in any legal proceedings to resolve the dispute between consumer and trader:

36. **CRA** rights in respect to services, digital content and goods, and protections against unfair terms can be relied upon by the consumer in any private legal dispute.[11] **Unfair terms** or notices are not binding on the consumer and therefore cannot be enforced by the trader if challenged. For example, if properly challenged, a trader could not enforce through the courts contract terms which gave it the right to unilaterally decide the price of the services or decide what the acceptable standard of service was after the consumer had entered in to the contract.[12]

37. In the event of any dispute, it is the trader that needs to show it complied with the **CCR** regulations requiring it to provide information to the consumer. The CCRs imply into any consumer contract a term that the trader will comply with the requirements on information provision. Any failure by the trader is therefore a breach of contract.[13]

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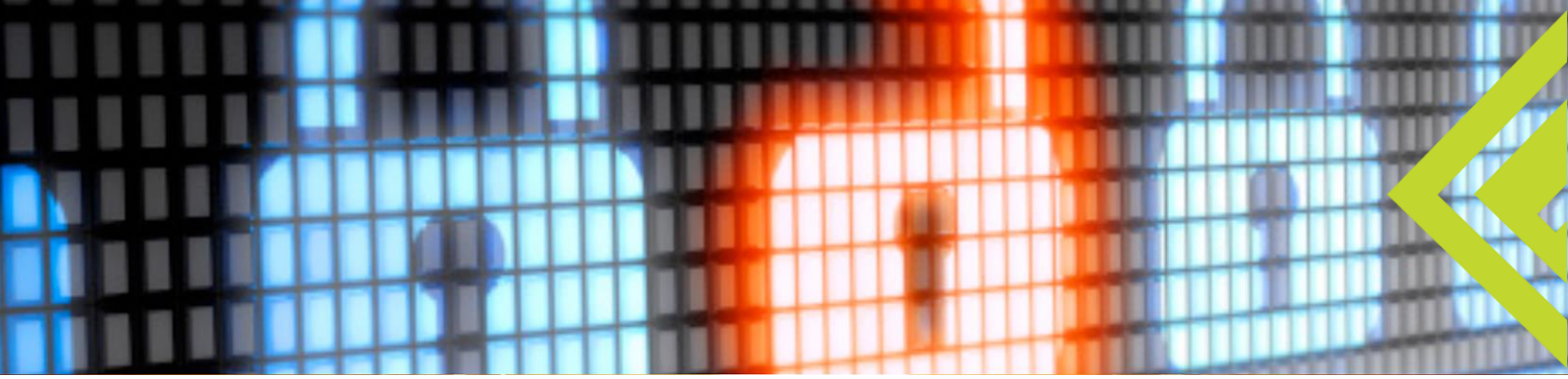
[9] See CRA section 2(3) and other identical definitions at CCRs regulation 4, CPUT regulation 2, PSRs, Electronic Commerce (EC Directive) regulation 2, the ADR regulation 3 and section 210 EA 2002 in respect to Part 8 enforcement.

[10] "Trader" means *"any person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader"* (BPMMR regulation 2).

[11] For example, section 58 CRA gives the courts powers to make orders in respect to services.

[12] Section 62 CRA

[13] CCR regulation 18.



38. Part 4A of **CPUT** gives consumers rights to redress in the event of misleading information[14] or aggressive commercial practices.[15] A consumer has rights to unwind the contract (so they are not trapped into a contract entered into as a result of misleading information or aggressive sales), to a discount and to damages. In respect to inertia selling (providing products - including services - not asked for by the consumer), the consumer is exempted from an obligation to pay for the product.[16]
39. Under the **PSRs**, the consumer has a right to repayment of charges which were levied in contravention of the PSR provisions.[17]
40. In contrast, a breach of the **BPMMR** prohibition on misleading marketing to businesses does not make business-to-business contracts void and unenforceable (so the business consumer remains stuck in the contract).[18] There is no provision in the BPMMRs for (business) consumers to seek redress for breaches either directly from the trader or via the courts, although equally there is nothing to stop the business consumer asking for it.

Enforcement of general consumer protections by enforcement agencies[19]

Ofgem

41. **Ofgem[20],** the energy sector economic regulator, has powers to enforce general consumer protection legislation:
42. Under the **CRA,** Ofgem can apply to the courts for an injunction (interdict in Scotland) to prevent the use of unfair terms and it can accept undertakings in place of an injunction.[21]

[14] A regulation 5 breach

[15] A regulation 7 breach

[16] Regulation 27M

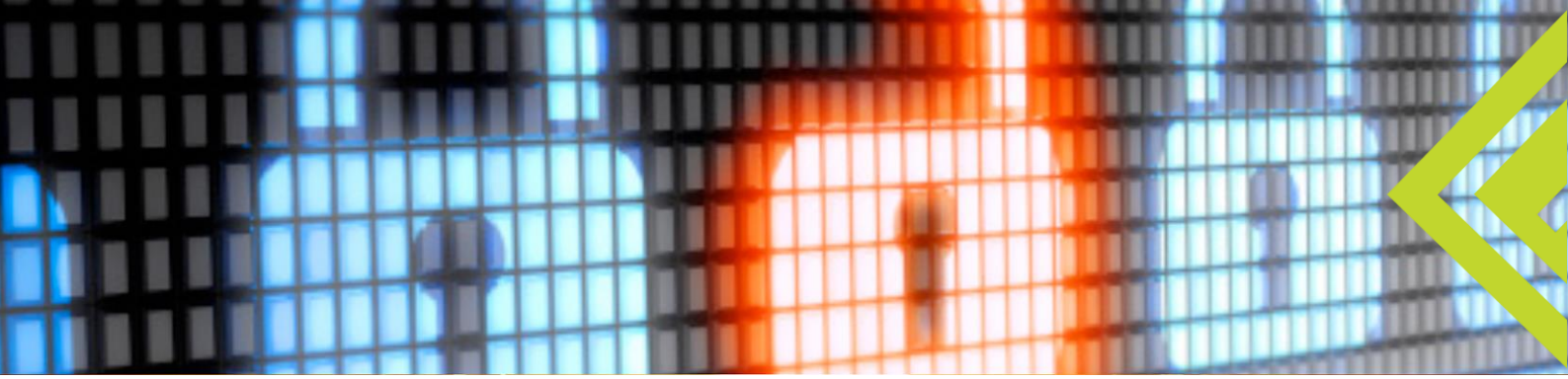
[17] Regulation 10

[18] regulation 29

[19] In this report "enforcement agencies" or "enforcers" are used to refer to organisations that have powers to enforce consumer protection laws and regulations on behalf of consumers. The term "regulator" is used to refer to an organisation that also has powers to create, amend and develop the substantive protections as well as to enforce those measures. For example Trading Standards, for the purposes of this report, are an enforcer, whereas Ofgem is both an enforcer for most relevant general consumer protection regulation and the regulator in respect to the energy sector. Note though that the CRA, for example, refers to enforcers as "regulators".

[20] Properly the Gas and Electricity Markets Authority

[21] See CRA section 70 and Schedules 3 and 5.



43. **Part 8 EA 2002** is the other key enforcement power for Ofgem for general consumer protection legislation.[22] Ofgem can take enforcement action in respect to infringements harming the collective interests of consumers and in relation to:

    - Infringements of **CCRs, CPUTs** and **PSRs.**[23]
    - Breaches of Parts 1 and 2 and Chapter 5 of Part 3 of **CRA.**
    - Other provisions of lesser practical importance.[24][25]

44. Ofgem can:

    - Apply to the court for an Enforcement Order requiring the business to stop (and not resume) the infringing behaviour. The court can also order *enhanced consumer measures* (see below) and can accept undertakings from the trader.[26]
    - Accept undertakings not to commit or repeat infringements, including accepting enhanced consumer redress measures.[27]

45. *Enhanced consumer redress* measures that the court can order (or Ofgem accept the offer of) are[28]:

    - *Redress measures*, meaning compensation or other redress provided to affected consumers, giving consumers the right to terminate their contract, or measures in the collective interest of consumers where no group of affected consumers can be identified.
    - *Compliance measures*, meaning measures to prevent or reduce the risk of recurrence of the breach.

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[22] Ofgem has been designated an enforcer (in respect to all infringements) (see *Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003/1399,* article 5 and schedule).

[23] It can take action in respect of other listed EU directives and regulations, and the UK regulations implementing them as domestic law, including all of the other regulations mentioned in the appendix save for BPMMRs. However, these other regulations are of minor importance.

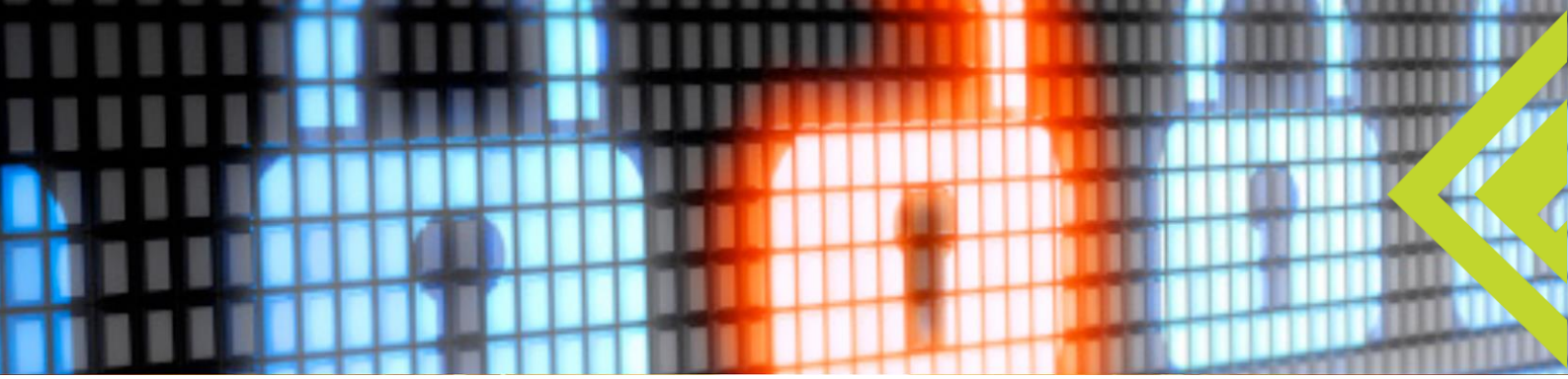
[24] In theory Ofgem could take action in respect of breaches of contract for supply of goods or services and acts of negligence towards consumers. The Supply of Goods Act 1979, SGSA, UCTA and Trade Descriptions Act 1968 are also within Part 8 Enforcement, although the power to take action depends on harm to "consumers" (individuals, not businesses).

[25] See EA 2002 sections 210 to 212, Schedule 13, *Enterprise Act 2002 (Part 8 Domestic Infringements) Order* 2015/1727 and *Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003/1593*)

[26] See EA 2002 sections 217 and 218. In urgent cases Ofgem can apply for an interim enforcement order, but otherwise normally needs to give at least 14 days' notice to the trader.

[27] Section 219

[28] Section 219A



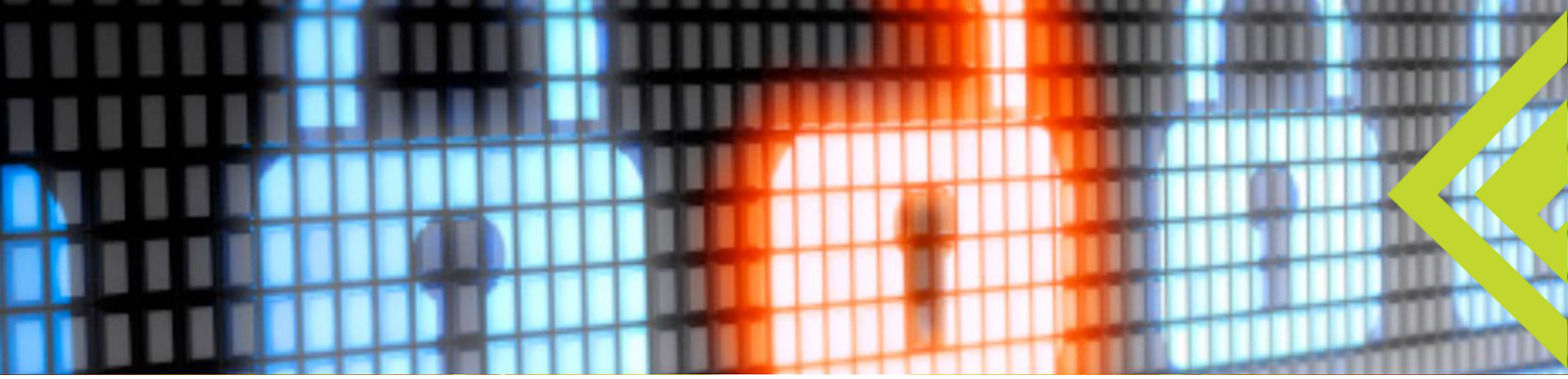
- *Choice measures*, meaning measures to enable consumers to choose more effectively.

46. Ofgem can also enforce **BPMMRs**, by applying to court for an injunction (interdict in Scotland) to stop a trader from misleading marketing to other businesses and to require the trader to correct any misleading marketing. Ofgem can accept undertakings from the trader in place of the injunction, but it cannot bring criminal proceedings.[29] Again, the BPMMRs do not however make (business) consumer contracts void or unenforceable where there has been misleading advertising.[30]
47. Whilst not current law, the government has stated that it intends to additionally give courts the power to impose financial penalties for breaches of consumer law. Ofgem (and other enforcers) will be able to ask the courts to impose fines either in addition to other remedies discussed above, or as a standalone remedy.[31]

Ofgem's exercise of its enforcement powers

48. Before Ofgem can take any action it needs to be aware of breaches, or potential breaches. Ofgem monitors the retail energy market generally, but ultimately is reliant upon particular concerns about supplier or TPI behaviour being brought to its attention in order for it to consider potential breaches and any actions it or another enforcer such as local Trading Standards can take. At present Ofgem does not have a particular remit in relation to TPIs in the way that it does in respect to suppliers (see next section on energy regulation).
49. Ofgem sets out its powers to enforce general consumer protection law in its Enforcement Guidelines.[32] Ofgem also notes the requirements upon it to liaise with the CMA in respect to enforcement. Ofgem states that it will seek to liaise with a business and resolve a matter without court proceedings if possible. Enforcement decisions will be subject to Ofgem's own prioritisation and decision making prior to commencing court actions (it has powers, not obligations to enforce general consumer protection law). In the event of enforcement via the courts (rather than resolution through engagement), Ofgem will be required to comply with usual court procedures such as disclosure.
50. This points to two important differences between enforcement of general consumer protection legislation, even if enforced by Ofgem, as compared to "sectoral" enforcement. For enforcement of general consumer protection law, Ofgem is required to comply with external

[29] Regulations 13, 15, 16 and 18
[30] Regulation 29
[31] See page 57 of https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699937/modernising-consumer-markets-green-paper.pdf
[32] https://www.ofgem.gov.uk/system/files/docs/2017/10/enforcement_guidelines_october_2017.pdf



(court) rules, procedure and timetables. This is likely to be a more involved and resource intensive process for Ofgem and requires sufficient numbers of staff with knowledge and skills in court litigation. Moreover, Ofgem does not have the same control over the outcome of the process, since the interpretation of the law and its application to the facts of the case is ultimately decided by a judge and not the regulator.

51. As at the time of writing, a search of Ofgem's public investigations database[33] revealed only two matters related to general consumer protection law. In 2013, an investigation into a supplier's compliance with the CPUTs was closed after assurances (which are not detailed) were received from the supplier. In 2011 an investigation in to another supplier was closed when the supplier agreed to compensate customers and take actions.

Other enforcers

52. There are other enforcement agencies that have powers in respect to general consumer protection legislation and who could take actions against TPIs. There are also powers to designate additional enforcers.

53. For the **CRA** Trading Standards, Ofcom, Ofwat, DETNI and NIAUR are also enforcers.[34]

54. Under the **CCRs**: Trading Standards (DETNI in Northern Ireland) are responsible for enforcement and have powers to prosecute the criminal offence of failure to give notice of a right to cancel in respect to an off-premises contract.[35]

55. **CPUT** is generally enforced under EA 2002 Part 8 (see below), but Trading Standards and DETNI have specific duties to enforce CPUT and CMA may also take action in respect to criminal offences of engaging in unfair commercial practices.[36]

56. EA 2002 Part 8 (discussed above in respect to Ofgem) can also be enforced by CMA, Trading Standards (and DETNI in Northern Ireland).[37] The Director General for Gas and for Electricity Supply for Northern Ireland, Ofcom, Ofwat, Which? (The Consumers' Association) and FCA.[38]

57. **Additional Part 8 enforcers can be designated**, and these additional enforcers can include non-public bodies.[39] The criteria for designation include:

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[33] (see https://www.ofgem.gov.uk/investigations)

[34] Schedule 3 paragraph 8

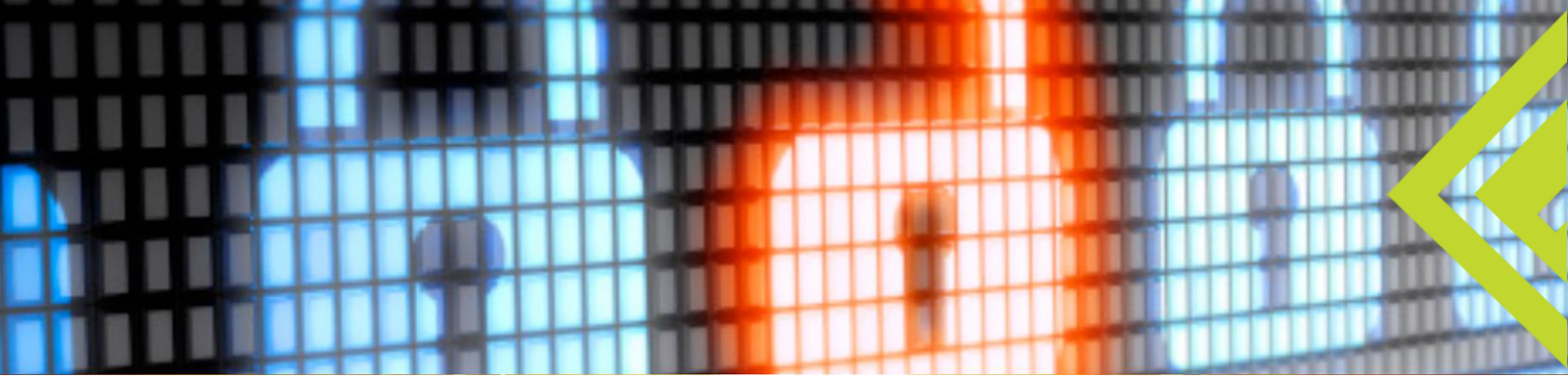
[35] Chapter 2, regulations 19 to 23 and 44

[36] Regulations 8 to 12 and 19

[37] Section 213

[38] see *Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003/1399, art 5 and schedule; Enterprise Act 2002 (Part 8) (Designation of the Consumers' Association) Order 2005/917*; and *Enterprise Act 2002 (Part 8) (Designation of the Financial Conduct Authority as a Designated Enforcer) Order 2013/478*

[39] Section 213(4)



- Independence and impartiality.
- Experience and competence.
- Ability to protect the collective interests of consumers.
- Capability and willingness to use Part 8 powers.[40]

58. It is thus possible for other enforcers, potentially including Citizens Advice or another body with a remit to protect consumers engaging with TPIs, to be designated as an enforcer by government. This could be achieved without any further changes to the general consumer protection regime or new legislation (aside from the order designating the new enforcer).

59. In respect to the **BPMMRs**, enforcement is a duty of Trading Standards (and DETNI), in their geographical area. CMA also has powers of enforcement.[41] Ofgem can also enforce the **BPMMRs**, but it cannot bring criminal proceedings in respect to the criminal offence of misleading marketing.[42]

60. In respect to the advertising codes, the role of the ASA is set out in the appendix.

[40] *Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Orde*r 2003/1399 (see especially regulations 3 and 4).

[41] Regulation 13.

[42] Regulations 3, 6 and 13

C: THE ENERGY SECTOR CONSUMER PROTECTION REGIME

Summary

Consumer protection in the energy sector is in addition to the general consumer protection regime. It provides a mixture of (some) higher standards, greater prescription on requirements and alternative "sectoral" enforcement options. Some of the energy sector regulations are, in practice, very similar to the general consumer protections, but enforceable without the need to go to court. Access to consumer consumption data is also regulated and is one area where TPIs are more tightly regulated than suppliers.

Sectoral regulation is based upon a defined category of "supplier" which requires a licence and to which obligations are attached.

Licensing of suppliers means standard supply licence conditions ("SLCs") can be imposed on suppliers. Provided legislation has given Ofgem (or government) the necessary powers over the specific policy area, SLCs can be used to implement sector specific consumer protection policies, for example on the information suppliers need to give to energy consumers.

This means that it is easier to develop specific regulation to deal with energy sector concerns, because provisions can be drafted that apply to specific businesses and activities only (instead of needing universal applicability) and because the practical mechanisms for doing this are easier (it is easier for Ofgem to introduce an amended SLC than to amend the CCRs, for example, because amending an SLC does not require any legislation and only requires Ofgem to act). SLC provisions on pricing, billing, switching and customer information, for example, show how sector specific policy concerns can be acted on relatively easily.

Additional sector specific requirements on complaints handling, compulsory and binding ombudsman dispute resolution, and guaranteed standards on certain industry activities, are also based on a defined category of supply businesses.

As Ofgem is regulator of a defined sector, it has powers to develop new regulation and to enforce it. Ofgem's guidance has additional weight and gives it "soft power".

Ofgem's enforcement powers include financial penalties, orders to compel compliance and consumer redress measures. In practical terms, it can achieve broadly the same outcomes as it can in respect to the general consumer protection, but with additional powers to fine.

Ofgem enforces sectoral regulation using its own rules and decision makers, with limited grounds of appeal against an Ofgem decision.

The powers already exist to make TPIs a licensable activity (with its own SLCs etc), similar to licensed supply.

There is also a precedent for making a separate regime, which regulates the activities of a larger and less easily defined group of businesses, enforceable "as if" part of the established sectoral regime. On this precedent, the substantive regulations for particular TPI activities could be developed outside of the existing sectoral regime, but still be enforced using established Ofgem processes and powers.

Specific consumer protection provisions generally apply to domestic consumers only, although some important protections such as the ombudsman scheme also apply to microbusinesses.

Voluntary industry codes provide protections over and above general consumer protection in respect to activities where Ofgem does not have specific regulatory powers. These codes do not have the legal power of the general consumer protection regime or (energy) sectoral regime, but they do have provisions for sanctions and for dealing with complaints. They promote good practice and provide additional requirements on areas of particular concern, for example provision of information to consumers.

TPIs could provide electricity to customers with electric vehicles, via public charging points, whilst remaining outside of the regulation of energy supply.

What is the regime?

61. Participants in the energy sector are subject to general consumer protection legislation in the same way as participants in other sectors.
62. In addition, suppliers are subject to further sector specific regulation. The scope of this regulation is wide and much of it is not relevant to a comparison of the protections provided for consumers engaging directly with a supplier or via a TPI. For example, regulation in respect to wholesale trading, balancing and settlement, the suppliers' role in the integrated energy network, or in the delivery of environmental schemes is not consumer protection regulation.
63. The focus of this report is on the regulation of the supplier – consumer engagement and where the addition of a TPI may have an impact or otherwise provide a comparator in terms of consumer protection.
64. Whilst suppliers are the main regulated entity in this context, the requirements on suppliers often include requirements to ensure that those acting on their behalf (often TPIs) also act within the regulations. Voluntary codes in the energy sector through which some TPIs have accepted quasi-regulatory requirements that go above and beyond the requirements of the general consumer protection regime have also been looked at.[43]

[43] Where codes are referred to, they are not referring to industry codes which regulated industry participants are required to comply with, for example licence conditions, and which regulate much of the

65. The **Electricity Act 1989 (EA89)** and **Gas Act 1986 (GA86)** provide the primary legislative framework for sector-specific consumer protection**.**

Supplier licencing and SLCs[44]

66. Suppliers require a licence: it is a criminal offence to supply without one[45] and Ofgem has been given the powers to grant licences.[46]

67. Licences may include conditions for protecting the interests of existing and future electricity and gas consumers.[47] (Obligations can be also be attached to licences specifically in relation to the north of Scotland, see appendix).

68. Government has determined a set of **standard supply licence conditions** (**SLCs**), which can be amended using powers contained in various legislation including:

    - **Electricity Act 1989 (EA89)** and **Gas Act 1986 (GA86)** (on which see below);
    - s2(2) European Communities Act 1972 (allowing SLCs to be used to give effect to EU law); and
    - a range of other law including, for example the Domestic Gas and Electricity (Tariff Cap) Act 2018 which introduced domestic price caps.[48]

69. SLCs are automatically incorporated into licences and Ofgem may modify the SLCs either as they apply to a particular licence or generally, subject to requirements for consultation. Ofgem's decisions can be appealed to CMA by licensees and Citizens Advice or Citizens Advice Scotland. [49]

70. The requirement for a licence, the imposition of SLCs and the power to modify SLCs thus gives Ofgem and government the power to develop and implement consumer protection measures

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workings of the gas and electricity networks and markets, for example the Retail Energy Code, Smart Energy Code or the Balancing and Settlement Code, to name just three.

[44] Government and Ofgem have undertaken a joint review of the future of the retail energy markets. See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819624/flexible-responsive-energy-retail-markets-consultation.pdf for the resulting July 2019 consultation document and https://www.gov.uk/government/consultations/flexible-and-responsive-energy-retail-markets for the relevant webpage. At the time of writing this report, the results of the consultation process are not known. However, the content of the consultation paper has been taken in to account when writing this paper. The review does not appear to propose any immediate and fundamental changes to the energy regulatory regime described in this part of the paper. It does, though point to the need for reforms to retail energy regulation.

[45] section 4(c) EA89; section 5(1) GA86

[46] section 6(1)(d) EA89; section 7A(1) GA86

[47] section 7 EA89; section 8 GA86

[48] sections 33 and 81 Utilities Act 2000

[49] Sections 8A, 11A,11D-11H and Schedule 5A EA89; GA86 Sections8, 23 to27 and Schedule 4A

targeted specifically at the energy supply market and the problems or opportunities that are perceived there. However, whilst there are powers to modify SLCs, Ofgem (or the government) must also have necessary powers over the issue that is the subject of the (proposed) SLC. For example, before using SLCs to give effect to the retail energy price cap, the 2018 Tariff Cap Act was passed so that Ofgem clearly had the necessary powers in this area; the powers to use the SLCs to implement EU measures is explicitly provided for and Ofgem has powers in respect to general consumer protection and suppliers (but not TPIs).

71. The content of the current SLCs is discussed in the appendix.

Scope for future expansion of the licensing regime

72. The power already exists for government to designate new licensable activities in respect to activities connected with the supply of electricity. This explicitly includes *"giving advice, information or assistance in relation to contracts for the supply of electricity to persons who are or may become customers under such contracts, and providing any other services to such persons in connection with such contracts"* whether or not that activity is undertaken by a supplier. This power includes the ability to make related amendments to other legislation, for example to introduce new licence conditions attached to that new licensable activity.[50]

73. Ofgem can ask the government:

- to create a licensable activity of acting as a TPI in the energy sector (but only as long as the TPI activity is "connected with" the supply of electricity. It could not make TPI activity more generally a licensable activity); and
- to attach licence conditions to the TPI licence which could subsequently be amended, developed, and enforced (see below) to deal with perceived consumer protection issues, without necessarily needing changes to EA89 and GA86.

Exemptions to supply licence requirements, "resale" regulation and potential TPI energy sales to electric vehicle owners

74. Suppliers can be **exempt from licensing**. However, the categories for exemption are such that they are not relevant for considering how a "normal" supplier is regulated and they are very unlikely to apply to most TPI activity. [51] There are no proposals to expand exemptions so that regular suppliers do not require a licence. Licence exempt suppliers are still subject to some

[50] See EA89 sections 56A to 56C for the process; for gas provisions, see GA86 sections 41C and 41D

[51] Section 5 EA89 and section 6A GA86 and most importantly the *Electricity (Class Exemptions from the Requirement for a Licence) Order 2001 (SI 2001/3270)* as amended. Exemptions from the requirement for an electricity supply licence are available for small suppliers (supplying less that 5MW, of which 2.5MW is to domestic consumers), for "on-site" supply" (where electricity is consumed at the same location as it is generated) and for resale. Resale occurs where a customer (A) of a licensed supplier (B) re-sells the electricity to A's customers at the same premises as A received the licensed supply from B. A typical example of this is a landlord that "resells" electricity to its tenants.

more limited obligations, including providing copies of a contract and explaining conditions of termination or renewal.[52]

75. TPIs may, in the future, become interested in arrangements under which the TPI purchases energy from a licensed supplier and then sells that energy to the end consumer perhaps as part of a larger suite of products and services. If the TPI were selling to an end consumer for consumption in a property (the consumer's home or business premises), such an activity would constitute "supply" requiring a licence from Ofgem. The exemption from the requirement for a licence in the event of "**resale**" of energy only applies where the resale takes place on the same premises as the original licensed supply. Moreover, making a profit from the resale of energy is (and has been for many years) in effect, prohibited by Ofgem's Maximum Resale Price control.[53]

76. The potential for TPIs to become licence exempt suppliers, whether as resellers or otherwise, has therefore not been given further consideration in this paper.

77. However, as Ofgem has noted, neither the requirement for a licence nor resale price controls apply in circumstances in which a trader (which could be a TPI) is selling electricity to **electric vehicle (EV)** owners and doing so only via **charge points**, having first purchased the energy from a licensed supplier.[54] This is because the requirement for a licence (and licence exemptions and resale price controls) apply to the supply of energy to premises. If a TPI were only selling electricity to EVs via charge points, then that limited activity would not be "supply" and would not need a licence, although the prior supply of the electricity to the charge point itself would require a licence.[55]

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[52] section 5B and Schedule 2ZB EA89; section 5C and Schedule 2AB GA86

[53] See https://www.ofgem.gov.uk/publications-and-updates/decision-application-maximum-resale-price-resale-electricity-charging-electric-vehicles, section 37 GA 86 and section 44 EA 89

[54] See www.ofgem.gov.uk/system/files/docs/2019/10/what_you_need_to_know_about_selling_electricity_to_ev_users.pdf

[55] To elaborate further:

- A TPI could sell electricity from public charging points to EVs and remain a TPI (only), so long as the electricity was separately supplied to each charging point by a licensed supplier. The TPI would be a customer of the licensed supplier and would, in turn, sell the power to EV owners via the charging point (and Ofgem has clarified that this activity does not constitute regulated "resale").
- However, if the TPI was also responsible for supplying the electricity to the charging point (or to premises more generally) then that would require a supplier licence. This might arise, for example, if the TPI was supplying electricity to a domestic residence for use in a private charging point.
- It is possible to envisage future business models in which a TPI may nevertheless provide power to EVs in a domestic setting and remain a TPI only (i.e. not become a supplier requiring a licence), albeit that this seems less likely than in respect to public charging point. For example, an EV manufacturer might guarantee to its customers a set per unit price for charging its cars wherever they were charged, with contractual arrangements in place under which the EV manufacturer

78. Therefore, the potential does exist for a TPI to take on a limited role in providing electricity to its customers via electric vehicle charging points. This would be outside of the scope of current regulation of energy "supply".

Other protections beyond the SLCs

79. The **Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008 ("CHRs")** are made by Ofgem with powers given to it by the **Consumers, Estate Agents and Redress Act 2007 ("CERA**").

80. CERA[56] gives Ofgem the power to set requirements for complaints handling procedures and for an alternative dispute resolution scheme. However, those powers are limited to placing obligations on suppliers (plus network providers); they do not provide powers for the regulation of TPIs.[57]

81. The protections given to domestic and microbusiness consumers by the **CHRs** are discussed below and in further detail in the appendix.

82. The **Gas and Electricity Regulated Providers (Redress Scheme) Order 2008** was made by Ofgem using powers given to it by CERA and in respect to suppliers. It requires suppliers to be members of a "qualifying redress scheme", which is, in practice, an **ombudsman** scheme approved by Ofgem. As with the CHRs (above), the power to require membership of a scheme does not cover TPIs.[58] (However, organisations can voluntarily submit to the jurisdiction of the energy ombudsman, for example via the Heat Trust scheme, on which see next paragraph).

    Domestic and microbusiness consumers are protected (CERA does not give the power to Ofgem or government to expand this to non-microbusinesses). The ombudsman scheme

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would pay whichever supplier was providing power to the charging point and whether that charging point was public or private. The EV manufacturer would pay the relevant licensed supplier for the power taken via the charging point and then separately deal with any payments by the consumer in the context of the arrangement between the EV provider and the consumer.

[56] See sections 43 to 46 and Part 2 generally

[57] see s42 and definition of "regulated provider" and "relevant consumer"

[58] CEAR section 47.
Directive (EU) 2019/944 Art 26(2) provides that in respect to electricity supply EU member states are required to provide out-of-court dispute settlement for *"any dispute that arises from products or services that are tied to, or bundled with, any product or service falling under the scope of this Directive."* This is a slightly wider wording than previous Directive 2009/72/EC (Article3(13)) that simply required an energy ombudsman to resolve disputes arising in respect to supply and which the UK was already complying with by virtue of the pre-existing 2008 Order. The addition of the wording *"tied to, or bundled with"* could capture ancillary services offered by a supplier alongside its traditional supply service. Arguably, it could also capture TPI-type services. However, it is not clear that the 2019 Directive extends the requirement for compulsory and binding alternative dispute resolution services to unlicensed TPIs. The 2019 Directive provisions are required to be transposed in to domestic law by 31 December 2020.

must be able to compel suppliers to offer an apology or explanation, to pay compensation and to take specific steps to remedy the complaint. The scheme is for complaints that have not been resolved to the satisfaction of the complainant by the supplier, or complaints about the difficulty in making a complaint.[59]

83. Ofgem has only approved one scheme and requires suppliers to be members of the **Ombudsman** Services: Energy scheme . The scheme is also operated for Heat Trust members on a voluntary basis (see appendix for more on the Heat Trust). It is a service that suppliers (not consumers) pay for.

84. The **Electricity and Gas (Standards of Performance) (Suppliers) Regulations 2015 ("GS")** are made by Ofgem using powers in EA89 and GA86[60] to prescribe standards of performance in respect to suppliers. There are similar powers in respect to electricity distributors and gas transports, but not TPIs. The **GS** provide protections for domestic customers, and some limited protection for microbusiness customers. The protections are discussed in further detail in the appendix.

Ofgem guidance

85. Ofgem has published a range of guidance on compliance for suppliers, as well as various "open letters" and similar statements as to what it expects to see by way of compliance[61]. Many of the SLCs dealing with consumer engagement issues explicitly require suppliers to have regard to any guidance on that SLC published by Ofgem. As the sector regulator, Ofgem's word on these matters carries weight given that in a sectoral enforcement regime Ofgem takes decisions on breaches (see below for enforcement) and given that it has the capacity to further develop SLCs GS, for example if it is concerned about supplier behaviour. As with other sectoral regulators, Ofgem also benefits from speaking to a defined group of businesses on issues of some (at least) common understanding. This is a contrast to the general consumer protection regime. Therefore, whilst not hard-edged law, Ofgem's guidance does contribute towards the overall sectoral regulatory regime.

The Data access and Privacy Framework

86. The **Data Access and Privacy Framework** ("the Framework") is contained in the Smart Energy Code and in SLC 47 for electricity and SLC 41 for gas. The Framework provides data protection in addition to the general data protection law regime contained, for example, in the GDPR. It regulates the access to microbusiness and domestic consumers' energy consumption data and gives consumers control over who can access their data, how often and for what

[59] CEAR section 49

[60] Sections 33A to 33D and 47 of GA 86 and sections 39 to 39B, 42A and 60 of EA 89

[61] See for example https://www.ofgem.gov.uk/licences-industry-codes-and-standards/licences/guides-supply-licences

purposes. There are requirements on consumer consent, data privacy and updates for consumers on how data is being used and on consumer consent.

87. Suppliers can access monthly and daily energy consumption data from domestic consumers for the purpose of regulated supplier activities such as billing. Consumers have a choice about whether to allow suppliers access to more detailed data and for more purposes. Suppliers can access data that is more granular than monthly, but not more granular than daily, where they either have the consumer's consent or the consumer has not opted-out from sharing this data. Suppliers can only access data that is more granular than daily if they have obtained the consumer's consent to do so. In obtaining consent, the supplier must explain how the data will be used. Consent is also required to use any consumption data for marketing purposes.

88. The Smart Energy Code allows authorised parties to access energy consumption data directly from a consumer's smart meters. Safeguards must be met including obtaining the consumer's consent and providing information to the consumer ahead of data collection and at appropriate intervals, including on how data is being used and opt-out options. Parties such as TPIs that are engaged in this are subject to a privacy assurance regime. (Alternatively, as under the general law, TPIs and other third parties are able to access consumer data if the consumer has exercised their right to ask their supplier for their consumption data and if the consumer has then chosen to share that data with the TPI, as may happen for example when using a price comparison website).

89. In respect to access to consumer consumption data, the restrictions on TPIs are therefore greater than on suppliers, in that they do not have any access for any purpose without the consumer specifically agreeing to this. Suppliers have some access for the purposes of fulfilling their roles as licensed suppliers and have the option of obtaining the consumer's consent for more access to provide further services, as well as marketing.

Voluntary Codes

90. In addition to compulsory sectoral regulation, there are a number of voluntary codes, particularly focussed on parts of the energy sector not currently subject to sectoral regulation and that relevant industry participants may choose to adhere to. These are not hard-edged law: they do not impose obligations on businesses that do not choose to join and there is no power in law to compel redress or impose fines.

91. However, common features of all of these schemes is that they set requirements for participants over and above those required by general consumer protection law, if only by prescribing information that needs to be shared with consumers for example. They all have some sort of independent code administrator who monitors compliance, investigates complaints and has powers to sanction scheme members on an escalating basis with expulsion from the scheme as the ultimate penalty. Under CPUT falsely claiming membership of a code is an unfair commercial practice and so the general consumer protection law supports codes by preventing false claims to accreditation. The use of codes to promote unfair practices or mis-selling is also prohibited (under CPUT, CCRs and BPMMRs).

92. As with other voluntary industry schemes, although they are limited in legal terms, the power of the codes lies in providing for a common set of standards and therefore some additional comfort for consumers engaging with members. Codes also provide a potential starting framework, or set of workable rules, for future compulsory regulation.

93. The Confidence Code, Flex Assure Codes and Heat Trust scheme are briefly discussed below and in the appendix.

Who is protected?

94. In respect to energy regulation, most SLC and GS provisions relate to "**domestic"** consumers only. However, there are important protections for "**microbusinesses**" and provisions on complaints handling and ombudsmen protect domestic and microbusiness consumers. A few SLCs protect all consumers generally.

95. "Microbusiness" is defined in various pieces of regulation (or microbusinesses are captured within the relevant definition of a consumer without being named as such) as:

- employing fewer than 10 employees (or their full time equivalent) and having an annual turnover or balance sheet no greater than €2 million, or
- consuming not more than 100,000 kWh of electricity per year, or

consuming not more than 293,000 kWh of gas per year.[62]

Summary of the protections provided

96. In addition to general consumer protections, sectoral energy regulation therefore gives the following protections:

Sales and marketing

- Tariffs and terms of contract must be easily identifiable, clear and easily comparable. Any environmental claims must be supportable.
- All engagement with domestic consumers, by suppliers or their representatives, must be fair, honest, transparent, appropriate and professional (a higher standard than the general consumer law prohibition on poor behaviour). The same is true in respect to engagement with microbusiness consumers on matters of billing, contract information, transfers and deemed contracts.

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[62] See, for example, the gas and electricity SLCs, at 7A, and the *Gas and Electricity Regulated Providers (Redress Scheme) Order 2008* at regulation 2. This definition ultimately comes from the EU *Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C (2003) 1422)*. It has been included, for example, within the definition of "SME" in the fourth (clean energy) package (Directive (EU) 2018/2001).)

- Only appropriate products can be marketed to domestic consumers[63].

During the contract

- The content of contracts, in particular domestic consumer contracts, is prescribed so that rights of dispute resolution, renewal and termination are made particularly clear.
- Prices are controlled, in particular by the present retail price caps of deemed contract tariffs and standard variable tariffs, but also by limits on the tariffs consumers can be transferred on to in the absence of any active decision making by them (for example, customers cannot be transferred on to "dead" tariffs).
- Billing information needs to be clear and suppliers are required to assist consumers with payments and clearance of debts. Consumers cannot be billed for consumption more than 12 months previously.
- Consumers in a vulnerable situation must be identified and if necessary given additional assistance.
- In respect to key industry activities such as fixing meters, suppliers have prescribed standards of service to meet, with a regime of automatic compensation if standards are not met. These are not activities TPIs would be likely to undertake, but show how suppliers have prescribed requirements that TPIs do not.
- Suppliers are required to operate effective complaints handling processes, with referral of unresolved consumer complaints to the ombudsman for binding resolution. This includes obligations to refer consumers to independent sources of advice, including Citizens Advice and to deal effectively with referrals of complaints in respect to consumers in a vulnerable situation or at risk of disconnection and which come from the Citizens Advice Extra Help Unit.
- Variation of contracts is restricted.
- Suppliers are required to engage with domestic consumers in particular around contract renewals, to encourage switching and to make sure the consumer knows what happens if they do not switch.
- Historical consumption data must be given to the consumer if they ask for it.
- Control over access to and use of historical consumption data by suppliers and TPIs.

[63] Neither SLC 0 nor SLC 25 define what is "appropriate", although SLC 25 states that it depends upon the domestic consumer's characteristics and / or preferences. In the event of any dispute between a consumer and supplier it would therefore be a matter for Ofgem, or the energy ombudsman (if dealing with an individual complaint) to decide whether any inappropriate products had been marketed, having reference to the consumer being marketed at. The products in question are gas and electricity tariffs (SLC 25) and "products and services" more generally (SLC 0), although this would seem to be limited to products and services provided by the supplier in its role as a licensee.

In addition:

- Confidence Code accredited price comparison websites or apps have specific requirements placed upon them, over and above those of general consumer protection law, in respect to information they provide to consumers (matters such as comparability of tariffs, pricing, search results and explanations of key issues).
- Flex Assure code members are required to provide nondomestic consumers engaging with demand side response services clarity of offering and terms, good practice in sales and marketing, information provision, technical due diligence, and complaints handling.
- Consumers of heat from Heat Trust scheme members are given substantively very similar protections to those that apply in respect to the licenced supply of gas and electricity, including the right to take complaints to the energy ombudsman.
- Gas and electricity consumers in the north of Scotland (only) are given additional protections against potential licensed supplier discrimination based upon geography.

97. See the appendix for more detail on these protections. With the exception of the voluntary TPI codes, the requirements are placed upon suppliers but not (directly) on TPIs. To the extent that the supplier engages with consumers via a TPI, the supplier is required to ensure that its obligations as a licensee are met (or not breached) by the TPI as necessary. Ofgem has sought to frame SC requirements as "outcomes based" rather than prescribing the precise steps a licensed supplier must undertake to achieve the required result, however the degree of prescription over and above the requirements of the general law is still notable.

How are those protections and rights enforced?

Enforcement by the consumer

98. Domestic consumers and microbusiness can take unresolved disputes with their supplier to the energy ombudsman for a binding (on the supplier) resolution. They can do this to enforce the protections they are given as gas and electricity consumers. This is free (for consumers) and an easier process for the consumer than resolving disputes via the courts. If their interaction is with a TPI or other business which is covered by a voluntary code, unresolved complaints can be made to an independent code administrator or an alternative dispute resolution scheme (which may be the energy ombudsman).

"Sectoral" enforcement by Ofgem

99. Ofgem has specific enforcement powers in relation to **suppliers** who breach **SLCs, CEAR, CHRs, and GS**.[64] It does not have powers of enforcement in respect to TPIs, but they are not subject to these substantive obligations anyway. This is often called "sectoral" enforcement, to distinguish it from enforcement of general consumer protection law (via the courts), competition law enforcement or (in Ofgem's case) its enforcement of the REMIT wholesale energy market regulations, all of which involve different regimes of rules, powers and procedure.

100. Ofgem can impose **provisional** or **final orders** requiring the supplier takes steps to comply with its obligations and can impose **penalties** of up to 10% of turnover (as well as pursuing potentially more flexible alternatives discussed in the paragraphs immediately below).[65] It can also impose **consumer redress orders** requiring suppliers to remedy the consequences of a breach and take further actions to avoid a future breach, including:

    - paying compensation to affected consumers,
    - issuing a written statement setting out the contravention and its consequences, and
    - the termination or variation of consumer contracts.[66]

101. Ofgem's powers are subject to procedural requirements that include allowing the supplier and third parties (including Citizens Advice) to make representations. Suppliers can appeal to the courts against an Ofgem decision, but only on limited grounds of failure to follow prescribed procedure, Ofgem going beyond its powers, or that financial penalties or consumer redress orders are unreasonable. Penalties imposed by Ofgem can be enforced by it as civil debts and orders enforced with court injunctions if necessary.[67] Failure to pay fines or comply with orders are also grounds for revocation of the licence (this is a standard condition of supplier licences, but not an SLC or EA 89 or GA 86 provision).

102. Ofgem's Enforcement Guidelines[68] explain how Ofgem exercises these powers. Ofgem operates a system of prioritising its compliance and enforcement work, overseen by senior civil servants and an Enforcement Oversight Board. Decisions on liability and penalties are decided in contested cases by the Enforcement Decision Panel ("EDP"). EDP also has a role in approving settlements of investigations, or a senior Ofgem civil servant alone can make a decision in relatively more minor cases (see next paragraph in respect to alternative resolution of matters). EDP is independent of the regulator's day-to-day enforcement and policy development work, however it is not independent in the way that judges and the courts

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[64]" Ofgem's "sectoral" enforcement powers are in relation to a "regulated person" and breaches of a "relevant condition" (an SLC) or a "relevant requirement", see EA 89 s25 and Schedule 6A paragraphs 1 and 6

[65] Sections 25 and 27A EA89; sections 28 and 30A GA86

[66] Sections 27G and 27H EA89; sections 30F and 30G GA86

[67] see EA sections 25 to 27O for more; see GA86 sections 28 to 30O

[68] https://www.ofgem.gov.uk/system/files/docs/2017/10/enforcement_guidelines_october_2017.pdf

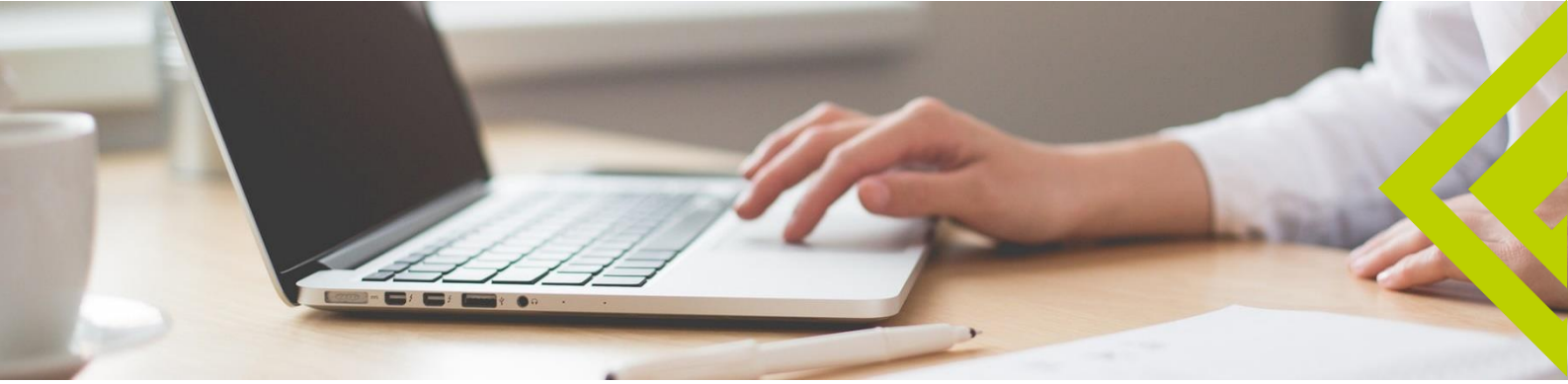
are. EDP takes decisions in the context of Ofgem's strategic policy perspective and as an economic sector regulator.

103. Ofgem can also resolve matters through a combination of "settled" formal enforcement cases and alternative resolution. In the former, Ofgem will typically agree a consumer redress package with the supplier under investigation, with the supplier taking any steps necessary to end the breach(es) to the satisfaction of Ofgem, to compensate affected consumers and potentially making an additional payment of Ofgem's redress fund. In return the supplier receives a discount on the "penal" (as opposed to compensatory and redress) element of any package. A nominal formal penalty of £1 (paid to the Treasury's consolidated fund) is applied, in order to ensure Ofgem's legal powers are engaged. It is also open to Ofgem, in particular prior to the more formal stages of a contested case or settlement process, to resolve a matter through alternative measures. In this case, the supplier will take steps to rectify any breaches and if necessary deal with consumer detriment, to the satisfaction of Ofgem and so that no formal enforcement steps are needed.

104. A search of Ofgem's published data on compliance and enforcement work suggests that a significant proportion of suspected non-compliances are resolved through alternative measures and the significant majority of formal enforcement outcomes are settlements. Contested cases argued all the way to a hearing in front of the EDP are rare. In recent years, there has also been an increase in the use of Provisional and Final Orders by Ofgem, to order suppliers to take steps to remedy breaches. Whilst it is open to Ofgem to accept undertakings in place of court orders in the general consumer protection regime (see the previous discussion of enforcement of this regime), Ofgem's out of court sectoral powers, alternative resolution and settlements provide the regulator with greater flexibility, in practice, to resolve compliance concerns.

105. Ofgem's "sectoral" enforcement does not apply to TPIs and it is limited to a defined list of "regulated persons", "relevant conditions" and "relevant requirements". However, there is a precedent for the application of the regime beyond these limits. The (non-consumer focused) electricity Capacity Market regime is enforced by Ofgem "as if" the obligations placed on the non-licenced participants were obligations on a licensee under the sectoral regime. Giving Ofgem these powers required legislation contained in an Act of Parliament and regulations made by government using powers in that act.[69] However, the sectoral enforcement of this new regime (the Capacity Market, with its own regulatory requirements on participants) has been achieved without having to amend the legislation in EA89 or GA86 and without, for example, having to create a potentially open-ended list of licensed "regulated persons", "relevant conditions" and "relevant requirements". It is a form of authorisation regime in the energy sectoral world (see Part E, below, for more).

[69] See the Energy Act 2013 section 36 and the Electricity Capacity Regulations 2014 regulation 67.



D. COMPARISON OF PRESENT PROTECTIONS AND RIGHTS FOR CONSUMERS ENGAGING WITH TPIS AND DIRECTLY WITH SUPPLIERS

Summary

Consumers are protected when engaging with the energy market by both the general consumer protection regime (applicable to TPIs and suppliers) and the energy regime (applicable only to suppliers). However, consumers are less protected when engaging with TPIs as compared to when engaging with suppliers.

Obligations on suppliers may indirectly control TPIs, who are acting on behalf of a supplier.

The Standards of Conduct reflect a required level of service from suppliers above that of general consumer protection law.

SLCs and GS provide heightened prescription in areas where additional regulation has been deemed necessary in order to encourage a more effective consumer market. In some areas, particularly around contract information and dealing with consumer debt, there are materially increased requirements on suppliers as compared to the general consumer protection regime and the obligations that would apply to TPIs.

The pricing and billing protections consumers benefit from when engaging with a supplier on its core product (mains gas and electricity) are in contrast to the relative lack of protection in respect to TPIs and their services.

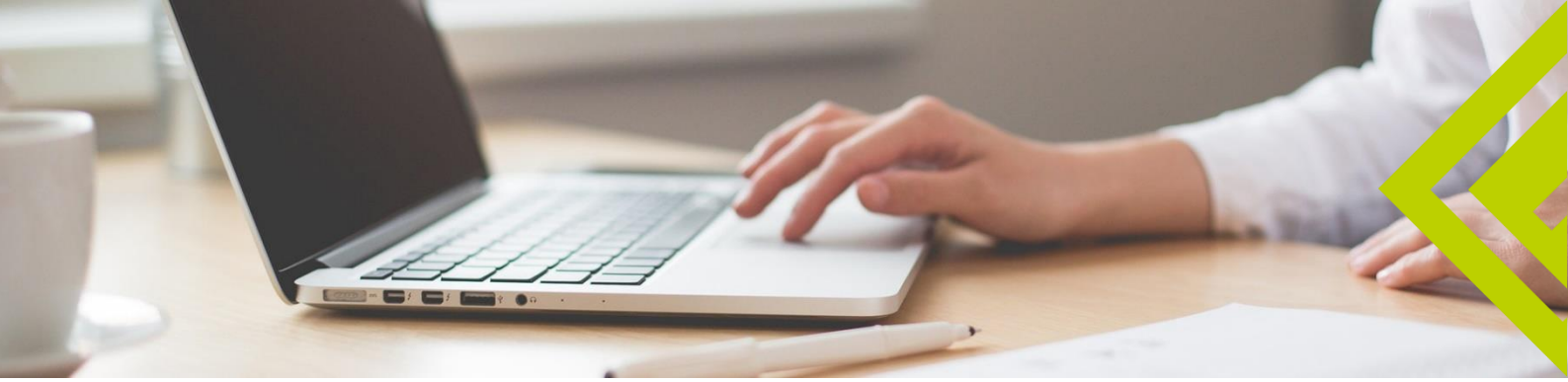
Both domestic and microbusiness consumers benefit from the requirement on suppliers to operate and resource effective complaints handling processes, and to be bound by the decisions of the energy ombudsman. There is no similar requirement on TPIs.

Consumers engaging directly with a supplier are also giv extra protection by Ofgem's ability to use its sectoral enforcement regime as well as its "soft power" to shape expectations of those it regulates in way that cannot be done in the general consumer protection regime.

Microbusinesses are given protections under energy regulation (of suppliers) that they will not generally achieve in relation to TPIs and the general consumer protection regime.

Voluntary codes give some additional protections (as compared to the general consumer protection regime) for consumers engaging with some TPIs. These protections generally address specific (potential) issues related to the particular TPI type (for example Confidence Code PCWs and search results), ensure a process of complaints handling and raise minimum expectations of code members in terms of consumer engagement.

Whilst positive, for the protection of consumer codes are voluntary only and lack hard-edged enforcement powers.



Analysis

106. The detailed protections of the general consumer protection regime, and of the energy specific regime, are set out in the appendix. The appendix also includes an analysis of how provisions of both regimes apply during the "life cycle" of consumer engagement, from pre-contract advertising and marketing, to the end of any contract.

107. In this section, the results of the comparison of the protections offered to consumers engaging with the energy market via TPIs and engaging directly with licenced suppliers have been analysed, as well as some specific points in relation to certain TPI models.

Rights and protections under the general consumer protection regime when engaging with a supplier or TPI

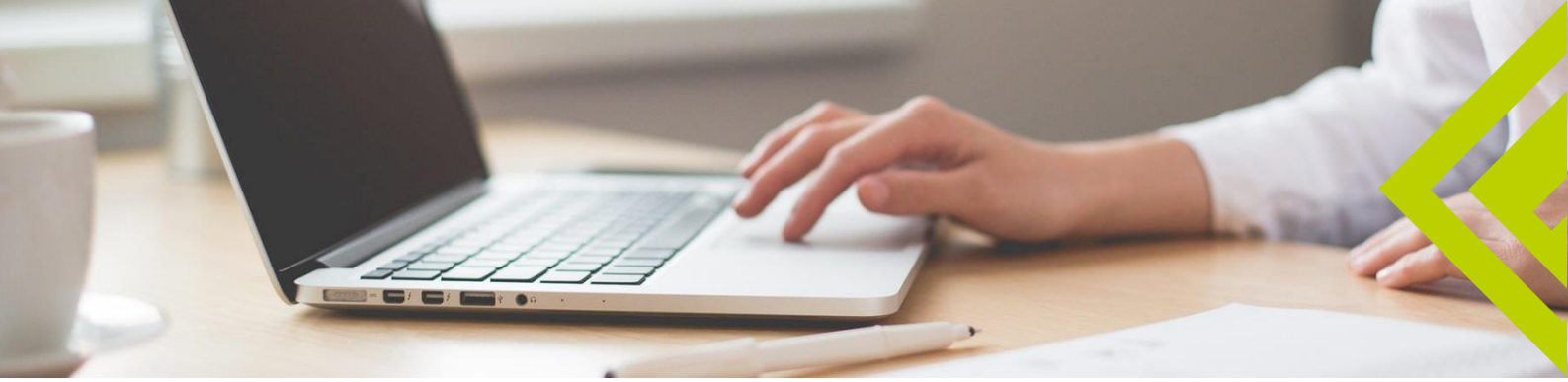
108. In summary, the general consumer protection regime provides the following protections to a domestic consumer when engaging with a TPI (of any type) or a supplier in respect to the provision of services or digital content:

Sales and marketing

- Protections from misleading advertising and marketing.
- Services and digital content will be as described.
- Consumers will be able to understand the terms of any contract.
- Consumers will be provided with information about the trader's identity, complaint handling policy, timings, duration and termination of contract and key terms of the contract on price and the services/digital content.
- Consumers will not be subject to "unfair practices" such as misleading the consumer, aggressive sales practices or inertia selling.
- Consumers have a right to a cancellation period (currently 14 days), in the case of "distance" or "off-premises" contracts. (Distance contracts being those not concluded face-to-face, for example online or telesales. Off premises contracts being those concluded away from the trader's premises, for example a sale concluded at a consumer's house).

The provision of services and digital content, the contract and payments

- Consumers are protected from unfair terms, which create a significant imbalance in the rights of the consumer and trader. Terms must be transparent.
- Services and digital content must be as described, of reasonable quality and fit for purpose.



- Additional charges cannot be imposed after contracting. If no price is agreed pre-contract, then only a reasonable price is payable by the consumer.
- A consumer cannot be charged more for taking a payment that the cost to the trader of receiving that payment.
- Traders' unilateral powers to dissolve, terminate, vary or roll-over contracts are limited (and are discussed further in the discussion on the general consumer protection regime and in the appendix).

109. Microbusiness consumers will also benefit from these protections if they are "an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or professions" This would apply to an unincorporated sole trader if they were acting outside of their trade. Engaging with a TPI in respect to energy matters seems likely to be outside most sole trader's normal trade, business, craft or profession.

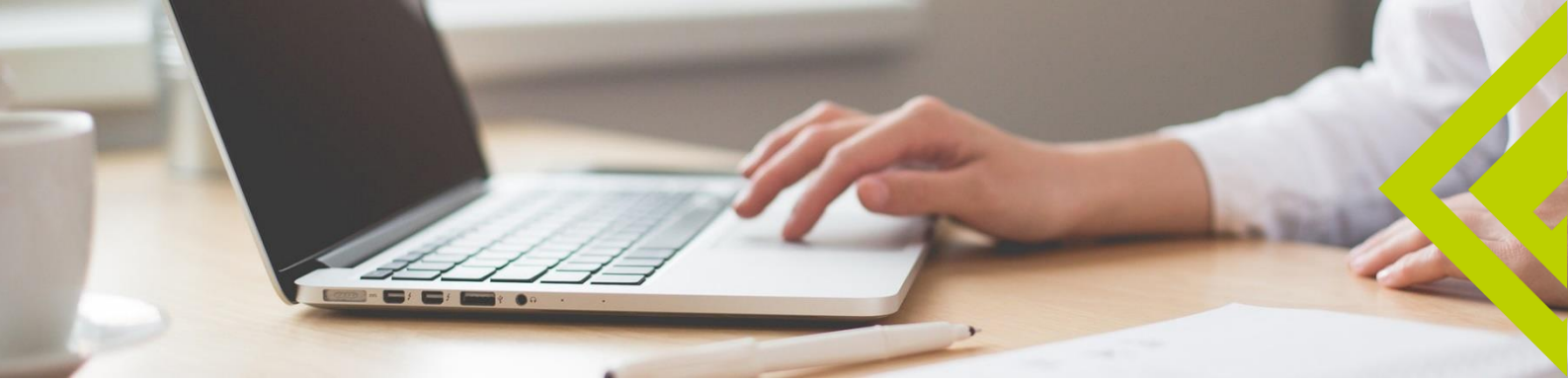
110. In general, however business consumers benefit from much less protection. They are protected from misleading advertising and marketing. If contracting on the supplier's or TPI's standard terms there will be implied terms that services will be of reasonable quality; business consumers will be protected from unreasonable standard terms and conditions that limit the TPI's or supplier's liability.

Protections offered to consumers when engaging with a licensed supplier

111. Over and above the general consumer protections, domestic consumers are given the following additional rights and protections (or otherwise benefit from requirements placed on suppliers):

Sales and marketing

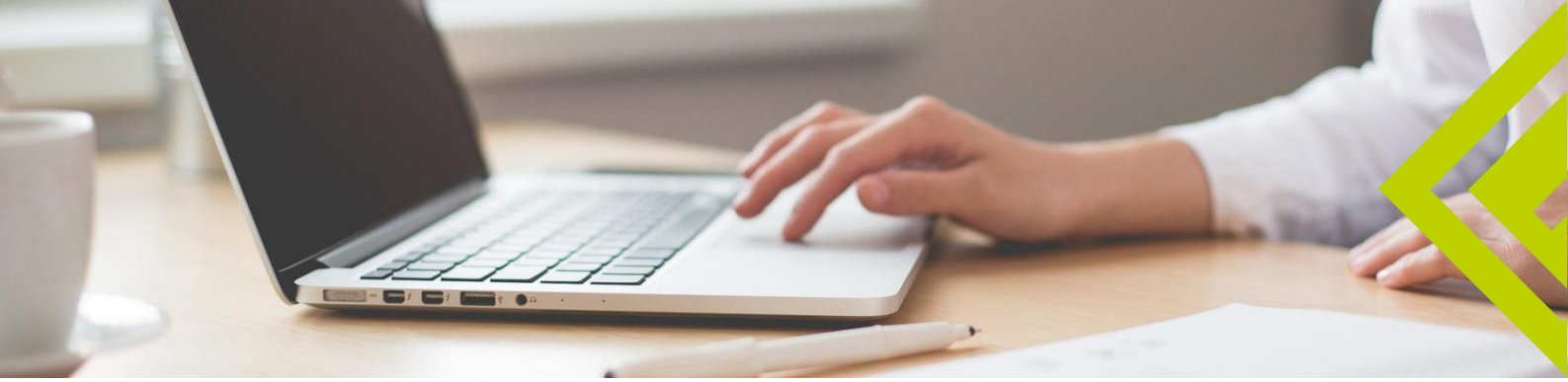
- Tariffs and terms of contract must be easily identifiable, clear and easily comparable. Any environmental claims must be supportable.
- All engagement with domestic consumers, by suppliers or their representatives (including TPIs), must be fair, honest, transparent, appropriate and professional.
- Only appropriate products can be marketed to domestic consumers. What is "appropriate" is not defined, but the supplier needs to think about the characteristics of the consumers they are marketing to and ask whether the product they are promoting may be inappropriate for those consumers: is it, for example, excessively expensive, demanding unrealistically high or low levels of energy usage, complicated and hard for the average consumer to understand?



During the contract

- The content of contracts, in particular domestic consumer contracts, is prescribed so that rights including those on dispute resolution, renewal and termination are made particularly clear.
- Prices are controlled, in particular by the present retail price caps, but also by limits on the tariffs consumers can be transferred on to in the absence of any active decision making by them.
- Billing information needs to be clear and suppliers are required to assist consumers with payments and clearance of debts. Consumers cannot be billed for energy consumed more than 12 months previously.
- Consumers in a vulnerable situation must be identified and if necessary given additional assistance.
- In respect to key industry activities such as fixing meters, suppliers have prescribed standards of service to meet, with a regime of automatic compensation if standards are not met.
- Suppliers are required to operate effective complaints handling processes, with referral of unresolved consumer complaints to the energy ombudsman for binding resolution. Suppliers are required to provide consumers with information on independent sources of advice, including Citizens Advice.
- Variation of contracts is restricted.
- Suppliers are required to engage with domestic consumers in particular around contract renewals, to encourage switching and to make sure the consumer knows what happens if they do not switch.
- Historical consumption data must be given to the consumer if they ask for it.
- Gas and electricity consumers in the north of Scotland are given additional protections against potential discrimination based upon geography.

112. In respect to microbusiness consumers, additional energy sector protections are more limited, although still potentially important. Like domestic consumers, microbusiness consumers benefit from the requirement of an effective and adequately resourced complaints handling service, with referrals of unresolved complaints to the energy ombudsman for binding (on the supplier) resolution. They benefit from a modified version of the Standards of Conduct that requires the supplier behave in a fair, honest, transparent, appropriate and professional way. However, this protection does not extend to any representative acting on behalf of the supplier (for example a TPI), in contrast to the domestic Standards of Conduct where the supplier is liable for its representative's actions. For microbusinesses the protection given by the Standards of Conduct is limited to matters of billing, contract information, transfers and deemed contracts. Microbusinesses also benefit



from requirements to provide comparable tariff information (unit rates, standing charges and calculations of actual and projected charges) and on the prohibition on "backbilling" for energy consumed more than 12 months previously.

113. Non-microbusiness consumers are not provided with energy specific protections, save for the relatively few SLCs of general application and SLC 20 obligation to notify of dispute resolution processes.

Analysis of differences in consumer protection as between the general consumer protection regime and sectoral energy regime: regulation of TPIs compared to suppliers

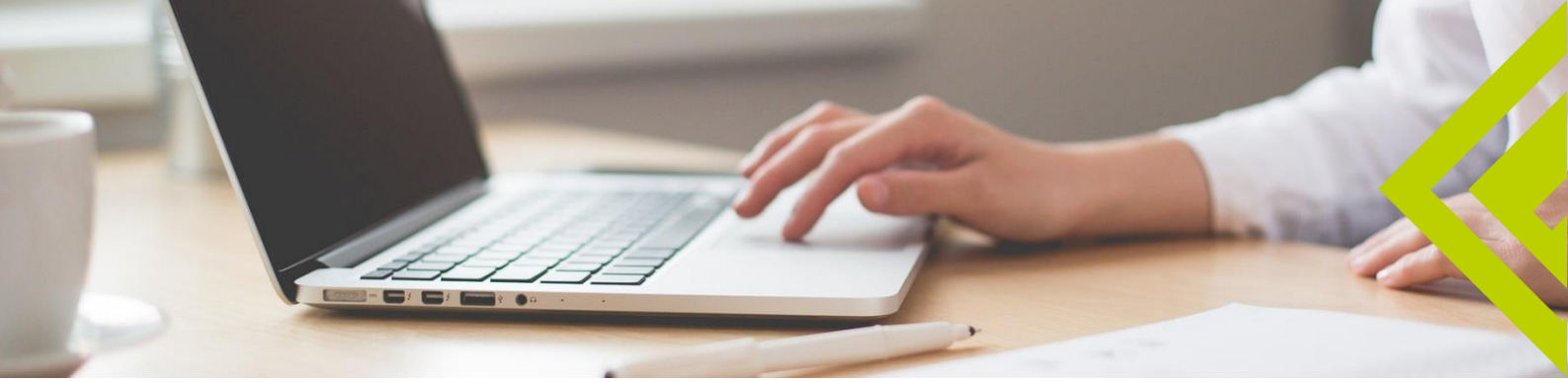
114. Suppliers and TPIs are both subject to the general consumer protection regime and so there is no difference in rights and protections outside of matters subject to specific energy regulation.70 This report, assumes that consumers will continue to be supplied by licensed suppliers and that TPIs will not (for now at least) be taking on the licensed supplier role.

115. This means that in legal terms if consumers engage with the retail energy market through a TPI they will ultimately continue to benefit from the same energy sector protections as if they engaged directly with a supplier: in both cases there will be a licensed supplier which will be required, for example, to ensure the Standards of Conduct are met in the service provided to the consumer. The supplier will have to ensure that they meet the requirements on price caps (if applicable), charges and billing, information provision, contract renewals and complaints handling. Key pre-contract protections for domestic consumers, for example the Standards of Conduct and SLC 25, require that the licensed supplier ensures that any representative acting on its behalf (a TPI) also achieves the required standards.

116. By engaging with the energy market via a TPI the consumer does not, in legal terms, lose the protections in respect of the supplier, because there will continue to be an obligated licensed supplier providing the energy. Moreover, as regards the TPI a consumer has the same protections under general consumer protection law as it would have against a supplier.

117. However, depending upon the TPI model, it is also possible though that in practice the consumer will have no direct engagement with the supplier. The additional TPI, standing between the supplier and consumer, is not subject to the heightened protections and

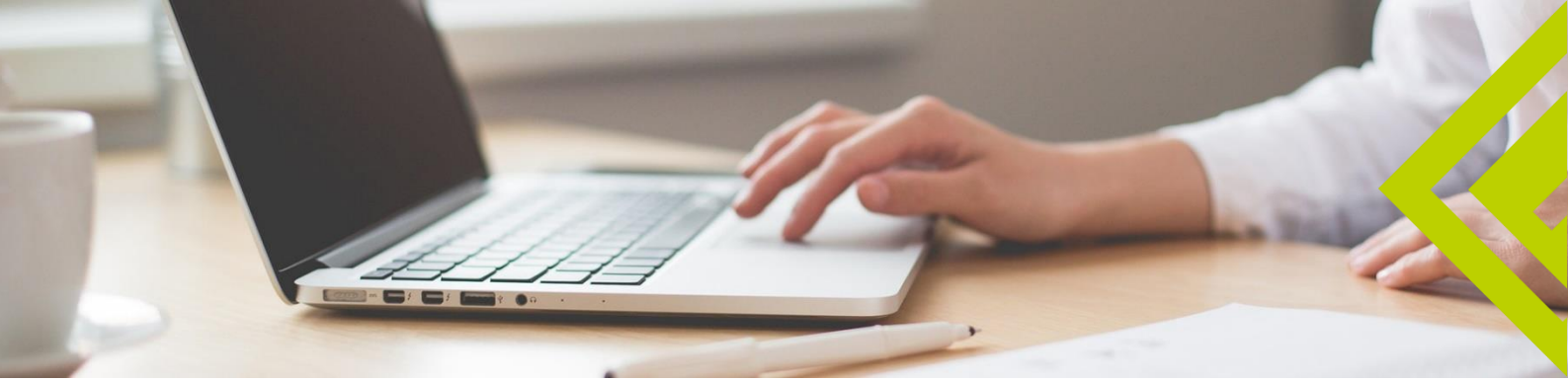
[70] This paper has not looked at suppliers offering ancillary services which are outside of and additional to their regulated role as licensed energy suppliers (and which could be similar to some services offered by TPIs, such as energy advice services). In general, to the extent suppliers do offer such services they are operating beyond their regulated role as licensed suppliers, and therefore also beyond the "normal supplier" against which the questions discussed in this paper have been analysed of TPI regulation. In general, if offering such ancillary services and outside of their licenced supply role suppliers would be regulated in the same way as any other business offering the same services. However, any connection between the supplier's licensed supplier role and the provision of ancillary services could trigger sectoral regulation questions, for example if it were to engage with existing customers on alternative tariff arrangements.



requirements that apply in respect to an energy supplier in the course of its own engagement with the consumer.

118. This highlights some differences in the requirements placed upon suppliers and TPIs when engaging with consumers. In particular:

- The Standards of Conduct (SLC 0 for domestic consumers and SLC 0A for non-domestic consumers) require a level of service from suppliers above that required by general consumer protection law. They specifically require fair, honest, transparent, appropriate and professional behaviours. In respect to domestic consumers (but not microbusinesses), if a TPI is acting on behalf of a supplier then that supplier is required to ensure that the TPI does not act in a way that would put the supplier in breach of the Standards of Conduct. So, for example, a supplier is liable (and a consumer given some protection) in the event that a TPI is conducting doorstep sales on behalf of the supplier and potentially breaching the Standards of Conduct (and also SLC 25).
- The requirements of the Standards of Conduct are impliedly required to some more limited degree by some general consumer protection measures, but general consumer protection law is generally addressed at avoiding bad behaviours not raising standards per se as the Standards of Conduct seek to do. Moreover, the Standards of Conduct (and SLCs generally) do not apply directly to the TPI. If the TPI is acting on behalf of a supplier (for example doorstep selling) then any Standards of Conduct obligations the TPI takes on are only contractual promises to the supplier and not regulatory obligations enforceable by Ofgem. If the TPI is acting for the consumer and not on behalf of the supplier (for example providing a basic price comparison service only and no sales), then the Standards of Conduct and SLCs generally do not apply to the interaction between the TPI and consumer.
- The SLCs and GS provide a heightened degree of prescription around key industry activities (billing, visits to premises, debt and disconnection for example) and in areas where additional regulation has been deemed necessary in order to encourage a more effective consumer market (for example requirements on the provision of specific contract information and prompts to switching). In some areas, particularly around contract information and dealing with consumer debt, there are materially increased requirements on suppliers as compared to the general consumer protection regime and the obligations that would apply to TPIs.
- Regulation in respect to price protection and billing focuses on supplier-specific roles in the energy industry. However, the pricing and billing protections consumers benefit from when engaging with a supplier on its core product (mains gas and electricity) is in contrast to the relative lack of protection in respect to TPIs (which might, in theory, charge a significant premium on top of the energy charges, for the services they offer).
- Both domestic and microbusiness consumers benefit from the requirement on suppliers to operate and resource effective complaints handling processes, and to be



bound by the decisions of the energy ombudsman. There is no similar requirement on TPIs.

119. In addition to differences in substantive protections, complaints handling and access to alternative dispute resolution (energy ombudsman), consumers engaging directly with a supplier are also given extra protection by Ofgem's ability to use its sectoral enforcement regime. Through this regime the regulator can achieve much the same outcomes as in the general consumer regime, as well as having the ability to impose fines. It can do so without having to use the court process which in practical terms will probably usually require more from the regulator in terms of administration and procedure, requires staff with skills and experience in court-based litigation and which has a costs regime attached. Whilst the sectoral process must be fair, follow "due process" and allow for appeals, a sectoral regulator can more easily use its enforcement to achieve policy aims. Decisions in contested cases will be taken independently of the team investigating suspected breaches, and must be within legal limits, both regulations can be interpreted and developed by the regulator in accordance with its strategic aims and (broadly) views on consumer protection.

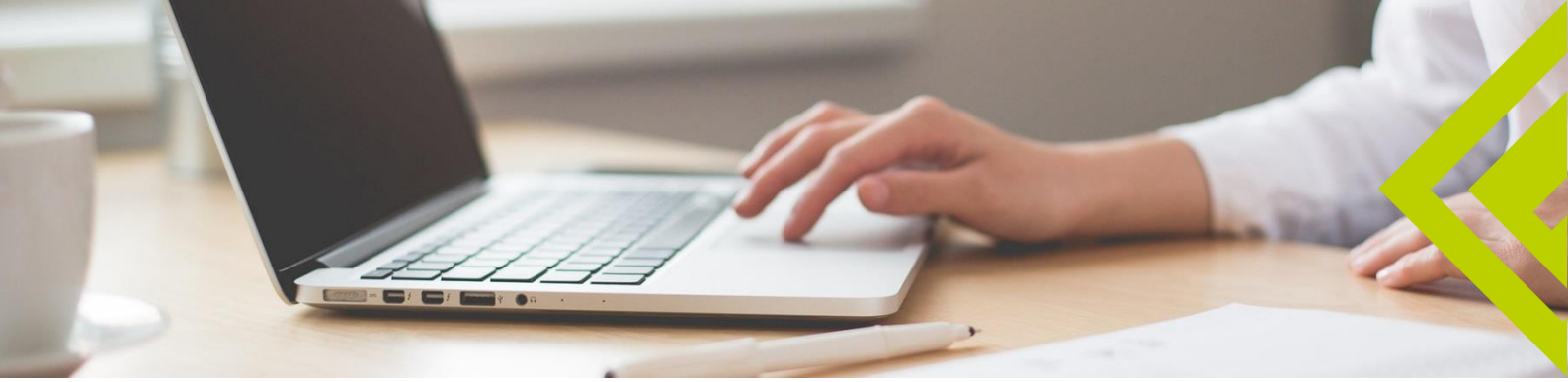
120. By having a more defined target audience to issue guidance to, as well as the ability to amend the SLC requirements on suppliers if needed, Ofgem is able to use its "soft power" to shape expectations of those it regulates in way that cannot be done in the general consumer protection regime.

121. Microbusinesses are given protections under energy regulation (of suppliers) that they will not generally achieve in relation to TPIs and the general consumer protection regime.

Alternative TPI models

122. There are a wide range of potential TPI models. For the purposes of analysing how protections differ between a TPI and supplier it has been specifically considered whether there are material differences depending on TPI type. We have considered TPIs as:

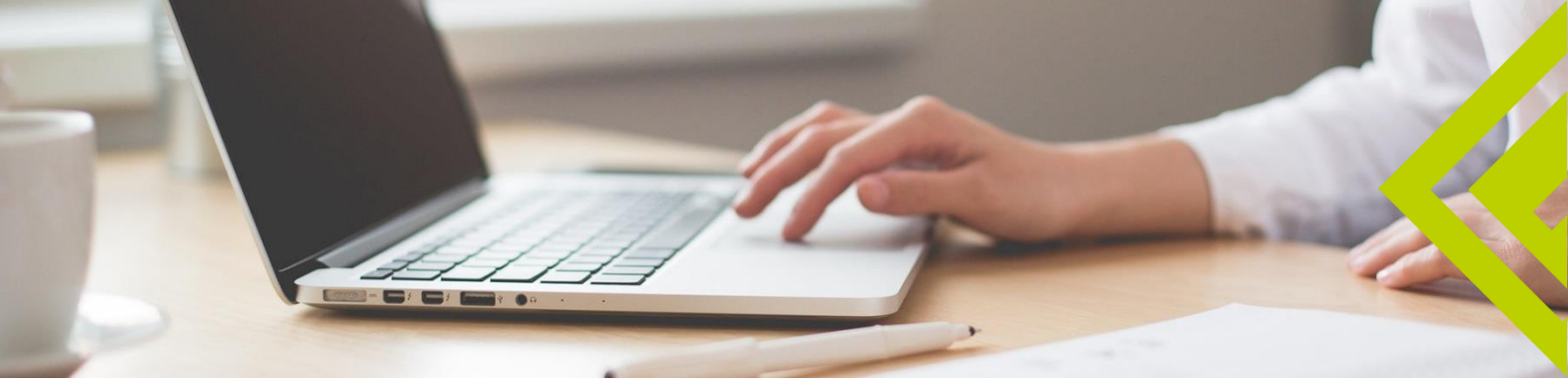
- information providers (only), including some energy consultants and brokers and online or app-based price comparison services. The TPI might be paid by a consumer or a supplier (with whom it would have a contractual relationship) or by advertising or other income;
- providers of information, plus additional services (for example bill splitting services and some brokers and other services);
- agents of suppliers, in which role they are marketing and selling on behalf of one or more suppliers;
- agents of consumers, in which role they are procuring energy from the supplier on behalf of their client (auto-switchers, collective switching services, aggregators, bundled service providers);



- sellers, who are potentially selling energy generated by consumer (or a demand side response equivalent) or who are potentially acting as an onward seller of a licenced supplier's energy (although as discussed in Part C, it is presently hard to see this happening other than if selling electricity to electric vehicle owners via charging points (only)).

123. However, whilst it is possible to identify a wide range of potential TPI models and whilst under some TPI models the consumer may have little or no direct engagement with the supplier, the legal analysis of the difference between TPI and supplier regulation remains the same:

    - The supplier continues to have additional regulatory burdens which it must discharge either directly with the consumer, or via the TPI.
    - The TPI will not, for now, be regulated beyond general consumer protection law.
    - Providers of information will be liable under general consumer protection law if they mislead a consumer. They may also have contractual obligations (and there may be associated general consumer protections) if the TPI is paid by consumers for its information services.
    - If the TPI is acting as agent of the supplier, then the supplier will need to ensure that the TPI acts in a manner that does not put the supplier in breach of its obligations towards the consumer under general consumer protection law or in respect to energy regulation (for example by breaching the Standards of Conduct or SLC 25 in its marketing, or by failing to pass on information from the supplier). The TPI will also be liable for breaches of general consumer protection law if, for example, it misleads consumers. But the TPI will not have a contractual relationship with the consumer and so there will be no implied terms that the TPI will, for example, provide a good service to the consumer.
    - If the TPI is acting as the agent of the consumer, then the general consumer protection law will imply terms in respect to matters such as a reasonable standard of service (whatever that precise service is) and no unfair terms. However, the additional energy regulation protections will only apply as between the supplier and consumer.
    - As already discussed in Part C, it is hard to see how a TPI would become a licence exempt supplier, given this is limited to (very) small scale supply, on-site supply (where generation is also taking place) and on-site resale. Sales of electricity to electric vehicle users via charging points may be a TPI activity, depending upon the business model (it seems most likely in relation to public charge points but might also be possible in respect to domestic charge points). However, as long as the TPI is only selling electricity from the charge point to the EV and not providing the power to the charge point or premises, it will remain outside of the present scope of energy regulation.



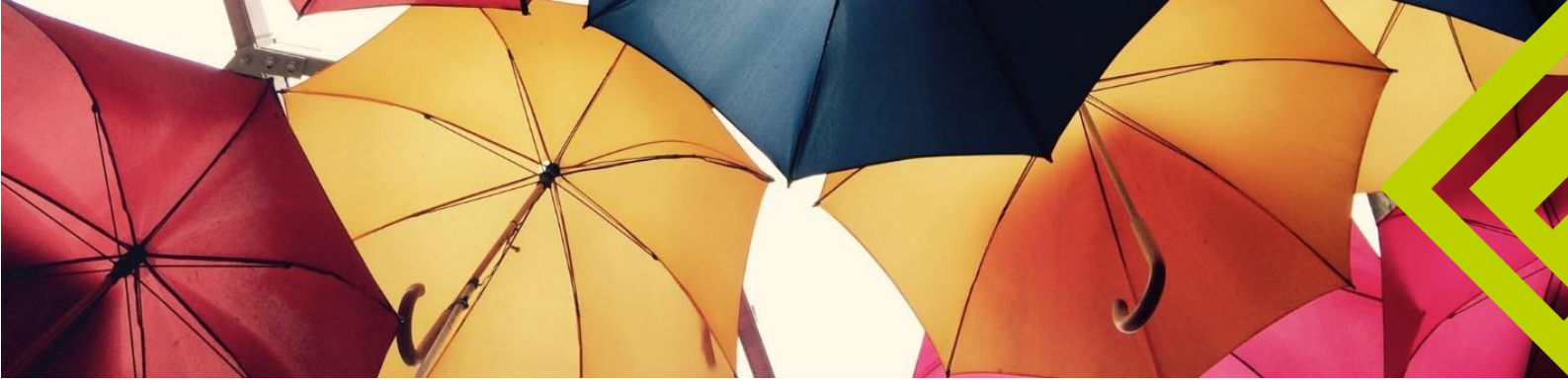
This analysis holds whether the consumer is buying energy and energy services or whether it is potentially selling energy (to a supplier through the Feed-in-Tariff (FIT) or Smart Export Guarantee (SEG) or via a TPI). Again, when the consumer engages with a TPI to use its services to engage with the energy market, whether using a price comparison website or selling energy via an aggregator, the consumer is protected in respect to the actions of the TPI by the general consumer protection law, but not by an additional TPI or energy regulatory regime. If the TPI is acting *for* a supplier (rather than for the consumer) then there may be some indirect energy sector regulation of the TPI because of some requirements on suppliers to ensure TPIs do not put suppliers in breach of what would otherwise be their obligations. However, when the consumer engages with the energy market directly through a supplier, it is given additional and/or heightened and directly applicable protections. These protections arise most obviously in respect to the purchase of energy but also to a lesser extent in respect to schemes in which the supplier purchases energy from the consumer.[71]

In short, **the consumer-supplier nexus is regulated in a way that any consumer-TPI nexus is not**.

124. At present, price comparison websites may additionally choose to seek accreditation under the Confidence Code. As outlined in the appendix, this does not provide additional consumer rights and remedies. It indirectly offers additional consumer protections by specifying requirements on, for example, the presentation and explanation of search results.

125. As also noted in the appendix, non-domestic consumers of demand side response services are given some additional protections if their service provider is a member of the Flex Assure code, because of specific and prescribed requirements above and beyond general consumer law requirements to provide clarity of offering and terms, good practice in sales and marketing, information provision, technical due diligence, and complaints handling.

[71] For the purposes of this report the detailed requirements place on suppliers in offering schemes such as the Feed-in-Tariff or Smart Export Guarantee have not been considered in detail. Such schemes are not mandatory for all suppliers. They are implemented via SLCs and so part of the wider regulatory regime for suppliers discussed in this paper. A number of energy sector protections apply whenever a supplier is acting as a licensed supplier, whether it is selling or buying energy. For example, the SLC0/0A Standards of Conduct or the Complaints Handling Regulations. The FIT requirements (electricity SLC 33), for example, include requirements on the terms of contract suppliers must offer to FIT generators, which may include consumers.



E. ALTERNATIVE MODELS OF TPI REGULATION

Summary

"Levelling up" within the current general consumer protection regime, so that microbusiness are given the same protections as domestic consumers, seems practically impossible at present due to the legislative changes required. It would also entail changing general law to deal with a sector specific issue with TPIs.

Levelling up in the energy regime is much easier, but only adds to protections and rights for microbusinesses against suppliers, not TPIs.

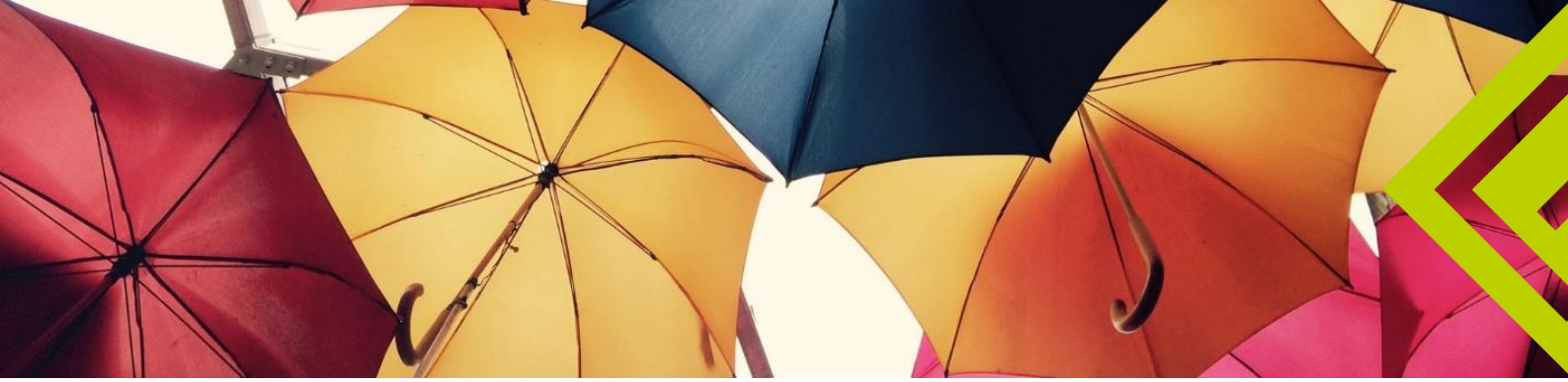
Enforcement of general consumer protection law without the courts seems achievable. Ofgem already enforces a regime that is otherwise outside of sectoral regulation (the Capacity Market), "as if" it were part of the EA 89 regime. However, this does not deal with (a) the lack of individual consumer protection on complaints handling and ombudsman redress, or (b) the lack of a body of rules that relate to TPI activities specifically and which can be developed by Ofgem (or another regulator) in light of future concerns.

The powers already exist to license TPIs and impose licence conditions, although only to the extent that their activities are connected to energy supply. This would give Ofgem powers to develop rules to reflect policy concerns and to enforce them without the courts. However, it would not on its own deal with the lack of a compulsory complaints handling and or alternative dispute resolution regime for TPIs. Licensing may not easily deal with cross-sectoral TPIs (for example selling in the telecoms and energy sectors) and licensing may not be the best way to regulate a market with a very large and diverse number of participants.

An authorisation regime would avoid the problem of trying to license a large and diverse TPI market. It could offer flexibility and regulation proportionate to the TPI activity, but careful drafting of rules would be required. The legislation creating the regime could give Ofgem powers to develop rules to reflect emerging concerns (as it presently can with suppliers and SLCs) and the new regime could be enforced "as if" part of the established sectoral regime. The new regime could provide for alternative dispute resolution of consumer complaints (for example use of the energy ombudsman) if proportionate.

A cross-sectoral authorisation regime would allow for regulation of TPIs operating in more than one market. Careful coordination would be needed, however, to ensure regulatory certainty/avoid duplicate or conflicting rules or enforcement. One way to achieve this would be to define a category of activities that are generic to TPIs and therefore subject to cross-sector TPI regulation, with a lead regulator (as perhaps seems to be proposed with Smart Data). This TPI regime would be separate to any sector-specific issues where TPIs may have to additionally comply with, for example, energy regulation if they chose to operate in that market.

A modular rulebook could complement a new licensing or authorisation regime, by giving rules that applied depending upon the activity undertaken and which were therefore proportionate and



relevant to the potential consumer detriments. The rules would require careful drafting so that the right rules applied at the right time.

The models of potential TPI regulation discussed are not necessarily mutually exclusive, save for the choice between licencing and authorisation regimes.

126. In light of the analysis of the present general consumer protection and energy regulatory regimes in previous parts of this paper, this part gives some high-level comments on the following options for the future development of TPI regulation:

- Expansion of domestic consumer protection to include microbusinesses ("levelling-up").
- Enforcement of general consumer protection law by CMA or Ofgem without the courts.
- Specific licensing of TPIs.
- Sectoral regulation without specific licensing - i.e. an authorisation regime.
- Cross-sectoral regulation using an authorisation regime.
- Modular regulation.

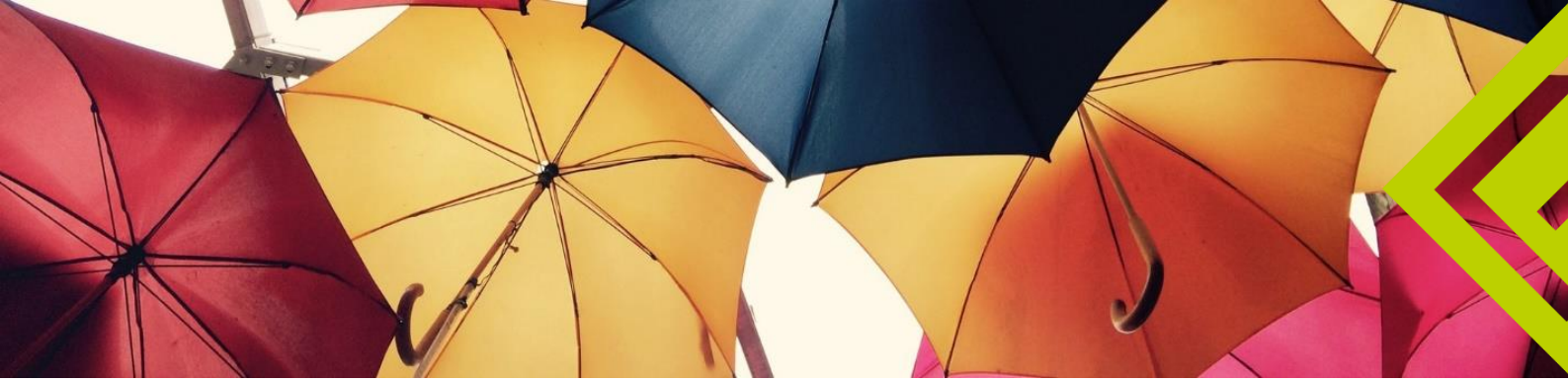
Expansion of domestic consumer protection to include microbusinesses ("levelling-up")

127. In this model, the existing regimes and protections would remain as they are, save that those protections offered to domestic consumers would be expanded to cover microbusiness consumers as well.

128. This would retain the key features of the existing regimes. In short, in respect to general consumer protection law Ofgem would be an enforcer, but it would not have powers to further develop the regulation in light of sector specific concerns. In respect to energy specific protections, Ofgem would have both powers of enforcement and the ability to develop and interpret regulation, and to give guidance.

129. In respect to the general consumer protection regime, this "levelling up" has two significant problems:

- The key legislation is, as noted, almost universally addressed to "an individual…" Changing this definition would be a significant amendment across a number of legislative provisions and requiring legislation to change existing Acts of Parliament and regulations implementing EU Law. The definition is derived from EU law. Examining whether and how the UK implements EU law in the future is beyond the scope of this report, but amendments to the definition of "consumer" could raise questions of compatibility with EU Law.



- The change would be made to law that is intended to be of universal application (general consumer protection law). It would have the effect of significantly expanding the application of "consumer" protection law, to cover microbusiness in all sectors of the economy. This may be a desirable outcome, but it is also a significant decision in respect to general economic regulation policy and in respect to which the impact on the economy as a whole, not just energy retail, would need consideration.

130. In any event, in respect to general consumer protection law the BPMMRs provide protection for microbusinesses in respect to sales and marketing, so microbusinesses are already protected in respect to TPIs and marketing.

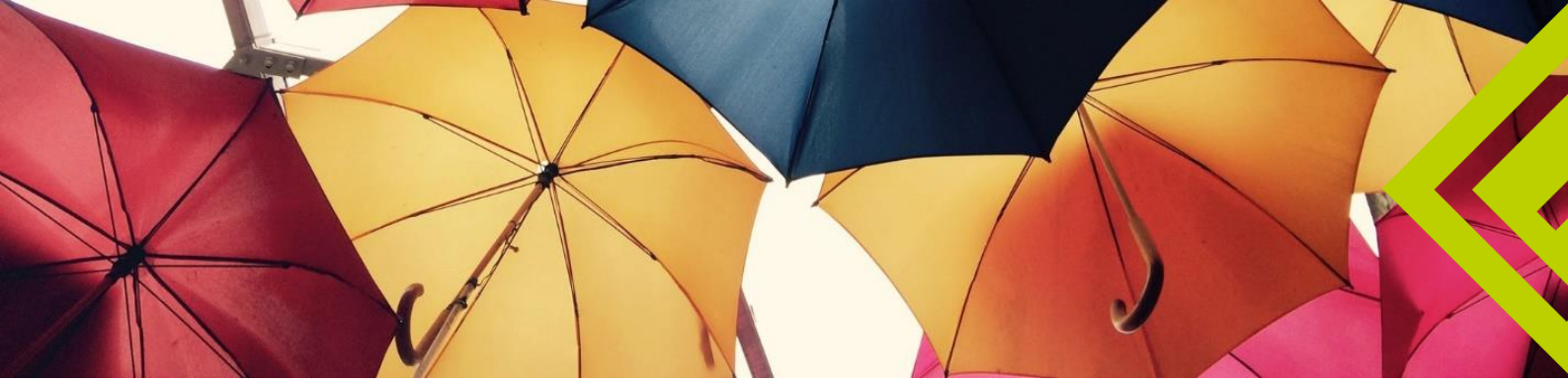
131. Changes specifically to energy sector regulation appear easier to make, providing Ofgem has the powers to further extend regulation to cover microbusiness consumers. (Looking in detail at Ofgem's powers in respect to hypothetical future regulatory changes is beyond the scope of this report, but in any event, it would be a less significant task for government to legislate to give Ofgem more powers in respect to microbusinesses, than it would be to change general consumer protection law). Microbusinesses already benefit from some protections given to consumers but not, otherwise, given to business consumers. Ofgem is presently reviewing the protections given to microbusiness consumers. However this would only develop protections for microbusiness consumers in respect to suppliers and potentially indirectly TPI activities on behalf of suppliers, as TPIs are outside of sectoral regulation.

Enforcement of general consumer protection law by Ofgem or CMA without the courts

132. This envisages a change in enforcement procedures, but not in the substantive protections of the consumer protection law.

133. As highlighted in the review of the general consumer protection and energy specific sectoral regimes (parts B, C and D above), enforcement without the courts gives the regulator the ability to control the process and thus ensure it works for the regulator. Whilst decisions on individual cases are made independently of case teams, "sectoral" regimes do allow senior decision makers and regulators to set expectations in respect to the compliance and behaviours of regulated businesses, both through the decisions taken and the guidance separately issued. It is possible, but not certain, that enforcement without the courts would lead to more use of the general consumer protection law (and perhaps less use of sectoral regulation such as SLCs). Additionally, giving Ofgem or CMA the power to enforce without the courts would give a clear signal to the market(s) of increased regulatory scrutiny.

134. CMA already enforces consumer protection regulation generally and in its competition law work has a process for independent decision making on cases (although these could not simply be adopted for enforcement of consumer protection law without review and amendment, the point is that it is possible to design and operate such a process).



135. The CMA already has a cross-sector enforcement remit and therefore logically would continue to do so if enforcing without the courts. However, the CMA necessarily has to prioritise its work. If there were a specific concern in respect to TPIs in the energy sector then Ofgem as energy regulator may be as well suited and able to give more priority to the work. The scope of Ofgem's remit would need consideration, as would the need to work with other regulators on cross-sector TPI complaints (for example if a TPI was mis-selling to both energy and telecoms consumers, would Ofgem and Ofcom both have powers and how would any conflicts or coordination be managed?).

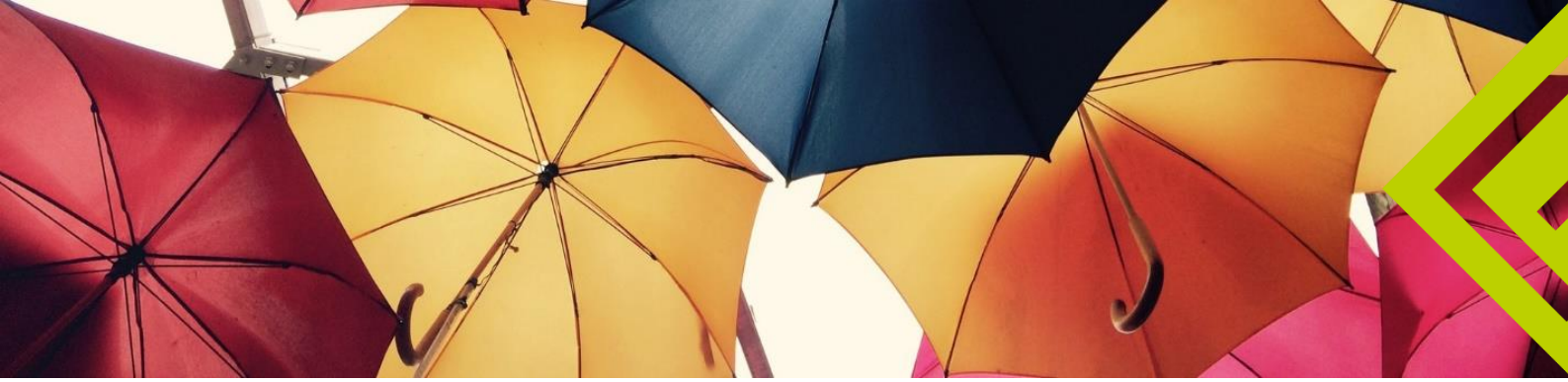
136. For Ofgem, using its sectoral enforcement process in respect to a wider range of businesses would not be completely new (see the reference to Capacity Market enforcement in the analysis of the energy regulation regime in Part C). Taking the Capacity Market as an example, Ofgem could be given powers to enforce a defined set of consumer protection law "as if" it were part of the pre-existing list of regulation (and regulated businesses) that Ofgem can pursue via sectoral enforcement. Ofgem could be given powers over TPIs specifically, or more generally in relation to businesses undertaking connected with the supply of gas or electricity (Ofgem's competition law powers similarly allow it to take action against businesses other than licensees subject to established sectoral regulation).

137. Enforcement by Ofgem or CMA (and/or Ofcom or others) without the courts may make regulator enforcement easier and more effective. The regulators would still need to operate processes that, for example, allowed for the TPIs under investigation to argue their case, test the evidence (including witness evidence) and seek a decision that was independent at least from the enforcement team. The regulators would have to decide cases with the law as interpreted by the courts (on appeal from a regulator decision or in any case that was not enforced within the sectoral regime), so the regulators powers to develop regulation, through their own decisions interpreting the law, would not be unlimited. However sectoral enforcement regimes are already designed (at least in theory) to comply with requirements on due process and application of the law.

138. Giving CMA or Ofgem the power to decide criminal offences under consumer protection law without the courts would be much more difficult (if not impossible) as there would be enhanced procedural requirements, for example, that would need to be met. Ofgem does not have powers to prosecute criminal cases under the present consumer protection regime, so giving it powers to investigate and decide such cases would be a very significant development.

139. Giving Ofgem or CMA powers to decide cases without the courts may make enforcement easier for the regulator, but it would not on its own deal with:

- the lack of a compulsory alternative dispute resolution scheme for binding resolution of individual consumer complaints outside of the courts; or
- the substance of the general consumer protection law, the lack of any TPI specific measures and the lack of any powers for regulator driven development of rules to deal



with issues of sector specific concern (Ofgem or CMA could not develop substantive new rules to deal with TPI problems).

Specific licensing of TPIs

140. As noted in the review of the energy sectoral regime, this is already possible: Ofgem can ask the government to designate TPIs as requiring a licence if and to the extent that the TPI activity is connected to energy supply. The government can attach, for example, SLCs which would impose requirements in respect to consumer protection and which could be further developed by Ofgem. This does not require any new primary legislation (in an Act of Parliament) and it would be a relatively easy matter for government to use the express powers it has been given and introduce the secondary legislation required. As the joint Ofgem – government review of the future of retail energy market regulation notes[72], licensing has the benefit that is familiar and is consistent with the approach in place for suppliers. Supplier specific obligations could be kept separate with separate licenses.

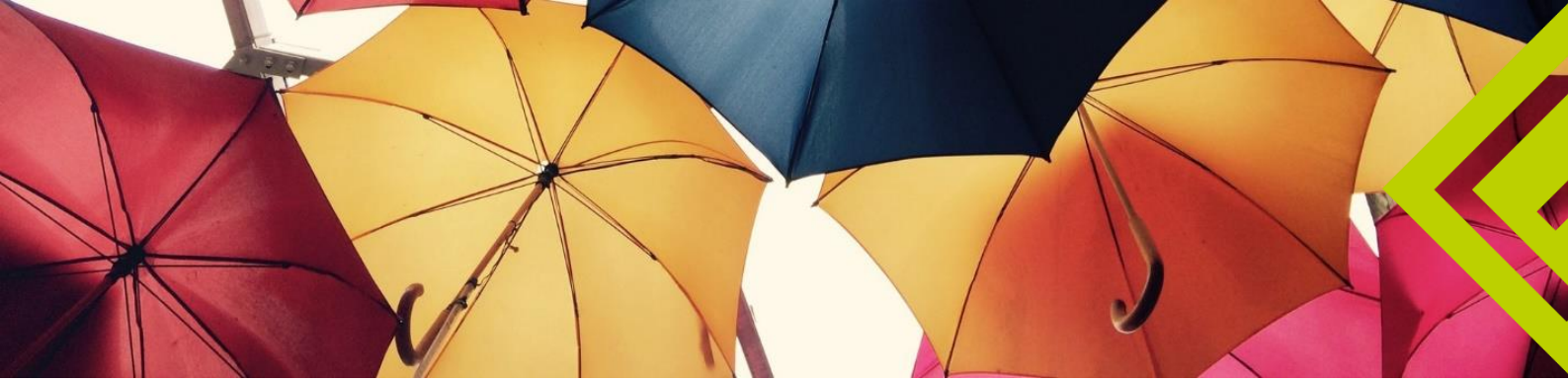
141. As and when a sectoral regime for licensed TPIs were to develop then additional legislation may be required to ensure Ofgem continued to have the necessary powers in respect to future policy areas of concern (in the same was as primary legislation was introduced to give Ofgem powers in respect to price controls, on the basis of which SLC powers could then be exercised to give effect to the retail energy price cap).

142. Additional legislation would also be required if TPIs were to be subject to the same requirements as suppliers in respect to complaints handling and the existing energy ombudsman scheme (which are outside of the SLCs and where CEAR, which is an Act of Parliament, limits Ofgem's powers to regulate on these matters to regulations applying to suppliers and distribution networks).

143. However, there are (at least) three potential issues with licencing TPIs:

- Many TPIs are likely to be cross-sectoral in their offering and they are unlikely to limit themselves to services "connected with" energy supply, in respect to which the powers exist to make TPI activities licensable. If a TPI were offering both energy and telecoms related services, for example, would Ofgem only regulate the business as and when it were dealing with energy, even though the same TPI may at the same time engage with the same consumers on telecoms? How a sectoral licensing regime of the type already anticipated in legislation would work for cross-sector TPIs would need careful consideration. Present powers to introduce a licensing regime are limited to TPI

[72] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819624/flexible-responsive-energy-retail-markets-consultation.pdf for government and Ofgem views on licensing and authorisation regimes, and on future regulation of the retail market more generally.



activity connected with supply; if TPI activity more generally were to be licensed then new primary legislation would be required.

- TPIs are a potentially very large and diverse group of businesses. Licensing of TPIs could quickly become a significant administrative burden on Ofgem if the definition of TPI were widely drawn. There may be limited additional benefit as compared to an authorisation regime (see below) because it would not be feasible for Ofgem to monitor or engage with a large number of TPIs or draft a single SLC rulebook for the newly licensed TPIs. If the definition of TPIs were more narrowly drawn, so that the licensing of TPIs was more feasible, it may not capture all of the businesses who were, in fact, offering TPI services.
- If providing TPI services without a licence were to become an offence, would Ofgem in practice be able to monitor for and prosecute businesses who were unlicensed? Given the potential range of TPI services, and depending upon how the licensed activity were defined, businesses may find themselves subject to a full licensing regime (or facing criminal prosecution) in respect to a relatively minor activity.

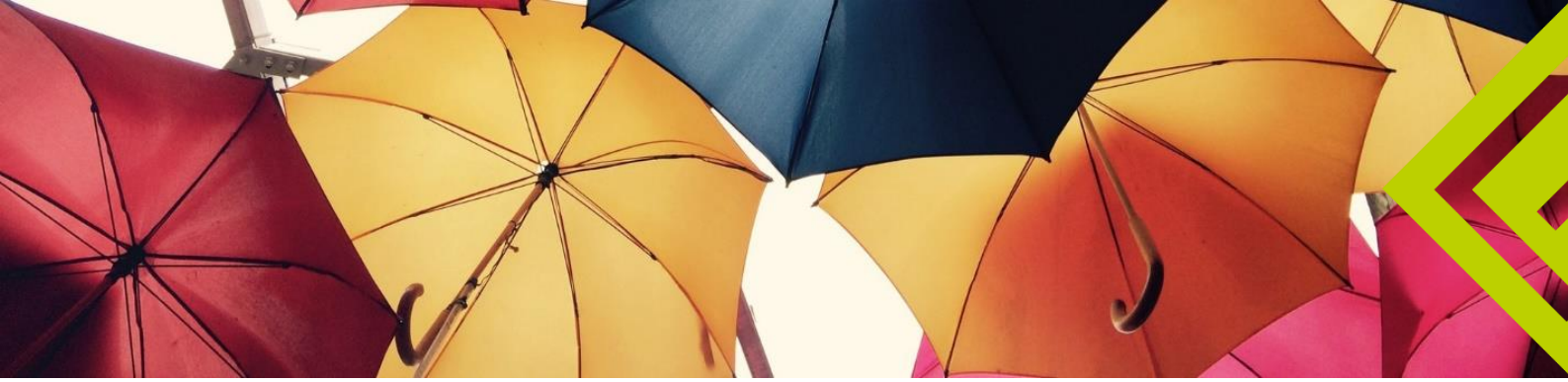
Sectoral regulation without specific licensing (an authorisation regime)

144. Under this model Ofgem would apply sectoral regulation to TPIs, but TPIs would not specifically require a licence. Instead, a business would need to comply with TPI regulation whenever it undertook TPI activities and whether its core business was as a TPI or whether it was ancillary to other services it provided. A similar approach is adopted, for example, in relation to elements of FCA/financial regulation.

145. This would avoid the potential difficulties of the licencing regime which were identified above in relation to the number of TPIs regulated, including businesses that may, for legitimate reasons, move in and out of TPI work at different times. However, as the joint Ofgem – government review of future retail energy regulation notes[73], introduction of an authorisation regime would probably need to be linked to a more fundamental review of energy regulation. Introduction of an authorisation regime for TPIs raises the question of whether a similar regime should be introduced for suppliers and the future of the "supplier hub" model in which a licensed supplier is the only nexus for consumer access to the energy supply and through which a wide range of energy policy is effectively delivered.

146. Any authorisation regime approach would need careful definition of what activities were captured by TPI regulation. Legislation would be needed to create a new regime of substantive requirements on TPIs. The substantive requirements of the new regime would

73 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819624/flexible-responsive-energy-retail-markets-consultation.pdf



need to be capable of application, with proportionate levels protection for consumers, in respect to a range of TPIs and TPI activities,

147. An authorisation regime could provide for Ofgem to have powers to develop new requirements in the light of particular concerns around TPIs (in the same way as it can amend SLCs in light of specific policy concerns around suppliers). As with the present Capacity Market regime, the requirements of this new TPI activity-based regime could be enforced "as if" part of the present sectoral enforcement regime, bringing in Ofgem's enforcement mechanisms (and see above regarding enforcement without the courts). Powers to impose sanctions against TPIs and any consumer redress measures would be based upon the TPI having chosen to engage in the activity, not upon it being a licensed entity (this would mean that the sanction of revoking a licence would not be available to Ofgem, however there would be range of potential other sanctions and measures available). If it was considered necessary, Ofgem could be given the power to prohibit a business from engaging in TPI activity (thus having the same effect as revoking a licence), but this would need the creation of powers over and above simply making the authorisation regime enforceable "as if" part of the existing sectoral enforcement regime.

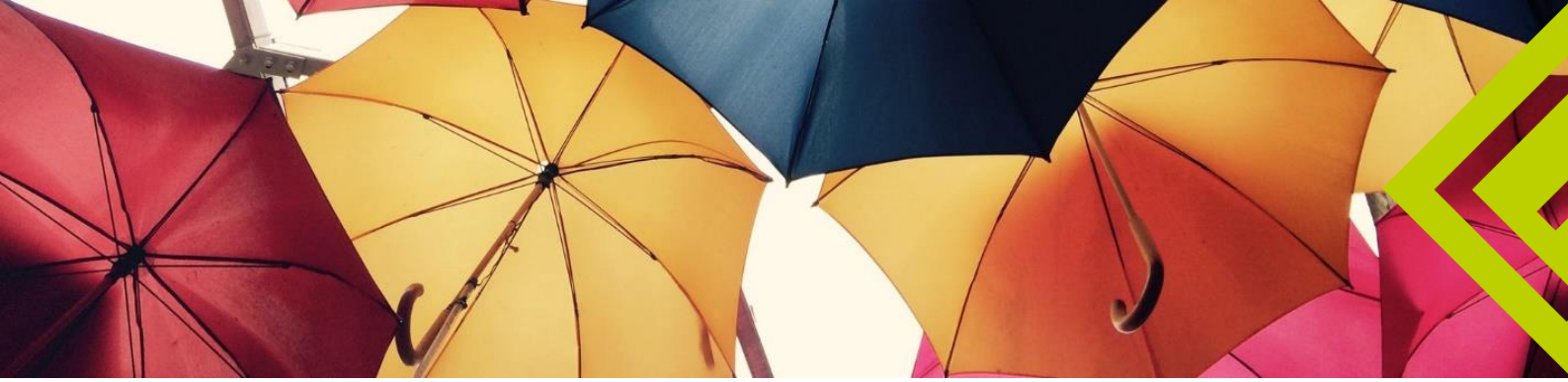
148. As already noted, however, TPIs seem unlikely to restrict themselves to the energy sector and this raises questions of whether an energy-only regime would be most effective, or whether a cross-sectoral regime may be needed in addition or as an alternative.

Cross-sectoral authorisation regime

149. This is a variation on the model discussed immediately above. It would recognise the potential for TPIs that cut-across traditional boundaries of sector regulation by providing for the substantive development of rules, and their enforcement by Ofgem and/or other relevant regulators such as Ofcom, FCA and CMA by reference to the activity being undertaken, rather than by reference to the economic sector that business was nominally allocated to. Again, legislation would be needed to create this regime, at least as far as it was create some element of energy sector regulation.

150. One question raised by such a regime is what would be within the scope of the cross-sector regulation and whether it falls to one or more regulators to deal with. Much cross-sector TPI activity is likely to be essentially the same whichever regulated sector the TPI activity relates to (for example accessing and using consumer data, and perhaps providing switching services, related to energy, water and telecoms).

151. One approach would therefore be to create a common set of regulations and perhaps one regulator for these common cross-sector activities. A cross-sector authorisation regime in relation to TPIs and Smart Data is anticipated and discussed in the government's own recent



review, for example.74 Under such an approach a new regulatory regime could be created, with new legislation. The regime could be further developed and enforced either by a new regulator or by giving one existing regulator that role (for example Ofcom, for anything "digital"). In this regard, cross-sector TPI regulation would be analogous to health and safety law and data protection regulation as a regime and regulator designed to deal with specific but not economic sector-specific concerns. Newly emerging issues related to TPIs (for example Smart Data) would be regulated under one regime, energy specific issues (for example demand side response services, aggregation or specific requirements on tariff information) would be left for energy sector regulation.

152. Cross-sectoral regulation is also already an issue under consideration for example as a result of the European Electronic Communications Code ("**EECC**") discussed in Part B of this paper (general consumer protection and non-energy data initiatives going beyond the established general data regime). EECC regulation is likely to impact upon TPIs offering energy services because key consumer contract protections that apply to electronic communications businesses will also apply to any additional services that are bundled together (and which could include energy TPI services). EECC implementation therefore highlights the potential for the "regulatory clash" of different regimes regulating the same specific activity (here for example consumer contract information). In practice, directly contradictory requirements from different regulators are unlikely, although not impossible and the more likely issues is probably one of potentially multiple requirements under different regulatory regimes but in relation to the same act. Economic sector regulators should be able to coordinate approaches through, for example, the UK Regulators Network. The CMA could be given a role resolving any clashes and if necessary, a legal framework for prioritisation of rights or protections could be created. This does, however, require regulators to be proactive in looking for potential clashes and flexible and proportionate in compliance and enforcement work where clashes or potential clashes arise.

Modular regulation

153. This could be a variation on either an authorisation regime, or licence based regulation. It could be cross-sector or energy specific. In essence, it would provide that the rules that applied to a TPI would be dependent upon the activities it was undertaking. For example, a TPI that was only providing information to consumers would not be subject to all of the rules that would apply to a TPI that was also actively marketing energy products or purchasing energy on behalf of consumers.

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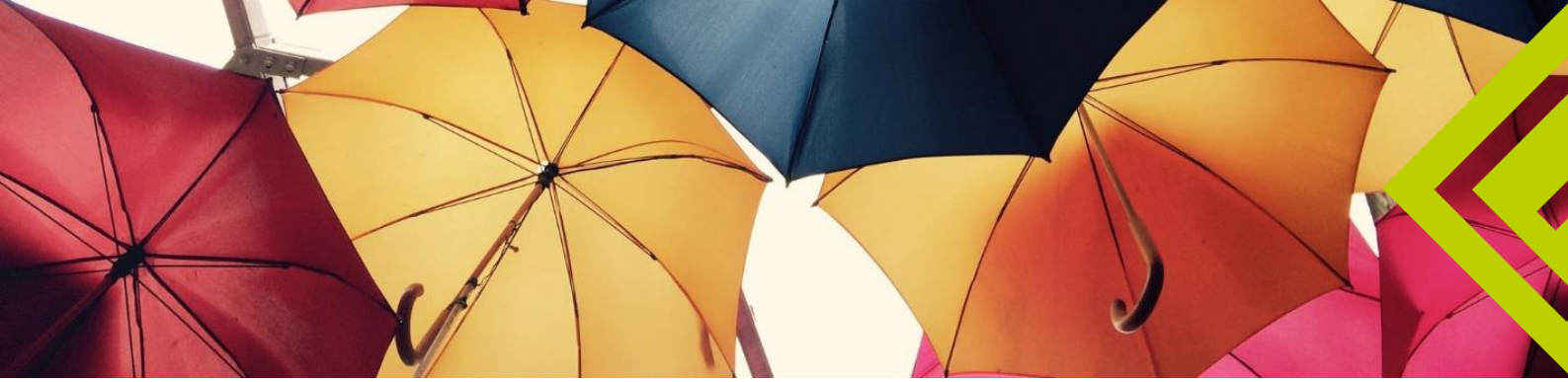
[74] See in particular page 29 onwards of https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808272/Smart-Data-Consultation.pdf



154. This would have the benefits of flexibility and, for example, rules applicable to suppliers could be used where TPIs were undertaking substantially similar tasks (perhaps billing, contracting or complaints handling). Equally, if one aim of modular regulation was to allow for diversity and innovation in TPI models, modular regulation would need to allow for some rules to not apply and therefore for lesser regulation of some businesses. As the joint Ofgem – government review of the future of retail energy regulation has noted, modular regulation could remove complexity around licence exemptions and allow for the more flexible and proportionate regulation of a newly emerging range of consumer-facing energy activities, including aggregator, flexibility and battery services. Equally, to the extent that modular regulation was adopted as a more general approach to energy retail regulation, not just TPI activities, it would raise questions about supplier obligations, for example, that are beyond the scope of this note.75

155. Drafting the rules so that they applied at the right time in the right way would require careful work, but should be possible. For example, it may be desirable to have careful drafting on how a TPI's obligations vary depending upon whether it is providing information (only), providing additional advice or acting on behalf of the consumer in engaging with a supplier etc and on what those obligations are. Modular regulation would need to ensure that all of the potential issues with a particular type of consumer-TPI engagement were captured by the rules that were stated to apply. In contrast to the present supplier SLC rule book, it would be not be the case that all of the rule automatically applied and that therefore there would be a great risk of "gaps" in protections.

[75] See page 25 of https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819624/flexible-responsive-energy-retail-markets-consultation.pdf

APPENDIX

DETAILED SUMMARY OF SUBSTANTIVE CONSUMER PROTECTION MEASURES AND APPLICATION TO THE CONSUMER LIFE CYCLE

1. This appendix contains a more detailed summary of the substantive consumer rights and protections offered under the general consumer protection regime (1). It also summarises the additional substantive consumer rights and protections offered under the energy regulation regime and some voluntary codes (2). The third part of this appendix gives further details of some of the specific provisions in an analysis of how relevant rights and protections apply during the life-cycle of a consumer's engagement with a TPI or supplier, from advertising and marketing, to the end of the contractual relationship.

1. General Consumer Protection

2. **Consumer Rights Act 2015** ("**CRA**"):

   a. Part 1 (Consumer Contracts for Goods, Digital Content and Services) implements the Sales and Guarantees Directive (1994/44/EC).

   b. **Digital content** is "*data which are produced and supplied in digital form*" (section 2(9)) (and might therefore be provided by TPIs in future business models). Digital content must be of satisfactory quality (section 34), fit for its purpose (section 35) and as described (section 36 and see Part 1, Chapter 3 generally).

   c. Terms are implied by law into consumer contacts in respect to **services**, including that:

   - the trader must perform services with reasonable care and skill (section 49);
   - anything said about the service will be treated as a binding term if taken into account by the consumer when entering in to the contract (section 50);
   - if no price is agreed then only a reasonable price is payable (section 51; and
   - services will be performed within a reasonable time (section 52 and see Part 1 Chapter 4 generally).

   d. Part 2 (**Unfair Terms**) implements the Unfair Contract Terms Directive and provides that unfair terms are not binding on consumers (see sections 62, 63 and Schedule 2 Part 1 for unfair terms. Specific Schedule 2 unfair terms are discussed in in the third part of this appendix, below).

3. The **Unfair Contract Terms Act 1977 ("UCTA")** deals with contracts not caught by CRA as "consumer" contracts. It provides some protection for business consumers. Section 2 provides a trader can only place reasonable limitations on its liability towards its business customers for negligence. Section 3 provides that, where the business consumer is contracting on the trader's standard terms and conditions, the trader can only place reasonable limitations on its liability generally (for example for any breach of contract); the trader must also be reasonable in giving itself the ability to provide a different service to that contracted for (see sections 11 and 24 and Schedule 2). Deciding what is "reasonable" requires looking at matters including the bargaining position of the parties and whether the terms were reasonably apparent to the business customer. Section 16 sets out these requirements slightly differently for Scotland, but the trader can only restrict its liability to the business consumer to the extent that it is fair and reasonable to do so.

4. The **Supply of Goods and Services Act 1982** ("**SGSA**") implies terms of reasonable care and skill in the provision of services in non-CRA regulated contracts (see sections 12 and 13).

5. The **Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("CCRs")** implement the Consumer Rights Directive (2011/83/EU). They require traders to provide consumers with information, for example regarding the services, the terms of contract and the identity of the trader, prior to and at the time of entering in to a contract. They also provide for consumer rights to cancel the contract and a prohibition on the imposition of additional charges post-contract. Specific provisions are discussed further in the third part of this appendix, below.

6. The **Consumer Protection from Unfair Trading Regulations 2008 ("CPUT")**, implement the Unfair Commercial Practices Directive (2005/29/EC). CPUT prohibits unfair practices which contravene professional due diligence, distort consumer behaviour, mislead consumers or employ aggressive commercial practices.

7. The **Consumer Rights (Payment Surcharges) Regulations 2012** implement Article 19 of European Directive 2011/83/EU on consumer rights. Subject to certain exceptions, the PSRs provide that a trader must not charge a consumer more for taking a payment than the costs of taking that payment (see regulations 4 and 5).

8. The **Electronic Commerce (EC Directive) Regulations 2002** implement consumer rights aspects of the E-Commerce Directive (2000/31/EC). They stipulate that "information society services" (which could include TPIs, as *"any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service")* must provide certain information, including details about the service provider. The regulations place requirements on traders in respect to consumer understanding of electronic contracts and clarity in agreeing to them, and in respect to the placing of online orders (see regulations 2 and 6 to

11).These regulations are potentially applicable, but have not been analysed in detail because they deal with specific issues that can arise in e-commerce, rather than consumer protection *per se*. E-commerce is not an area in which energy specific regulation differs in material aspects from the general consumer protection regime.

9. The **Provision of Services Regulations 2009** implement the Services Directive (2006/123/EC). These regulations apply to self-employed service providers (regulation 2) and so are unlikely to apply to most TPIs, but could be relevant for example for self-employed energy brokers. Part 1 places requirements on the trader to provide information such as contact details, complaints and dispute resolution processes. These regulations have not been considered in detail as they are not core to consumer protection as is likely to arise for TPIs or to differences between general consumer protection and energy sector regulation.

10. The **Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015** ("**the ADR Regulations**") implement the ADR Directive (2013/11/EU) and create a regime for designation of "ADR entities" who provide alternative dispute resolution services to consumers. However, they do not make the use of an alternative dispute resolution service compulsory for the resolution of disputes between a trader and consumer, they merely regulate for minimum standards and controls in respect of the provision of such services. See, for example:

    a. Regulations 2, 8 and schedule 1 that designate the FCA as the competent authority for the Financial Ombudsman Scheme; Ofgem and Ofcom *"in relation to the area for which it has responsibility";* and, the secretary of state (in other words BEIS or any successor department dealing with trade matters) for general trade where there is no other authority designated.

    b. Competent authorities appoint ADR entities in response to applications and provide ongoing monitoring and verification (regulations 9 to 13). ADR entities must have sufficient independence, transparency, expertise, impartiality and fairness, and they must provide contact details. If the service is not free, charges for the consumer must be nominal only (see regulation 9 and schedule 3).

    c. Regulations 19 and 19A stipulate that where the law, contract or rules of a trade association require use of ADR provided by an ADR entity, the trader needs to provide ADR contact details and refer the consumer to it when its internal complaints procedure is exhausted (and if trading online, the trader must refer to the European online dispute resolution platform).

    d. However, participants must have the right to withdraw (unless the trader is obliged by law to be in a scheme, and in respect to the energy ombudsman scheme and suppliers see the second part of this appendix below and Part C of the main paper). The outcomes are not binding unless the parties have accepted in advance that they will be. (Regulations 14C and Schedule 3).

11. **Business Protection from Misleading Marketing Regulations 2008** ("**BPMMRs**") implement European Directive 2006/114/EC on misleading and comparative advertising. The BPMMRs specifically provide protection to businesses ("traders") in respect to misleading advertising. This includes protections in respect to comparative advertising and prohibitions on promoting misleading advertising in codes of conduct (see regulations 3 to 5).

12. The **UK Code of Broadcast Advertising (BCAP Code)** is a self-regulatory code, although the requirement for the rules is provided for in legislation (Ofcom has a duty to prepare codes for TV and radio standards, see section 319 of the Communications Act 2003). BCAP provides that advertisements should not mislead or cause serious or widespread offence or harm, especially to children or the vulnerable. Content needs to be recognisably an advert and should not mislead (including through omissions), including in respect to prices, consumer rights and the nature of the product or service (including environmental claims). Ofcom-licenced broadcasters are responsible for (self-)enforcing the BCAP and Ofcom has contracted out its powers to deal with complaints to the Advertising Standards Authority ("**ASA**"), which can give directions to a broadcaster to correct a broadcast, impose a fine and even revoke (or shorten) the broadcaster's licence. ASA can also refer cases to Trading Standards, who will then consider the complaint with reference to the BPRMMRs and CPRs.

13. The **UK Code of Non-broadcast Advertising and Direct and Promotional Marketing (CAP Code**), deals with non-broadcast advertising and provides substantially the same protections in terms of non-misleading advertising. Again, enforcement is by the ASA, which can issue alerts to members advising them to withhold access to advertising space. CAP members can revoke access to services and ASA can require that all adverts are vetted for up to two years. ASA can also "name and shame" online. Again, ASA can refer cases to Trading Standards and Ofcom, who may take enforcement action for breaches of the BPMMRs and CPRs.

2. Energy Sector Regulation

14. Most current standard supply licence conditions (**SLCs)** are not direct consumer protection measures for the purposes of analysis in this paper. They cover issues such as "continuity of supply" and "industry activities and procedure" (in a large part of Section A); and (in Section C) industry schemes such as feed-in-tariffs and smart metering. These apply by virtue of taking on the role of a licensed supplier, which is a specific role within the regulated energy system, rather than being triggered by consumer engagement. It is clear though, from reviewing the development of the SLCs over recent years that they have been used as a tool to implement consumer protection policies and measures such as price caps. They cover areas of specific sector regulatory concern such as charging, consumer debt, encouragement of consumer switching, comparable tariff information and marketing to consumers.

15. SLCs, as discussed in this report, only apply directly to suppliers. Other licensed energy businesses such as the gas and electricity distribution networks also have licence conditions

and the distribution networks have some similar obligations as suppliers in respect to their more limited interactions with consumers, but these are all outside the scope of this analysis and report. However, a number of the SLCs require suppliers to ensure that both they (the supplier) and anyone acting on their behalf (which could be a TPI) meet certain standards or outcomes. TPIs are thus indirectly regulated, via suppliers and SLCs.

16. Specific SLCs are discussed in the third part of this appendix below for the purposes of comparing general consumer protection and energy sector specific consumer protections.

17. The **Gas and Electricity (Consumer Complaints Handling Standards) Regulations 2008 ("CHRs")** provide protection to domestic and microbusiness consumers by requiring suppliers to provide complaints handling procedures that meet specified requirements (see regulations 3 to 11).

18. For completeness, the key CHR provisions are:

- Regulation 3: Suppliers must have in place a complaints handling procedure, which they comply with and which, amongst other matters:
  - is in plain and intelligible language;
  - allows for oral and written (including email) complaints;
  - describes the steps in the process and how complaints are investigated, reviewed and escalated;
  - provides contact details for independent help;
  - provides for the right to refer to the energy ombudsman scheme;
  - sets out the remedies available, including an apology, an explanation, remedial action and compensation;
  - includes provision for compensation for breaches of SLC 25 (see the third part of this appendix for SLC 25).
- Regulations 4 and 5: Suppliers must record complaints and how they are handled (allowing supplier's performance to be checked, if necessary).
- Regulation 6: A requirement to signpost consumers to the energy ombudsman scheme when the supplier cannot resolve the complaint to the consumer's satisfaction.
- Regulation 7: Suppliers must review, handle and process complaints in an efficient and timely manner and must allocate such resources as are reasonably required to achieve this.
- Regulations 8 and 9: Suppliers must have in place procedures to deal with referrals from Citizens Advice and Citizens Advice Scotland of complaints from consumers in a vulnerable situation, or regarding disconnection. This includes a requirement to deal

with (and have in place procedures to deal with) referrals from the "consumer advice service" (i.e. Citizens Advice's Extra Help Unit, which supports consumers in vulnerable situations or who are at risk of disconnection).

- Regulation 10: Requirement to provide consumers with information (easily accessed and reasonably prominent) regarding the complaints handling process.
- Regulation 11: Suppliers are required to publish information, annually, on complaints.

19. The **Gas and Electricity Regulated Providers (Redress Scheme) Order 2008** requires suppliers to be members of, and subject to, the **energy ombudsman** scheme. The scheme protects both domestic consumers and microbusiness consumers. Complaints that have not been resolved by the supplier to the satisfaction of the complainant, or complaints about the difficulty in making a complaint, can be referred to the ombudsman. The ombudsman can compel suppliers to offer an apology or explanation, pay compensation and take specific steps to remedy the complaint. It is a service that suppliers (not consumers) pay for.

20. The **Electricity and Gas (Standards of Performance) (Suppliers) Regulations ("GS")** provide protections for domestic customers, and some protection for microbusiness customers, although most relate to the particular activities of a supplier in the energy system, rather than *per se* to consumer protection. The GS regulate the standards of performance of suppliers. The regulations (and protections) are:

- Regulation 3 (for domestic and microbusiness customers): In respect to activities as a licensed supplier, where the supplier makes appointments to visit premises then the appointment needs to be within a reasonable time and at least within a four hour window which is itself within working hours.
- Regulations 4 and 5: Requirement to take action on reports of faulty meters (and at regulation 5 specific requirements on prepayment meters).
- Regulation 6: Requirement on reconnections within 24 hours.
- Regulations 6A, 6B and 6C: Requirement to take action on reports of suspected erroneous transfers within 20 or 21 days (depending upon particular requirement).
- Regulation 6D: Requirement to refund credit balance to the customers within 10 working days of a final bill.
- Regulation 7: Requirement to relay to customers "distributed payments" received from gas transporters or electricity distributors.
- Regulation 8: If the supplier fails to meet the GS obligations, then it is automatically required to pay £30 to the affected customer within 10 days of the breach. If the supplier fails to meet this obligation then it must pay an additional £30.

- Regulation 10: A requirement to notify the customer of the relevant standards of performance whenever the relevant circumstances arise, as well as to have a statement generally available and to provide a copy to the customer every 12 months.
- Regulation 11: Disputes between customers and supplier may be referred to Ofgem for resolution. There is scope for Ofgem to order payments (see GS schedule for more).

21. By section 7B of the Electricity Act 1989 ("**EA89**") and the **Electricity Act 1989 (Uniform Prices in the North of Scotland) Order 2005** suppliers are required to apply the same **prices** or conditions of contract to all consumers within northern Scotland.

22. The Ofgem-administered **Confidence Code** accredits internet-based price comparison websites and apps ("PCWs").[76] Not all PCWs are members. The code's provisions do not protect a particular group of consumers, rather they place obligations on PCWs in respect to the operation of their services and the provision of information.

23. The code requires that PCW's act with independence and impartiality and clearly identify commission arrangements with suppliers. It deals with service requirements such as clarifying whether a comparison is made in respect of the whole market and provision of accurate information. PCWs must operate a complaints handling process. For completeness, the requirements are:

2 – Requirements on tariff and price comparisons.

3 – PCW needs to manage and control its price comparison service and use its own tariff and database (and includes provisions in respect to third party providers of services).

4 – PCW must provide consumers with explanations of payment options including standard credit, cash and cheque, monthly and quarterly direct debit and prepayment meters.

5 – Requirements on the presentation of results and filters, including a requirement to explain the impact of filtering.

6 – The PCW may assign (methodologically objective) quality of service ratings to suppliers and must signpost consumers to energy efficiency and Warm Home Discount information.

[76] See https://www.ofgem.gov.uk/consumers/household-gas-and-electricity-guide/how-switch-energy-supplier-and-shop-better-deal/compare-gas-and-electricity-tariffs-ofgem-accredited-price-comparison-sites and https://www.ofgem.gov.uk/system/files/docs/2018/07/decision_letter_-_confidence_code_wom_-_16_july.pdf, appendix 3 and 4. The present Code text is not, otherwise, publically available on Ofgem's website.

7 – Price and tariff information must be up-to-date and include VAT. Requirements on consumption calculations.

8 – Annual independent audit of the PCW required.

9 – The PCW must establish and operate an effective consumer complaint handling process.

10 – Where the PCW is not providing a whole of market comparison, then it needs to make this clear, provide a link to the Citizens Advice Comparison Tool and detailed requirements of Requirements 1 to 9 are modified to reflect that the PCW is not providing whole of market comparison.

24. The **Flex Assure** code (https://www.flexassure.org/) is for aggregators working with non-domestic (including microbusiness) consumers. It covers demand side response ("DSR") aggregators, electricity suppliers who act as aggregators and businesses active in DSR aggregator sector. It provisions require good practice in sales and marketing (including advertising), technical due diligence and site visits, proposals and pre-contractual information, customer contracts, complaints procedures and audits. There is a process of escalation of levels of violation and consequences with written warnings, temporary suspension and potentially expulsion.

25. The **Heat Trust** scheme https://heattrust.org/the-scheme-rules effectively provides the consumer protection measures set out in the gas and electricity SLCs, CHRs and GS, but for consumers of heat networks. It also provides that members submit to the energy ombudsman scheme for the resolution of individual complaints. The scheme looks at member organisation's compliance and performance and can take actions, including ultimately expulsion, for non-compliance.

3. Substantive consumer rights and protections during the life cycle of engagement with a TPI or supplier under the general consumer protection regime and under energy regulation

26. This part looks at how the relevant consumer protections provided in the general consumer protection regime and in the energy sector regime apply during the life cycle of consumer engagement: from pre-contract advertising to the end of the contract. The application of the specific voluntary TPI schemes noted above has not been looked at, but we do cover those codes in our comparison of the general consumer protection regimes and energy specific protections in Part D of the main paper. Protections listed below in respect to one point of the consumer life cycle may apply at other points too, but are not repeated. For example, provisions holding traders to statements about services and pricing at the pre-contract stage have been noted, because in effect these provisions control for misleading marketing, but the provisions will also offer protection during any subsequent contract agreed on the basis of a particular understanding as to the services or price.

Pre-contract and marketing: general protections

All consumers

27. The **BCAP** and **CAP** codes provide protection against misleading advertising generally.

Domestic (and potentially some microbusiness) consumers

28. **CRA** provides an implied term that anything said about the service will become a binding term if it was taken into account by the consumer when entering into the contract (CRA section 50).

29. Digital content will (when provided) be as it was described (CRA section 36) and information provided in line with **CCRs** (see below) is treated as included in the terms of contract (CRA section 37)

30. The CRA Schedule 2 Part 1 list of terms which may be regarded as unfair and therefore not binding on the consumer (see below) includes those which purport to bind the consumer to a contract that they have not been given a real opportunity to acquaint themselves with the terms of.

31. **CCRs:** Traders need to provide certain **information to the consumer pre-contract**. Under the CCRs, making information available means making it reasonably accessible to the consumer (regulation 8). The level of information required varies depending on whether it is an "on [trader's] premises contract", "off [trader's] premises contract" or "distance contract", all of which are possible with respect to TPIs (see regulation 5 for definitions).

32. For an on-premises contract the trader must provide a description of the services or digital content (and digital compatibility with hardware/software), identity of trader, price, timings for performance, trader's complaint handling policy, duration of contract and how to terminate if the contract is of indefinite length. There is no requirement as to the form in which this information must be provided, but it must be clear and comprehensible (regulation 9 and Schedule 1). For off premises contracts (unless the payment to the trader is £42 or less (regulation 7)) there are additional requirements to provide information on cancellation rights, copies of/confirmation of the contract, the identify of any other trader that the original trader is acting on behalf of, the existence of relevant codes of conduct and any applicable out-of-court complaint and redress mechanisms (regulations 10, 12 and Schedule 2).

33. By virtue of regulation 13 and Schedule 2, for distance contracts, the requirements to provide information are as above, but with additional specific requirements that information must be given in a clear manner and by appropriate means. Consumers must be provided with, amongst other things (and using Schedule 2 lettering):

(a) The main characteristics of the goods/services to the extent appropriate to the medium of communication and to the goods/services.

(b) Identity of the trader and address information.

(d) Where trader is acting for another trader, the geographical address and identity of that other trader, and (e) the address where the consumer can address any complaints directed to that other trader.

(f) The total price of the service.

(k) The trader's complaint policy.

(h) In the case of a contract of indeterminate duration or a contract containing a subscription, the total costs per billing period or (where charged at fixed rate) the total monthly costs.

(i) The cost of using the means of distance communication for concluding the contract where the cost is calculated other than at a basic rate.

(l) Details about right to cancel if that right exists, or acknowledgement that the rights does not exist as the case may be.

(s) Duration of the contract or if contract to be extended automatically, conditions for terminating the contract.

(t) Where applicable, the minimum duration of the consumer's obligations.

34. CCR requirements for distance contracts concluded by electronic means (regulation 14) additionally provide that if a payment is required, this must be explicit and obvious (Schedule 2 paragraph (3)). If there is a button to confirm payment, that button must be unambiguous that there will be payment obligation(s) (paragraph (4)). If paragraphs 3 and 4 are not followed then the consumer is not bound.

35. If the distance contract is completed over the phone the trader must, at the beginning of the call, identify the name of the trader, the identity of the person making the call and the commercial purpose of the call.

36. A distance contract must be confirmed, within a reasonable time and before performance of the services, on a durable medium or in digital format with the consumer's consent if the contract is in relation to digital content. The confirmation must include Schedule 2 information (see above) (regulation 16).

37. CPUTs protects consumers during the sales process. It does this by reference to the "average consumer" (being a reasonably well informed, observant and circumspect consumer) or if there is particularly targeted group, the average consumer in that group (see regulations 2 (2) to (4)). There is no special protection for consumers in a vulnerable situation. References to "products" includes services and digital content (regulation 2).

38. CPUT Part 2 prohibits **"unfair practices",** meaning practices which contravene the requirements of professional diligence and materially (or are likely to materially) distort the

economic behaviour of the average consumer with regard to the product (regulation 3). Unfair practices specifically also include providing misleading information (whether false or deceitfully presented) (regulation 5), misleading omissions (regulation 6), aggressive commercial practices which impairs or are significantly likely to impair the freedom of consumer (regulation 7), and the practices listed in Schedule 1, including:

- Falsely claiming to be a signatory to a code of conduct.
- Displaying a trust mark or equivalent that the trader has not properly obtained.
- Falsely claiming public body endorsement.
- Advertising a price the trader does not think it will be able to supply at.
- "Bait and switch" tactics of offering a product in order to actually sell another.
- Using editorial content to advertise, without making it clear.
- Pyramid schemes.
- Passing on materially inaccurate information on market conditions.
- Falsely claiming something is free.
- Falsely creating the impression that the trader is not acting in that capacity.
- Conducting personal visits to the consumer's home and ignoring requests to leave.
- Persistent and unwanted solicitations by telephone, email and other media.
- Inertia selling (supplying services not requested and then demanding payment for them).

39. The promotion of unfair commercial practices in a code of conduct is also prohibited (regulation 4).

Business consumers

40. The **BPMMRs prohibit misleading advertising** of products, which includes "any goods or services") (regulations 2 and 3). Advertising is misleading if it deceives or is likely to deceive traders and it affects the traders' behaviour or harms competitors. In addition, regulation 4 places limits on comparative advertising, so that it is only allowed if not misleading under BPMMRS or CPUTs and does not confuse traders. Regulation 5 provides that Code owners and codes of conduct are also subject to the BPMMRs.

Pre-contract and marketing: energy regulation

All consumers

41. **SLC 21D** requires that environmental claims for tariffs (including claims made by representatives of the supplier) must be supportable.

Domestic customers

42. SLC 0 provides that suppliers must ensure that they and any representatives of theirs (including TPIs) achieve the **Standards of Conduct** to ensure domestic customers, including those in a **vulnerable situation**, are treated fairly (not likely to suffer unreasonable detriment as a result of the supplier's (or representative's) actions). The Standards of Conduct include that supplier and representative actions and behaviours are **fair, honest, transparent, appropriate and professional**; that information is complete, accurate and not misleading; that customer service arrangements are fit for purpose and responsive; and that customers in a vulnerable situation are identified and the vulnerability accounted for. Suppliers must have regard to Ofgem guidance. SLC 0 does not regulate prices.

43. SLC 25: Suppliers must ensure their tariffs are clear, distinguishable and easily compared. Suppliers must not, and must ensure that any representatives (TPIs) do not, mislead consumers or use inappropriate sales tactics during any marketing. They must only recommend appropriate products. Records must be kept for two years of information provided in face-to-face or telesales.

44. SLC 23: Suppliers must (and must ensure any representatives) notify consumers of the principle terms of contract, before contracting.

Microbusiness

45. SLC 0A is the microbusiness **Standards of Conduct**. It is broadly as per SLC 0 (see above) save that it does not apply to representatives' (and therefore TPIs') actions and the scope of activities it applies to is more limited, being to billing (but not prices *per se*), contractual information, customer transfers and deemed contracts.

46. SLC 7D places an obligation on suppliers to provide price information (unit rates, standing charges) on the supplier's website or via a PCW or other internet-based microbusiness TPI that provides comparisons.

Contracting: general protections

47. The **CCRs** provide for cancellation periods in respect to distance contracts and in respect to off-premises contracts where the payment made by the consumer is more than £42. By regulation 29 a consumer can cancel at any time in the cancellation period (which is 14 days from the moment the contract is entered into) without giving any reason or incurring any liability; no charges are to be applied and the consumer is entitled to a reimbursement if necessary (regulation 34).

48. During the cancellation period the trader must not supply the services or digital content unless the consumer has made an express request (services) or consented (digital content). If the consumer receives services during the cancellation period at their request and then

cancels, the consumer is liable to pay for the proportion of service supplied and in respect to digital content they lose the right to cancellation (regulations 36 and 37).

49. Under regulation 38 (2), when the trader is informed by a consumer that it wishes to exercise its right to cancel a contract, the trader must inform any other trader with whom the consumer has an ancillary contract. "Ancillary" means "*a contract by which the consumer acquires goods or services related to the main contract, where those goods or services are provided… by a third party on the basis of an arrangement between the third party and the trader*". This may have the potential to place an obligation on a TPI to inform an energy supplier, on the basis that the supply contract is an ancillary contract to the consumer-TPI contract, for example if an auto-switching TPI were acting on the consumer's behalf in entering into contracts.

50. **Unfair contract terms** or notices are not binding on the consumer by virtue of **CRA** s62. Terms are "unfair" if they cause a significant imbalance of parties' rights and obligations under the contract, to the consumer's detriment (CRA section 62(4) and (6)). CRA section 63 and Schedule 2 Part 1 give a (well-established) list of terms which may be regarded as unfair.[77]

51. CRA Section 68 also provides that written **terms must be transparent**, meaning legible and expressed in plain and intelligible language.

52. As already noted (see second part of this appendix above), for contracts not covered by the CRA, **UCTA** provides that a trader can only seek to limit its liability, or provide an alternative or reduced service, to the extent that it is "reasonable". Testing whether the trader's actions

[77] The CRA Schedule 2 Part 1 list includes terms which seek:

- inappropriate limiting of liability on the trader's part,
- disproportionate charging and the trader being able to keep hold of sums,
- disproportionate obligations on the consumer,
- discretionary powers to dissolve the contract that belong to the trader only
- to terminate a contract of indefinite length without appropriate notice,
- roll-over of a fixed term contract when the consumer is required to indicate they do not want to do so unreasonably early,
- binding the consumer to a contract that they have not been given a real opportunity to acquaint themselves with the terms of,
- unilateral variations without valid reasons,
- unilateral powers of the trader to decide the price post-contract,
- the right for the trader to decide whether services or digital content are in conformity with the contract terms,
- limits on the consumers' rights to pursue legal remedies.

are reasonable at whether the business consumer was aware of the relevant terms, had a chance to comment upon them and had the bargaining power to seek any changes.

53. The **Electronic Commerce (EC Directive) Regulations** (see second part of this appendix above) have the potential to apply to digital TPIs and would require the TPI to provide details about the service provider and make provisions in relation to electronic contracts, information provision, placing of orders and rights to cancel. The **Provision of Services Regulations 2009** (also already outlined in the second part of this appendix, above) would also place information provision requirements, for example about contact details, complaints and dispute resolution processes, on self-employed TPIs (potentially, for example, a sole trader broker) to the extent that these obligations had not already arisen in any event.

Contracting: energy regulation (domestic consumers only)

54. **SLC 22** places an obligation on suppliers to supply consumers if they ask to be supplied, and to do so only under regulated *Domestic Supply Contracts or Deemed Contracts* (Deemed Contracts have not been specifically analysed because they are unlikely to have a TPI equivalent: a Deemed Contract arises when the consumer has not chosen the supplier or tariff and has not engaged with the supplier prior to contracting, but is on a contract by virtue simply of receiving supply (for example when moving in to a new house). Deemed Contracts are, in any event, generally subject to the requirements outlined in this paper plus specific measures to deal with their particular characteristics).

55. Domestic Supply Contracts must be in writing and include provisions on charges (and sources for up-to-date information on these), termination, the identity and address of the supplier, services provided, any conditions for renewal, compensation and refund arrangements if services are not met, rights of dispute resolution (see below regarding the energy ombudsman) and when connection (if required) will take place (SLC 22.4 and 22.5).

56. The supplier must send a copy of the contract terms and historical consumption data if requested (SLC 22.8 and 22.9).

57. By **SLC 23** suppliers must (and must ensure any representatives) notify consumers of the principle terms of contract, before contracting.

58. Mutual variations to contracts are not allowed if extending the life of the contract. If they are in respect to charges or otherwise disadvantageous to the consumer then they are only allowed if the consumer has been given sufficient notice and told they do not have to agree; any agreement must be express and followed-up with a note explaining the new terms (**SLC 23A**).

Pricing: general protections (domestic only)

59. If no price is agreed for the service beforehand, then only a reasonable price is payable (**CRA** s51). In addition, the CRA Schedule 2 Part 1 list of terms which may be regarded as unfair (see above) includes disproportionate charging, the trader being able to keep hold of sums and unilateral powers of the trader to decide the price post-contract.

60. **CCR** regulation 40 prohibits the trader imposing additional charges post-contract.

61. Note, in addition, the remedies of price reductions and refunds for consumers if services and digital content are not of satisfactory quality.

Pricing: energy regulation

Domestic

62. **SLC 22A** provides that domestic customer charges for supply (of gas and electricity) can only be based on standing charges and unit rates, save for limited allowance for separate costs such as (dis-)connection which are not part of the normal supply. This does not regulate price *per se* but it does mean that for the core product of supplying energy, the supplier must charge on a prescribed basis. Any additional ancillary services a supplier might offer (and which might be similar to TPI services) would likely be outside of the definition of "charges for supply" and therefore not caught. **SLC 31E** provides that suppliers need to be clear whether references to charges for domestic customers are inclusive or exclusive of VAT and **SLC 25** provides that tariffs must be clear, distinguishable and easily compared.

63. Within the north of Scotland, suppliers are not permitted to set different rates of charges for supply based on the location of the domestic customer.

64. At present, domestic energy consumers benefit from **SLCs 28A, 28AA** (to the extent still relevant) and **28AD** which provide for the retail energy price cap for those with (non-smart) prepayment meters or who are on standard variable or deemed tariffs. In addition, the resale of energy is, in effect price capped to the same level as the re-seller itself paid for the energy [see Part C of the main paper regarding resale of energy].

Domestic and Microbusinesses

65. **SLC 0** (for domestic customers) **and 0A** (microbusiness consumers) whilst not otherwise regulating prices, do prohibit excessive charging under deemed contracts.

Billing and payment: general protections

66. As noted above (see the first part of this appendix), the **PSRs** provide that a trader must not charge a consumer more for taking payment that the cost of taking that payment.

Billing and payment: energy regulation

Domestic and non-domestic consumers

67. **SLC 21B** sets out requirements regarding billing based on meter readings and making available bills or statements of account, thus exercising some control over how consumers are charged for the supplier's offering. **SLC 21BA** prohibits "backbilling", **domestic** and **microbusiness consumers**. In this context, "backbilling" is charging for consumption or standing charges that are more than 12 months old.

Domestic consumers

68. **SLC 27** requires suppliers to offer a wide variety of payment methods and to offer assistance to customers in payment difficulty including through offering a prepayment meter or payment plan. Disconnection is not allowed unless the supplier has first taken all reasonable steps to deal with payment difficulties. Final bills must be provided within six weeks.

69. **SLC 31H** is a requirement to provide consumers with relevant billing information including a tariff name, its features, charges, and a QR code to access information etc, in a form and frequency (including on bills and annual statements) so as to enable consumers to understand and manage costs.

Quality of service/digital content: general protections

70. There is an implied term of reasonable care and skill in respect to services (and a right to ask for repeat performance if this is not provided (**CRA** sections 49, 54 and 55). Services are to be performed within a reasonable time (section 52).

71. Digital content is to be of satisfactory quality, fit for purpose and as described, failing which the consumer has rights to costs, repair or replacement, price deduction and refunds (sections 34, to 37 and 42 to 45).

72. The CRA Schedule 2 Part 1 list of terms, which may be regarded as unfair (see above) include a term which purports to give the trader the right to decide whether services or digital content are in conformity with the contract terms.

73. For consumers not protected by the CRA, **SGSA** implies terms regarding reasonable care and skill in the provision of services.

Quality of service: energy

74. To a significant extent all of the supplier specific regulation outlined in this paper relates to the quality of the service the supplier provides to the consumer in its role as a licensed supplier (and regulation in respect to the quality of the gas and electricity is outside the scope of this note).

Domestic Consumers

75. As already outlined above (see the second section of this appendix), the **GS** also provide a specific regime of guaranteed standards of performance by suppliers in respect to certain specific elements of their service.

76. **SLC 26** requires suppliers to establish a priority services register, identifying customers who may need priority services, because they are or may be in a **vulnerable situation**, and to provide additional assistance for example on engaging with the supplier and accessible communications.

Complaints handling and redress: general protections

77. The key provisions of the **Alternative Dispute Resolution regulations** (see first part of this appendix, above) have been highlighted. In effect, these provide a regime for the approval and quality control of "ADR schemes", which are out-of-court dispute resolution services. However, the regulations do not make ADR schemes compulsory nor the outcomes binding on the trader. Consumers will be able to rely on consumer protection regulation and the general law in any disputes with TPI service providers, but there is no general legal requirement for alternative dispute resolution of disputes in order to ease the consumer's resolution of complaints and disputes.

78. The requirement on traders to make consumers aware of whatever complaints process they do have been noted elsewhere. Equally, falsely claiming to be part of an alternative dispute resolution scheme, or not complying with it having previously committed to do so, would breach general consumer protections against misleading marketing and contracting information, and which hold the trader to its representations.

Complaints handling and redress: energy

Domestic and Microbusiness Consumers

79. As set out above in the second part of this appendix, the **CHRs** require that suppliers have a clear complaints handling process, that they make consumers aware of it, comply with it and adequately resource it. Suppliers are also required to be members of the energy ombudsman scheme (which they pay for), to refer consumers to this if complaints are not resolved and to comply with binding decisions that may require them to pay compensation, provide apologies and take steps to remedy complaints (again, see the second part of the appendix, above, in respect to the energy **ombudsman** regime). The CHRs also require suppliers to have in place systems to deal properly with referrals from the Citizens Advice consumer service and the Extra Help Unit (again, see above).

Domestic

80. **SLC 31G** requires suppliers to provide (including in annual guidance), information to domestic consumers about how to contact, seek advice from and raise complaints with the supplier,

relevant distribution network and Citizens Advice / Citizens Advice Scotland. **SLC 32** requires them to provide Citizens Advice and Citizens Advice Scotland with information on consumer service.

Non-domestic

81. Suppliers must also provide their non-domestic customers with information concerning dispute settlement that is available if required and must do so on promotional material, statements of account and bills (**SLC 20.5**).

Contract variation, switching, termination and renewals: general protections

82. The **CRA** Schedule 2 Part 1 list of terms, which may be regarded as unfair (see above) includes:

- discretionary powers to dissolve the contract that belong to the trader only;
- powers to terminate a contract of indefinite length without appropriate notice;
- the roll-over of a fixed term contract when the consumer is required to indicate they do not want to do so unreasonably early;
- unilateral variations to the contract without valid reasons; and
- the right for the trader to decide whether services or digital content are in conformity with the contract terms.

Contract variation, switching, termination and renewals: energy

All consumers: switching, transfer blocking and debt

83. SLC 14 sets out provisions on customer transfer blocking. Microbusiness consumers cannot be blocked from switching if the attempted block is due to disputed unpaid charges. Domestic customer should generally be able to transfer with debts of up to £500 (they are assigned to the new supplier). Generally, suppliers are required to help domestic customers in particular with clearing and dealing with debt. Customers should transfer within three weeks **(SLC 14A).**

Domestic consumers: terminations, roll-overs, variations

84. By **SLC 22C**, fixed term supply contracts are not to automatically roll-over. Suppliers must provide statements of renewal terms, must give written notice and obtain written consumer consent to a new fixed term contract. In the event that the customer does not make a decision on a new tariff or switch, the customer must be switched on to the relevant cheapest tariff. Prices cannot be increased and no disadvantageous unilateral variations are allowed during the life of the contract.

85. For "Evergreen" tariffs (i.e. not fixed-term), the tariff must be "live" (i.e. other consumers can switch to it). There is a prohibition on "dead" tariffs (invariably uncompetitive tariffs that

cannot be switched on to), with exceptions where consumers are not losing-out as a result of being on such a tariff (**SLC 22D)**

86. **SLC 23** provides that the supplier needs to notify consumers when a contract is coming to an end and provide the terms of the deemed contract that will apply if the consumer does not otherwise chose a new tariff or switch away. Suppliers are required to notify consumers of increases in charges or other disadvantageous unilateral variations (to the extent that they are not anyway prohibited). **SLC 23A** adds to this that mutual variations are not allowed if extending the life of the contract; in respect to charges or if disadvantageous they are only allowed if the consumer has been given sufficient notice and told they do not have to agree; any agreement must be express and followed-up with a note explaining the new terms**.**

87. Domestic supply contracts automatically terminate at the end of ownership or tenancy, provided the consumer notifies the supplier of the change of status. Termination fees cannot be charged if the contract is for an indefinite period or there has been an increase in charges. Evergreen contracts (i.e. not fixed term), must be terminable, without charges applying, with no more than 28 days' notice required. Fixed term contracts can be terminated, without charges, once the end of the fixed term is drawing near. If the switching process has been initiated, the customer is to stay on the original fixed terms until completed (**SLC 24**).

88. **SLC 31I** sets out requirements regarding notices of increases in charges, disadvantageous unilateral contract variations and the end of fixed term contracts.

89. **SLC 31F** requires suppliers to encourage consumers to consider switching tariff and/or supplier, including through providing information about alternative cheaper tariffs and consumption.

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