

CMA ENERGY MARKET INVESTIGATION
SUPPLEMENTAL NOTICE OF POSSIBLE REMEDIES
– SCOTTISHPOWER RESPONSE

1. Introduction

ScottishPower welcomes the publication of the CMA's Supplemental Notice of Possible Remedies and has prepared this submission in response.

The CMA's Supplemental Notice presents two similar remedies proposed by ScottishPower and Centrica in which evergreen tariffs are phased out over a period of time and the standard variable tariff (SVT) is replaced by fixed term default tariffs. The motivation behind these remedies is to harness the greater effectiveness of annual renewals as a prompt to engagement, which, in conjunction with the CMA's remedies 3 to 10, we would expect to lead to a step change in engagement and competition.

Although the CMA has characterised these remedies¹ as "a specific proposal in the context of Remedy 10" rather than as an alternative to the safeguard regulated tariff (Remedy 11), we would reiterate that we see the ScottishPower and Centrica remedy proposals as a radical intervention in the market which provides a viable alternative Remedy 11 - but without the serious risks and disadvantages associated with price regulation. We continue to believe that Remedy 11 is a disproportionate intervention, especially when considered against this less intrusive alternative.

We have provided answers to the CMA's questions in section 2, including our analysis of the relative strengths and weaknesses of the variants proposed by ScottishPower and Centrica. Although we still feel on balance that our variant will be more effective in stimulating engagement, we believe that both options will be significantly more effective than the status quo. It may be that the best approach will combine aspects of both variants.

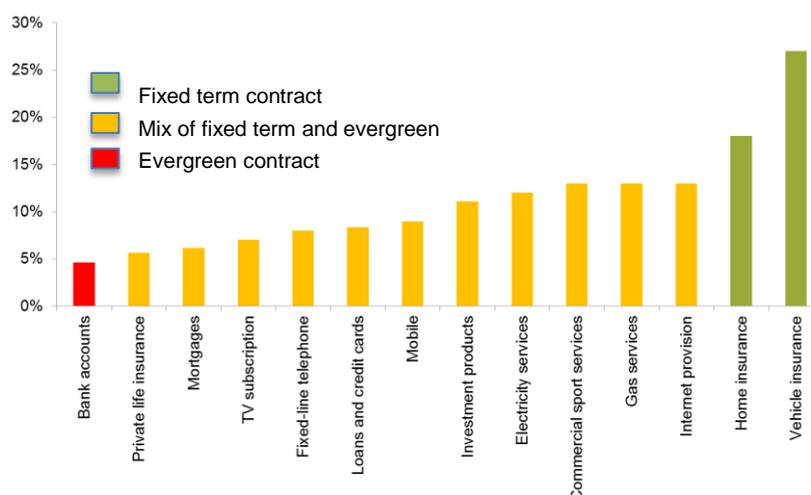
2. Answers to CMA questions

(a) Would this remedy be effective in encouraging customers to engage more frequently in the market? Are there certain groups of customers who could not be covered by this remedy and, therefore, would not benefit, e.g. those on prepayment, DTS or other meters?

We would expect that both versions of the remedy (fixed and variable price default) should lead to a substantial improvement in engagement with the energy market compared to current engagement under SVT. Our reasons for expecting greater engagement are that:

- Annual renewal prompts typically generate much higher levels of engagement, as evidenced in other industries (see Figure 1) and in the retail energy market, where in ScottishPower's case we see engagement levels of over 70% (see Table 1).

¹ Supplemental Notice, para 12.

Figure 1 – switching rates for different consumer products and services

Source: Switching data from EU Consumer Market Monitoring Survey (2013)², Oxera analysis

Table 1: Engagement rates at recent fixed term product maturities

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- The effectiveness of SVT price increases as a prompt is weakened by their irregularity (it is now 21 months since the last increase by one of the six large energy firms (**SLEFs**)) and by consumer expectation that all suppliers will increase prices - especially if other suppliers have moved first. The effectiveness of the prompt is also diminished where the magnitude of the customer bill change is moderate.

We agree that two groups of customers who may benefit less directly from this remedy are those on prepayment meters and on complex meters such as DTS.

Prepayment

Although we would expect this remedy to have some benefit in encouraging prepayment customers to engage more frequently, the effect may be less than for other payment methods for two reasons:

- Because of limitations on prepayment tariff codes, there are fewer non-standard tariffs in the market to choose from. The savings from engaging may therefore be less than for other payment methods.
- The limitation on tariff codes will mean that it is not practicable to adopt ScottishPower's version of the remedy for prepayment customers (fixed price default tariff), since a fixed price tariff would need to be revised on perhaps a monthly basis. Centrica's version of the remedy (variable price default tariff) would however be possible, so one option would be a hybrid remedy, ie fixed price default tariff for credit and direct debt customers and variable price default tariff for prepayment.

² http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/market_monitoring/index_en.htm, last accessed 17 September 2015.

We are aware that Ofgem is currently exploring the feasibility of alleviating the technical limitations on numbers of tariff codes. If this were to be successful, both the above issues would potentially be overcome. In any event, these issues will largely disappear with the rollout of smart prepayment meters. It may also be possible to mitigate the lack of prepayment tariff flexibility in the short term by means of cash-backs and discounts, should the relevant RMR tariff rules be relaxed.

Even if prepayment customers receive less direct benefit from this remedy, they may benefit indirectly, to the extent that prepayment prices are linked to direct debit and credit prices (eg via the SLC27.2A requirement for cost reflectivity in payment method price differences). If the remedy increases the competitive pressure on default tariffs for direct debit and credit payment, this could indirectly constrain prepayment tariffs.

DTS and other complex meter types

The benefits of this remedy will be less for customers on DTS and other complex metering arrangements, given the limited choice of alternative tariffs for such customers. We recognise that these customers are unlikely to have greater freedom of choice in the short to medium term as the cost of launching tariffs or price comparison services for the small number of customers on these tariffs³ is disproportionate to the opportunity (for both suppliers and PCWs).

The main safeguard for such customers at present is that suppliers recognise that they have a responsibility not to charge unreasonable prices, and the fact that prices are regularly monitored by Ofgem. Ofgem's review in 2013 found that "while competition appears to be less vigorous for DTS customers, they do not appear in general to be paying higher prices, although there are some exceptions".⁴ Indeed the lack of competing offerings probably reflects in part the pricing policies that suppliers have adopted. For example, DTS customers generally benefit from afternoon boosts to their heating at cheaper night time rates.

(i) To what extent is the higher level of engagement observed in response to end of fixed-term contract notifications the result of the type of customer who has chosen those products, rather than a response to the notification itself?

As noted in ScottishPower and Centrica's remedy proposals, there is a marked difference between response rates to end of fixed-term contract notifications (around 70% in ScottishPower's experience, see Table 1) and response rates to price change notifications (less than 20% in ScottishPower's experience). A key question is therefore, how much of this difference is due to the nature of the prompt and how much due to the people?

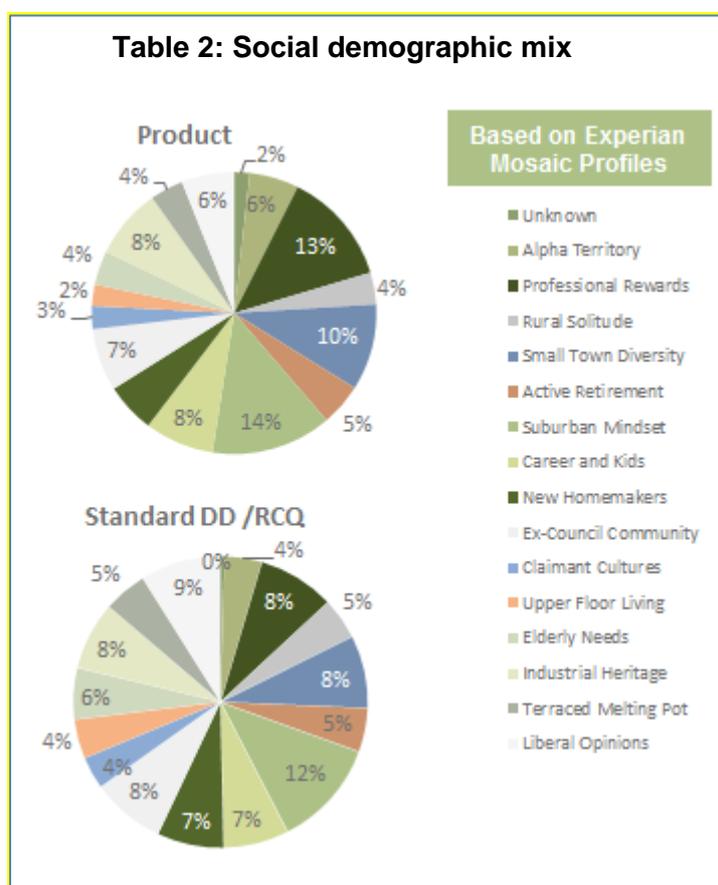
We acknowledge that some of the difference is likely to be down to the people, but we think there are a number of reasons to believe that it also reflects the relative strength of the prompts:

- There is a significant overlap between our SVT and fixed term customer bases, with around half our SVT base on debit/credit dividing their time between the two (these are the 'intermittently engaged'). Given this large degree of overlap, it seems implausible to us that the difference could be solely down to people.

³ Even for ScottishPower, which has a relatively high share of such customers, they account for less than [CONFIDENTIAL] of its domestic base.

⁴ <https://www.ofgem.gov.uk/ofgem-publications/82288/state-market-customers-dynamically-teleswitched-meters.pdf>

- The social demographic breakdown of direct debit/credit customers on SVT and on fixed term tariffs is broadly similar (see Table 2 below); there is therefore no obvious social demographic reason why response rates should be different.
- There is evidence that SVT customers respond to other types of price signal; for example, ScottishPower has historically had a wider price differential between direct debit and credit customers on SVT, and now has, by a significant margin, the smallest proportions of credit customers amongst the SLEFs.⁵
- A significant number of ScottishPower’s SVT customers show other signs of engagement, such as proactively checking that direct debit amounts are set correctly and proactively submitting meter readings.



(b) Would this remedy be effective in protecting those customers who failed to engage in the market, even after receiving prompts, from paying high prices? Would the extension of SLC 7, in the manner proposed by Centrica, provide such protection?

We believe that the main protection for customers who fail to engage in the market will come from competitive pressure on the default tariff price as a result of those who do engage. If all customer defaults for a given supplier in a given period are required to use the same tariff (including no action on product maturity and deemed contracts), there will be a mix of disengaged and intermittently engaged customers on the default tariff. Intermittently

⁵ <https://www.ofgem.gov.uk/ofgem-publications/92059/monitoringsocialobligations-q42013datareport.pdf>

engaged customers are the main source of downwards competitive pressure on default rates.⁶ If the proportion of intermittently engaged customers increases, which we would expect to happen with this remedy, we would expect the price gap between default and 'special offer' tariffs to reduce accordingly.

We believe that the competitive constraints outlined above are likely to provide sufficient protection. However, as Centrica has suggested, a possible fall back option would be to extend the 'unduly onerous' requirement in SLC 7.3 and 7.4 so that it applies to default tariffs as well as to deemed.⁷ SLC7 was intended as a safety net to protect against extreme behaviour in setting the unilateral deemed contract, and in general (leaving aside all the disbenefits of price controls, as mentioned in our Response to the Remedies Notice), this kind of formulation is not appropriate for use as a price control. Therefore the main protection for these customers should be provided through competition.

(c) Should this remedy apply to domestic customers only, or should it also be extended to microbusiness customers?

We see no reason why this remedy should not be extended to microbusiness customers, should it be considered proportionate to do so. However, the CMA is already considering some fairly radical interventions in the microbusiness market (published non-negotiable prices, changes to objections rules), so it may wish to recommend that Ofgem review how these other remedies perform before extending this remedy to microbusinesses.

We would also note that the proportion of microbusinesses that are on evergreen tariffs is significantly less than in the domestic market. (In ScottishPower's case, fewer than [CONFIDENTIAL] of microbusiness customers are on a Published or Deemed tariff whereas around [CONFIDENTIAL] of domestic customers are on the SVT.)

(d) The wording of the end of fixed-term notifications appears to be critical to the effective functioning of this remedy. Should Ofgem take responsibility for developing and testing appropriate wording, or should the energy suppliers retain responsibility for this?

It is likely that some key elements of the notifications will need to be prescribed by Ofgem, but as a general rule it will be preferable to give suppliers appropriate incentives to maximise the effectiveness of these notifications as prompts and then leave the detail to their discretion.

Suppliers are better placed than Ofgem to understand how different customers will respond to different forms of communication, test alternatives and optimise the design accordingly. Suppliers may also be able to tailor some of the details of the communication to meet the needs of different customer groups (in the same way that marketing communications are tailored to different demographics).

One way to provide the right incentives would be via a principles-based licence condition. This could, for example, define the objective of the fixed term notification and then require

⁶ This pressure can arise in a number of ways. For example, the default price would be used in place of the SVT in the sales quotation process and in cheapest tariff messages, when a tariff has less than a year to run. When intermittently engaged customers re-engage, they are more likely to switch supplier if the price comparison shows a large saving.

⁷ In practice, some suppliers (including ScottishPower) currently use their SVT as their deemed tariff, and we would expect this practice to continue, with suppliers setting their deemed tariff equal to the default.

suppliers to take reasonable steps to secure the achievement of the objective and avoid doing anything which jeopardises the achievement of the objective.

(i) If suppliers design these prompts, how can they be incentivised to maximise their effectiveness?

See our response above. If the effect of this remedy is to intensify competition around the time of renewal, we would expect suppliers to have an incentive to encourage internal switching away from the default tariff, to reduce the risk that the customer will switch to a competitor.

(e) Should the default tariff be fixed price as well as fixed term, or should suppliers be allowed to roll customers onto a variable price tariff?

We think it is useful to consider three variants of this remedy:

- a) fixed price default tariff (multiple) – suppliers can replace the default tariff with a new version on a frequent (eg monthly) basis; there is no exit fee, so customers can switch between tariff versions if they wish to, prior to maturity;⁸
- b) variable price default tariff (single) – the same default tariff applies to all customers; suppliers must change the price for all default customers at the same time – similar to current unilateral price change arrangements for SVT;⁹
- c) variable price default tariff (multiple) – same as (a) except that the tariffs are variable price rather than fixed price, so that the supplier has the additional flexibility to change the price mid-term (using the unilateral price change process); in practice we would expect suppliers to adjust pricing via replacement tariffs rather than via unilateral variations, but this flexibility should allay concerns over hedging risks.¹⁰

In evaluating these options, we think the following four criteria are most relevant (and of these, the first is the most important to the success of the remedy):

- a) the strength of the prompt – how effectively it stimulates increased search and engagement; we think that variants (a) and (c) will provide the strongest prompt because the customer is presented with a real choice at maturity, ie the tariff will almost certainly change if they do nothing (whereas there is unlikely to be any change under option (b)).
- b) the responsiveness of prices – how quickly prices can react to changes in costs; for example, experience of the last 6 months suggests that fixed term tariffs have responded much more quickly than SVTs to falling wholesale prices;
- c) hedging risk premium – the extent to which suppliers may be exposed to additional risks as a result of entering into fixed price contracts with no exit fee and charge a premium in their prices to reflect this; this is potentially a complication of variant (a) that could emerge in the era of next day switching;

⁸ This is the version suggested by ScottishPower for the first three years (paragraph 13 of our remedy submission).

⁹ This is the version suggested by Centrica.

¹⁰ This is one of the options that could result if, as suggested by ScottishPower, suppliers are given greater flexibility around tariff type after 3 years.

- d) simplicity – whether the overall proposition is easily understood by consumers; this is probably the main weakness of variant (c).

It has been suggested that the media scrutiny associated with price changes may provide an additional discipline on supplier pricing and that this scrutiny would be strongest for the single variable price default tariff (variant (b) above). We would attach less weight to this criterion as the CMA’s findings suggest that media scrutiny has not been a particularly effective discipline to date, and in our view the main constraint on pricing should come from competition.

It has also been suggested that perceived fairness may also be a reason to favour variant (b). We do not believe significant weight should be attached to this criterion, as any perceived unfairness associated with variants (a) and (c) may actually be positive if it serves as an additional prompt for customers to engage and switch to a cheaper tariff.

Accordingly, we would suggest that the pros and cons of the three variants can be summarised as follows:

Criterion	Variant of default tariff		
	Fixed - multiple	Variable - single	Variable - multiple
Strength of prompt	●	●	●
Price responsiveness	●	○	●
Hedging risk premium	○	●	●
Simplicity	●	●	●

Key: ● very good; ● good; ○ potential weakness

In our view, the pros and cons of variants (a) and (c) are relatively finely balanced, and either of these variants is likely to be effective as a remedy. Variant (b) could also be effective, but we think it is less strong than (a) and (c) on the key criterion of strength of prompt. Our preference would be for variant (a) (fixed – multiple) for the first three years, with suppliers being given the flexibility to move to variant (c) (variable – multiple) thereafter. This would maximise simplicity in the early years, when consumers will be adjusting to the new regime, and provide flexibility in later years when smart metering is starting to enable more innovative approaches to energy pricing and when next day switching is increasing the hedging risk associated with no exit fee tariffs. As explained in response to Question (a) above, it is likely that variant (b) (variable – single) would need to be used for prepayment customers because of the technical limitations around tariff codes.

- (i) If the default tariff were variable price, should energy suppliers be required to roll all customers who did not take action onto the same tariff, such that in effect there was only a single variable price default tariff per supplier?**

As noted above, we think it is important (and could usefully be made a licence requirement) that all customers who move to a default tariff at a given point in time move to the same tariff, regardless of the reason (ie including no action on maturity and deemed contracts). This will help ensure a good mix of intermittently engaged customers on the tariff and hence competitive pressure on prices.

This does not necessarily mean that all customers will be on the same default tariff. In variants (a) and (c) above, there would be a number of different default tariffs which are live at any time (albeit only one which is open to new customers).

- (ii) If the default tariff were fixed price, should energy suppliers be required to roll all customers who did not take action within a given period, e.g. one month, onto the same default tariff? Is there a risk that the existence of multiple default tariffs (e.g. one for every month) would reduce the pressure on SVT pricing that currently results from media attention on changes to SVTs?**

Yes, as noted above, it is important that all customers who move to a default tariff at a given point in time move to the same tariff, regardless of the reason, in order to ensure a good mix of intermittently engaged customers. However this does not mean that all customers have to be on the same default tariff.

We accept that having multiple default tariffs (e.g. one for every month) is likely to reduce the degree of national media attention on changes to default prices, but as noted above, we do not consider this to be a problem. The CMA's findings suggest that media scrutiny has not been a particularly effective discipline to date, and in our view the main constraint on pricing should come from competition. If the implementation is phased on a geographic basis (see response to (f)(ii) below), there would still be a potential for coverage of price changes in the local or regional media. And finally, we would note that non-standard tariffs, which have generally been subject to less intense media attention, have typically been more responsive to movements in costs, up and down.

(f) How should this remedy be implemented in order to ensure it is effective and proportionate?

- (i) How long should energy suppliers be given to phase existing customers off their SVTs?**

It will be important that suppliers are given sufficient time to prepare their systems for the new remedy and that the migration of customers is then phased over a sufficient period of time to avoid causing problems for customer service.

We have previously suggested a 6 month planning phase and a 12 month rollout phase. However, if there is evidence that the volume of customer calls associated with a 12 month rollout is likely to exceed the service capabilities of energy suppliers or cause disproportionate costs, we would strongly support moving to a 24 month roll out.

We would note that where time is allowed for system development, this should be measured from the point at which the details of supplier obligations are sufficiently well defined to allow system functionality to be specified. Even if suppliers have advance notice of the general direction of a remedy, this may not be enough for them to start making system changes.

- (ii) Should the remedy be phased in starting with customers who have been on the SVT longest? Alternatively, should it be organised geographically in order to facilitate marketing by competitors and support from consumer groups in later years? For example, energy suppliers might be required to move all SVT customers in a region to the default tariff in the same month, such that the following year energy suppliers, PCWs and other TPIs would know that a large number of customers in that region might be looking to move in that month.**

We can see significant advantages in phasing rollout on a geographic basis, provided it is done in a way that does not cause significant peaks in maturity volumes for individual suppliers. Phasing on the basis of PES area would not be practicable (as large suppliers would experience a peak in their incumbent region), but we think that it should be possible to specify a phased rollout by post code at appropriate granularity (eg area or area plus district¹¹) so which does not result in significant peaks. For example, each month, rollout could be targeted on a range of postcodes selected from across the country, avoiding undue concentration in any one PES area.

As the CMA suggests, geographic phasing could have a number of advantages:

- rival suppliers and TPIs could target their marketing and sales activity more efficiently at the window where customers are making their renewal decision, whether by direct mail, telephone or possibly face to face;
- consumer groups could also target advice and public awareness campaigns more efficiently (eg temporary drop-in advice centres, billboard or local press advertising);
- for many of the most disengaged consumers, an important factor in decision making is word of mouth communications, such as advice and recommendations from friends, family or neighbours; if everyone in the local community is receiving prompts at the same time, this should encourage such word of mouth advice.

Alternative approaches to phasing, such as by tenure or first letter of surname, could also be considered, but they would be less effective in terms of focusing competition, and may be less straightforward to implement. In particular, we think it could be counter-productive to start with those who have been on the SVT longest. As noted above, the most disengaged customers will often rely more on word of mouth than on websites (say), and the prompts are likely to be more effective for such customers if the process has already built up some momentum and public awareness - or if, as with geographic rollout, their neighbours are receiving prompts at the same time.

- (iii) Should energy suppliers be required to provide contact details for all SVT customers or a subset of SVT customers (e.g. those who have been on the default tariff for several years in a row, e.g. three or five years) to Ofgem, which could then seek to contact them with further prompts? Alternatively, should suppliers be required to place the contact details of these customers on a shared database, available to all licensed energy suppliers, in order to allow targeted marketing to these customers? We note that GDF has been required to share such information on those of its customers who remain on the regulated tariff in France.**

Such sharing of customer information could raise privacy concerns and may be difficult to implement in a way that is compatible with data protection law. In the case of domestic customers, suppliers would need to obtain their customer's opt-in consent before they could share this information and obtaining opt-in consent from disengaged customers is likely to have a low success rate. In the case of microbusiness customers, any customers who are sole traders would also be caught by the data protection rules.

¹¹ There are 124 postcode areas in the UK (denoted by the first two letters) and approximately 20 postcode districts in an area (denoted by the numeral at the end of the first part of the postcode)

The CMA will need to weigh up the potential welfare benefits for such customers against the likely privacy concerns, and the practicability of the compliance with data protection law.

We would note, however, that if a geographic phasing is adopted as suggested above, the incremental benefits of an information sharing obligation in terms of customer targeting will be significantly reduced.

(g) What should the default tariff be called? Should it be the ‘emergency’ tariff to further prompt engagement or would some other wording be more appropriate? Is there a risk that certain customers will be concerned that their energy supply will be cut off if they do not engage following an end of contract prompt?

The name of the tariff needs to strike an appropriate balance between promoting engagement and avoiding unfounded consumer concerns.

We think that ‘emergency tariff’ is very likely to cause such concerns and would recommend something less extreme. One possibility might be ‘standby tariff’, which conveys the sense that this is not a long term option, but without raising alarm. However, we think the best approach would be for the CMA to commission consumer research, to identify options that best meet these criteria for the demographic groups who are expected to benefit most from this remedy.

The generic name should also lend itself to incorporation within the names that suppliers use to refer to individual tariffs, for example ‘ScottishPower [generic name] January 2017’.

(i) How should the CMA assess the costs of such potential distress to customers?

The costs of creating unfounded concerns amongst consumers (eg that they are at risk of disconnection) will include:

- the temporary emotional/psychological stress caused by the concern;
- the time cost of contacting their supplier to obtain reassurance;
- increased supplier call centre costs (which may ultimately be reflected in consumer bills).

Whilst the latter two items will be easier to quantify, we think the former is likely to be more significant.

(iii) Are there means by which this distress could be avoided or mitigated?

As noted above, we believe the CMA should aim to avoid using language that could cause customer alarm, and seek to mitigate any residual distress through public awareness raising and education.

(h) Should Ofgem monitor the proportion of customers on default tariffs, their average tenure and/or the pricing of default tariffs (e.g. with a view to publishing summary information)?

Yes, we believe it could be appropriate for the CMA to recommend that Ofgem monitor the effectiveness of this remedy with a view to publishing summary information. This might include the parameters suggested above, ie the proportion of customers on default tariffs, their average tenure and the pricing of default tariffs.

(i) Should all energy suppliers be subject to the prohibition on evergreen tariffs?

Yes, we believe that the prohibition on evergreen tariffs should apply to all suppliers irrespective of their size. A remedy which prohibits some suppliers offering evergreen tariffs and not others risks causing uncertainty and confusion for customers.

It may be prudent to give Ofgem a power to issue derogations from this requirement on a case by case basis, to cater for any unforeseen situations outside the mainstream competitive market.

(j) Would any energy suppliers have the ability to circumvent the remedy? If so, how could they do this?

We are not aware of any loopholes that suppliers could use to circumvent the remedy. However, there may be ways in which they could reduce its effectiveness, for example:

- seeking to water down the language in the end of fixed term prompt, eg “your contract has come to an end; you do not need to do anything; we have defaulted you to a new variable contract at the same rate, but should you wish to consider options please call”;
- finding alternative means of locking customers into their supply, for example targeting the roll out of SMETS 1 meters that, given current lack of interoperability, could result in consumers needing to stay with their supplier to maintain their smart functionality;
- bundling the default tariff with other services such as boiler cover (should the RMR rules be relaxed to permit this) which may make their customers less inclined to switch.

(k) Could this remedy give rise to unintended consequences and, if so, what these might be and how they might be prevented or mitigated?

If the remedy is successful in driving increased switching and engagement, this is likely to lead to increased costs for suppliers, eg in commissions paid to PCWs and internal administration costs.

If the PCW market is sufficiently competitive we would expect that a significant increase in the volume of PCW-mediated switches would be accompanied by a fall in commission rates. The CMA and Ofgem could mitigate the risk of increased costs by ensuring that the PCW market is fully competitive.

(l) Are there any relevant customer benefits to which we should have regard as being affected by the proposed remedy?

We are not aware of any relevant customer benefits which would be adversely affected by the proposed remedy to which the CMA should have regard.

(m) What are the relevant costs and benefits that we should take into account when considering the proportionality of this remedy?

This question raises important issues as to the overall purpose of the CMA's proposed remedies and the relative weight that should be given to different objectives such as improving competition and outcomes for consumers as a whole, and improving outcomes for particular groups of consumers.

We would suggest that the main costs and benefits that should be taken into account in assessing this remedy would include:

Benefits

- lower overall prices to consumers as a result of increased competition and engagement;
- enhanced innovation as a result of increased competition.

Costs

- one off implementation cost for suppliers (notably IT system development and initial customer communications);
- increased ongoing costs for suppliers (eg cost of additional communications and call centre activity, costs of administering increased switching, (if applicable) increased cost of commissions to PCWs¹²).

(n) Are there any alternative remedies that would be as effective as the proposed remedy in addressing the provisional AEC and that would be less costly and/or intrusive?

We are not aware of any alternative remedies that would be as effective as the proposed remedy in strengthening competition and engagement for SVT customers and that would be less costly and/or intrusive.

(o) Should the CMA seek to implement this remedy itself via an order (e.g. to make a licence modification), or whether it should make a recommendation that another body, such as Ofgem or DECC, implement the remedy?

In our view the CMA should make an order, backed up by licence modifications, both to reinforce certain aspects of the order, but also to remove any provisions of the existing supply licences that would be inconsistent with the requirements of the order. We do not have strong views on whether the CMA should make those licence modifications itself, or whether it should make a recommendation to Ofgem to make the necessary licence modifications.

The CMA's Supplemental Notice envisages (para 20) the remedy consisting of the following elements:

¹² Even if unit commission rates fall, there is likely to be an increase in overall commission costs as a result of the increased volumes.

- a) a prohibition on the supply of energy to new and existing customers on an evergreen basis as from a future date;
- b) a requirement for suppliers to inform existing evergreen/SVT customers that their tariffs are being phased out and that they need to choose a new tariff;
- c) a requirement for suppliers to move those existing customers who do not respond to this prompt by selecting another (fixed-term) tariff onto the default tariff.

We agree that these are the central elements of the remedy. As regards the legal basis for the remedy, the CMA has the power under para 2(1) of Schedule 8 of the Enterprise Act 2002 (**EA02**) to prohibit the making of new agreements as well as the performance of existing agreements; and it can also require existing agreements to be terminated. Therefore a CMA order under para 2(1) could in principle prohibit suppliers from entering into new evergreen contracts with domestic customers (and new contracts that have a duration of more than 12 months). It could also require suppliers to terminate existing evergreen SVT contracts with domestic customers.

In addition the CMA has power under para 17(1) of Schedule 8 to require suppliers of goods or services to publish or otherwise notify “such other information in relation to the goods or services supplied as the relevant authority considers appropriate”. This would appear broad enough to encompass the provision of information to customers along the lines set out in (b) above.

As to the legal basis for imposing an obligation on suppliers to move customers who do not respond onto the default tariff, it seems to us that para 10(2) of Schedule 8 provides the necessary power. This allows the CMA to impose a requirement on energy suppliers to supply “in a particular manner”; in this case, the “manner” could be a requirement for energy suppliers to ensure that such customers are moved onto the default tariff.

This would need to be coupled with modifications to the standard licence conditions of the electricity and gas supply licences so as to align them with the terms of the order and remove any inconsistencies between the licence and the order. This would ensure that the obligations on suppliers could be enforced by Ofgem, rather than the CMA having to investigate whether there had been a breach of the order and potentially instigate court proceedings to obtain an injunction. In addition, existing licence provisions that contemplate the use of evergreen contracts would need to be removed.¹³ The CMA could either make those licence modifications itself, or recommend that Ofgem make them.

Under section 15(1) of the Electricity Act 1989 (**EA89**) and section 27(1) of the Gas Act 1986 (**GA86**) the CMA can only make licence modifications if they are “requisite or expedient for the purposes of giving effect to, or taking account of, any provisions made by the order”. This means that the CMA cannot make licence modifications in isolation, without also making an order: in essence, any licence modifications made by the CMA must be shown to be necessary for the order to work. However, we think it is clear that the modifications we have suggested above would meet this test.

We have considered whether there could be any contractual impediment to domestic SVT customers being moved onto default tariffs that might make it difficult or impossible for suppliers to comply with the remedy. However, our analysis indicates that each of the SLEFs already has the ability, by virtue of the standard terms and conditions applicable to its

¹³ For example, references to Relevant Cheapest Evergreen Tariff in SLC22C and elsewhere.

domestic SVT customers, to bring the agreements with these customers to an end.¹⁴ We have no reason to expect that other suppliers' terms and conditions would be materially different. Thus, the offer of the new fixed term contract would be treated, contractually speaking, as a notice to bring the current (SVT) agreement to an end.

Under the current EA89 and GA86 regulatory framework, where customers fail expressly to agree to a fixed term contract (either from the existing supplier or another supplier) they will be 'out of contract' and subject to the protection of the 'deemed contract' regime.¹⁵ We see no reason why this regime could not co-exist with the CMA's remedy. Essentially it would mean that customers on a 'deemed contract' would need to be supplied at the default tariff.

Finally, we have considered whether these default contracts might fall foul of the prohibition of inertia selling under the Consumer Protection from Unfair Trading Regulations 2008. In our view, the fact that an occupier chooses to consume energy (available on default contract terms) at the relevant premises would overcome any objections as to 'inertia' on his part.

SCOTTISHPOWER

9 November 2015

¹⁴ The standard terms and conditions of five of the SLEFs already permit the supplier to terminate the agreement with the SVT customer on a specified period of notice (SP, condition 8.7 (six weeks), SSE, condition 10.3 (28 days), npower, condition 26 (28 days), BG, condition 8.7 (28 days) and EDF, condition 4d (three months). E.ON's terms and conditions do not currently contain such a provision, but they may be varied unilaterally by the supplier (condition 14.1) and such a termination right could therefore be inserted.

¹⁵ Under this 'deemed contract' regime (which is overseen by Ofgem), a supplier must have in place terms and conditions applicable to those 'out of contract' customers who continue to take a supply from it at their premises.