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Dear Will

Submission on Supplemental Remedies

We former energy regulators previously submitted responses to the CMA in August 2014 and February and July 2015. We now submit our views on the *Supplemental Remedies* proposed by Scottish Power and Centrica. Briefly, we argue as follows:

- These remedies would amount to prohibiting the form of tariff that the great majority (70 per cent) of British customers have actively or passively chosen. In addition to inconveniencing such customers on an annual basis, they would force customers to adopt a method of purchasing energy that they have not hitherto been persuaded is better than the Standard Variable Tariff (SVT).
- It would be better to promote more effective competition for SVTs than to prohibit them. This could be done by removing those aspects of Ofgem's post-2008 interventions that have had adverse effects on competition. Any further regulatory protection should be focused upon vulnerable customers, in line with Ofgem's statutory duties.
- The CMA should reconsider its provisional findings about weak customer response and unilateral market power, and its calculations of excess profits, costs and overcharging. These analyses are not convincing.
- The CMA's provisional findings on this one issue mar an otherwise balanced and constructive energy market investigation. The different views of respondents on the issue suggest that it will be difficult to reach a widely accepted conclusion. We propose an alternative way forward. This would be to recognise that the adverse effects of Ofgem's post-2008 interventions have been so strong and widespread that it is very difficult – perhaps impossible - to come to an informed judgement on what the market would have been like in the absence of these interventions, on whether or how far other factors have also had an adverse effect on competition, and on the likely effects of additional possible remedies when the removal of those interventions is also being proposed. It would be correspondingly premature and disproportionate to impose yet more restrictions on the competitive market.

From

Stephen Littlechild, Director General of Electricity Supply and Head of the Office of Electricity Regulation (Offer) 1989-1998

Sir Callum McCarthy, Chairman and Chief Executive of Ofgem and the Gas and Electricity Markets Authority (GEMA) 1998-2003

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Stephen Smith, senior executive positions at Ofgem 1999-2002 and 2003–2010 including Managing Director, Markets, 2004-2007 and Executive Board Member, GEMA 2004- 2010

Clare Spottiswoode CBE, Director General of Gas Supply and Head of the Office of Gas Regulation (Ofgas) 1993–1998.

Executive Summary

- We can understand that some suppliers might regard such a remedy as preferable to the re-introduction of retail price control via a safeguard regulated tariff. Other regulators have argued against such price controls. The remedy would overrule customer preferences. The CMA has been led to such a possible remedy as a result of an incorrect analysis of the retail market.
- The CMA finds that customers do not engage in the way that the CMA considers they should. On the basis of that it explores ways of changing the behaviour of customers.
- A more plausible view of customer preferences is that about 30 per cent are presently attracted by non-standard tariffs and for various reasons about 70 per cent are not.
- The CMA's interpretation of this as weak customer response is incorrect. British consumers have responded strongly and clearly. At present, a majority has not been convinced that non-standard products and frequent switching are worth the hassle. This may change with the development of new approaches.
- The CMA's well-functioning energy market is an unduly limited and static concept, unlike the CMA's usual characterisation of rivalrous competition. This has contributed to the CMA's misinterpretation of customer preferences.
- The CMA has not established that suppliers have 'significant' market power, which is the term the CMA *Guidelines* use to describe the power to increase prices above competitive levels.
- The CMA seems to suggest that price discrimination is evidence of market power, without discussion of an extensive literature explaining how price discrimination can also be a characteristic of strong competition.
- The CMA's calculations of excess profits, excess costs and hence alleged overcharging, are concerning and unconvincing.
- The CMA's proposal to prohibit evergreen tariffs would overrule customer preferences and have other disadvantages.
- A better alternative would be to make competition for SVTs more effective, notably by removing RMR and other regulatory interventions.
- We have some concerns about Ofgem's current position on RMR and its proposals for a principles-based approach.
- We continue to urge that any additional steps to protect customers should be focused on vulnerable customers rather than on allegedly unengaged customers generally.
- We suggest that a way forward would be to recognise the extreme difficulty of assessing the possible effect of other factors in a competitive market that has been distorted by extensive regulatory interventions by Ofgem since 2008. It would be premature to propose additional remedies beyond the removal of those regulatory interventions.

As before, we focus on the domestic market. But here and previously, the points we raise may have application in the microbusiness market too.

Introduction

1. The CMA has invited interested parties to comment on possible remedies proposed by Scottish Power and Centrica. The *Supplemental Notice* summarises these remedies as follows:
 15. Scottish Power and Centrica have both proposed a remedy that would seek to increase customer engagement by phasing out the use of evergreen contracts and moving to a system where all contracts have a fixed term, eg one year. Under this proposal (once implemented) customers would be encouraged to engage via end of fixed-term contract notifications.
2. We can understand that some suppliers might regard such a remedy as preferable to the re-introduction of retail price control via a safeguard regulated tariff. Indeed, we are not aware of any energy regulator in any competitive retail energy market that does not consider that retail price control is likely to restrict competition and work to the disadvantage of customers once competition is established. For example, the Council of European Energy Regulators (CEER), of which Ofgem is a leading member, and the Australian Energy Market Commission (AEMC), are pressing to remove remaining price controls, not reintroduce them.
3. However, our concern is that the new possible remedies, like the CMA's own safeguard regulated tariff (Remedy 11), would amount to prohibiting the form of contractual relationship that the great majority (70 per cent) of British customers have actively or passively chosen. In addition to inconveniencing such customers on an annual basis, it would force them to adopt a method of purchasing energy that they have not hitherto been persuaded is better than the Standard Variable Tariff (SVT).
4. In our view, the CMA has been led to this possible remedy as a result of an inappropriate and incorrect analysis of customer preferences, market power and alleged overcharging. We therefore explore these aspects in more detail.

The CMA on customer preferences

5. Early in its *Provisional Findings* (PF) analysis of the nature of competition in domestic retail markets, the CMA proposes the following hypothesis.
 - 7.10 Gas and electricity are extreme examples of homogenous products in that the energy that customers consume is entirely unaffected by the choice of retailer. We would expect, therefore, that price would be the most important product characteristic to a customer in choosing a supplier and/or tariff.This leads the CMA to the view that “7.44 We would expect competition to be largely on price ...”. The CMA then tests this hypothesis and draws its conclusion.
 - 7.192 Our finding of material potential savings that are persistent over time, available to a significant number of domestic customers and that go unexploited, provides evidence of weak customer response in the domestic retail markets for electricity and gas in Great Britain.
6. Instead of concluding that its hypothesis – “that price would be the most important product characteristic to a customer” - has been comprehensively

rejected by the evidence, the CMA concludes that its hypothesis is correct but that “weak customer response” has prevented customers from exhibiting their true preferences.

7. The CMA considers whether there might be other explanations.

“7.193 In particular, we consider the merits of competing explanations for the gains from switching that go un-exploited – namely that customers attach value to features of tariffs, suppliers and payment methods that are not reflected in our analysis.”

It looks particularly at SVTs, considering and rejecting the possibility that customers are thereby choosing lower volatility, preferred payment methods, or quality of service. It finds, instead, that there are various barriers to customer engagement. It concludes

8.71 While there may be a degree of disengagement in the behaviour of customers on the non-standard tariff, we are more concerned about levels of engagement from those customers who are currently on an SVT, as most of these customers have not actively chosen this tariff, and the potential gains from switching for these customers is considerably higher. We have not seen any characteristics of an SVT to which customers might attach substantial value.

8. So, some 70 per cent of British energy customers are presently on SVTs and the CMA cannot think of any reason why these customers might value them. On the basis of this acknowledged lack of understanding it is contemplating prohibiting such SVTs.
9. In effect, the CMA’s view is that these customers have failed to engage in the way that the CMA considers would be rational – that is, consistent with the CMA’s own assumptions about what should be important to them. These customers exhibit what the CMA *Market Investigation Guidelines* (para 295) call “undesirable patterns of customer responses”. The CMA therefore proposes a set of possible measures to help these customers to act more rationally, to “remedy undesirable patterns of customer responses” as the *Guidelines* put it. These customers are first to be nudged into behaving the way the CMA considers they ought to behave, then prohibited from choosing the kinds of tariffs for which they have exhibited a preference. Finally, on the assumption that not enough customers will learn to respond in a desirable way soon enough, the introduction of a price control is to be considered.

A more plausible view of customer preferences

10. Surely there is a simpler and more plausible explanation for the observed customer behaviour? Customers have different personalities and preferences. As of today, some 30 per cent of customers see the financial attraction of searching out and choosing a non-standard product. They accept that this will involve repeated choices over time. They may even find the process stimulating and satisfying. But for various reasons some 70 per cent of customers – those on SVTs - have not yet been persuaded that a different (non-standard) product offers sufficient attractions to make it worth changing from the standard type of tariff.

11. A great merit of an SVT is that the customer doesn't have to do anything except pay the bill. In contrast a non-standard product involves time, evaluation, judgement, risk, the possibility of making (in retrospect) the wrong decision – all unattractive attributes to many people. What is more, the prospect is of a continuing future stream of such unattractive decision situations, typically every year. Of course, other things being equal, such customers would prefer a lower bill. However, it seems that the savings presently available are not – for these customers – sufficient to warrant the prospect of an unattractive decision process, when the time and effort could be spent in positively attractive ways, and the energy will continue to flow.

Weak customer response?

12. The CMA's assumption that "price is the most important product characteristic to a consumer" is simply inconsistent with the empirical evidence, and its conclusion of "weak customer response" is incorrect.
13. The response of British consumers to the market is not weak at all. On the contrary, it is clear and strong. A substantial minority sees advantage in non-standard products and is willing to switch frequently to obtain the best terms. But the majority view today is that non-standard products and frequently switching energy supplier are not worth the hassle, and these customers don't see the point of spending time repeatedly checking this.
14. This is the picture today. It could change. After all, Ofgem's post-2008 interventions halved customer switching, particularly among certain socio-economic groups, and prohibited many attractive products that had persuaded customers to engage and choose. The removal of these interventions could be expected to enable suppliers to find new and better ways to stimulate more customers to consider a greater variety of non-standard products, and in particular to reinstate competition between SVTs.
15. Newer approaches are emerging, such as services which customers can choose that automatically switch customers when there are savings to be made, consistent with guidelines they have specified. Such services might appeal to some customers that are presently less active. The way to maximise the prospects of such developments is to allow maximum opportunity and incentive to suppliers, aggregators, PCWs, TPIs etc to discover what works best for customers, rather than to assume that what they want is more information and repeated nudging or nagging.
16. Research for Citizens Advice is consistent with this. Consumers have limited time. Tasks like switching energy supplier are in principle high on consumers' priorities but in practice not. Customers give a higher priority to, and spend more time on, more enjoyable tasks such as searching for good holiday hotels and music streaming/downloading services. The implication is that prospective enjoyment or otherwise is an important additional determinant in customer decisions whether to switch, along with other non-price factors such as customer loyalty. (Consistent with the reference to enjoyment, we

understand that one of the most successful PCW tactics for encouraging customer response has been the offer of a free toy.)

17. Another implication is that additional information and “nudging” are unlikely to make much difference. As Citizens Advice put it,
“If we are to stick with the switch-led model, then we need to be creative about designing viable alternatives that enable consumers to shop around without placing unrealistic demands on them. Any solutions must start by understanding and respecting the time poor, information rich world people live in and are realistic about the appeal of energy shopping in such a crowded consumer landscape.”¹

The CMA’s well-functioning market

18. The *Provisional Findings* benchmark of a well-functioning retail energy market is essentially a static equilibrium concept, as in the perfectly competitive model that the CMA generally takes pains to distance itself from. In this energy market investigation the *Provisional Findings* see active well-informed customers as a prerequisite for competition. This is an unduly limited concept of competition, more limited than the CMA’s stated preference for seeing competition as a rivalrous process. That rivalrous process - for discovering and providing what customers want – includes, importantly, discovering what marketing techniques will attract the attention of customers. We have explained above that British energy customers have expressed their views about the products presently on offer, and so far many have not been persuaded to engage repeatedly in this market in the way that the CMA would like.
19. In developing its benchmark, the CMA asserts that “gas and electricity are extreme examples of homogeneous products” (PF para 82), and again repeats that customers are mainly concerned about price. Homogeneous products and a focus on price are characteristics of the perfect competition model. But as we argued in our earlier submission of 16 July, this is not how customers view this market, and in order to understand how the market works one needs to understand how customers see it. In practice many customers seem to see energy as a service rather than as a homogeneous product, and they care about how easy it is to contact their supplier, to use their online services, to get a meter changed or moved, to top up their pre-payment meter on a phone, to deal with the supplier when they have payment problems, to submit meter reads through an app, and so on. To assume all this away is to over-simplify

¹ “Consumer engagement with the market: where do energy and other regulated markets fit in a consumer hierarchy of priorities?” Policy Manager Liz Coll’s Blog, 30 July 2015, referring back to *Consumers’ hierarchies of priorities*, A research report for Citizens Advice, GfK, May 2014. That report concludes, “Given we see little or no influence on consumers’ hierarchy of priorities from the effect of presenting information based on principles drawn from behavioural economics, we need to recognise its limitations in influencing behaviour in this context.” (p vi)

the market and to understate the extent of continually ongoing competition to discover and satisfy the preferences of customers.

20. The CMA's characterisation of a well-functioning retail energy market is thus inconsistent with the way that customers actually behave and with the CMA's normal concept of competition as a rivalrous process. This has led the CMA to misinterpret the evidence about customer preferences, and to conclude, wrongly, that a preference for SVTs despite lower prices on non-standard products demonstrates weak customer response and is inconsistent with competition. We therefore ask the CMA to reconsider its preliminary finding of weak customer response in the domestic retail energy market.

Unilateral market power

21. We also urge the CMA to review its finding that the domestic retail market is characterised by the exercise of unilateral market power. The CMA finds that suppliers have unilateral market power that they can exploit by price discrimination and/or by pricing above efficient costs.

8.195 Overall, our provisional view is that the overarching feature of weak customer response, in turn, gives suppliers a position of unilateral market power concerning their inactive customer base. In relation to unilateral market power, our provisional finding is that suppliers in such a position have the ability to exploit such a position, for example through price discrimination by pricing their SVTs materially above a level that can be justified by cost differences from their non-standard tariffs and/or pricing above a level that is justified by the costs incurred with operating an efficient domestic retail supply business.

22. Even if it were accepted that British energy customers did exhibit weak customer response, the claim that "weak customer response ... gives suppliers a position of unilateral market power" could be misleading without reference to the CMA's particular definition of that term. It simply means that a firm can "influence aspects of competition" (*Guidelines* para 9), which must be true of many firms much of the time. Unilateral market power does *not* mean 'significant market power', which the *Guidelines* define as giving firms "the ability to maintain prices above the competitive level".
23. So, the *Preliminary Findings* have *not* established that weak customer response gives suppliers significant market power. Hence they have *not* established that this in turn gives suppliers the ability to exploit such a position through price discrimination and/or pricing above competitive levels. Weak customer response *might* give suppliers a position of unilateral market power, but equally it *might not*. In simple terms, a price-inelastic demand for a product does not necessarily mean that the producer of that product can make an excessive profit, or indeed any profit at all.

Price discrimination

24. The *Provisional Findings* discussion of price discrimination could be similarly misleading.

25. The CMA *Guidelines* note that price discrimination by firms with market power may create barriers to entry or expansion. But the *Guidelines* also note that measures to restrict such discrimination “may themselves generate significant distortion risk by adversely affecting the competitive dynamics of a market”. (para 52) The implication is that price discrimination may be an inherent part of the competitive dynamics of a market. The *Provisional Findings* and Appendix 8.4 on price discrimination do not discuss this.
26. The CMA acknowledges, in a footnote buried in an Appendix, that “Price or margin discrimination is present in many industries and it is not, by itself, evidence that a market is not functioning well.” (fn 2, Appendix 8.4) Price discrimination might be the only means by which a producer can cover the costs of producing a product. However, neither the Appendix nor the *Preliminary Findings* discusses this: the CMA’s analysis gives the impression of proceeding on the basis that price discrimination is indeed evidence that the market is not functioning well.
27. There is now a considerable economic literature explaining more precisely how price discrimination can be an integral feature of a competitive market. Indeed, the strength of competition can *force* firms to price discriminate. The *Provisional Findings* and Appendix 8.4 do not mention this literature.
28. Appendix 8.4 notes that “10. Price discrimination appears to have been a consistent feature of retail domestic energy supply in Great Britain.” In many industries including energy, price discrimination has been a means of offering tariffs with lower margins to vulnerable customers. Also, the CMA has acknowledged the adverse effects of Ofgem’s non-discrimination licence condition that sought to prevent certain kinds of price discrimination. Its discussion proceeds on the basis of the removal of that licence condition and Ofgem’s assurance that the condition no longer has effect.
29. Yet the CMA now seems to suggest that price discrimination is evidence of the exploitation of market power. This in turn is used to support the CMA’s finding that there is an Adverse Effect on Competition. Presumably this does not imply that Ofgem’s non-discrimination condition ought to be reinstated, and indeed that all forms of price discrimination ought to be prohibited? If this is not the implication, and some forms of price discrimination are consistent with competition, then the CMA’s use of price discrimination to support its allegation of unilateral market power at the very least needs clarification and qualification.

Excess profits and costs and overcharging

30. Neither alleged weak customer response nor the existence of price discrimination establishes the existence of ‘significant’ unilateral market power which the Guidelines specify as giving firms the ability to raise prices above the competitive level. What about the CMA’s analysis of those prices themselves? The CMA asserts that “average prices paid by domestic customers have been above the levels that are justified by the costs incurred

with operating an efficient domestic retail supply business”. (PF 10.137) However, at least three aspects of this calculation are concerning.

31. First, the CMA’s calculation of excess revenues is obscure and unusual. Excess costs have not typically formed part of a market investigation calculation of excess revenues. They do not feature in the contemporaneous CMA market investigation of retail banking. Usually, the CMA’s calculations focus on excess profits. But here the CMA calculates “prices that we would expect to see had the market functioned effectively, ie in which competition had driven costs and profits down to efficient levels”. (PF para 10.10)
32. This again (despite the CMA’s unpersuasive denial in PF para 10.43) is simply the theoretical but unrealistic benchmark of perfect competition. In no real competitive market are all costs and profits at “efficient levels”. This is a particularly serious flaw in the CMA’s analysis when it seems (though it is unclear) that alleged inefficient costs might account for more than half the alleged excess revenues.
33. Second, it seems that the highest indirect costs are those of EdF. (Appendix 10.5 Table 3, and *Assessment Document* para 6.37) EdF is a majority state-owned entity. Its continued toleration of high costs seems to be a consequence of state ownership. To attribute an effect of ownership to a failure of the competitive market process would be an elementary error. Yet the CMA makes no obvious adjustment for this.
34. Third, it seems likely that part of the actual profits recorded since 2008 have reflected regulatory interventions, yet the CMA makes no adjustment or allowance for this. The CMA finds that several aspects of Ofgem’s policy since 2008 have softened competition or had an Adverse Effect on Competition. If these interventions did not increase prices and profits it would seriously undermine the CMA’s provisional finding that the simple components element of RMR constitutes an AEC. Yet the CMA makes no attempt to quantify and allow for the impact of these interventions, even though supplier profits have increased by about £1 billion per year since 2008. Instead, all the alleged excess profits are attributed to weak customer response and supplier market power and none to the interventions that the CMA has found to have restricted competition.
35. Similarly, the CMA does not acknowledge that removing these regulatory interventions will increase competition and tend to reduce any excess profits.
36. The CMA’s calculations of excess costs and excess profits, and hence alleged overcharging, are therefore unconvincing. We urge the CMA to reconsider these findings.

Prohibiting evergreen tariffs

37. We have argued against the provisional findings of weak customer response and unilateral market power, and therefore question the CMA’s findings of an

Adverse Effect on Competition in this regard and the related need for remedies.

38. We have also explained that the proposal to prohibit evergreen tariffs such as SVTs, as set out in the CMA's remedy 11 and the proposals from Scottish Power and Centrica, would misinterpret and overrule the preferences of the majority of British energy customers and impose upon them the CMA's preferences. It would require these customers repeatedly to explore, evaluate and choose tariffs and suppliers on the assumption that price is the most important characteristic to them, when evidently it is not. It would deny them the type of tariff that they have chosen – actively or passively – because they have not yet been persuaded that another type of tariff is preferable. It would impose upon them a stream of enforced decisions that that they have chosen – actively or passively – to eschew. It would therefore make these 70 per cent of customers worse off as these customers themselves presently view the situation.
39. These remedies would have other disadvantages. Suppliers would adjust their tariffs to compensate. The extent of regulatory specification and monitoring would increase. Suppliers would find ways around the new regulations – for example by introducing tariffs that technically meet the new regulations but that have minimal differences from present SVTs. Some customers might be attracted by such new tariffs. But the tariffs could well be less subject to competitive pressure than present SVTs and hence characterised by higher prices. One cannot be confident that forcing customers to make periodic choices of tariff will actually reduce their energy bills, let alone make them better off as they themselves judge the situation.

Making competition for SVTs more effective

40. Rather than prohibit standard variable tariffs, a better alternative would be to make competition for them more effective. The obvious way to do that is to remove the regulatory restrictions on competition that have made the Standard Variable Tariff generally (for non-prepayment customers) no longer an active acquisition tariff. (PF para 99)
41. The CMA's Remedy 3 is that the 'simple tariffs' component of RMR be removed from suppliers' licences. This is eminently desirable. However, it is not only the 'simple tariffs' component of RMR that has had adverse effects on competition. The CMA notes that with the introduction of RMR, discounts on the SVT were banned (PF para 102). But there are also other conditions in the RMR, for example relating to supplier's cheapest tariff, that constrain suppliers' ability to compete using the SVT.
42. Suppliers have identified many other aspects of RMR that have made it more difficult for suppliers to communicate with customers. And there have been convincing claims that Ofgem's required calculation of benefits from switching can provide incorrect answers in some plausible circumstances. All provisions of the RMR policy therefore need to be scrutinised and those that constrain competition, not least between SVTs, need to be removed. In

addition, the Marketing Condition needs to be reconsidered so that more appropriate methods of direct marketing, perhaps including doorstep selling, can be developed for the benefit of customers, which again could increase competition for SVTs.

Ofgem's current position on RMR

43. We have some concerns about Ofgem's current position on RMR. In its response to the *Provisional Findings* it says about Remedy 3:

1.4 ... We would not want to see a return to the "confusopoly" that existed in the domestic energy market prior to the RMR and risk reversing the positive impacts we have seen. In particular we are concerned that removing the ban on "multi-tier" tariffs may reintroduce a significant amount of complexity and make it difficult for consumers to compare, ... 1.5 ... We would like to explore with the CMA whether some of the tariff rules could be redesigned in such a way as to ensure that we do not see a return to the level of complexity observed prior to the RMR. For instance, it may be possible to design these rules in a principles-based way.

44. The CMA needs to bear firmly in mind that it has provisionally found the simple tariffs component of RMR to have had an Adverse Effect on Competition. The "multi-tier" tariffs are an example where Ofgem's enthusiasm for simple tariffs and customers' ability to compare led it to overlook the evidence that many customers (including many vulnerable customers) greatly valued the no-fixed-charge tariffs that suppliers were thereby able to offer. This in turn led Ofgem to fail to recognise that such tariffs increased competition including for SVTs rather than reduced it. An unrealistic theory of how customers behave led to restrictions on competition that made customers worse off rather than better off.

45. The suggestion that the RMR tariff rules be designed in a principles-based way may be superficially appealing because it seems to reduce regulatory intervention and prescription. However, given Ofgem's past record, suppliers would need detailed guidance as to what sorts of tariffs and price differentials Ofgem would or would not consider acceptable. Given Ofgem's present views just cited, it seems likely that Ofgem would seek to reinstate much of the simple tariffs component of RMR through the back door. The attractions of a principles-based regulation are therefore illusory.

Vulnerable customers

46. In our previous submissions to the CMA we have urged that any additional steps to improve the outcomes for customers should be focused on those vulnerable customers for whom Ofgem has a specified statutory responsibility, rather than on allegedly unengaged customers generally. Instead of debating this in detail here, we would encourage the CMA to explore two particular possibilities.

47. First, the CMA documents (PF paras 8.16-8.18) the steps that some major suppliers are taking to ensure that specified vulnerable customers (those on the Priority Services Register) are on more favourable tariffs. As the CMA seems

to recognise (PF para 8.15), this suggests that in practice the most vulnerable customers are not necessarily disadvantaged by the present nature and extent of competition in the market. Other suppliers might be encouraged to adopt similar approaches.

48. Second, the Government already has in place a number of schemes for assisting various kinds of vulnerable customers. The Department of Energy and Climate Change administers the Big Energy Network Fund that supports (inter alia) training and advice to communities on energy saving and switching. Ofgem has recently reported on the Warm Homes Discount scheme. The total of this funding is very considerable, as is the potential for ensuring that the most vulnerable customers benefit from a competitive retail energy market. The CMA might wish to consider whether there is scope for rationalising, clarifying or making more effective use of these many schemes for vulnerable customers, to supplement rather than restrict or distort the operation of a competitive retail market.

A way forward

49. The fundamental problem is the CMA's provisional finding that weak customer response constitutes an Adverse Effect on Competition in the domestic retail energy market. In our view this misconstrues the evidence on customer preferences. But even if accepted, it does not establish the significant market power that the *Guidelines* say gives the power to raise prices above competitive levels. Nor does the existence of price discrimination prove market power. The CMA's calculations of alleged excess profits, excess costs and over charging are unconvincing.
50. In our opinion, this particular provisional finding, and the associated possible remedies, mar an otherwise balanced, constructive and welcome CMA report on the energy market investigation. Moreover, the different views of respondents on the issue suggest that it will be difficult to reach a widely accepted conclusion. Thus the question arises as to whether there is another way forward.
51. The CMA has found that the effects of Ofgem's interventions in this market since 2008 have been far-reaching.
- 7.48 The nature of price competition between the Six Large Energy Firms has changed several times since liberalisation, due in large part to changes in the regulatory regime. ...
- 7.50 Over the last six years, three major interventions by Ofgem have changed the nature of retail competition significantly.
- The CMA provisionally finds that Ofgem's non-discrimination condition contributed to a softening of competition and that the simple tariffs component of its RMR reforms has had an Adverse Effect on Competition.
52. These adverse effects are likely to have been significant. They have been reflected, for example, in increases in prices and profits, significant reductions in customer switching, changes in products and competitor behaviour, and other consequences less straightforward to identify. In such circumstances it is

difficult – perhaps impossible - to come to an informed judgement on what the market would have been like in the absence of these regulatory interventions, on whether or how far other factors have also had an adverse effect on competition, and on the likely effects of possible remedies when the removal of those regulatory interventions is also being proposed. This suggests that it would be correspondingly premature and disproportionate to impose yet more restrictions on the competitive market at the present time.

53. In these circumstances, the CMA could reasonably decide to confirm its provisional view that Ofgem's various regulatory interventions have had an adverse effect on competition, confirm that a remedy would be to remove those interventions, and decide that it would be premature and inappropriate to take a view on the existence or otherwise of other potential adverse effects on competition. This would allow a significant improvement in competition that can be expected to benefit all customers. The CMA could also consider the scope for improving the various arrangements for assisting vulnerable customers.