

RESPONSE TO OFGEM CONSULTATION:

The regulation of gas and electricity sales to domestic customers: notice of the proposed modification of standard licence conditions 48 (marketing conditions) and consultation on their continuation

February 2006

This paper responding to Ofgem's consultation has been produced by the domestic energy suppliers forming the Energy Retail Association (ERA). The ERA was established in October 2003 and is the only dedicated trade association for UK energy suppliers. All the main energy suppliers operating in the domestic market in the UK are members of the association: British Gas, Scottish & Southern Energy, RWE npower, E.ON Powergen, EDF Energy and Scottish Power.

ERA has a subsidiary company, the Association of Energy Suppliers ("AES") which acts as Code Sponsor for the Code of Practice for the Face-to-Face Marketing of Energy Supply ("the AES Code"). The AES Code, which was produced with input from Ofgem and energywatch, exceeds the standards of consumer protection currently required by law and aims to promote consumer confidence.

1. Overall Views

We welcome Ofgem's consultation drawing attention to the significant fall in the overall rate of complaints to energywatch about suppliers' marketing activities. We believe that improvements in self-regulation by suppliers, in particular the AES Code, have been a major contributor to this significant fall.

- We support Ofgem's proposal to remove the application of the marketing conditions for telesales forthwith.
- We believe that Ofgem should also consider the subsequent removal of the marketing conditions for face-to-face sales because the AES Code has already delivered significant improvements in these activities. This would be subject to the continuation in the low level of complaints already established in this area. We believe that this would be in accordance with Ofgem's stated commitment to the principles and practice of better regulation.
- The AES Code is now fully operational and embedded in ERA members' sales activities.
- Since it assumed responsibility for the AES Code in October 2003, the ERA has undertaken a full review of the AES Code and its operations including the governance framework in which it operates. The processes in place for compliance monitoring are robust and include an annual audit of each member organisation which is carried out by an independent Code Auditor. The position of Code Auditor is currently held by KPMG LLP.

- The AES Code has an effective mechanism for compliance. Where Code compliance has been found to fall short of the required standard, members have been responsive to the notification of infringements of the AES Code and have quickly implemented corrective actions to rectify the infringement.
- The ERA is committed to obtaining approval for the AES Code under the OFT's Consumer Codes' Approval Scheme (CCAS). We submitted an application in October 2005 to the OFT's CCAS following an update of the Code. Ofgem will be aware that discussions are currently ongoing with the OFT.
- The ERA notes that the OFT has a live consultation on CCAS regarding an update of the core criteria. We will be responding to this consultation.

2. The AES Code – Background and recent improvements

The AES Code was launched in May 2003 and benefits residential consumers by providing added protection to that already enshrined in law, detailing clear standards which energy sales agents must follow. Integral to the AES Code is the EnergySure Accreditation Scheme which all member companies must operate. This covers the rigorous selection, training and assessment of sales agents. The AES Code includes a requirement for compensation to be offered when it is proven that a sales agent (or any person induced by the agent) has deliberately forged the consumer's signature for the purposes of effecting a legally binding contract.

Governance of the AES Code is being undertaken through the AES. The rules of the AES require AES Code members to comply with the AES Code and to be subject to the disciplinary procedures set out in the AES Code. The Association has appointed a Code Manager to carry out the supervision, administration and day-to-day operation of the AES Code. The Code Manager acts independently of all members in operating the AES Code, putting into place monitoring procedures regarding member performance, ensuring corrective action where agreed performance standards are not met, and setting sanctions consistent with the AES Code. In addition, an annual audit of each member's compliance with the AES Code is carried out by the Code Auditor, an independent body appointed by AES. KPMG (who are registered auditors) were appointed as Code Auditor in July 2004.

Supporting the AES Code's governance framework is the Code Panel, whose members are independent and come from a variety of backgrounds, including consumer representation and the wider business field. The Panel is the means whereby appeals from Code Members against decisions of the Code Manager will be heard, and it will also take an overview of the operation of the AES Code and put forward recommendations.

Since the ERA assumed responsibility for AES, much work has been done by AES with its members to ensure that they have appropriate procedures and processes in place that enable them and their sales agents to comply with the AES Code. AES and its members have allocated significant time and resources to ensuring that members are complying with the Code and that the Code has an impact on improving the face to face marketing of energy supply. Within each member organisation there is a dedicated

EnergySure Compliance Manager whose responsibility is to ensure that the organisation is complying with all the requirements of the Code.

Members are required to submit monthly returns to the Code Manager to demonstrate their levels of compliance with the Code. Where the returns indicate that there may have been difficulties with compliance, the Code Manager will discuss a rectification plan with the member in question.

The appointment of an independent Code Auditor has done much to raise the profile of Code compliance across the industry. The results of the 2005 compliance audit will be carefully considered by all of the members. A very important part of the audit process is the identification of opportunities for members to improve processes and procedures through devising and implementing agreed action plans. The implementation of action plans arising out of the audit process will be closely monitored by the Code Manager.

To ensure full disclosure and openness concerning the proactive role that the Code Manager has taken with respect to alleged breaches of the Code and subsequent investigations of such alleged breaches, the Code Manager presents a quarterly report to the AES Board and to the Code Panel containing full details of Code investigations and emphasising the areas in which members have not complied with the Code.

There have been a number of areas identified during the year where members' Code compliance has fallen short of the required standard. Members have been responsive to the notification of infringements of the Code and have quickly implemented corrective actions to rectify the infringement.

The infringements, which involved four different members, included:

- Delays in the registration of sales agents on the EnergySure Register;
- Failure to obtain appropriate references for sales agents within the agreed timescales;
- Failure to prevent individual sales agents from misleading consumers about their purpose; and
- Failure to prevent individual sales agents from breaking requirements of the Code concerning their conduct and behaviour with consumers.

Appropriate sanctions were applied by the Code Manager and have been complied with by the members concerned.

There were no appeals made to the Code Panel about the sanctions applied by the Code Manager.

The Code Manager works closely with all members and strives to assist them to comply with the Code without the need to apply formal sanctions. However, where necessary, the Code Manager must take a strong line in order to protect the integrity of the Code.

The AES had previously submitted an application under CCAS in 2003 for the Code but this application was withdrawn pending a review of the governance arrangements around the Code and the aforementioned update of the Code.

3. Process for reviewing the marketing conditions

We have previously stressed the need for the subsequent removal of the existing marketing conditions for both telesales and face-to-face sales and set out the reasons for their ultimate removal in this document. We would hope that Ofgem will now adopt such a course of action.

However, assuming that some regulation of the marketing activity is to be continued beyond 31 March 2006, we would support Ofgem's proposed licence amendments as set out in Appendix 2 and 3 of its letter, which would remove references to telephone conversations in relation to the marketing of both electricity and gas.

4. Continuation and further review of the marketing conditions

As stated in section 1 of this document, we support the subsequent removal of the licence conditions for face-to-face marketing activities covered by the AES Code, subject to a continuation of a low level of complaints in this area.

As detailed in section 2 above, the AES Code has:

- Contributed to the significant reduction in the overall rate of complaints to energywatch about marketing conditions.
- A robust governance framework for monitoring compliance.
- An independent Code Auditor who carries out an audit at member's premises on an annual basis. This role is carried out by one of the "Big 4" auditing firms.
- A track record of identifying infringements of the AES Code and obtaining swift rectification actions from the member companies concerned.
- A publicly stated commitment to seeking approval for the Code under the OFT's CCAS scheme.

Regarding the specific enhancements suggested by Ofgem:

- The annual report of the AES Code for the year ended 31 December 2005 detailed how breaches had been investigated and the sanctions that had been applied. We consider this reporting to be sufficiently transparent to address Ofgem's concerns.
- The ERA meets with consumer bodies on a regular basis and is willing to formally record details of these meetings in respect of the AES Code in the AES Code's future annual reports.
- During 2006 we hope to increase consumer awareness of the Code and the EnergySure Scheme and intend to re-brand the Code as the "EnergySure Code". This will improve brand awareness of the AES Code.



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- We would be willing to consider inclusion of further signatories to the AES Code beyond the six major suppliers.