

Third Party Intermediaries in the Retail Energy Market

UR Position Paper

May 2018



About the Utility Regulator

The Utility Regulator is the independent non-ministerial government department responsible for regulating Northern Ireland's electricity, gas, water and sewerage industries, to promote the short and long-term interests of consumers.

We are not a policy-making department of government, but we make sure that the energy and water utility industries in Northern Ireland are regulated and developed within ministerial policy as set out in our statutory duties.

We are governed by a Board of Directors and are accountable to the Northern Ireland Assembly through financial and annual reporting obligations.

We are based at Queens House in the centre of Belfast. The Chief Executive leads a management team of directors representing each of the key functional areas in the organisation: Compliance and Network Operations, Finance and Network Assets, Wholesale, Retail and Consumer Protection and Corporate Affairs. The staff team includes economists, engineers, accountants, utility specialists, legal advisors and administration professionals.

Our Mission

Value and sustainability in energy and water.

Our Vision

We will make a difference for consumers by listening, innovating and leading.

Our Values

Be a best practice regulator: transparent, consistent, proportionate, accountable, and targeted.

Be a united team.

Be collaborative and co-operative.

Be professional.

Listen and explain.

Make a difference.

Act with integrity.

Abstract

Protecting consumers is at the heart of the Utility Regulator's (UR) role and ensuring there is effective competition in the Northern Ireland (NI) energy market is an integral part of our statutory duties. In the UR's Forward Work Programme 2017/2018, under the third strategic objective of protecting the long-term interests of business and domestic consumers, the UR committed to a project to assess if there is a need for "Energy Broker" or Third Party Intermediary (TPI) Regulation.

This paper follows on from the Information Paper and Call for Evidence on this project which was published by the UR in November 2017. Responses indicated that TPI activity in the NI market was found to be at a much lower than level than in GB, with around 8.1% of all non-domestic electricity contracts in NI being sourced through TPIs, and 4.1% for gas. There were also found to be at least 163 unique TPIs active in the NI energy market (with 25 being NI specific TPIs). This compares to over 1,000 active TPIs in GB.

The UR considered a variety of measures and has chosen to implement Option 1; a program of information gathering and monitoring. As a follow-up to this position paper, we will be consulting on the expansion of the REMM data to include broker information, as well as the publication of TPI commissions on customer bills.

Audience

Businesses and business groups; industry; and statutory bodies.

Consumer impact

Businesses benefit from TPI activity and they will also benefit from any project which investigates if there are suitable protections in place regarding their interactions with brokers. Businesses may also gain increased understanding of the energy market and the reassurance that intermediaries are acting fairly on their behalf.

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1. CONTEXT

- 1.1. Protecting consumers is at the heart of the Utility Regulator's (UR) role and we pursue this, where appropriate, through promoting effective competition in the Northern Ireland (NI) energy markets. The UR operates to ensure consumers are adequately protected in these markets through fostering transparent and effective competition, alongside regulation if that competition is not deemed effective enough to adequately protect consumers.
- 1.2. In the UR's Forward Work Programme 2017/2018¹, under its third strategic objective of protecting the long-term interests of business and domestic consumers, the UR committed to a project to assess if there is a need for "Energy Broker" Regulation.

Project to Date

- 1.3. On 9 November 2017, the UR published its 'Third Party Intermediaries in the Non-domestic Retail Energy Market' - Information Paper and Call for Evidence. The purpose of this paper was to communicate formally to stakeholders the commencement of the project and to gather evidence regarding the scale and nature of TPI activity in the NI market. This would then inform our view regarding any need for broker regulation.

About this document

- 1.4. The Information Paper stated that the project analysis will aim to:
 - Research and report on the scale of non-domestic TPI activity in NI at a market level;
 - Identify whether there is a sufficient risk from disreputable brokers to require more regulation than there is at present;
 - If more regulation is required identify, develop and critically analyse a set of potential measures for the NI market which can be implemented to ensure fair and transparent behaviour from TPIS;
 - Undertake stakeholder engagement in the development of these potential measures e.g. in the format of bilateral meetings and/or workshops;
 - Consider the logistical and regulatory policy implications of all measures (such as the requirement for licence modifications or legal issues).
- 1.5. The document is structured as follows:

¹ <https://www.uregni.gov.uk/sites/uregni/files/media-files/FWP%20201718%20final.pdf>

- Section 2 outlines the background and issues;
- Section 3 discusses the potential customer scope;
- Section 4 summarises the findings of the Call for Evidence;
- Section 5 discusses the range of measures considered by the UR;
- Section 6 outlines the UR's position on the range of measures;
- Section 7 sets out the next steps and timelines.

Timeframe and next steps

- 1.6. Subsequent to the publication of this position paper, we will communicate with each NI energy supplier directly in order to reaffirm and clarify the existing arrangements for reporting concerns over TPI behaviour.
- 1.7. We will also follow this paper with a consultation on the possibility of TPI commissions being published on customer bills, including whether this would need to be a new licence obligation on all suppliers or done on a voluntary basis. This consultation will also ask whether in future the extent of broker activity should be included in suppliers REMM submissions.

2. BACKGROUND & ISSUES

- 2.1. Protecting consumers is at the heart of the Utility Regulator's (UR) role and we pursue this, where appropriate, through promoting effective competition in the Northern Ireland (NI) energy markets. The UR operates to ensure consumers are adequately protected in these markets through competition, alongside regulation if that competition is not deemed effective enough to adequately protect consumers.
- 2.2. Third Party Intermediaries (TPIs) play an important role in helping customers (usually non-domestic customers) negotiate energy contracts by operating as an interface, or go-between, between suppliers and their customers. Ofgem has previously stated² that a broad range of business models can be classified as TPIs, including:
 - Brokers or consultants;
 - Sales / Supplier agent;
 - Price Comparison Website (PCW);
 - Bundled services providers;
 - Umbrella/Franchise sites;
 - Aggregators;
 - Energy advice companies.
- 2.3. Despite their prevalence in the retail market, energy brokerage is not a licensable activity, nor are energy TPIs bound by any sector-specific regulations. They are however subject to general business protection regulations, enforced by the Department for the Economy's (DfE) Trading Standards Service (TSS).
- 2.4. At various points in recent years, the UR has been asked if we would look at the issues around energy broker activity and consider potential regulatory actions if necessary. Therefore, in the UR's Forward Work Programme 2017/2018³, under its third strategic objective of protecting the long-term interests of business and domestic consumers, the UR committed to a project to assess if there is a need for "Energy Broker" Regulation. This position paper outlines our views on the need for broker regulation at this time.
- 2.5. Over the past five years, various work streams from Ofgem have provided insight into the scale of the non-domestic TPI market in Great Britain (GB), as

² https://www.ofgem.gov.uk/sites/default/files/docs/2014/02/tpi_non-dom_condoc_final.pdf

³ <https://www.uregni.gov.uk/sites/uregni/files/media-files/FWP%20201718%20final.pdf>

well as their behaviours and business models. However, in NI the role of TPIs remains largely unexplored.

- 2.6. This position paper outlines the findings from the Call for Evidence of November 2017 and the UR position on the appropriate regulatory approach to TPIs at this time. This position has been formulated after consideration of the scale of broker activity in NI and the legal position of the UR in relation to energy brokers. The UR also communicated with Ofgem in coming to this position. Ofgem consulted on the issue of broker regulation in GB in the period 2014 to 2016.

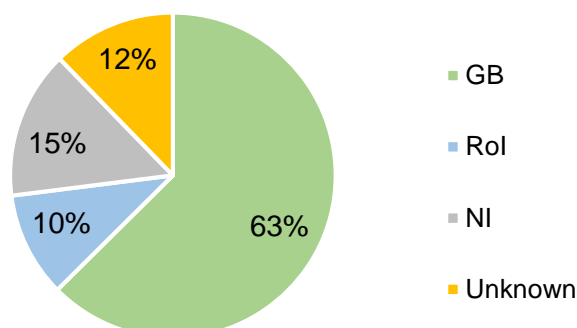
3. SCOPE

- 3.1. This project looks at non-domestic TPIs. For the purpose of this project, non-domestic TPIs are defined as:
 - Non-domestic Brokers – These are organisations or individuals which compare energy contracts from a range of suppliers, and present the options to businesses. Interaction between the broker and business may be face to face, online, or via telephone or any other medium.
 - Non-domestic Consultants – These operate in a similar manner to brokers, but may also offer advice on energy efficiency measures.
- 3.2. However, as mentioned previously any outcomes or measures that may arise will most likely, but not definitely, also be applicable to domestic TPIs. The project covers the retail energy business markets in both electricity and gas in NI.
- 3.3. Price Comparison Websites (PCWs) fall outside of the scope of this project as this is a market that is yet to fully emerge in NI. Again, should this circumstance change in future the UR may seek to address PCW regulation.

4. CALL FOR EVIDENCE FINDINGS

- 4.1. Respondents to the Call for Evidence provided a list of all known TPIs active in the NI energy market. Responses were compared to determine that there are at least 163 unique TPIs operating in NI. Almost two-thirds (63%) of these TPIs were found to be based in GB with NI businesses representing an extension of their existing operation in the larger GB market. Only 15% or 25 of TPIs operating in NI were found to be based in NI; and 10% from RoI. No information could be found on 12% of the TPIs provided, possibly due to the companies having limited online presence.

Chart 1 - Location of TPIs operating in NI



Source: Call for Evidence data

- 4.2. TPI penetration in the NI market was found to be much lower than levels in GB. It is only in the non-domestic electricity and gas markets and there is currently no broker activity that we know of in the domestic markets. For electricity, 8.1% of all non-domestic contracts had been sourced through the TPI channel. For gas, overall levels were found to be even lower with 4.1% of total non-domestic customers acquired via the TPI channel. This is in contrast to GB where Ofgem found 28% of micro-business and SMEs stated brokers were the main influence in choosing their existing contract⁴.
- 4.3. However, as this is an assessment of the total number of TPI acquired contracts, the gas and electricity summary percentages above are skewed by the fact there are many more small non-domestic customers than larger ones. A more disaggregated view is shown in the table below where we look at the percentage of contracts obtained via TPIs in separate market sectors, specifically those three market sectors we use for REMM data collection.

⁴ [https://www.ofgem.gov.uk/system/files/docs/2017/04/ofgem - micro and small business engagement 2016 - research report.pdf](https://www.ofgem.gov.uk/system/files/docs/2017/04/ofgem_-_micro_and_small_business_engagement_2016_-_research_report.pdf)

Table 2 – Percentage of customers obtained via TPIs

Fuel	Consumption band	Percentage of customers obtained via TPIs
Electricity	< 50 MWh	8.7%
	50-500 MWh	8.0%
	>500 MWh	2.2%
	Total	8.1%
Gas	<73,200 KWh	2.7%
	73,200 KWh – 732,000 KWh	4.2%
	> 732,000 KWh	7.9%
	Total	4.1%

4.4. The TPI data for individual market segments reaffirms that broker activity in NI energy markets is at a low level. Table 2 shows that regardless of which fuel or market segment is looked at, the percentage of customers obtained via TPIs does not exceed 9%.

TPI Behaviour

4.5. Our Call for Evidence asked respondents to indicate potential negative activities associated with energy TPIs. The issues detailed below were raised by three or more respondents. It is important to note that these issues were not necessarily said to be present in the NI energy market but could either be a possible risk or similar behaviours had been witnessed in neighboring markets. They are however the most prevalent issues mentioned by respondents to the Call for Evidence.

- **Lack of Transparency**

One of the main concerns voiced by respondents was the lack of transparency around the operation of TPIs. Comments from several respondents addressed TPI commissions, suggesting that in some circumstances businesses were not always being made fully aware of what commission rates they were paying. This was partially due to lack of consistency in the approach from TPIs with some insisting the commission be built into the unit rate whilst others charge a separate fee.

In situations where the unit rate was inclusive of the commission, several respondents stated that the business customer had been misled (whether intentionally or unintentionally) over who is paying the TPI. Anecdotal evidence from one response suggested some customers were incorrectly told TPI commissions were obtained from the suppliers, whilst another

supplier reported numerous customer queries about whether their rates included TPI commission.

A lack of transparency was said to extend to a broader range of TPI operations such as the range of energy suppliers TPIs will approach on behalf of the customer and the criteria used when assessing deals on behalf of customers.

- **Letters of Authority**

Respondents raised concerns over Letters of Authority (LOAs) which are the agreements signed by business customers allowing TPIs to liaise with suppliers on their behalf. LOAs are commonplace in many industries but there were numerous complaints that some used in the NI energy market granted the TPI overly extensive powers to act on the customer's behalf, including examples of indefinite periods of representation and the power to make contract decisions on the customer's behalf.

In addition, whilst it was reported that the vast majority of LOAs were legitimate, there were also alleged examples of falsified letters where direct contact with the customer had revealed the customer had never actually signed the document themselves. This however is fraud and should be dealt with outside the energy regulation regime.

- **Lack of knowledge about the NI energy market**

As evidenced in Chart 1, the majority of TPIs which operate in the NI energy retail market are GB based. Several respondents commented that many TPIs operating in NI lack sufficient NI specific market knowledge to advise businesses reliably. As a result they could receive inaccurate or incorrect information on core aspects of their contract including cost, passthrough charges, meter type and switching process.

- **Other issues**

Below are some issues that were raised by two or fewer respondents:

- Businesses receiving an overall lower quality of service;
- Misrepresenting the role of TPIs / role of suppliers or pricing;
- Aggressive or misleading sales tactics;
- High commissions;
- Customer data security;
- Oversaturation of TPIs contacting businesses.

Regulation of TPIs

- 4.6. Most respondents were of the opinion that TPIs in NI require more regulation than is currently provided by business protection legislation. Both consumer representatives and suppliers stated that the existing legislation does not provide sufficient guidance or control over TPIs behaviour and that a strengthening of these would help raise standards and protect business customers.
- 4.7. Another supplier acknowledged that whilst the actual level of complaints may be low, without adequate controls the existing issues could become more prevalent as the brokering market grows.

Legal Considerations

- 4.8. As part of developing our understanding and evidence, we consulted with the UR legal team over potential regulatory interventions and it was confirmed that at this stage there is no legislation that allows the UR to have direct authority over TPIs in the energy market and consequently no revenue raising powers as we do with energy suppliers. The UR does not have the direct remit to regulate these third party bodies and as such cannot enforce measures (e.g. a code of practice) onto them.
- 4.9. It was also confirmed that unlike Ofgem the UR does not have concurrent powers around the Business Protection from Misleading Marketing Regulations (BPMMRs). TSS are responsible in NI for enforcing these regulations.
- 4.10. We are also not proactively considering the option of urging DfE at this stage to make energy brokerage a licensable activity like energy supply is. Such an option would be extremely lengthy to deliver and require a change in law and falls outside of the scope of this review. However, the option may be kept for consideration regarding future work streams addressing TPI regulation assuming DfE were willing in future to contemplate such legislation. In discussion with the UR, TSS indicated support for this future option; as well as extending concurrent powers to enable the UR to enforce BPMMRs in the regulated energy sector.
- 4.11. However, given that currently the UR has no concurrent power regarding the BPMMRs and also has no statutory functions in legislation regarding the regulation of brokers, the practical options considered for business protection from TPIs are limited. These are discussed below.

5. MEASURES CONSIDERED

- 5.1. This section of the paper sets out the potential measures that the UR considered during this process. These measures took into account lessons from similar customer experiences in GB, as well as the views expressed by respondents to the Call for Evidence as laid out in Section 4.
- 5.2. In our Information Paper we highlighted a number of potential measures. These included:
 1. Status quo (i.e. investigate and enforce TPI behaviour through TSS powers under business protection laws)
 2. A voluntary CoP for TPIs, which would contextualise the BPMMRs for the energy retail market in NI.
 3. A CoP supported by a licence condition for suppliers to work only with CoP accredited TPIs.
 4. An obligation on suppliers to have in place arrangements to ensure customer protection regarding TPI activity.
- 5.3. Following the Call for Evidence and various legal considerations, we refined these options into the following three.

Option 1 – Information Gathering and Monitoring

- 5.4. This option aims to clarify with market participants the process of all relevant TPI concerns being referred to TSS by the body made aware of them (UR, suppliers, businesses, etc.). The UR will communicate with all suppliers directly to ensure they are aware of the BPMMRs and the process of reporting TPI breaches to TSS. We have met directly with TSS and they agree that such referrals would come under their remit were there have been misrepresentations, misleading statements, or fraud. Reported issues will then be investigated by TSS using their powers under the BPMMRs or any other applicable legislation. However, in discussions with the UR, TSS noted several of the areas of concern identified in Section 4.5 would not be covered by the BPMMRs. This is discussed further in Section 6.
- 5.5. Data covering the number of existing non-domestic customers acquired via the TPI channel for each supplier, which was collected as part of the Call for Evidence, could be added to the quarterly REMM data panel. This will give us ongoing visibility as to the extent of broker activity in NI.

Option 2 – Voluntary Industry Code of Practice

- 5.6. A voluntary Code of Practice (CoP) for TPIs, which would (as a minimum) contextualise the BPMMRs for the energy retail market in NI. In effect, this would be a form of industry self-regulation. The code could address themes such as:
- fair and honest marketing and selling;
 - clear offers that are understood by business customers; and
 - transparency of commissions.
- 5.7. Those responsible for the creation of any such code would be the TPIs themselves (or a TPI association) possibly with some input from one or more of the following bodies: UR, TSS, DfE, a panel of suppliers, business representatives.
- 5.8. This measure has two potential variants:
1. the code would be a guide for market participants which would not need to be enforced or require TPIs to be accredited to it;
 2. a code that TPIs can voluntarily sign up to, but which would require a TPI industry authority responsible for accreditation and monitoring of the TPIs who have chosen to opt in.

Option 3 – Mandated UR regulation via Energy Suppliers

- 5.9. In this option the UR would seek to regulate TPI activity in the NI energy market via energy suppliers. Through a new licence condition, energy suppliers would be obligated to have in place arrangements to ensure a reasonable level of customer protection regarding TPI activity via monitoring and governance of those brokers the supplier has contracted with. This could be implemented as a principle-based licence condition with the onus on suppliers to ensure they have sufficient processes in place to monitor and report on TPI behaviour.
- 5.10. Conversely a more prescriptive approach could dictate certain conditions that suppliers must meet including:
- Suppliers co-operating to create and enforce a market wide TPI CoP, along with an appropriate accreditations process. Suppliers would then only be allowed to work with TPIs who are accredited under the CoP. If a broker breached the code suppliers could remove that broker's accreditation by agreement with the UR;
 - Obligating suppliers to regularly audit all the TPIs they work with for compliance with any relevant legislation/regulations;

- Ensuring TPI commissions are displayed clearly and prominently on all bills;
 - Create a TPI register (akin to the Gas Safe Register).
- 5.11. This option appears to be the only way that the UR could put firm obligations on TPIs. However, suppliers would only be responsible for ensuring adequate governance be in place, and would not be held in breach of their licence for any TPI misconduct.

6. UTILITY REGULATOR POSITION

- 6.1. This section of the paper sets of the UR's position on the three options considered.

Option 1 – Information Gathering and Monitoring

- 6.2. Option 1 represents the least interventionist approach. As there is no current legislation that allows the UR to have direct authority over TPIs in the energy market, any attempt to implement a mandated CoP could face a legal challenge from TPIs or suppliers. In discussions with Ofgem, we understand that these limitations were also faced during a similar TPI project in GB.
- 6.3. Option 1 also provides the quickest remedy to any perceived concerns over TPIs as all market participants will be encouraged to actively report these concerns to TSS. Other options requiring new legislation, such as a new licensable activity, would be unlikely to be implemented in the coming years.
- 6.4. We accept that the BPMMRs do not provide TSS with sufficient powers to investigate all of the issues highlighted in section 4.5. Issues such as commission level and over saturation of customer contact would not fall within the scope of these regulations. Also, businesses have less protection enshrined in law than domestic consumers when considering a number of the other issues we highlighted; including transparency, LOAs, and the extent of an individual TPI's knowledge. Another important distinction is that only misleading representations are covered by the BPMMRs, but not scenarios where a TPI has misled by omission.
- 6.5. Due to some areas of concern regarding TPI behavior highlighted by respondents being beyond the scope of the BPMMRs, we discussed with TSS that there may be current gaps in legislative protection for businesses. This is something that DfE / TSS may need to address in future; with UR input as necessary.
- 6.6. However, it is our view that the BPMMRs do currently provide sufficient protection in circumstances where businesses have been directly misled, and we would expect all instances of TPIs marketing or selling energy products to business customers in a misleading way to be reported to TSS.

Option 2 – Voluntary Industry Code of Practice

- 6.7. As was discussed in Ofgem's non-domestic Retail Market Review and stakeholder engagement sessions, a voluntary CoP option as considered under Option 2 is unlikely to add any additional protection for businesses; or any meaningful deterrent for TPI misconduct. Furthermore, unlike GB, there

are no existing TPI trade associations in NI which would present a suitable body to develop and administer a code.

Option 3 – Mandated UR regulation via Energy Suppliers

- 6.8. Following the Call for Evidence we consulted further with legal representatives around the feasibility of Option 3. Whilst the UR could create a new licence condition compelling suppliers to implement some form of TPI governance, it would not be without legal risk and could exceed our statutory duties. Such an option would potentially leave the UR open to challenge by way of an appeal to the CMA, should suppliers decide to challenge the condition.
- 6.9. Another risk highlighted regarding Option 3 was the potential for a challenge from TPIs. This licence condition proposed in Option 3 could be construed as the UR exceeding its statutory remit and attempting to regulate TPIs, albeit via suppliers. We would consider this a substantive risk, as granting suppliers the authority to expel TPIs from a mandatory CoP (with or without UR agreement) would end their energy brokering activities in NI.

UR Position

- 6.10. The UR currently has no statutory remit to regulate TPIs; nor revenue raising powers to resource such work. However, TPIs are subject to business protection regulations which are enforced by TSS. We believe that in the event of TPI abuse, it is important that this regulatory channel be understood and utilised effectively in order to protect businesses. Whilst we have acknowledged the limitations of the BPMMRs, we expect all instances of TPIs marketing or selling energy products to business customers in a misleading way to be reported to TSS.
- 6.11. After careful review we believe that due to the issues highlighted in this section, Option 2 and 3 are not suitable for implementation by the UR in the NI energy market at present.
- 6.12. It is also evident that TPI activity in NI is at a much lower level than in GB. Due to significant differences in market size and the number of suppliers, it is also possible that TPIs in NI may never exert a similar degree of influence as is seen in the GB market.
- 6.13. As TPI activity is at a small scale in NI, we believe that an option that has a focus on monitoring and reporting would be best suited to the market at present. Therefore, given all considerations legal and otherwise, we see the only viable choice as Option 1 and will proceed with its implementation. We will endeavor to review this position after 18-24 months in order to determine whether the brokerage market has changed significantly enough to require a review of this decision.

6.14. We also note that many of the concerns highlighted in the Call for Evidence responses addressed a lack of transparency around TPI activity, especially with regard to commissions. Therefore, in addition to the measures listed under Option 1, we will follow-up this paper with a consultation on the possibility of suppliers publishing TPI commission on customers' bills. We believe this would help introduce a level of transparency and protect businesses from excessive charging. We will also ask whether in future the extent of broker activity should be included in suppliers REMM submissions.

7. NEXT STEPS AND TIMELINES

- 7.1. Subsequent to the publication of this position paper, we will communicate with each NI energy supplier directly in order to reaffirm and clarify the existing arrangements for reporting concerns over TPI behaviour.
- 7.2. We have met with CCNI and TSS to discuss the outcome of our review, and the position we have reached regarding the selection of Option 1. We will continue to work in partnership with both CCNI and TSS to monitor TPI activity and complaints. We will also review our position within 18-24 months to enable us to reflect on any changes to TPI activity and customer outcomes.
- 7.3. We will also follow this paper with a consultation on the possibility of TPI commissions being published on customer bills, including whether this would need to be a new licence obligation on all suppliers or done on a voluntary basis. We will also ask whether in future the extent of broker activity should be included in suppliers REMM submissions.