EXPLANATORY MEMORANDUM TO

THE BUSINESS PROTECTION FROM MISLEADING MARKETING (AMENDMENT) REGULATIONS 2013

2013 No. 2701

1. This explanatory memorandum has been prepared by the Department for Business, Innovation & Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Business Protection from Misleading Marketing (Amendment) Regulations 2013 (BPR Amendment Regulations) give the Gas and Electricity Markets Authority (GEMA) new powers to take civil enforcement action in cases of misleading marketing. These powers are intended to be exercised with respect to businesses operating in the energy sector.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Business Protection from Misleading Marketing Regulations 2008 (S.I. 2008/1276) (BPRs) prohibit misleading business-to-business advertising and set out the conditions under which comparative advertisements are permitted. The BPRs implement the Misleading and Comparative Advertising Directive (Directive 2006/114/EC) and came into force on 26 May 2008. The BPRs are currently enforced by the Office of Fair Trading (OFT), local weights and measures authorities in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland (DETINI).

4.2 GEMA is the independent regulator for gas and electricity markets in Great Britain. Its principal objective is to protect the interests of existing and future gas and electricity consumers. The Office of the Gas and Electricity Markets Authority (Ofgem) supports GEMA in its day to day work. As set out in paragraphs 7 and 8 below, Ofgem has consulted on a range of measures aimed at improving the protections offered to businesses operating within the energy market. These include a proposal to gain new civil enforcement powers under the BPRs. The BPR Amendment Regulations seek to give effect to this proposal.

5. Territorial Extent and Application

5.1 This instrument applies to Great Britain.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 Ofgem's consumer research and feedback from stakeholders has revealed concerns in relation to certain sales and marketing practices within the non-domestic energy market. These involve a range of business practices, typically relating to certain intermediary businesses involved in the sale of energy products or contracts to business customers. Such parties can include businesses operating energy switching websites, energy brokers and energy efficiency advice providers who interact with business energy customers.

7.2 While affecting a minority of business energy 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 resolve the issue. For example, research undertaken for Consumer Focus[1] highlighted that micro-business customers can be committed to contracts that are not best suited to their needs, because prices and terms offered are not at competitive levels.

7.3 Currently GEMA does not have specific statutory powers to address these practices, unless the relevant party is a licensed energy supplier. Further, as mentioned above, the BPRs are currently enforced by the OFT, local weights and measures authorities and DETINI. These enforcement authorities have an economy-wide remit and prioritise issues accordingly. The specific issue of mis-selling in the business energy market has not been a priority for these organisations.

7.4 The aim of this instrument is therefore to give GEMA certain specific enforcement powers in this area. The relevant powers are consistent with those held by GEMA in respect of the consumer energy market under the Consumer Protection from Unfair Trading Regulations 2008 (S.I. 2008/1277) (CPRs)[2].

7.5 The BPR Amendment Regulations will include GEMA as an enforcement authority within the meaning of this term the BPRs and provide it with a power to enforce the BPRs. In particular:

a) if GEMA thinks it appropriate to do so, it will have the power to bring proceedings for an injunction where it considers that there has been or is likely to be a breach of regulations 3, 4 or 5 of the BPRs. Those regulations prohibit mis-leading advertising, non-compliant comparative advertising and the promotion of misleading advertising and non-compliant comparative advertising in certain codes of conduct In exercising this power, GEMA will be required to notify the OFT of its intention to apply for an injunction;

b) GEMA will have the power to accept an undertaking from any person concerned or likely to be concerned with a breach of regulations 3, 4 or 5 of the BPRs that it will comply with those regulations; and

[1] "Watching the middlemen - Brokerage services for micro-business energy consumers" by Nigel Cornwall and Robert Buckley, Cornwall Energy (Consumer Focus, February 2011). In April 2012, Consumer Focus became known as Consumer Futures. Consumer Futures is the operating name of the National Consumer Council, the body representing consumers in the regulated markets created by the Consumers, Estate Agents and Redress Act 2007.

[2] The CPRs prohibit the use of misleading, aggressive or otherwise unfair commercial practices by businesses in interactions with domestic consumers. GEMA is a "designated enforcer" in respect of the CPRs by virtue of s213 of the Enterprise Act 2002 and the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003.

c) GEMA will have the power (by notice in writing) to require a person to provide it with specified information or documents for the purpose of determining whether to bring injunction proceedings.

7.6 The BPR Amendment Regulations do not authorise GEMA to undertake criminal prosecutions for breaches of the BPRs, nor do they give it relevant enhanced investigatory powers held by other enforcement authorities. These are the power to make test purchases, the power of entry and investigation and the power to enter premises with a warrant.

7.7 The BPRs currently provide the OFT with a co-ordinating role where there is potential for overlapping investigations by relevant enforcement authorities. By virtue of the BPR Amendment Regulations, this will include the power to direct which enforcement authority in Great Britain is to bring injunction proceedings or to decide that only it may do so.

8. Consultation outcome

8.1 Ofgem originally consulted on its proposal to seek these powers in its 'Retail Market Review: non-domestic proposals' in November 2011[3]. In response to this consultation, it received support from a number of energy suppliers and business representative organisations including the British Chambers of Commerce, the Forum of Private Business and the Association of Convenience Stores. One supplier did not support the proposal in response to this consultation and another company noted that Ofgem was also looking at other approaches to address the issue through the development and accreditation of codes of practice.

8.2 Ofgem subsequently published for consultation its 'Retail Market Review: updated proposals for business' in October 2012[4]confirming its intention to seek the relevant powers. It received further support for the proposal in response to this consultation.

8.3 Following ministerial approval to pursue its case for change, Ofgem consulted on the specific powers it was seeking for eight weeks between 4 February 2013 and 4 April 2013. The consultation time period reflected the fact that there is no material policy change to the underlying regulations (i.e. the BPRs) or to the organisations expected to be affected. A number of responses were received including from energy suppliers and other businesses operating in the energy market and consumer bodies. There was broad support from respondents for GEMA gaining the powers.[5]

9. Guidance

9.1 There is a range of existing guidance on the BPRs. This includes a guide published by the OFT which applies across all affected business sectors[6].

9.2 Ofgem's Enforcement Guidelines on Complaints and Investigations[7] explain the organisation's processes and policies for enforcement. The Guidelines are currently

[3] See: https://www.ofgem.gov.uk/ofgem-publications/39654/rmrnon-domestic-proposalsconsultation.pdf
[4] See: https://www.ofgem.gov.uk/ofgem-publications/39455/retail-market-review-updated-proposals-businesses.pdf
[5] Copies of the consultation document and published responses can be found at: https://www.ofgem.gov.uk/publications-and-updates/gaining-enforcement-powers-under-business-protection-misleading-marketing-regulations-consultation
[6] "Business to business promotions and comparative advertisements – A quick guide to the Business Protection from Misleading Marketing Regulations 2008" (OFT, 2009).

being reviewed and an updated version will be available on Ofgem's website in due course.

10. Impact

10.1 The impact on business, charities or voluntary bodies is largely on energy market players. The powers are intended to be exercised with respect to businesses engaged in the sale and marketing of energy products and services to business energy consumers.

10.2 The impact on the public sector is largely on Ofgem.

10.3 An Impact Assessment is attached to this memorandum. It will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating small business

11.1 This instrument applies to small business. Enforcement action can be taken by GEMA in respect of any person acting for purposes relating to that person's trade, craft, business or profession and anyone acting in the name of or on behalf of those person(s).

11.2 To minimise the impact of the requirements on firms employing up to 20 people, Ofgem will act in line with its better regulation duties and take a proportionate approach in accordance with its usual processes and policies for enforcement. Cases will be opened and progressed in line with its Enforcement Guidelines on Complaints and Investigations[8].

12. Monitoring & review

12.1 Ofgem's Annual Report includes details of its enforcement activity and outcomes. Alongside details of other cases, this will include action taken using these powers to prevent misleading marketing to business energy customers. Ofgem's Annual Reports can be found on its website at https://www.ofgem.gov.uk/

13. Contact

The following contacts can answer any queries regarding the instrument:

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[7] See: https://www.ofgem.gov.uk/ofgem-publications/37567/enforcement-guidelines-2012.pdf
[8] See: https://www.ofgem.gov.uk/ofgem-publications/37567/enforcement-guidelines-2012.pdf