

## **ENERGY MARKET INVESTIGATION**

### **Notice of the Competition and Markets Authority's intention to open a disclosure room and operate a confidentiality ring to allow review of data underlying the customer survey and certain economic analysis**

As part of the energy market investigation (the 'Investigation'), the Competition and Markets Authority (the 'CMA') has received information and/or data from a number of parties underlying the updated issues statement published on 18 February 2015 (the 'Updated Issues Statement') and certain reports and pieces of economic analysis conducted during the Investigation.

In particular, the CMA has received data and/or information underlying:

- A) the results of the customer survey conducted by the company Gfk NOP Ltd. on the CMA's behalf (the 'Gfk Customer Survey'),<sup>1</sup> which are included in (i) the Gfk report entitled 'Energy Market Investigation, a report for the Competition and Markets Authority' published on 20 February 2015 (the 'Gfk Report'), and (ii) one set of tabulations that the CMA published on 25 February 2015;
- B) the economic analysis conducted to calculate the potential savings for dual fuel domestic energy customers if they were to switch to a different tariff within the same or another supplier, which is included in the working paper entitled 'Analysis of the potential gains from switching' published on 24 February 2015 (the 'Switching Gains WP'); and
- C) the economic analysis conducted to illustrate the manner in which domestic retail energy price changes are reflective of changes in costs, which is included in: (i) a presentation entitled 'Descriptive analysis of the evolution of retail prices and costs (cost pass-through)' (the 'Presentation'), and (ii) a paper outlining the accompanying methodology (the 'Methodology Paper'), both of which were included in the working paper published on 23 February 2015 entitled 'Cost-pass-through' (the 'Cost Pass-through WP'),

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<sup>1</sup> See the CMA's [Notice of intention to conduct a customer survey](#) dated 4 September 2014.

together the 'Underlying Data'.

The Underlying Data includes confidential information provided by a range of parties, including Centrica, EDF Energy (EDF), E.ON, RWE npower, Scottish and Southern Energy (SSE) and Scottish Power (the 'Six Large Energy Firms'), Ofgem, Energylinx Ltd. ('Energylinx'), and ICIS.<sup>2</sup>

Accordingly, the CMA considers that the Underlying Data includes 'specified information' within the meaning of section 238 of the Enterprise Act 2002 (the 'Act'), to which the general restriction on disclosure by the CMA in section 237 of the Act applies. The CMA has decided to disclose the Underlying Data to certain parties for the purpose of allowing such parties to understand the 'gist'<sup>3</sup> of the GfK Report, and the CMA's analyses in the Switching Gains WP and Cost Pass-through WP and, accordingly, facilitating the exercise by the CMA of any of its statutory functions pursuant to section 241 of the Act.

In light of the particularly sensitive and confidential nature of the Underlying Data, the CMA considers it necessary to disclose the Underlying Data to a limited number of approved external legal and/or economic advisers of the relevant parties. In doing so, the CMA intends to disclose part of the Underlying Data through a disclosure room (the 'Disclosure Room') and part through a confidentiality ring (the 'Confidentiality Ring'). Specific details of the Disclosure Room and Confidentiality Ring are set out below.

## **Disclosure Room**

The Disclosure Room will include the information and data underlying the GfK Customer Survey and the Switching Gains WP.

- A) In relation to the GfK Customer Survey, the Disclosure Room will include the following:
- (i) the data with anonymised responses of individual customers to the questionnaire used in the GfK Customer Survey and customer records produced from responses to such questionnaire (the 'GfK Customer Survey Underlying Data');

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<sup>2</sup> ICIS is a market information provider owned by Reed Business Information Limited.

<sup>3</sup> Disclosing the 'gist' of a case means giving the party sufficient information to put it in a position where it is able to make worthwhile representations and respond to the allegations made against it; see, eg, Competition Appeal Tribunal's judgment in Case No 1219/4/8/13 *Ryanair Holdings plc v Competition Commission and Aer Lingus Group* [2014] CAT 3, paragraph 39(7). This judgment was upheld by the Court of Appeal on 12 February 2015 in Case No 1219/4/8/13.

- (ii) the data and files used in an analysis conducted by the CMA to calculate weights for the Gfk Customer Survey Underlying Data; and,
  - (iii) a set of tabulations including the results of the Gfk Customer Survey.
- B) In relation to the Switching Gains WP, the Disclosure Room will include data on retail energy tariff prices and numbers of customer accounts, as well as data on domestic consumption that the CMA has received from the Six Large Energy Firms and Energylinx. In particular, the Disclosure Room will include the following:
- (i) the tariff prices and customer accounts data underlying Tables 1, 2 and Figures B1 and B2 of the Switching Gains WP illustrating the total number of electricity and gas accounts in the period from 31 March 2012 to 30 June 2014;
  - (ii) the data underlying Table 3 of the Switching Gains WP illustrating the proportion of dual fuel domestic customers who could save by switching supplier in the period from 31 March 2012 to 30 June 2014;
  - (iii) the data underlying Table 4 of the Switching Gains WP illustrating the weighted average potential savings for dual fuel domestic customers if they were to switch supplier in the period from 31 March 2012 to 30 June 2014; and,
  - (iv) the data underlying Table 5 of the Switching Gains WP illustrating the weighted average potential savings for dual fuel domestic customers subscribed to standard variable (evergreen) tariffs if they were to switch supplier in the period from 31 March 2012 to 30 June 2014.

The Disclosure Room will be open on each CMA Working Day<sup>4</sup> **from 9 March 2015 until 20 March 2015** inclusive. Its hours of operation will be from 9.30am until 5pm on each day. A set of rules will govern the operation of the Disclosure Room, including the equipment and software that will be provided by the CMA. Numbers of individuals allowed access to the data room both generally and at any one time will be limited.

### **Confidentiality Ring**

The Confidentiality Ring will include the information and data on wholesale and retail energy prices and costs that the CMA has received from the Six Large Energy Firms,

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<sup>4</sup> CMA 'Working Day' means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

Ofgem and ICIS and has used to conduct the economic analysis contained in the Cost Pass-through WP.

In particular, the Confidentiality Ring will include:

- (i) the data underlying Figure 3 of the Methodology Paper relating to the CMA's wholesale energy supply cost benchmarks which are constructed using prices between 2004 and 2014;
- (ii) the data underlying Figure 4 of the Methodology Paper relating to the CMA's estimate of suppliers' costs for transmission, distribution, balancing services use of system and environmental and social obligations in the period from January 2004 until December 2014;
- (iii) the data underlying Figure 5 of the Methodology Paper relating to non-standard tariffs at launch and through the sales period for domestic customers in the period from January 2006 until December 2014;
- (iv) the data underlying the figures on pages 6, 7 and 9 of the Presentation, relating to measures of industry costs;
- (v) the data underlying the figure on page 12 of the Presentation, relating to the evolution of standard variable prices and costs for gas and electricity supply in the period from January 2004 until December 2014;
- (vi) the data underlying the figure on page 15 of the Presentation, relating to the evolution of non-standard tariff prices and costs for gas and electricity supply in the period from January 2006 until December 2014;
- (vii) the data underlying the figure on page 16 of the Presentation, relating to the evolution of one-year fixed tariffs and costs for gas and electricity supply in the period from January 2006 until December 2014;
- (viii) the data underlying the figure on page 18 of the Presentation relating to the comparison of the evolution of standard variable and non-standard tariff prices and costs for gas and electricity supply in the period from January 2006 until December 2014; and
- (ix) the data underlying the figure on page 19 of the Presentation relating to the comparison of the evolution of standard variable and one-year fixed tariff prices and costs for gas and electricity supply in the period from July 2007 until July 2014.

The Confidentiality Ring will operate on the same dates as the Disclosure Room, ie **from 9.30am on 9 March 2015 until 5pm on 20 March 2015**. The CMA will make

the Disclosure Material available electronically by a secure file transfer protocol website (the 'FTP Website').

### **Access to the Disclosure Room and Confidentiality Ring**

In order to safeguard the confidentiality of the Underlying Data, and in line with the CMA's Disclosure Room and Confidentiality Ring procedures,<sup>5</sup> access to the Disclosure Room and Confidentiality ring will be granted to a limited number of approved external legal and/or economic advisers of certain parties as noted above. These external advisers and the firms they represent will be required to sign undertakings and agree to comply with the Disclosure Room rules before they will be granted access to the Disclosure Room or Confidentiality Ring.

The draft undertakings that the external legal and/or economic advisers approved by the CMA (and the firms they represent) will be required to sign before they will be granted access to the Disclosure Room and/or Confidentiality Ring by the CMA are attached at Appendices 1 to 4 of this Notice.

The CMA is prepared to approve up to a maximum of six external legal or economic advisers per party to access both the Disclosure Room and the Confidentiality Ring.

This notice invites interested parties to submit expressions of interest to access the Disclosure Room or Confidentiality Ring or both, together with an explanation of their interest and the reasons for requesting access to the Disclosure Room and/or Confidentiality Ring, and details of the interested party's external legal and/or economic advisers (ie name, job title and employer) seeking entry to either the Disclosure Room, or Confidentiality Ring, or both.

This notice also invites parties expressing an interest to access the Disclosure Room and/or Confidentiality Ring to submit comments with regard to the CMA's approach to disclose the Underlying Data, including the attached draft undertakings and Disclosure Room rules.

Any expressions of interest together with any comments interested parties have on the attached documents must be submitted to the Investigation team at [EnergyMarket@cma.gsi.gov.uk](mailto:EnergyMarket@cma.gsi.gov.uk) by **5pm on Tuesday 3 March 2015**. The CMA will consider each expression of interest received within the above deadline, and the reasons given for access to be granted, before deciding, at the CMA's discretion, whether to grant access to the interested party to the Disclosure Room and/or Confidentiality Ring.

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<sup>5</sup> See the CMA's guidance documents *Chairman's Guidance on Disclosure of Information in Merger Inquiries, Market Investigations and Reviews of Undertakings and Orders accepted or made under the Enterprise Act 2002 and Fair Trading Act 1973*, CC7; and *Transparency and disclosure: the CMA's Policy and Approach*, CMA6.

**ENERGY MARKET INVESTIGATION****UNDERTAKINGS GIVEN BY [Name of Adviser] TO THE  
COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS  
TO THE CUSTOMER SURVEY AND SWITCHING GAINS  
DISCLOSURE ROOM****WHEREAS**

- I. On 26 June 2014, Ofgem, in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (the 'Act'), made a reference to the chair of the Competition and Markets Authority (the 'CMA') for the constitution of a group under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 for an investigation into the Supply and Acquisition of Energy in Great Britain (the 'Investigation').<sup>6</sup>
- II. On 24 July 2014, the CMA published an issues statement setting out a framework for the Investigation, including four candidate potential theories of harm. On 18 February 2015, the CMA published an updated issues statement setting out updated theories of harm and those issues which are likely to represent the focus of the Investigation in the period up to publication of the provisional findings (the 'Updated Issues Statement').
- III. During the Investigation, the CMA received detailed records for domestic energy customers from a number of parties which have been used by the company Gfk NOP Ltd. to conduct a customer survey on the CMA's behalf (the 'Gfk Customer Survey').<sup>7</sup> The results of the Gfk Customer Survey are included in the Gfk report entitled 'Energy Market Investigation, a report for the Competition and Markets Authority' (the 'Gfk Report') published on 20 February 2015 and in one set of tabulations published on 25 February 2015.
- IV. During the Investigation, the CMA also received data on retail energy tariff prices and numbers of customer accounts, as well as data on domestic consumption from a number of parties, including the six large energy firms<sup>8</sup> (the 'Six Large Energy Firms') and Energylinx Ltd. ('Energylinx'). The CMA

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<sup>6</sup> The terms of reference dated 26 June 2014 can be accessed at [www.ofgem.gov.uk/ofgem-publications/88435/stateofthemarket-decisiondocumentinofgemtemplate.pdf](http://www.ofgem.gov.uk/ofgem-publications/88435/stateofthemarket-decisiondocumentinofgemtemplate.pdf).

<sup>7</sup> See CMA's Notice of intention to conduct a customer survey dated 4 September 2014.

<sup>8</sup> Centrica, EDF Energy (EDF), E.ON, RWE npower, Scottish and Southern Energy (SSE) and Scottish Power.

used this data to conduct an economic analysis of potential gains from switching energy supplier in the domestic energy markets in Great Britain. This economic analysis is included in the working paper entitled 'Analysis of the potential gains from switching' (the 'Switching Gains WP') published on 24 February 2015.

- V. The CMA has decided to disclose the following by means of the Customer Survey and Switching Gains Disclosure Room (the 'Disclosure Room'):
- (a) the data with anonymised responses of individual customers to the questionnaire used in the Gfk Customer Survey and customer records produced from responses to such questionnaire (the 'Gfk Customer Survey Underlying Data');
  - (b) the data and files used in an analysis conducted by the CMA to calculate weights for the Gfk Customer Survey Underlying Data;
  - (c) a set of tabulations including the results of the Gfk Customer Survey;
  - (d) the tariff prices and customer accounts data underlying Tables 1, 2 and Figures B1 and B2 of the Switching Gains WP, illustrating the total number of electricity and gas accounts in the period from 31 March 2012 to 30 June 2014;
  - (e) the data underlying Table 3 of the Switching Gains WP, illustrating the proportion of dual fuel domestic customers who could save by switching supplier in the period from 31 March 2012 to 30 June 2014;
  - (f) the data underlying Table 4 of the Switching Gains WP, illustrating the weighted average potential savings for dual fuel domestic customers if they were to switch supplier in the period from 31 March 2012 to 30 June 2014; and,
  - (g) the data underlying Table 5 of the Switching Gains WP, illustrating the weighted average potential savings for dual fuel domestic customers subscribed to standard variable (evergreen) tariffs if they were to switch supplier in the period from 31 March 2012 to 30 June 2014,
- together the 'Disclosed Material'.
- VI. The CMA considers that the Disclosed Material includes 'specified information' within the meaning of section 238 of the Act to which the general restriction on disclosure in section 237 of the Act applies. The CMA has decided to disclose the Disclosed Material to certain parties (each a 'Relevant Party') in the Disclosure Room for the purpose of allowing the parties to

understand the 'gist'<sup>9</sup> of the Gfk Report and the CMA's analysis included in the Switching Gains WP and, accordingly, facilitating the exercise by the CMA of any of its statutory functions pursuant to section 241 of the Act.

- VII. The CMA has approved the external legal and/or economic advisers of [Name of Party] listed in Annex A, and may approve, in writing, further advisers of [Name of the Party] during the operation of the Disclosure Room (each the 'Adviser', collectively the 'Advisers'). However, access to the Disclosure Room will only be granted to an Adviser who has given undertakings in such form as the CMA requires in accordance with paragraph IX below (the 'Individual Undertakings') and in respect of whom written undertakings have been provided by the relevant firm that such Adviser represents (the 'Firm Undertakings') (each such Adviser being an 'Authorised Adviser').
- VIII. Access to the Disclosure Room is provided to check the accuracy of the Gfk Customer Survey Underlying Data and the data underlying the economic analysis contained in the Switching Gains WP, as well as to enable the Authorised Advisers to further understand the CMA's analyses concerning the Gfk Customer Survey and the Switching Gains WP in order to allow the Authorised Advisers to prepare submissions and representations to the CMA during the Investigation (the 'Permitted Purpose').
- IX. The CMA must be informed of the date(s) on which each Adviser is seeking entry into the Disclosure Room. The CMA must receive a signed copy of the Individual Undertakings by 4pm of the CMA Working Day<sup>10</sup> before the date of intended access by the Adviser to the Disclosure Room. The CMA must have accepted the signed Individual Undertakings before access to the Disclosure Room is granted to any Adviser.
- X. Disclosure of the Disclosed Material, or removal from the Disclosure Room of the Disclosed Material, or any part thereof, by the Authorised Advisers other than in accordance with the Individual Undertakings and the Disclosure Room Rules attached to Annex B, is not permitted without the express, and prior, written consent of the CMA and will constitute a criminal offence under section 245 of the Act.

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<sup>9</sup> Disclosing the 'gist' of a case means giving the party sufficient information to put it in a position where it is able to make worthwhile representations and respond to the allegations made against it; see, eg, Competition Appeal Tribunal's judgment in Case No 1219/4/8/13 *Ryanair Holdings plc v Competition Commission and Aer Lingus Group* [2014] CAT 3, paragraph 39(7). This judgment was upheld by the Court of Appeal on 12 February 2015 in Case No 1219/4/8/13.

<sup>10</sup> CMA 'Working Day' means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.



## NOW THEREFORE

I, [Name of Adviser], [Job title] at [Name of Firm], who has been engaged by [Name of Party] in connection with the Investigation, undertake to the CMA in my own name:

- A. To abide by the Disclosure Room Rules which are annexed hereto;
- B. To use the Disclosed Material for, and only for, the Permitted Purpose on behalf of [Name of Party];
- C. To hold the Disclosed Material in strict confidence and not to discuss, disclose, transmit, communicate or otherwise make the Disclosed Material available in any other manner to any other person (including any other legal adviser, economic adviser, officer or employee of [Name of Firm] and [Name of Party], who is not an Authorised Adviser);
- D. Not to make any electronic or non-electronic copy in any format of any of the Disclosed Material, or remove any of the Disclosed Material from the Disclosure Room, save as provided at paragraph E below;
- E. That I may, subject to the following conditions, prepare by myself or in connection with the other Authorised Advisers of [Name of Party] one report which may contain the Disclosed Material (the 'Report):
  - (a) I may copy the Disclosed Material only for the purposes of preparing the Report in the Disclosure Room, subject to sub-paragraphs F(b), F(c) and F(d) below;
  - (b) I will not copy or remove any Disclosed Material relating to the Gfk Customer Survey other than in an aggregated form that will not allow any of the individual domestic customers that were interviewed by Gfk to be identified;
  - (c) I will not copy or remove any Disclosed Material relating to the Gfk Customer Survey that will allow the number of customer accounts of each party (other than [Name of Party]) to be identified (including the overall number of customer accounts and the number of accounts on a narrower segmented basis such as per tariff type);
  - (d) I will not copy or remove any Disclosed Material relating to the Switching Gains WP, other than in aggregated form that will not allow the number of customer accounts of each party (other than [Name of Party]) to be identified (including the overall number of customer accounts and the

number of customer accounts on a narrower segmented basis such as per tariff type);

- (e) The Report must be no longer than is reasonably necessary for the Permitted Purpose;
- (f) I may remove one copy of the Report from the Disclosure Room to facilitate the Permitted Purpose on behalf of [Name of Party];
- (g) I may make copies of the Report prepared in accordance with the Undertakings solely for my use and for the use of any Authorised Adviser;
- (h) I will keep the Report or copies of the Report secure and will prevent the disclosure, transmission, communication or dissemination by any other means of the Report (or copies thereof), or of the information contained therein, to any person other than an Authorised Adviser;
- (i) I may disclose, in general terms, the gist of the Report to [Name of Party] but, in doing so, I will not disclose, transmit, communicate or otherwise make known to [Name of Party] specific information regarding the following:
  - (i) the Disclosed Material relating the Gfk Customer Survey; other than in aggregated form that will not allow (a) any of the individual domestic customers that were interviewed by Gfk to be identified, or (b) any of the parties (other than [Name of Party]) to be identified;
  - (ii) the Disclosed Material, other than in aggregated form that will not allow the number of customer accounts of each party (other than [Name of Party]) to be identified (including the overall number of customer accounts and the number customer accounts on narrower segmented basis such as per tariff type);
  - (iii) the Disclosed Material relating to prices; and,
  - (iv) the Disclosed Material relating to domestic energy consumption;
- (j) For the avoidance of doubt, when providing the gist of the Report to [Name of Party], I will ensure that such gist will not enable or assist [Name of Party] to gain any understanding of its position or potential future position in any market, relative to any other market operator and, in particular, I will not reveal any data that identifies numbers of customer accounts and prices concerning any party other than [Name of Party];

F. To offer the Report to the CMA for inspection before removing the Report from the Disclosure Room, and to remove it after the CMA has had

reasonable time to ensure that the Report has been prepared in accordance with paragraph E above;

- G. To ensure that any analysis I undertake, or any report that I write for [Name of Party], or any knowledge that I obtain in the Disclosure Room, cannot be used in any way to disclose any part of the Disclosed Material which does not belong to [Name of Party], save as provided at paragraph E above;
- H. To destroy or return the Report (and all copies) prepared which contain the Disclosed Material at the conclusion of the Investigation or at the conclusion of an appeal to which [Name of Party] is a party or an intervening third party, in the event of an appeal;
- I. To notify the CMA immediately if I become aware of or suspect that any of [Name of Party]'s Authorised Advisers have failed to comply with the Individual Undertakings or the Disclosure Room Rules, or any of the firms that such Authorised Advisers represent have failed to comply with the Firm Undertakings;

#### **PROVIDED THAT**

These undertakings shall not apply to any part of the Disclosed Material that:

- (i) belongs or relates solely to [Name of Party] or to [Name of Party]'s business and which does not include any confidential information belonging to, relating to, or deriving solely or partially from, any other party, or to any individual domestic customers interviewed during the Gfk Customer Survey;
- (ii) at the time of disclosure is in the public domain or that subsequently comes into the public domain, except through breach of the Individual Undertakings or of undertakings given by external legal and/or economic advisers for any other Relevant Party in relation to the Disclosure Room; and
- (iii) is required to be disclosed by law or regulation, so long as I consult with the CMA prior to disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure;

#### **AND IN AGREEMENT THAT**

These undertakings and the Disclosure Room Rules shall be governed by and construed in accordance with English law, and I submit to the exclusive jurisdiction of the courts of England and Wales to hear and decide any action or proceedings which may arise out of, or in connection with, these undertakings and the Disclosure Room Rules.

[Name of Party] has given full and informed consent to the restrictions placed upon [Name of Adviser] on the further disclosure of information, subject to the undertakings above.

[Name of Adviser] of [Name of Firm]

[signature]

[Date]

## **ANNEX A: ADVISERS OF [NAME OF PARTY] APPROVED BY THE CMA ('the Advisers')**

This Annex contains the names of Advisers for [Name of Party].

[Name]

[Name]

[...]

## **ANNEX B: RULES OF THE CUSTOMER SURVEY AND SWITCHING GAINS DISCLOSURE ROOM IN THE ENERGY MARKET INVESTIGATION ('the Disclosure Room Rules')**

- I. The CMA will make a room available at its offices at Victoria House, Southampton Row, London, WC1B 4AD to the Authorised Advisers.
- II. Only the Authorised Advisers will be allowed in the Disclosure Room, subject to a maximum of three Authorised Advisers at any one time.
- III. The Disclosure Room will be open on each CMA Working Day<sup>11</sup> from 9 March 2015 until 20 March 2015 inclusive. Its hours of operation will be from 9.30am until 5pm on each day. Should the CMA decide to open the Disclosure Room beyond that time or period, access will continue to be governed by the Individual Undertakings, Firm Undertakings, and the Disclosure Room Rules.
- IV. At all times that the Disclosure Room is open, a member of CMA staff will be present to oversee compliance with the Disclosure Room Rules and shall be the person any Authorised Adviser should contact in the event of a query or difficulty concerning the operation of the Disclosure Room (including IT matters).
- V. In addition to the Disclosed Material, a printed copy of the published Switching Gains WP and Gfk Report; an electronic copy of the published Gfk tabulations; and stationery, will be available in the Disclosure Room.
- VI. The Disclosure Room will contain computers (desktops or laptops) with the following specification:
  - (a) Word, Excel and PowerPoint software;
  - (b) Stata software;
  - (c) access to a specific subfolder containing the Disclosed Material;
  - (d) access to three printers;
  - (e) no storage medium other than the hard disk will be available (ie the USB ports and the CD writer – if any – will be disabled);
  - (f) no internet or email capacity; and

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<sup>11</sup> CMA 'Working Day' means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

- (g) the computers available for use by the Authorised Advisers of each Relevant Party will be networked to each other.
- VII. Within reason, other software may be installed on one or more computer(s) in the Disclosure Room, provided that the following procedures are followed:
- (a) the Authorised Adviser must notify the CMA at least 48 hours before they wish to have alternative software installed;
  - (b) such software must be provided on CD-ROM only, which must contain nothing other than the software to be installed;
  - (c) CMA staff will check such CD-ROM prior to installation;
  - (d) compliance with the licence arrangements for such software remains at all times the responsibility of the Authorised Adviser(s) wishing to install it.
- VIII. All printing activity will be logged automatically.
- IX. Authorised Advisers will be provided with A4 sized envelopes in which they may store any printed materials including any handwritten notes. The envelope will be sealed and placed in a secure location at the CMA's offices, which will be locked overnight. After the closure of the Disclosure Room any such materials will be destroyed by the CMA.
- X. In accordance with paragraphs E and F of the Individual Undertakings, one copy of the Report, per Relevant Party, produced by the Authorised Advisers on the computers provided in the Disclosure Room, may be removed at the end of the Disclosure Room process. Where necessary, CMA staff will redact from the Report any information which may, in their opinion, lead to a breach of the Individual Undertakings.
- XI. Authorised Advisers may talk to each other in the Disclosure Room but any conversations must be kept as brief and as quiet as possible to avoid disturbing other users of the Disclosure Room.
- XII. The CMA will make provision for a breakout room during the opening hours of the Disclosure Room for reasonable use by the Authorised Advisers, upon request. Such requests must be made to the CMA staff member present in the Disclosure Room on the day the Authorised Advisers wish to use the breakout room. In the event that more than one Relevant Party wishes to use the breakout room, each party concerned shall be able to use the breakout room for a maximum of 2 hours at any one time and the priority given to parties will be determined by the order in which the Relevant Party's Authorised Adviser(s) made the request to the CMA staff member. In the

event of a dispute, the matter shall be resolved by the CMA staff member in the Disclosure Room. Authorised Advisers are permitted to take handwritten notes into the breakout room but are reminded that, in doing so, they must not breach the Individual Undertakings.

- XIII. No Authorised Advisers are to carry into the Disclosure Room or breakout room any device allowing external contact (eg mobile phones, PDAs, laptop computers) or storage devices (eg memory sticks or dictaphones).
- XIV. The usual rules for access to the CMA's offices will apply. In particular, visitor badges must be worn visibly at all times. The Authorised Advisers must not leave the Disclosure Room at any time without informing a member of the CMA staff and may be accompanied if appropriate.
- XV. Any Authorised Adviser who does not comply with the Disclosure Room Rules will also breach the Individual Undertakings. This could result in the Authorised Adviser being removed from the Disclosure Room, and the Authorised Adviser may be barred from participation in any subsequent disclosure room or confidentiality ring whether relating to the same investigation or any other investigation run by the CMA. A breach of the Individual Undertakings may be referred to the Authorised Adviser's regulatory body, if applicable, who may subsequently decide to undertake disciplinary action.
- XVI. Any Authorised Adviser's firm who does not comply with the Firm Undertakings, may be barred from participation in any subsequent disclosure room or confidentiality ring whether in relating to the same investigation or any other investigation run by the CMA.
- XVII. The CMA may, at any time, vary the Disclosure Room Rules where it considers there is a good reason, which may include a reasonable suspicion, that a breach of the Disclosure Room Rules, the Individual Undertakings or the Firm Undertakings has occurred.



**ENERGY MARKET INVESTIGATION****UNDERTAKINGS GIVEN BY [Name of Firm] TO THE COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS TO THE CUSTOMER SURVEY AND SWITCHING GAINS DISCLOSURE ROOM****WHEREAS**

- I. On 26 June 2014, Ofgem, in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (the 'Act'), made a reference to the chair of the Competition and Markets Authority (the 'CMA') for the constitution of a group under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 for an investigation into the Supply and Acquisition of Energy in Great Britain (the 'Investigation').<sup>12</sup>
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- IV. During the Investigation, the CMA also received data on retail energy tariff prices and numbers of customer accounts, as well as data on domestic consumption from a number of parties, including the six large energy firms<sup>14</sup> (the 'Six Large Energy Firms') and Energylinx Ltd. ('Energylinx'). The CMA used this data to conduct an economic analysis of potential gains from switching energy supplier in the domestic energy markets in Great Britain.

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<sup>12</sup> The terms of reference dated 26 June 2014 can be accessed at [www.ofgem.gov.uk/ofgem-publications/88435/stateofthemarket-decisiondocumentinofgemtemplate.pdf](http://www.ofgem.gov.uk/ofgem-publications/88435/stateofthemarket-decisiondocumentinofgemtemplate.pdf).

<sup>13</sup> See CMA's Notice of intention to conduct a customer survey dated 4 September 2014.

<sup>14</sup> Centrica, EDF Energy (EDF), E.ON, RWE npower, Scottish and Southern Energy (SSE) and Scottish Power.

This economic analysis is included in the working paper entitled 'Analysis of the potential gains from switching' (the 'Switching Gains WP') published on 24 February 2015.

- V. The CMA has decided to disclose the following by means of the Customer Survey and Switching Gains Disclosure Room (the 'Disclosure Room'):
- (a) the data with anonymised responses of individual customers to the questionnaire used in the Gfk Customer Survey and customer records produced from responses to such questionnaire (the 'Gfk Customer Survey Underlying Data');
  - (b) the data and files used in an analysis conducted by the CMA to calculate weights for the Gfk Customer Survey Underlying Data;
  - (c) a set of tabulations including the results of the Gfk Customer Survey;
  - (d) the tariff prices and customer accounts data underlying Tables 1, 2 and Figures B1 and B2 of the Switching Gains WP, illustrating the total number of electricity and gas accounts in the period from 31 March 2012 to 30 June 2014;
  - (e) the data underlying Table 3 of the Switching Gains WP, illustrating the proportion of dual fuel domestic customers who could save by switching supplier in the period from 31 March 2012 to 30 June 2014;
  - (f) the data underlying Table 4 of the Switching Gains WP, illustrating the weighted average potential savings for dual fuel domestic customers if they were to switch supplier in the period from 31 March 2012 to 30 June 2014; and,
  - (g) the data underlying Table 5 of the Switching Gains WP, illustrating the weighted average potential savings for dual fuel domestic customers subscribed to standard variable (evergreen) tariffs if they were to switch supplier in the period from 31 March 2012 to 30 June 2014,
- together the 'Disclosed Material'.
- VI. The CMA considers that the Disclosed Material includes 'specified information' within the meaning of section 238 of the Act to which the general restriction on disclosure in section 237 of the Act applies. The CMA has decided to disclose the Disclosed Material to certain parties (each a 'Relevant Party') in the Disclosure Room for the purpose of allowing the parties to

understand the ‘gist’<sup>15</sup> of the Gfk Report and the CMA’s analysis included in the Switching Gains WP and, accordingly, facilitating the exercise by the CMA of any of its statutory functions pursuant to section 241 of the Act.

- VII. The CMA has approved the external legal and/or economic advisers of [Name of Party] listed in Annex A, and may approve, in writing, further advisers of [Name of the Party] during the operation of the Disclosure Room (each the ‘Adviser’, collectively the ‘Advisers’). However, access to the Disclosure Room will only be granted to an Adviser who has given undertakings in such form as the CMA requires in accordance with paragraph IX below (the ‘Individual Undertakings’) and in respect of whom written undertakings have been provided by the relevant firm that such Adviser represents (the ‘Firm Undertakings’) (each such Adviser being an ‘Authorised Adviser’).
- VIII. Access to the Disclosure Room is provided to check the accuracy of the Gfk Customer Survey Underlying Data and the data and economic analysis contained in the Switching Gains WP, as well as to enable the Authorised Advisers to further understand the CMA’s analyses concerning the Gfk Customer Survey and the Switching Gains WP in order to allow the Authorised Advisers to prepare submissions and representations to the CMA during the Investigation (the ‘Permitted Purpose’).
- IX. The CMA must receive a signed copy of the Firm Undertakings by 4pm of the CMA Working Day<sup>16</sup> before the date of intended access by the Adviser(s) to the Disclosure Room. The CMA must have accepted the signed Firm Undertakings before access to the Disclosure Room is granted to any Adviser.
- X. Disclosure of the Disclosed Material, or removal from the Disclosure Room of the Disclosed Material or any part thereof, by the Authorised Advisers other than in accordance with the Individual Undertakings and the Disclosure Room Rules attached to Annex B, is not permitted without the express, and prior, written consent of the CMA and will constitute a criminal offence under section 245 of the Act.

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<sup>15</sup> Disclosing the ‘gist’ of a case means giving the party sufficient information to put it in a position where it is able to make worthwhile representations and respond to the allegations made against it; see, eg, Competition Appeal Tribunal’s judgment in Case No 1219/4/8/13 *Ryanair Holdings plc v Competition Commission and Aer Lingus Group* [2014] CAT 3, paragraph 39(7). This judgment was upheld by the Court of Appeal on 12 February 2015 in Case No 1219/4/8/13.

<sup>16</sup> CMA ‘Working Day’ means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

## **NOW THEREFORE**

[Name of Firm], which has been engaged by [Name of Party] in connection with the Investigation, undertakes to the CMA that:

- A. Only the Authorised Advisers at [Name of Firm] shall be given access to the Disclosed Material;
- B. It will notify the CMA immediately if it becomes aware of, or suspects that, there has been any breach of these undertakings or that any Authorised Adviser at [Name of Firm] has failed to comply with the Individual Undertakings or the Disclosure Room Rules attached to Annex B; and,
- C. It will notify the CMA immediately if any Authorised Adviser has ceased employment with [Name of Firm];

In addition, [Name of Firm] also undertakes to the CMA to use all reasonable endeavours to ensure that each Authorised Adviser:

- D. Will comply with the Individual Undertakings; and,
- E. Will abide by the Disclosure Room Rules;

## **PROVIDED THAT**

These undertakings shall not apply to any part of the Disclosed Material that:

- (i) belongs or relates solely to [Name of Party] or to [Name of Party]'s business and which does not include any confidential information belonging to, relating to, or deriving solely or partially from, any other party, or to any individual domestic customers interviewed during the Gfk Customer Survey;
- (ii) at the time of disclosure is in the public domain or that subsequently comes into the public domain, except through breach of the Individual Undertakings or of undertakings given by external legal and/or economic advisers for any other Relevant Party in relation to the Disclosure Room; and,
- (iii) is required to be disclosed by law or regulation, so long as [Name of Firm] consults with the CMA prior to disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure;

## **AND IN AGREEMENT THAT**

These undertakings and the Disclosure Room Rules shall be governed by and construed in accordance with English law, and [Name of Firm] submits to the exclusive jurisdiction of the courts of England and Wales to hear and decide any

action or proceedings which may arise out of, or in connection with, these undertakings and the Disclosure Room Rules.

[Name of Party] has given full and informed consent to the restrictions placed upon [Name of Firm] on the further disclosure of information, subject to the undertakings above.

[Name of Firm]

[Signature]

[Date]

## **ANNEX A: ADVISERS OF [NAME OF PARTY] APPROVED BY THE CMA ('the Advisers')**

This Annex contains the names of Advisers for [Name of Party].

[Name]

[Name]

[...]

## **ANNEX B: RULES OF THE CUSTOMER SURVEY AND SWITCHING GAINS DISCLOSURE ROOM IN THE ENERGY MARKET INVESTIGATION ('the Disclosure Room Rules')**

- I. The CMA will make a room available at its offices at Victoria House, Southampton Row, London, WC1B 4AD to the Authorised Advisers.
- II. Only the Authorised Advisers will be allowed in the Disclosure Room, subject to a maximum of three Authorised Advisers at any one time.
- III. The Disclosure Room will be open on each CMA Working Day<sup>17</sup> from 9 March 2015 until 20 March 2015 inclusive. Its hours of operation will be from 9.30am until 5pm on each day. Should the CMA decide to open the Disclosure Room beyond that time or period, access will continue to be governed by the Individual Undertakings, Firm Undertakings, and the Disclosure Room Rules.
- IV. At all times that the Disclosure Room is open, a member of CMA staff will be present to oversee compliance with the Disclosure Room Rules and shall be the person any Authorised Adviser should contact in the event of a query or difficulty concerning the operation of the Disclosure Room (including IT matters).
- V. In addition to the Disclosed Material, a printed copy of the published Switching Gains WP and Gfk Report; an electronic copy of the published Gfk tabulations; and stationery, will be available in the Disclosure Room.
- VI. The Disclosure Room will contain computers (desktops or laptops) with the following specification:
  - (a) Word, Excel and PowerPoint software;
  - (b) Stata software;
  - (c) access to a specific subfolder containing the Disclosed Material;
  - (d) access to three printers;
  - (e) no storage medium other than the hard disk will be available (ie the USB ports and the CD writer – if any – will be disabled);
  - (f) no internet or email capacity; and

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<sup>17</sup> CMA 'Working Day' means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

- (g) the computers available for use by the Authorised Advisers of each Relevant Party will be networked to each other.
- VII. Within reason, other software may be installed on one or more computer(s) in the Disclosure Room, provided that the following procedures are followed:
- (a) the Authorised Adviser must notify the CMA at least 48 hours before they wish to have alternative software installed;
  - (b) such software must be provided on CD-ROM only, which must contain nothing other than the software to be installed;
  - (c) CMA staff will check such CD-ROM prior to installation;
  - (d) compliance with the licence arrangements for such software remains at all times the responsibility of the Authorised Adviser(s) wishing to install it.
- VIII. All printing activity will be logged automatically.
- IX. Authorised Advisers will be provided with A4 sized envelopes in which they may store any printed materials including any handwritten notes. The envelope will be sealed and placed in a secure location at the CMA's offices, which will be locked overnight. After the closure of the Disclosure Room any such materials will be destroyed by the CMA.
- X. In accordance with paragraphs E and F of the Individual Undertakings, one copy of the Report, per Relevant Party, produced by the Authorised Advisers on the computers provided in the Disclosure Room, may be removed at the end of the Disclosure Room process. Where necessary, CMA staff will redact from the Report any information which may, in their opinion, lead to a breach of the Individual Undertakings.
- XI. Authorised Advisers may talk to each other in the Disclosure Room but any conversations must be kept as brief and as quiet as possible to avoid disturbing other users of the Disclosure Room.
- XII. The CMA will make provision for a breakout room during the opening hours of the Disclosure Room for reasonable use by the Authorised Advisers, upon request. Such requests must be made to the CMA staff member present in the Disclosure Room on the day the Authorised Advisers wish to use the breakout room. In the event that more than one Relevant Party wishes to use the breakout room, each party concerned shall be able to use the breakout room for a maximum of 2 hours at any one time and the priority given to parties will be determined by the order in which the Relevant Party's Authorised Adviser(s) made the request to the CMA staff member. In the



event of a dispute, the matter shall be resolved by the CMA staff member in the Disclosure Room. Authorised Advisers are permitted to take handwritten notes into the breakout room but are reminded that, in doing so, they must not breach the Individual Undertakings.

- XIII. No Authorised Advisers are to carry into the Disclosure Room or breakout room any device allowing external contact (eg mobile phones, PDAs, laptop computers) or storage devices (eg memory sticks or dictaphones).
- XIV. The usual rules for access to the CMA's offices will apply. In particular, visitor badges must be worn visibly at all times. The Authorised Advisers must not leave the Disclosure Room at any time without informing a member of the CMA staff and may be accompanied if appropriate.
- XV. Any Authorised Adviser who does not comply with the Disclosure Room Rules will also breach the Individual Undertakings. This could result in the Authorised Adviser being removed from the Disclosure Room, and the Authorised Adviser may be barred from participation in any subsequent disclosure room or confidentiality ring whether relating to the same investigation or any other investigation run by the CMA. A breach of the Individual Undertakings may be referred to the Authorised Adviser's regulatory body, if applicable, who may subsequently decide to undertake disciplinary action.
- XVI. Any Authorised Adviser's firm who does not comply with the Firm Undertakings, may be barred from participation in any subsequent disclosure room or confidentiality ring whether in relating to the same investigation or any other investigation run by the CMA.
- XVII. The CMA may, at any time, vary the Disclosure Room Rules where it considers there is a good reason, which may include a reasonable suspicion that a breach of the Disclosure Room Rules, the Individual Undertakings or the Firm Undertakings has occurred.

## ENERGY MARKET INVESTIGATION

### UNDERTAKINGS GIVEN BY [Name of Adviser] TO THE COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS TO THE COST PASS-THROUGH CONFIDENTIALITY RING

#### WHEREAS

- I. On 26 June 2014, Ofgem, in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (the 'Act'), made a reference to the chair of the Competition and Markets Authority (the 'CMA') for the constitution of a group under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 for an investigation into the Supply and Acquisition of Energy in Great Britain (the 'Investigation').<sup>18</sup>
- II. On 24 July 2014, the CMA published an issues statement setting out a framework for the Investigation, including four candidate potential theories of harm. On 18 February 2015, the CMA published an updated issues statement setting out updated theories of harm and those issues which are likely to represent the focus of the Investigation in the period up to publication of the provisional findings (the 'Updated Issues Statement').
- III. During the Investigation, the CMA received data on wholesale and retail energy prices and costs from a number of parties, including the six large energy firms<sup>19</sup> (the 'Six Large Energy Firms'), Ofgem and ICIS.<sup>20</sup> The CMA used this data to conduct an economic analysis of the comparative evolution of retail prices and costs (cost pass-through) in the retail energy markets in Great Britain. The CMA's analysis is set out in the presentation entitled 'Descriptive analysis of the evolution of retail prices and costs (cost pass-through)' (the 'Presentation'). The Presentation and a paper outlining the accompanying methodology (the 'Methodology Paper') are included in the working paper entitled 'Cost pass-through' (the 'Cost Pass-through WP') published on 23 February 2015.
- IV. The CMA has decided to disclose the following by means of a confidentiality ring (the 'Confidentiality Ring'):

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<sup>18</sup> The terms of reference dated 26 June 2014 can be accessed at [www.ofgem.gov.uk/ofgem-publications/88435/stateofthemarket-decisiondocumentinofgemtemplate.pdf](http://www.ofgem.gov.uk/ofgem-publications/88435/stateofthemarket-decisiondocumentinofgemtemplate.pdf).

<sup>19</sup> Centrica, EDF Energy (EDF), E.ON, RWE npower, Scottish and Southern Energy (SSE) and Scottish Power.

<sup>20</sup> ICIS is a market information provider owned by Reed Business Information Limited.

- (a) the data underlying Figure 3 of the Methodology Paper, relating to the CMA's wholesale energy supply cost benchmarks which are constructed using prices between 2004 and 2014;
- (b) the data underlying Figure 4 of the Methodology Paper, relating to the CMA's estimate of suppliers' costs for transmission, distribution, balancing services use of system ('BSuoS') and environmental and social obligations in the period from January 2004 until December 2014;
- (c) the data underlying Figure 5 of the Methodology Paper, relating to non-standard tariffs at launch and through the sales period for domestic customers in the period from January 2006 until December 2014;
- (d) the data underlying the figures on pages 6, 7 and 9 of the Presentation, relating to measures of industry costs;
- (e) the data underlying the figure on page 12 of the Presentation, relating to the evolution of standard variable prices and costs for gas and electricity supply in the period from January 2004 until December 2014;
- (f) the data underlying the figure on page 15 of the Presentation, relating to the evolution of non-standard tariff prices and costs for gas and electricity supply in the period from January 2006 until December 2014;
- (g) the data underlying the figure on page 16 of the Presentation, relating to the evolution of one-year fixed tariffs and costs for gas and electricity supply in the period from January 2006 until December 2014;
- (h) the data underlying the figure on page 18 of the Presentation, relating to the comparison of the evolution of standard variable and non-standard tariff prices and costs for gas and electricity supply in the period from January 2006 until December 2014; and,
- (i) the data underlying the figure on page 19 of the Presentation, relating to the comparison of the evolution of standard variable and one-year fixed tariff prices and costs for gas and electricity supply in the period from July 2007 until July 2014,

together the 'Disclosed Material'.

- V. The CMA considers that the Disclosed Material includes 'specified information' within the meaning of section 238 of the Act to which the general restriction on disclosure in section 237 of the Act applies. The CMA has decided to disclose the Disclosed Material to certain parties (each a 'Relevant Party') in the Confidentiality Ring for the purpose of for the purpose of

allowing the parties to understand the ‘gist’<sup>21</sup> of the CMA’s analysis included in the Cost Pass-through WP and, accordingly, facilitating the exercise by the CMA of any of its statutory functions pursuant to section 241 of the Act.

- VI. The CMA has approved the external legal and/or economic advisers of [Name of Party] listed in Annex A, and may approve, in writing, further advisers of [Name of the Party] during the operation of the Confidentiality Ring (each the ‘Adviser’, collectively the ‘Advisers’). However, access to the Confidentiality Ring will only be granted to an Adviser who has given undertakings in such form as the CMA requires in accordance with paragraph IX below (the ‘Individual Undertakings’) and in respect of whom written undertakings have been provided by the relevant firm that such Adviser represents (the ‘Firm Undertakings’) (each such Adviser being an ‘Authorised Adviser’).
- VII. Access to the Confidentiality Ring is provided to check the accuracy of the data underlying the economic analysis contained in the Cost Pass-through WP, and to enable the Authorised Advisers to further understand the CMA’s analysis in order to allow the Authorised Advisers to prepare submissions and representations to the CMA during the Investigation (the ‘Permitted Purpose’).
- VIII. The CMA will make the Disclosed Material available to the Authorised Advisers from 9.30am on 9 March 2015 until 5pm on 20 March 2015 by a secure file transfer protocol website (the ‘FTP Website’). Each Authorised Adviser will then be permitted to download the Disclosed Material via the FTP Website on a computer (each download a ‘Permitted Copy’).
- IX. The CMA must be informed of the date on which each Adviser is seeking access to the Disclosed Material. The CMA must receive a signed copy of the Individual Undertakings by 4pm on the CMA Working Day<sup>22</sup> before the date of intended access by the Adviser to the Disclosed Material. The CMA must have accepted the signed Individual Undertakings before access to the Confidentiality Ring is granted to any Adviser.
- X. Disclosure of the Disclosed Material by the Authorised Advisers, other than in accordance with the Individual Undertakings, is not permitted without the express, and prior, written consent of the CMA and will constitute a criminal offence under section 245 of the Act.

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<sup>21</sup> Disclosing the ‘gist’ of a case means giving the party sufficient information to put it in a position where it is able to make worthwhile representations and respond to the allegations made against it; see, eg, Competition Appeal Tribunal’s judgment in Case No 1219/4/8/13 *Ryanair Holdings plc v Competition Commission and Aer Lingus Group* [2014] CAT 3, paragraph 39(7). This judgment was upheld by the Court of Appeal on 12 February 2015 in Case No 1219/4/8/13.

<sup>22</sup> CMA ‘Working Day’ means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

## NOW THEREFORE

I, [Name of Adviser], [Job title] at [Name of Firm], who has been engaged by [Name of Party] in connection with the Investigation, undertake to the CMA in my own name:

- A. To only use the FTP Website for the purpose of downloading one Permitted Copy, and to only access the Disclosed Material using a computer which is password-protected and accessible to the Authorised Advisers of [Name of Party] only;
- B. To use the Disclosed Material for, and only for, the Permitted Purpose on behalf of [Name of Party];
- C. To hold the Disclosed Material and the Permitted Copy in strict confidence and not to discuss, disclose, transmit, communicate or otherwise make the Disclosed Material available in any manner to any other person (including any other legal adviser, economic adviser, officer or employee of [Name of Firm] and [Name of Party], who is not an Authorised Adviser);
- D. Not to make any electronic or non-electronic copy in any format of any of the Disclosed Material, save as provided at paragraph E below;
- E. I may copy the Disclosed Material only for the purposes of preparing a report or document within the scope of the 'Permitted Purpose' but, in doing so, I will ensure that any report or document I prepare or any analysis I undertake which are derived from the Disclosed Material are not used in any way to disclose any part of the Disclosed Material to [Name of Party] or to any other person who is not an Authorised Adviser, save as provided in paragraph F below;
- F. I may disclose in general terms the gist of the Disclosed Material to [Name of Party] but, in doing so, I will not disclose, transmit, communicate or otherwise make known to [Name of Party] specific information regarding the following:
  - (i) the Disclosed Material relating to prices (other than in relation to [Name of Party]); and,
  - (ii) the Disclosed Material relating to costs (other than in relation to [Name of Party]);
- G. For the avoidance of doubt, when providing the gist of the Disclosed Material to [Name of Party], I will ensure that such gist will not enable or assist [Name of Party] to gain any understanding of its position or potential future position in any market, relative to any other market operator and, in particular, I will not

reveal any data that identifies prices and costs concerning any party other than [Name of Party];

- H. To keep the Disclosed Material, the Permitted Copy and/or any report or document prepared which includes the Disclosed Materials secure at all time, including in a manner which is not accessible to any other person (including any officer or employee of [Name of Firm] who is not an Authorised Adviser);
- I. To destroy or return any documents which contain the Disclosed Material at the conclusion of the Investigation or at the conclusion of an appeal to which [Name of Party] is a party or an intervening third party, in the event of an appeal. In the case of a document in electronic format, to render it inaccessible from any computer system, disk or device so that it is not readily available to any person. In the event that material containing the Disclosed Material is to be destroyed (or rendered inaccessible if it is in electronic form) the party destroying (or rendering the material inaccessible if it is in electronic form) shall notify the CMA as to the manner of, and date of, the destruction (or rendering inaccessible if it is in electronic form);
- J. To ensure that any submission I prepare incorporating or referring to the Disclosed Material is submitted to the CMA separately from any other [Name of Party] submission;
- K. To notify the CMA immediately if I become aware of or suspect that any of the [Name of Party]'s Authorised Advisers have failed to comply with the Individual Undertakings, or any of the firms that such Authorised Advisers represent have failed to comply with the Firm Undertakings;

#### **PROVIDED THAT**

These undertakings shall not apply to any part of the Disclosed Material that:

- (i) belongs or relates solely to [Name of Party] or to [Name of Party]'s business and which does not include any confidential information belonging to, relating to, or deriving solely or partially from, any other party;
- (ii) at the time of disclosure is in the public domain or that subsequently comes into the public domain, except through breach of the Individual Undertakings or of any undertakings given by external legal and/or economic advisers for any other Relevant Party in relation to the Confidentiality Ring; and,
- (iii) is required to be disclosed by law or regulation, so long as I consult with the CMA prior to disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure;

**AND IN AGREEMENT THAT**

These undertakings shall be governed by and construed in accordance with English law, and I submit to the exclusive jurisdiction of the courts of England and Wales to hear and decide any action or proceedings which may arise out of, or in connection with, these undertakings.

[Name of Party] has given full and informed consent to the restrictions placed upon [Name of Adviser] on the further disclosure of information, subject to the undertakings above.

[Name of Adviser] of [Name of Firm]

[signature]

[Date]

## **ANNEX A: ADVISERS OF [NAME OF PARTY] APPROVED BY THE CMA (the 'Advisers')**

This Annex contains the names of Advisers for [Name of Party]

[Name]

[Name]

[...]



## ENERGY MARKET INVESTIGATION

### UNDERTAKINGS GIVEN BY [NAME OF FIRM] TO THE COMPETITION AND MARKETS AUTHORITY REGARDING ACCESS TO THE COST PASS-THROUGH CONFIDENTIALITY RING

#### WHEREAS

- I. On 26 June 2014, Ofgem, in exercise of its powers under sections 131 and 133 of the Enterprise Act 2002 (the 'Act'), made a reference to the chair of the Competition and Markets Authority (the 'CMA') for the constitution of a group under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 for an investigation into the Supply and Acquisition of Energy in Great Britain (the 'Investigation').<sup>23</sup>
- II. On 24 July 2014, the CMA published an issues statement setting out a framework for the Investigation, including four candidate potential theories of harm. On 18 February 2015, the CMA published an updated issues statement setting out updated theories of harm and those issues which are likely to represent the focus of the Investigation in the period up to publication of the provisional findings (the 'Updated Issues Statement').
- III. During the Investigation, the CMA received data on wholesale and retail energy prices and costs from a number of parties, including the six large energy firms<sup>24</sup> (the 'Six Large Energy Firms'), Ofgem and ICIS.<sup>25</sup> The CMA used this data to conduct an economic analysis of the comparative evolution of retail prices and costs (cost pass-through) in the retail energy markets in Great Britain. The CMA's analysis is set out in the presentation entitled 'Descriptive analysis of the evolution of retail prices and costs (cost pass-through)' (the 'Presentation'). The Presentation and a paper outlining the accompanying methodology (the 'Methodology Paper') are included in the working paper entitled 'Cost pass-through' (the 'Cost Pass-through WP') published on 23 February 2015.
- IV. The CMA has decided to disclose the following by means of a confidentiality ring (the 'Confidentiality Ring'):

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<sup>23</sup> The terms of reference dated 26 June 2014 can be accessed at [www.ofgem.gov.uk/ofgem-publications/88435/stateofthemarket-decisiondocumentinofgemtemplate.pdf](http://www.ofgem.gov.uk/ofgem-publications/88435/stateofthemarket-decisiondocumentinofgemtemplate.pdf).

<sup>24</sup> Centrica, EDF Energy (EDF), E.ON, RWE npower, Scottish and Southern Energy (SSE) and Scottish Power.

<sup>25</sup> ICIS is a market information provider owned by Reed Business Information Limited.

- (a) the data underlying Figure 3 of the Methodology Paper, relating to the CMA's wholesale energy supply cost benchmarks which are constructed using prices between 2004 and 2014;
- (b) the data underlying Figure 4 of the Methodology Paper, relating to the CMA's estimate of suppliers' costs for transmission, distribution, balancing services use of system ('BSuoS') and environmental and social obligations in the period from January 2004 until December 2014;
- (c) the data underlying Figure 5 of the Methodology Paper, relating to non-standard tariffs at launch and through the sales period for domestic customers in the period from January 2006 until December 2014;
- (d) the data underlying the figures on pages 6, 7 and 9 of the Presentation, relating to measures of industry costs;
- (e) the data underlying the figure on page 12 of the Presentation, relating to the evolution of standard variable prices and costs for gas and electricity supply in the period from January 2004 until December 2014;
- (f) the data underlying the figure on page 15 of the Presentation, relating to the evolution of non-standard tariff prices and costs for gas and electricity supply in the period from January 2006 until December 2014;
- (g) the data underlying the figure on page 16 of the Presentation, relating to the evolution of one-year fixed tariffs and costs for gas and electricity supply in the period from January 2006 until December 2014;
- (h) the data underlying the figure on page 18 of the Presentation, relating to the comparison of the evolution of standard variable and non-standard tariff prices and costs for gas and electricity supply in the period from January 2006 until December 2014; and,
- (i) the data underlying the figure on page 19 of the Presentation, relating to the comparison of the evolution of standard variable and one-year fixed tariff prices and costs for gas and electricity supply in the period from July 2007 until July 2014,

together the 'Disclosed Material'.

- V. The CMA considers that the Disclosed Material includes 'specified information' within the meaning of section 238 of the Act to which the general restriction on disclosure in section 237 of the Act applies. The CMA has decided to disclose the Disclosed Material to certain parties (each a 'Relevant Party') in the Confidentiality Ring for the purpose of for the purpose of

allowing the parties to understand the ‘gist’<sup>26</sup> of the CMA’s analysis included in the Cost Pass-through WP and, accordingly, facilitating the exercise by the CMA of any of its statutory functions pursuant to section 241 of the Act.

- VI. The CMA has approved the external legal and/or economic advisers of [Name of Party] listed in Annex A, and may approve, in writing, further advisers of [Name of the Party] during the operation of the Confidentiality Ring (each the ‘Adviser’, collectively the ‘Advisers’). However, access to the Confidentiality Ring will only be granted to an Adviser who has given undertakings in such form as the CMA requires in accordance with paragraph IX below (the ‘Individual Undertakings’) and in respect of whom written undertakings have been provided by the relevant firm that such Adviser represents (the ‘Firm Undertakings’) (each such Adviser being an ‘Authorised Adviser’).
- VII. Access to the Confidentiality Ring is provided to check the accuracy of the data underlying the economic analysis contained in the Cost Pass-through WP, and to enable the Authorised Advisers to further understand the CMA’s analysis in order to allow the Authorised Advisers to prepare submissions and representations to the CMA during the Investigation (the ‘Permitted Purpose’).
- VIII. The CMA will make the Disclosed Material available to the Authorised Advisers from 9.30am on 9 March 2015 until 5pm on 20 March 2015 by a secure file transfer protocol website (the ‘FTP Website’). Each Authorised Adviser will then be permitted to download the Disclosed Material via the FTP Website on a computer (each download a ‘Permitted Copy’).
- IX. The CMA must receive a signed copy of the Firm Undertakings by 4pm of the CMA Working Day<sup>27</sup> before the date of intended access by the Adviser(s) to the Confidentiality Ring. The CMA must have accepted the signed Firm Undertakings before access to the Confidentiality Ring is granted to any Adviser.
- X. Disclosure of the Disclosed Material by the Authorised Advisers, other than in accordance with the Individual Undertakings, is not permitted without the express, and prior, written consent of the CMA and will constitute a criminal offence under section 245 of the Act.

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<sup>26</sup> Disclosing the ‘gist’ of a case means giving the party sufficient information to put it in a position where it is able to make worthwhile representations and respond to the allegations made against it; see, eg, Competition Appeal Tribunal’s judgment in Case No 1219/4/8/13 *Ryanair Holdings plc v Competition Commission and Aer Lingus Group* [2014] CAT 3, paragraph 39(7). This judgment was upheld by the Court of Appeal on 12 February 2015 in Case No 1219/4/8/13.

<sup>27</sup> CMA ‘Working Day’ means any day of the week, Monday to Friday, on which the CMA office is open, excluding public or bank holidays.

## **NOW THEREFORE**

[Name of Firm], which has been engaged by [Name of Party] in connection with the Investigation, undertakes to the CMA that:

- A. Only the Authorised Advisers shall be given access to the Disclosed Material;
- B. It will notify the CMA immediately if it becomes aware of, or suspects that, there has been any breach of these undertakings or that any Authorised Adviser has failed to comply with the Individual Undertakings; and,
- C. It will notify the CMA immediately if any Authorised Adviser has ceased employment with [Name of Firm];

Further, [Name of Firm] also undertakes to the CMA to use all reasonable endeavours to ensure that the Authorised Advisers:

- D. Will comply with their Individual Undertakings;

## **PROVIDED THAT**

These undertakings shall not apply to any part of the Disclosed Material that:

- (i) belongs or relates solely to [Name of Party] or to [Name of Party]'s business and which does not include any confidential information belonging to, relating to, or deriving solely or partially from, any other party;
- (ii) at the time of disclosure is in the public domain or that subsequently comes into the public domain, except through breach of the Individual Undertakings or of undertakings given by external legal and/or economic advisers for any other Relevant Party in relation to this disclosure; and,
- (iii) is required to be disclosed by law or regulation, so long as [Name of Firm] consults with the CMA prior to disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure;

## **AND IN AGREEMENT THAT**

These undertakings shall be governed by and construed in accordance with English law, and [Name of Firm] submits to the exclusive jurisdiction of the courts of England and Wales to hear and decide any action or proceedings which may arise out of, or in connection with, these undertakings.

[Name of Party] has given full and informed consent to the restrictions placed upon [Name of Firm] on the further disclosure of information, subject to the undertakings above.

[Name of Firm]

[signature]

[Date]

## **ANNEX A: ADVISERS OF [NAME OF PARTY] APPROVED BY THE CMA ('the Advisers')**

This Annex contains the names of Advisers for [Name of Party]

[Name]

[Name]

[...]