

Monitoring the Business Retail Market from April 2017: a consultation

This response has been produced by the Energy Managers Association (EMA). The EMA's members are responsible for around £6 billion of energy spend and a corresponding amount of water. One of the greatest concerns of the membership is issues related to bad practice in procurement in the marketplace by TPIs and energy brokers. Whilst the majority of TPIs give good service and drive down prices there is a significant number who do not. The EMA is concerned that these abuses will be replicated in the water marketplace unless systems are put in place based around transparency to stop these practices.

The deregulation of the water marketplace will in theory give consumers greater choice in retailers and the products they offer, however there are significant risks that mean that many consumers may well through TPI charges, end up paying more than they expected for their water. This has been the case in the electricity and gas sector and the learnings from these industries should guide the regulator in the processes they put in place to protect consumers.

Deregulation has been developed around Ofwat's vision that Ofwat's role is in, "provoking, challenging and where appropriate leading the sector, to ensure it has clarity on what customers and society expect". Deregulation should be a process where the customer expects to be protected from hidden or unexpected charges.

TPIs have been a central part of the electricity and gas markets, leading to a reduction in the amounts consumers pay through finding the best deals. However, Ofgem has recognised that there is a rogue element in the TPI marketplace that has not worked in the consumer interests and have profited from hidden charges, tying customers into long and expensive contracts and offering contracts with one particular provider whilst giving the impression they are securing prices from the whole of the marketplace. To deal with this problem, Ofgem has worked on a code of conduct for TPIs. Even though the implementation of the code was recommended in the recent CMA report, Ofgem has failed to implement the code. The lack of action, especially to protect micro-businesses and SMEs, is a failure of the regulator to meet its core duty to protect its customers.

Ofwat's consultation based around monitoring the marketplace ignores the well documented abuses that have taken place in the electricity and gas sector. The abuses are common for the simple reason that there is no need for transparency, so the customers who often have no knowledge on the procurement process can be misled in the terms rates and basic cost of the contract. Even though Ofgem's work on a code of practice has been in gestation for at least four years, no action has been taken.

The industry has a number of self-regulating codes that have been initiated by the industry; they have little credibility and no power to take action against any TPI that acts outside the codes.

The most recognised code with credibility in the sector is the Eon code; however, this is a code that is built around the obligations of a supplier.

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In order to protect the interests of its members and the wider procurement community, the EMA launched a voluntary code in 2016 that was based on the Ofgem draft code and centred on transparency. Although this was marketed to the whole of the TPI community and over 100 TPIs were contacted, there was no appetite for a code which imposed requirements for transparency. It was thought at the time that following the CMA review a mandatory code would be implemented. When asked, companies indicated they would wait for the mandatory code although there was scepticism that such a code would be introduced; a prediction that has turned out to be the case.

The EMA believes that this issue is so important it is looking at a number of options with other bodies that include judicial review. Ofgem is failing to protect customers and Ofwat, if it fails to take some action, will also be failing water customers.

Problems with the approach set out in the consultation.

Ofwat's position is that it should regulate the interaction between market participants which is an important element of a successful deregulated market, however it ignores one crucial element and that is customer protection. The customer may well benefit from the smooth interaction of segments of the deregulated marketplace but there are no systems in place to protect the consumer from sharp practice. Ofgem has often quoted the Business Protection from Misleading Marketing Regulations (BPMMRs) and the Consumer Protection from Unfair Trading Regulations (CPRs) which prevents mis-selling. However there have been no conviction and little ability to enforce these laws against TPIs, although there have been heavy sanctions enforced against malpractice by suppliers.

The reason that few actions are taken is that most abuses take place in the implementation of the contract. The contract itself may be legal and the customer has signed the contract so enforcement is a problem, however the number of documented complaints shows that this is a common problem and many businesses, due to a lack of knowledge, end up paying far more than expected and locked into long term contracts. Most companies, even if they believe there was a problem with the way the contract was sold, will just pay the money and move to another supplier when they can as there are few routes to get their complaints dealt with. This is a major failing in a regulated marketplace.

Possible Solutions

The EMA would like to explore the possibility of a self-regulating code of conduct in the water market that would be based on the EMA revised Ofgem draft code. The code could be financed through a membership fee paid for by the water retailers and TPIs who wish to work in the marketplace.

The benefits of the code are that it is based on transparency of practice which would allow customers to understand what they are being charged for at what rate. The water retailers are constrained in the charges they can levy. The element of transparency would be that any TPI would need to state as part of the contract the rate charged by the water retailer, they would then need to show the amount they are charging to the customer for any service separately. The customer may well pay the TPI a commission for services rendered be they in the area of tendering or water efficiency however they would have a clear understanding of what is being charged and by whom.

On signing the code the TPIs would need to undertake two actions. They would need to abide by the provision of the code, elements of which would be to publicize their membership of the code and how

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to contact the codes administrators in case of complaints. The TPIs and also the water retailers would need to keep a standardised complaints log that could be regularly accessed by the administrators of the code.

Complaints that were of a serious nature or a high volume of complaints could then be the trigger for an audit of the company's practices and a judgement could be made as to whether the company should be removed from the code or actions to rectify problems could be taken. Ofwat could require licenced water retailers as part of their licence obligations to make sure that any TPIs they worked with were members of the code. This would mean that companies that failed to act in a transparent manner and were removed from the code would not be able to arrange contracts between customers and retailers in the water sector.

The value of the code to Ofwat is that industry would pay for its own monitoring and self-regulation through a process that would give Ofwat full transparency on the operation of the marketplace and complaints lodged by consumers. The code would not contravene commercial confidentiality as the water prices and maximum margins charged by retailers are published, but it would stop TPIs hiding charges that they make as part of the unit cost.

The EMA or another body could carry this work out on an open book process only charging the amount in member's fees that the scheme costs to implement. As the process is straightforward and simple to administer the costs would be low. There would be processes that would allow companies to appeal any decision to an independent arbiter.

The whole purpose of the concept and design of this system is to aid in the implementation of a successful water retail market that will allow customers to make choices with confidence that they will be aware of the charges made for services rendered by all parties. The complaints processes will alert Ofwat to failings in the process or abuses that occur.

The consultation sets out robust measures to monitor the marketplace but misses out the crucial element of retailer interaction with customers through the medium of TPIs. As the majority of contracts that will be arranged on behalf of microbusinesses or SMEs will be through TPIs or bundled services it is essential that consumers have clear and transparent information on the elements of the contracts they are signing.

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