Title: Gas & Electricity Markets Authority (GEMA) gaining powers under the Business Protection from Misleading Marketing Regulations 2008 (SI 2008/1276) 'BPMMRs' **IA No:** BIS CCP001 **Lead department or agency:** BIS **Other departments or agencies:** Ofgem (Ofgem is the office which supports GEMA in its work).	**Impact Assessment (IA)** **Date:** 24/09/2013 **Stage:** Final **Source of intervention:** Domestic **Type of measure:** Secondary legislation **Contact for enquiries:** Helen Purnell, BIS, helen.purnell@bis.gsi.gov.uk 02072153167

Summary: Intervention and Options

RPC Opinion: GREEN

Cost of Preferred (or more likely) Option				
Total Net Present Value	**Business Net Present Value**	**Net cost to business per year** (EANCB on 2009 prices)	**In scope of One-In, One-Out?**	**Measure qualifies as**
£0.0140m	£0.0140m	£0.0013m	Yes	IN

What is the problem under consideration? Why is government intervention necessary?

To address the mis-selling of energy contracts to business energy consumers particularly by Third Party Intermediaries (TPIs) which play a key role in selling and marketing energy contracts to business customers. The powers to address these practices are through the BPMMRs. The Gas & Electricity Markets Authority (GEMA) does not have these powers. Currently in Great Britain, they can be exercised by the Office of Fair Trading (OFT) and Trading Standards (TSS) who, given their need to prioritise actions on an economy-wide basis, have not taken action in this area. Government intervention is necessary to amend the statutory instrument (SI) to name GEMA as an enforcement body, gaining powers under the BPMMRs.

What are the policy objectives and the intended effects?

To allow GEMA to take action using statutory powers against entities, principally TPIs (although the regulations also apply to energy suppliers), to help reduce the mis-selling of energy contracts to business consumers. Powers would support a voluntary industry code of practice also being developed. Estimates suggest about 500 TPIs (and around 30 suppliers) operate in this market.The intended effect is to reduce detriment by ensuring consumers are provided with information they can rely on to make informed decisions. Increased trust should lead to more effective switching and contracting decisions by businesses in the energy market, saving them money and providing for a greater degree of trust and engagement.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0 - Do nothing.

Option 1 (Preferred option) - BPMMR powers provided to GEMA, to enforce the BPMMRs as a statutory backstop to the voluntary Code of Practice for non-domestic TPIs.

Option 2 - Voluntary Industry Code of Practice for non-domestic TPIs. Ofgem is developing (with TPIs, suppliers and consumer groups), a code of practice covering TPI activities in the non-domestic energy market.

Option 3 - Use of provisions proposed in the Energy Bill. To extend the scope of activities that can be made subject to the licence regime governed by Ofgem. If granted, this provision would enable Ofgem to regulate TPIs in the domestic and non-domestic energy market through licence conditions (subject to consultation).

Will the policy be reviewed? It will/will not be reviewed. **If applicable, set review date:** Month/Year

Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	**Micro** Yes	**< 20** Yes	**Small** Yes	**Medium** Yes	**Large** Yes
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)			**Traded:** N/A		**Non-traded:** N/A

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: Jo Swinson Date: October 2013

Summary: Analysis & Evidence

Policy Option 1

Description: GEMA gaining powers to enforce BPMMRs

FULL ECONOMIC ASSESSMENT

Price Base Year 2013	PV Base Year 2013	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: £0.0234	**High:** £0.0047	**Best Estimate:** £0.0140

COSTS (£m)	**Total Transition** (Constant Price) Years		**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low	£0m		£0.0005m	**£0.0047m**
High	£0m		£0.0027m	**£0.0234m**
Best Estimate	£0m		£0.0016m	**£0.0140m**

Description and scale of key monetised costs by 'main affected groups'

Monetised costs have been identified for TPIs where action is taken under BPMMRs but which are found to be compliant (estimate 1 per year). Scale of monetised costs shown in the further evidence section.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	**Total Transition** (Constant Price) Years		**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low	£0m		£0m	**£0m**
High	£0m		£0m	**£0m**
Best Estimate	£0m		£0m	**£0m**

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

Compliant TPIs - resulting from an increase in trust in the TPI market overall with the potential for business consumers to use them on a greater scale. It also helps create a level playing field by limiting the impact of non-compliant TPIs gaining unfair commercial advantage through mis-selling energy contracts.

Business consumers - who would not experience the additional costs/inconvenience of being on a mis-sold contract with higher costs and/or not appropriate to their needs.

Key assumptions/sensitivities/risks — **Discount rate (%)** 3.50

The key assumption is the number of cases that GEMA may bring under the BPMMR powers and, of those, actions which which might impact main affected groups. OFT and TSS, have undertaken 41 cases since 2008, on an economy-wide basis. The number of cases GEMA would undertake on an annual basis is difficult to estimate, although given they are energy specific the number is likely to be less. Information requested by Ofgem from TPIs under BPMMRs is to be on a case-by-case basis, not a regular return.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			**In scope of OIOO?**	**Measure qualifies as**
Costs: 0.0013	**Benefits:** 0.0000	**Net:** 0.0013	Yes	IN

Evidence Base (for summary sheets)

Problem under consideration

Evidence exists and continues to emerge of the mis-selling of energy contracts to business energy consumers by Third Party Intermediaries (TPIs) which play a key role in selling and marketing energy contracts to business energy customers.

Rationale for intervention

These practices are currently enforced under the Business Protections from Misleading Marketing Regulations 2008 (SI 2008/1276) ("BPMMRs") by the Office of Fair Trading (OFT) and Trading Standards (TSS) although they have taken no action in this area, given their need to prioritise actions on an economy-wide basis. Government intervention is necessary to extend these powers to the Gas & Electricity Markets Authority ("GEMA") - the regulator for the gas and electricity markets in Great Britain (England, Scotland and Wales).

The office supporting GEMA in its day-to-day work is Ofgem. Specifically, Ofgem is seeking information gathering powers and the ability to apply to the court for an injunction to secure compliance with the BPMMRs and exercise their civil enforcement powers. It is not seeking powers to undertake criminal prosecutions for breaches of the BPMMRs. The specific powers sought are:

- Power to bring proceedings for an injunction for a breach (or likely breach) of regulations 3, 4 and 5 prohibiting misleading advertising, or the promotion of advertising which misleads traders, including non-compliant comparative (contained in regulation 15 of the BPMMRs);
- Power to accept an undertaking for compliance with regulations 3, 4 or 5 (contained in regulation 16 of the BPMMRs); and
- Power to request information for the purpose of determining whether to bring injunction proceedings (contained in regulation 21).

In February 2013, Ofgem consulted on the proposal to acquire these powers, together with a request for any further evidence on costs and benefits. It received 15 responses, 14 of which gave broad support for Ofgem acquiring the powers.

Evidence

Although business customers' spending on energy varies according to the business size and type of activity, data from research contained in Ofgem's Retail Market Review[1] shows that, over a third of small businesses and around 80% of medium-sized businesses spend over £5,000 per year on electricity. There are estimated to be 2.4million energy contracts, 97% are for SMEs. TPIs help many business customers to successfully engage in the market with over half of major energy users and several hundred thousand SMEs (around 15%) using them. Many suppliers contract with new customers primarily through TPIs. We are not aware of the exact number of TPIs active in the non-domestic market, but based on responses to our consultation and other evidence[2], we estimate it to be at least 500. TPIs vary in size (ranging from sole traders to large companies), and type, covering sales agents for suppliers, brokers and consultants (although boundaries between these functions are not always strongly distinguishable).

1 Ofgem Retail Market Review: updated proposals for businesses, October 2012, http://www.ofgem.gov.uk/MARKETS/RETMKTS/RMR/Documents1/The%20Retail%20Market%20Review%20-%20Updated%20proposals%20for%20businesses.pdf

2 Source: Energy Brokerage in the business and industrial energy supply markets, Cornwall Energy, April 2013 (available from Ofgem)

There is consistent evidence, and it continues to emerge, of TPI practices which involve the alleged mis-selling of energy contracts. While affecting a minority of business customers these practices can lead to detriment, both financially and in terms of other resources, including the time it takes a business to try to sort out the issue. Consumer Focus' 'Watching the Middlemen' Report, May 2011[3], highlighted a range of issues and behaviours in the TPI market. In particular, it stated that businesses can be committed to contracts which are not best suited to their needs, because the prices and terms offered by certain TPIs are not at competitive levels. In some cases, this may be as a result of TPI commissions not previously disclosed, being included on the final price.

The Report provided evidence from Consumer Direct (now the Citizens Advice Consumer Service). Unlike domestic consumer contracts where there is a cooling-off period for contracts agreed at a distance (e.g. either over the phone or online) business customers may not be able to easily cancel a contract. These customers then experience the time, inconvenience and distress of making a complaint and/or disputing the transfer of their supply, potentially by taking cases to the Ombudsman (in micro-business cases) or seeking independent legal advice at further expense. The Report highlighted that, where contracts are concluded over the telephone, these issues can often be exacerbated.

Examples were also provided in the Report of complaints from business customers of mis-representation by TPIs where they had used official sounding names (i.e. indicating it did not have a commercial interest) or, for an official sounding purpose, such as having to register a meter, when the intention was actually to sell the business an energy contract.

Evidence from research[4] by Ofgem to inform its Retail Market Review shows many small business customers share the same characteristics as domestic consumers (for example, in terms of resources and awareness) and they are often no better placed than domestic consumers to protect themselves from poor behaviour in the market.

The research has also shown that business customers are concerned about the effects of a range of TPI behaviour. In particular, while TPIs were generally seen as a positive presence in the market, 14% of businesses (of all sizes) who used a broker when considering a switch to a different electricity supplier and 17% when considering a new gas supplier were dissatisfied with them. This was mainly due to perceived pressure and unprofessional behaviour.

Costs and benefits:
Option 1 (Preferred) - BPMMR powers provided to GEMA, to enforce the BPMMRs as a statutory backstop to the voluntary Code of Practice for non-domestic TPIs.

Costs
It is not expected that there will be familiarisation costs for TPIs as the regulations have been in existence since 2008 and firms will already be familiar with these regulations.

We do not expect there to be any ongoing costs to businesses under the proposals. Information requested by Ofgem from TPIs under the BPMMRs would be on a case-by-case basis where

3 Watching the Middlemen, March 2011, http://www.consumerfocus.org.uk/files/2011/03/Watching-the-middlemen.pdf

4 Quantitative Research into Non-Domestic Customer Engagement and Experience of the Energy Market http://www.ofgem.gov.uk/Markets/RetMkts/rmr/Documents1/Quantitative%20Research%20into%20Non%20Domestic%20Customer%20Engagement%20and%20Experience%20of%20the%20Energy%20Market.pdf

there is sufficient evidence of the need to take action. There would be no requirement for a regular return from TPIs.

One-off costs will apply when these powers are exercised by Ofgem to request information from a TPI, and where the TPI is subsequently found to be compliant. Any costs for non-compliant businesses are not considered here, in line with Green Book guidance.

A key assumption is the number of cases that GEMA may bring under the BPMMR powers and of those actions, which might impact the main affected groups. Figures provided by the OFT show that from 2008-2013, OFT and TSS undertook 41 civil interventions on an economy-wide basis, with 12 cases resulting in formal undertakings. This means that 29 civil interventions or approximately 6 cases per year[5], were either against compliant businesses or businesses which were not compliant but changed their behaviour so as not to incur a formal undertaking from OFT/TSS.

The number of cases GEMA may undertake against businesses later found to be compliant is difficult to estimate accurately. The estimate of 6 cases per year covers all sectors, whereas we believe that the number of cases brought specifically against businesses in the energy sector is likely to be considerably lower. For the energy sector, based on the figure of 6 cases for the whole economy, we believe that on average no more than 1 case is likely to occur under the proposed reforms.

The time taken for a business to respond to a request for information is likely to vary depending on the nature of the information requested, whether the business has it to hand and how quickly it can gather the information. Therefore, we estimate that it may take a business between 1 working day (8 hours) and 5 working days (40 hours) to respond. The staff required to work on producing the information requested are likely to be a Director (£32.54 per hour), legal advisor (£24.76 per hour) and administrator (£9.22 per hour) of the affected business[6]. We estimate the main costs on TPIs (those compliant with the regulations but which are subject an information request under the powers) to range £543.40 - £2,717 per year, with a best estimate of £1,630.20.

Cost to public sector

Ofgem/GEMA has concurrent powers under the Competition Act 1998, and has established enforcement teams to monitor and prosecute firms found to be in breach of competition law and so we do not expect that Ofgem/GEMA will incur additional costs as a result of the new powers.

Benefits

It is estimated that there are currently 500 TPIs operating in the business energy market ranging from sole traders to large companies. The majority are SMEs. (The powers also apply to energy suppliers directly selling energy to business customers - about 30 in total). We believe there will be a potential benefit to TPIs resulting from an increase in trust in the TPI market overall with the potential for business customers to use them on a greater scale. It also helps create a level playing field by limiting the impact of non-compliant TPIs gaining an unfair commercial advantage through the mis-selling of energy contracts.

There is a potential benefit to business customers who, under the proposed reforms, will not experience the costs/inconvenience of being tied into a mis-sold contract with higher costs which is not appropriate to their needs.

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5 41-12 = 29/5yrs = 5.8 (approx 6)

6 Source: Office of National Statistics Annual Survey of Hours & Earnings (ASHE) data, table 14.5a Hourly Pay, UK, 2012,http://www.ons.gov.uk/ons/rel/ashe/annual-survey-of-hours-and-earnings/2012-provisional-results/index.html

One in, two out (OITO)
This policy is in scope of OITO as it has direct impacts on business. We calculate the proposed changes will result in a direct net cost to business of £1,630.20, with an EANCB of £1,345, based on the potential number of cases brought by GEMA against compliant businesses.

Wider impacts
In Great Britain, the powers to enforce under the BPMMRs are currently held by OFT and Trading Standards. It is not expected that there would be a material impact on these organisations. Ofgem expects to coordinate any action it takes under the BPMMRs with these bodies through current coordination mechanism such as the Consumer Concurrencies Group.