

INITIAL SUBMISSION

ME/6721/17

innogy SE / SSE plc

 Freshfields Bruckhaus Deringer

SLAUGHTER AND MAY

30 May 2018

1. Executive summary

- 1.1 The Parties provide below their response to the CMA's full text decision following its Phase 1 investigation dated 26 April 2018 (the "**Phase 1 Decision**").
- 1.2 The Parties welcome the CMA's Phase 1 conclusion that the Transaction will not result in any competition concerns – including horizontal unilateral effects, vertical effects or coordinated effects – on the basis of any standard merger analysis. In particular, the Parties are pleased that the CMA has recognised that:
- (i) there is strong competition to the Parties both from larger suppliers and SAMS;
 - (ii) the Parties' shares of supply are low, and falling;
 - (iii) the Transaction will not result in significant upward pricing pressure for FTCs, to which nearly all customers switch when they change suppliers; and
 - (iv) the Parties are not close competitors in any possible market segment, and therefore the Transaction does not result in any incentive to raise prices as a result of the loss of the "next best" alternative for customers.
- 1.3 These findings align with the Parties' view that the Transaction is a procompetitive opportunity for the retail energy market in Great Britain ("**GB**") that will deliver significant consumer benefits. The combination of the Parties' retail businesses will create an exciting, new, independent energy retailer in GB, with a new market model combining the experience and expertise of two large suppliers with the focus and agility of a standalone retailer.
- 1.4 With its own dedicated Board and expert management team strongly focused on customers, MergeCo will be better placed than either of the Parties individually to adapt to the rapid changes in the retail energy market. MergeCo will be able to set its own strategy, make quicker decisions in reaction to market developments and implement decisions with greater agility, particularly when it comes to investments and product development.
- 1.5 Most importantly, the Transaction will benefit consumers across GB. MergeCo will be better able to serve customers by reducing costs (through synergies) and being more focused and agile in responding to their needs. MergeCo will also continue to drive forward industry initiatives and the Transaction will not affect its delivery of key industry schemes, such as the smart meter roll out and faster switching. Given these evident consumer benefits, it is unsurprising that none of the consumer groups the CMA contacted during its Phase 1 inquiry raised any concerns about the Transaction.¹
- 1.6 Given the clear consumer benefits and the absence of competition concerns, the Parties are therefore disappointed that the CMA has relied on an unorthodox and untenable theory of harm to refer the Transaction to Phase 2, particularly given the

¹ Phase 1 Decision, paragraph 252.

procedural irregularities surrounding its introduction at a very late stage in the Phase 1 process.

- 1.7 The Parties fundamentally disagree with the CMA's remaining theory of harm: that the Transaction will result in the loss of a comparator in relation to SVT pricing leading to a "loss of rivalry in the process of setting SVT prices" and consequently a substantial lessening of competition ("SLC") in the GB retail energy market.² On a proper review of the evidence, it is clear that this theory of harm is untenable.
- 1.8 In the absence of any clearly identified merger-specific effect giving rise an SLC the CMA must clear the Transaction unconditionally. Yet it is clear that the Phase 1 Decision has not identified any merger-specific effects relating to SVT pricing arising from the Transaction. The absence of any such effect is clear, in particular since:
 - (i) the vast majority of customers do not switch onto an SVT when they switch suppliers and therefore no "rivalry" will be lost as a result of the Transaction;
 - (ii) the Parties are not important comparators for each other in relation to SVT pricing – the CMA accepts that there is no evidence that either of the Parties' SVT price-setting behaviour is a particular constraint on the other;³
 - (iii) the Transaction will have no dampening effect on the way in which the media and other public commentary report SVT price increases, since comparisons between SVT prices are not a focus of any such reporting – any SVT increase will face public scrutiny irrespective of its positioning relative to other suppliers;
 - (iv) MergeCo's strategy and its realisation of cost efficiencies, particularly from significant synergies, must be expected to result in lower SVT prices for its existing and prospective customers; and
 - (v) there is no evidence that the Transaction would have a "market-wide" effect on SVT pricing as there is no evidence that the Transaction would have any effect on the SVT pricing decisions of the other suppliers.
- 1.9 Furthermore, the adverse findings in the Phase 1 Decision:
 - (i) *are based on irrelevant and outdated evidence and data.* For example, the Phase 1 Decision relies heavily on the conclusions of the CMA's energy market investigation (the "**EMI**"), without fully taking into account the comprehensive, up-to-date evidence and data submitted by the Parties. This recent evidence and data show that the competitive conditions for the domestic retail energy supply market in GB have changed significantly since the EMI concluded, rendering the EMI conclusions out of date. These market trends will continue to develop in light of the regulatory remedies that have been, or will soon be, implemented following the EMI, as well as ongoing Ofgem initiatives;

² Phase 1 Decision, paragraph 138.

³ Phase 1 Decision, paragraph 132.

- (ii) *does not take account of the imminent SVT price cap*, the effects of which will entirely negate the CMA's theory of harm. Since the introduction of the price cap is expected this year and its effects are reasonably foreseeable, the CMA must take it into account in the counterfactual when assessing the Transaction; and
- (iii) *depend on a critical misunderstanding of the competitive dynamics of the GB retail energy market*. For example, the Phase 1 Decision wrongly asserts that there is "rivalry" between the Parties in relation to SVT prices, despite its acceptance in other parts of the decision that when SVT customers switch, the vast majority move onto an FTC, not another SVT.

1.10 The Phase 1 Decision is therefore fundamentally flawed and does not support the CMA's initial finding of a potential SLC resulting from the Transaction. To the contrary, it is clear from a proper review of the evidence that the Transaction is procompetitive and will benefit both consumers and the broader GB retail energy market.

1.11 The Parties have set out their response to the Phase 1 Decision as follows:

- (i) an overview of the Transaction including a description of its structure and the nature of MergeCo's future business (**Section 2**);
- (ii) a summary of the standard merger analysis undertaken on horizontal unilateral effects, vertical effects and coordinated effects and the conclusions reached following that analysis in the Phase 1 Decision (**Section 3**);
- (iii) a summary of the evidence and analysis illustrating the ways in which the Phase 1 Decision does not take into account relevant and indisputable evidence on current and future market conditions (**Section 4**); and
- (iv) a response setting out the evidence and analysis demonstrating that the CMA's theory of harm in relation to the loss of rivalry in setting SVT prices are unfounded and untenable (**Section 5**).

1.12 Except as otherwise defined in this response, references to defined terms in this response have the same meaning as in the Parties' response to the CMA's Issues Paper dated 30 May 2018 (the "**Issues Paper Response**") and the Parties' response to the CMA's Supplementary Issues Paper dated 18 April 2018 (the "**Supplementary Issues Paper Response**").

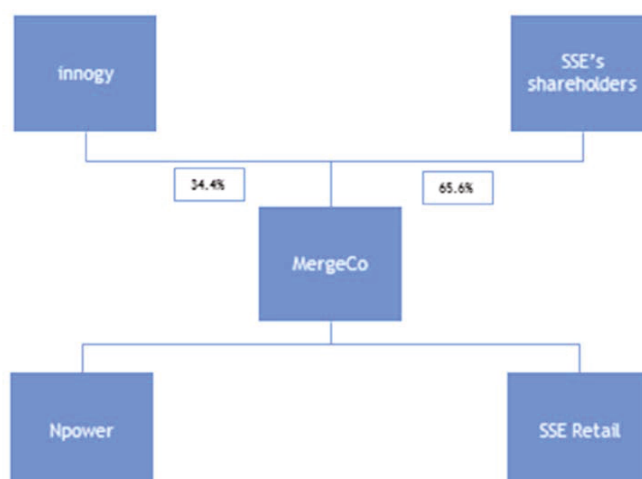
2. Overview of the Transaction

2.1 On 8 November 2017, innogy and SSE entered into a Contribution Agreement, pursuant to which they will transfer the following businesses into MergeCo:

- (i) Npower, which is active in domestic and non-domestic retail energy supply and certain energy-related services in GB;⁴ and
- (ii) SSE Retail, SSE's domestic retail energy supply, telecoms and energy-related services businesses to the extent that they operate in GB.

2.2 Upon completion of these transfers, MergeCo will be admitted to the premium listing segment of the Official List and to trading on the main market of the London Stock Exchange. At this time, SSE's shares in MergeCo (65.58%) will be distributed to SSE's shareholders, while innogy will receive a minority (34.42%) shareholding in the listed MergeCo entity, as set out in Figure 2.1 below.⁵ innogy will also be bound by a Relationship Agreement ("**RA**"), which will be entered into by innogy and MergeCo at completion. The RA will place certain restrictions on innogy to ensure MergeCo meets the independence requirements set out in the UK Listing Rules.⁶ innogy will be required to conduct all transactions and arrangements with MergeCo at arm's length and on normal commercial terms. Further details of the Transaction were provided in section 2 of the Merger Notice.

Figure 2.1
Proposed structure of MergeCo on completion



2.3 The Transaction will create an efficient new independent retail energy supplier in Great Britain by combining the resources and experience of two established players in a new market model. MergeCo will combine the best aspects of both Parties in order to have the focus and agility to respond to the changing dynamics of an increasingly competitive retail energy environment, and to respond more effectively to customer expectations on

⁴ Npower also has a small number of legacy non-domestic retail energy supply contracts in Ireland, which will also be transferred to MergeCo.

⁵ SSE's shareholding will be distributed to its shareholders immediately – at no point will there be a joint venture between innogy and SSE.

⁶ For example, for as long as innogy is a 30+ per cent shareholder, it will be required to abstain from voting on any resolution to approve the election or re-election of any independent director.

tariff innovation and technological development as well as the technology, resources and know-how to provide those customers with the highest level of service.

- 2.4 MergeCo will be a standalone retail business, benefitting from its own board of directors and specialist management team. Katie Bickerstaffe has been appointed Chief Executive Designate and will begin her role later in 2018. Katie Bickerstaffe has a wealth of experience in the retail sector, including as Executive Director of Dixons Carphone plc since it was formed in 2014. Until 30 April 2018, she was also a Non-Executive Director of SSE plc (a position from which she has stepped down on accepting her new position with MergeCo).⁷

3. The Parties welcome the fact that the CMA has accepted that the Transaction will not result in any horizontal unilateral effects, vertical effects or coordinated effects on the basis of any standard merger analysis

- 3.1 There is considerable agreement between the CMA and the Parties on the absence of competition concerns resulting from the Transaction. In particular, the Parties welcome the CMA's conclusions in the Phase 1 Decision that the Transaction will not result in an SLC as a result of horizontal unilateral effects (on the basis of standard merger control analysis), vertical effects or coordinated effects. The Parties also broadly agree with the CMA's conclusions on the appropriate frame of reference in which to consider the Transaction.
- 3.2 In these circumstances, it is not surprising that none of the consumer groups contacted by the CMA raised any concerns about the Transaction.⁸ The sole complainants identified in the Phase 1 Decision were therefore competitors (who could hardly be expected to support the competitive constraint that will be imposed by MergeCo)⁹ and Ofgem.¹⁰ The majority of the concerns raised by these complainants (including Ofgem) were dismissed by the CMA following its Phase 1 review.
- 3.3 In the rest of this Section 3, the Parties consider the CMA's frame of reference, the conclusions that it reached in respect of the theories of harm that were dismissed at Phase 1 and the evidence that supports those conclusions. As explained in detail in Section 5, the Parties expect that, following a proper assessment of the evidence, the CMA will reach the same conclusion in relation to the highly unorthodox and untenable theory of harm that led to the Phase 2 reference outlined in paragraphs 100 to 140 of the Phase 1 Decision.
- 3.4 At the end of this Section, the Parties also note some procedural concerns arising from the Phase 1 process.

⁷ Katie Bickerstaffe has also just been announced as a non-executive director for Marks and Spencer (<https://corporate.marksandspencer.com/media/press-releases/2018/marks-and-spencer-group-plc-appointment-of-non-executive-directors>).

⁸ Phase 1 Decision, paragraph 252.

⁹ Phase 1 Decision, paragraph 250.

¹⁰ Phase 1 Decision, paragraph 251.

The CMA's conclusions on the appropriate frame of reference are broadly correct

3.5 The CMA has identified two distinct frames of reference for the purposes of assessment of the Transaction:

- (i) the supply of electricity to domestic customers in GB; and
- (ii) the supply of gas to domestic customers in GB,

with additional segmentation by meter type and payment type, namely the supply of electricity to domestic non-Economy 7 restricted meter customers in GB; the supply of electricity to domestic pre-payment meter ("**PPM**") customers in GB; and the supply of gas to domestic PPM customers in GB.

3.6 The Parties broadly agree with the CMA's conclusions on the appropriate frame of reference, specifically that the Transaction should be assessed by reference to separate product markets for the supply of gas to domestic customers and the supply of electricity to domestic customers.¹¹

3.7 The Parties do not agree that it is appropriate to segment the product market further by meter type or by payment type, but submit that it is not necessary to reach a conclusion on such segmentation given that the CMA identified no competition concerns in respect of the supply of electricity to domestic non-Economy 7 restricted meter customers and the supply of electricity or gas to domestic prepayment customers.

3.8 The CMA concludes in the Phase 1 Decision that the geographic scope of the frames of reference is GB-wide, on the basis of "*demand-side and supply-side considerations, such as uniform product characteristics, similar switching costs and the prevalence of suppliers operating across the whole of GB*".¹² The Parties agree that the geographic markets for the retail supply of electricity and gas are GB-wide, and that the CMA must therefore take into account national competitive constraints. In particular, the CMA's suggestion that SVT prices in certain regions could be disproportionately affected by the Transaction is not substantiated and is not consistent with the clear evidence supporting a GB-wide frame of reference.

Absence of horizontal unilateral effects on the basis of standard merger control analysis

3.9 The Parties welcome the conclusion in the Phase 1 Decision that the Transaction will not result in any loss of competition or significant upward pricing pressure for customers when they switch between suppliers.¹³ Similarly, the Parties agree with the CMA's conclusion that the Transaction will not give rise to any other horizontal unilateral concerns in relation to non-Economy 7 restricted meter customers or PPM customers.

¹¹ The Parties note, however, that the supply of dual fuel is a key driver of competition and should therefore be taken into account where relevant in the assessment of the Transaction.

¹² Phase 1 Decision, paragraph 85.

¹³ Phase 1 Decision, paragraph 174.

3.10 In particular, as set out in paragraphs 141 to 198 of the Phase 1 Decision, the CMA has accepted that:

- (i) there is strong competition to the Parties both from larger suppliers and SAMS;
- (ii) the Parties' shares of supply are low, and falling;
- (iii) the Transaction will not result in significant upward pricing pressure for FTCs, to which the vast majority of customers switch when they change suppliers; and
- (iv) the Parties are not close competitors in any possible market segment, and therefore the Transaction does not result in any incentive to raise prices as a result of the loss of the "next best" alternative for customers.

3.11 We consider each of these points further below.

There is strong competition to the Parties both from larger suppliers and SAMS

3.12 The Parties agree with the CMA's conclusion that competition for all customers considering switching suppliers takes place between many players, including SAMS, and its finding that "*there exists strong competition to the Parties for new customers, both from the other SLEFs and from at least some of the SAMS*".¹⁴ The CMA has accepted that this is true for all tariff and regional segments of the market that it has identified.¹⁵

3.13 The CMA reached this conclusion on the basis of the overwhelming evidence on the strength of competition faced by the Parties, including the Parties' extensive and up-to-date switching data. As shown in Figure 3.1 and Figure 3.2 below, the proportion of customers switching from each of the Parties to SAMS is now over 50% and, as the CMA observed, shows "*a trend of switching to SAMS rather than SLEFs increasing over time*".¹⁶

Figure 3.1

[X]

¹⁴ Phase 1 Decision, paragraph 170.

¹⁵ Phase 1 Decision, paragraph 171.

¹⁶ Phase 1 Decision, paragraph 162.

Figure 3.2

[REDACTED]

- 3.14 The evidence the Parties have submitted to the CMA therefore clearly demonstrates that both larger suppliers and SAMS together pose a strong competitive constraint on the Parties, and the CMA has accepted that there is strong competition to the Parties for new customers and that such competition can be expected to continue.
- 3.15 The Parties have also submitted clear evidence that this conclusion is equally applicable to both FTC and SVT customers, including those who have been on an SVT for an extended period. This is clearly demonstrated in Figure 3.3 below which shows that overwhelmingly the destination of SVT customers who have been on a SVT for three or more years is to one of the SAMS.

Figure 3.3

[REDACTED]

- 3.16 For the reasons set out at paragraph 4.3 *et seq* below, the Phase 1 Decision raises certain concerns about the effectiveness of SAMS as competitors based on out-of-date information. Had the Phase 1 Decision properly taken the most recent information into account, the CMA's conclusion at paragraph 170 of the Phase 1 Decision, of strong competition including from the SAMS, would have been incontrovertible.

The Parties' shares of supply are low and falling

- 3.17 The CMA has accepted that the Parties' shares of supply are low, and falling, and do not raise any concerns. In particular, the CMA found that the Parties' combined shares of supply nationally to domestic customers are well below [REDACTED] for electricity and below 20% for gas.¹⁷ The CMA also acknowledged that the larger suppliers' combined share of supply of domestic energy declined by approximately 15% between 2013 and 2017,¹⁸ which reflects the growth of the SAMS at an equivalent rate.
- 3.18 The CMA's conclusions are reflected in the share of supply data over time submitted by the Parties, set out in Table 3.1 and Table 3.2 below, which clearly demonstrate that the SAMS' shares of supply in GB have rapidly increased over the last five years in both electricity and gas (from [REDACTED] in January 2013 to [REDACTED] in January 2018 collectively), while the combined share of the Parties has decreased by [REDACTED] in that same time period. Given the strong competition from the SAMS (that the CMA has itself acknowledged, as described in paragraph 3.12 *et seq* above), there is no clear reason why this trend

¹⁷ Phase 1 Decision, Table 2. The CMA has confirmed that it considers the Parties' submissions on market shares to be accurate, as they are based on independent third party data collected by a specialist consultancy (Cornwall Energy) (Phase 1 Decision, footnote 80).

¹⁸ Phase 1 Decision, paragraph 89.

should not be maintained. The Parties' shares of supply are well below a level that would raise competition concerns or typically warrant the opening of a Phase 2 inquiry.

Table 3.1
Domestic shares of supply in Great Britain: electricity

| Supplier | January 2013 | January 2014 | January 2015 | January 2016 | January 2017 | January 2018 |
|------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Npower [1] | [X] | [X] | [X] | [X] | [X] | [X] |
| SSE Retail [2] | [X] | [X] | [X] | [X] | [X] | [X] |
| Combined (MergeCo) | [X] | [X] | [X] | [X] | [X] | [X] |
| British Gas | [X] | [X] | [X] | [X] | [X] | [X] |
| E.ON | [X] | [X] | [X] | [X] | [X] | [X] |
| EDF | [X] | [X] | [X] | [X] | [X] | [X] |
| Scottish Power | [X] | [X] | [X] | [X] | [X] | [X] |
| Small and mid-tier suppliers | [X] | [X] | [X] | [X] | [X] | [X] |
| - First Utility (Shell) | [X] | [X] | [X] | [X] | [X] | [X] |
| - Ovo Energy | [X] | [X] | [X] | [X] | [X] | [X] |
| - Utilita | [X] | [X] | [X] | [X] | [X] | [X] |
| - Utility Warehouse | [X] | [X] | [X] | [X] | [X] | [X] |
| - Co-op Energy | [X] | [X] | [X] | [X] | [X] | [X] |
| - Green Star Energy | [X] | [X] | [X] | [X] | [X] | [X] |
| - Economy Energy | [X] | [X] | [X] | [X] | [X] | [X] |
| - Spark | [X] | [X] | [X] | [X] | [X] | [X] |
| - Bulb | [X] | [X] | [X] | [X] | [X] | [X] |
| - Extra Energy | [X] | [X] | [X] | [X] | [X] | [X] |
| - Iresa | [X] | [X] | [X] | [X] | [X] | [X] |
| - Others [3] | [X] | [X] | [X] | [X] | [X] | [X] |

Source: Cornwall Energy, January 2018¹⁹

Notes: [1] [X]
[2] [X]
[3] [X]

¹⁹ This table has been updated with the Q1 2018 Cornwall data published on 26 March 2018.

Table 3.2
Domestic shares of supply in Great Britain: gas

| Supplier | January 2013 | January 2014 | January 2015 | January 2016 | January 2017 | January 2018 |
|------------------------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Npower | [X] | [X] | [X] | [X] | [X] | [X] |
| SSE Retail | [X] | [X] | [X] | [X] | [X] | [X] |
| Combined (MergeCo) | [X] | [X] | [X] | [X] | [X] | [X] |
| British Gas | [X] | [X] | [X] | [X] | [X] | [X] |
| E.ON | [X] | [X] | [X] | [X] | [X] | [X] |
| EDF | [X] | [X] | [X] | [X] | [X] | [X] |
| Scottish Power | [X] | [X] | [X] | [X] | [X] | [X] |
| Small and mid-tier suppliers | [X] | [X] | [X] | [X] | [X] | [X] |
| - First Utility (Shell) | [X] | [X] | [X] | [X] | [X] | [X] |
| - Ovo Energy | [X] | [X] | [X] | [X] | [X] | [X] |
| - Utilita | [X] | [X] | [X] | [X] | [X] | [X] |
| - Utility Warehouse | [X] | [X] | [X] | [X] | [X] | [X] |
| - Co-op Energy | [X] | [X] | [X] | [X] | [X] | [X] |
| - Green Star Energy | [X] | [X] | [X] | [X] | [X] | [X] |
| - Economy Energy | [X] | [X] | [X] | [X] | [X] | [X] |
| - Spark | [X] | [X] | [X] | [X] | [X] | [X] |
| - Bulb | [X] | [X] | [X] | [X] | [X] | [X] |
| - Extra Energy | [X] | [X] | [X] | [X] | [X] | [X] |
| - Iresa | [X] | [X] | [X] | [X] | [X] | [X] |
| - Others ^[1] | [X] | [X] | [X] | [X] | [X] | [X] |

Source: Cornwall Energy, January 2018²⁰

Note: [1] [X]

3.19 As described in paragraph 3.8 above, the Parties agree that the appropriate frame of reference is GB-wide, as they face similar competitive conditions across all regions, in particular given the consistently strong presence of SAMS, who have collectively attracted a large proportion of customer switching in every region.²¹

3.20 However, even on a regional basis, the share of supply data referred to by the CMA shows that the Parties' shares of supply in their former PES regions²² would not give rise to competition concerns. In the former Npower PES regions, the Parties' combined shares of supply are in all cases below 30%. In the former SSE PES regions (where

²⁰ This table has been updated with the Q1 2018 Cornwall data published on 26 March 2018.

²¹ The Parties' switching data shows that – of the customers switching away during 2017 – [X] switched to the SAMS in every region, both for electricity and gas

²² Public Electricity Supply regions.

SSE has a higher pre-existing share of supply), the increments to the Parties' combined shares are in all cases very small and would have no impact on competition.²³

- 3.21 Moreover, the CMA also concludes that “[s]hares of supply will not accurately reflect the dynamic of competition” and “disproportionately reflect a stock of customers rather than customer preferences”.²⁴ The Parties agree with this conclusion, and note that the CMA must therefore – in all aspects of its analysis – fully take into account how customers behave when they engage in the market. Understanding customer preferences when they engage in the market, including changing suppliers, is key to understanding the competitive constraints that the Parties face. It is clear that, on this basis, both Parties face a strong competitive constraint from the SAMS (as demonstrated by the Parties' switching data), as well as from the other larger suppliers.

The Transaction will not result in significant upward pricing pressure for FTCs or SVTs

- 3.22 The CMA recognises that customer switching is “consistently low” between the Parties on any metric:²⁵
- (i) on a GB-wide basis, the proportion of customers lost by one Party to the other Party is very low, at [X]% or less;²⁶
 - (ii) on a regional basis, the CMA found that switching rates from SSE to Npower in SSE's former PES regions are slightly higher, although still less than [X]% and “not at a level to indicate any particular closeness of competition”, and switching rates from Npower to SSE in these regions are lower than the overall GB-wide switching rate;²⁷
 - (iii) the CMA concluded that “the Parties' SVT customer switching is similar to switching in the whole market” and that switching rates between the Parties are also very low for SVT customers;²⁸ and
 - (iv) the same is true for non-Economy 7 restricted meter and PPM customers. The CMA found that the number of non-Economy 7 restricted meter customers who switch from SSE to Npower is “extremely limited” and only [X]% of non-Economy 7 restricted meter customers that switched away from Npower to

²³ Phase 1 Decision, Table 3.

²⁴ Phase 1 Decision, paragraph 146.

²⁵ Phase 1 Decision, paragraph 152.

²⁶ Phase 1 Decision, Table 4.

²⁷ Phase 1 Decision, paragraph 153.

²⁸ Phase 1 Decision, paragraphs 136 and 154.

SSE;²⁹ and that switching between the Parties was “*significantly lower*” for PPM customers compared to other customer types.³⁰

- 3.23 The Parties agree with the CMA’s conclusion that, given this consistent and strong evidence, the Parties are not close competitors, including on a GB-wide basis, a regional basis or in respect of FTC customers, SVT customers, non-Economy 7 restricted meter customers, or PPM customers.
- 3.24 Moreover, the CMA has acknowledged that the “*majority*” of customers who switch suppliers switch to an FTC product, including “*customers on SVTs, and those who have been on SVTs for a significant amount of time*”.³¹ The Parties agree with this conclusion.
- 3.25 Given the strong and consistent evidence accepted by the CMA that (i) customer switching between the Parties is low; and (ii) the majority of customers switch to an FTC product, the CMA appears to agree with the Parties’ conservative GUPPI calculation, specifically that the Parties would need to earn variable margins on their FTC tariffs of at least between [X] and [X] to generate a GUPPI of just 5% (which equates to a 2.5% price increase under linear demand) (see Figure 3.4 below).³²

Figure 3.4

[X]

- 3.26 As the CMA has already acknowledged, the Parties’ FTC margins are nowhere near this level.
- 3.27 [X].³³ [X].³⁴ It is clear, therefore, and must be accepted by the CMA, that rates of switching between the Parties are too low – including for SVT customers – to create any incentive for the Parties to increase their prices as a result of the Transaction. The Transaction will therefore not result in significant upward pricing pressure for FTCs or SVTs. That is the only rational and evidence-based conclusion that can be drawn from the CMA’s findings on customer switching. This indicates that, applying the CMA’s standard horizontal unilateral effects test, there cannot be an SLC as a result of the Transaction, including in respect of SVT prices. This critical fact alone ought to have been sufficient to lead to an unconditional clearance of the Transaction at Phase 1.

²⁹ Phase 1 Decision, paragraph 181.

³⁰ Phase 1 Decision, paragraph 191.

³¹ Phase 1 Decision, paragraph 128.

³² Phase 1 Decision, footnote 82

³³ See footnote 27 of the Issues Paper.

³⁴ See Supplementary Issues Paper Response, footnote 78.

The Parties are not close competitors for new customers, so the Transaction does not result in any incentive to raise prices as a result of the loss of the next best alternative for any customers

- 3.28 As set out in paragraphs 3.22 and 3.23 above, the CMA has accepted that the Parties are not close competitors nationally or in any region, including Npower's and SSE's former PES regions, or in any of the various customer categories identified by the CMA – including in respect of customers switching from SVTs.³⁵
- 3.29 The CMA recognised that the strong evidence to this effect from the Parties' up-to-date switching data was supported by the pricing data. In particular, the CMA found that *"the Parties are not particularly close competitors with regard to the tariffs they offer across all different customer segments"* and the Parties' pricing strategies have been different, indicating that *"for the majority of the time, they have not been close competitors"*.³⁶ The CMA has also recognised that there is *"no evidence in the Parties' internal documents to indicate that the Parties consider each other to be close competitors for FTCs"*, and third parties did not submit any evidence to indicate that the Parties are close competitors.³⁷
- 3.30 Given the CMA's conclusion that the Parties are not close competitors, there can be no plausible theory of harm that the Transaction would result in any incentive for MergeCo to raise prices as a result of the loss of the next best alternative or a close alternative for customers.
- 3.31 The CMA has accepted that, on the basis of the evidence clearly showing that the Parties are not close competitors for FTCs, the Transaction *"does not result in significant upward pricing pressure on FTC tariffs"*.³⁸ The Parties agree with this conclusion. However, the CMA must apply its reasoning consistently. The Phase 1 Decision also concluded that the Parties are not close competitors for any customers, including SVT customers, and that they each face significant competitive constraints from other larger suppliers and from *"many of the SAMS"* in respect of customers switching from SVTs.³⁹ The CMA has also found that there is *"unlikely to be significant additional upward pricing pressure on SVTs from customer switching"*.⁴⁰

³⁵ Phase 1 Decision, paragraphs 158, 172, 173, 182 and 192.

³⁶ Phase 1 Decision, paragraph 155. The CMA found that although the Parties do offer tariffs with the same characteristics, *"the tariffs the Parties offer are no more similar (in particular on price) than those offered by other competitors"*. In terms of the Parties' differing pricing strategies, the CMA found that Npower offers a more stable, lower FTC price compared with SSE, while SSE typically offers a higher FTC price compared with Npower, except for short "bursts" of time when it will significantly reduce the price.

³⁷ Phase 1 Decision, paragraphs 156 and 157.

³⁸ Phase 1 Decision, paragraph 174.

³⁹ Phase 1 Decision, paragraphs 172 and 173: *"This conclusion also applies [...] to customers switching both from FTCs or SVTs"* (emphasis added).

⁴⁰ Phase 1 Decision, paragraph 136.

3.32 In light of those findings the CMA must, therefore, also conclude that MergeCo would not have any increased incentive to raise SVT prices as a result of the Transaction. The Parties' response to the CMA's conclusions in respect of SVTs is explained in detail in Section 5.

The Transaction does not raise any prospect of vertical effects

3.33 The Parties agree with the CMA's conclusion that the Transaction will not give rise to any vertical effects as a result of either:

- (i) the upstream activities of SSE and/or innogy; and/or
- (ii) any vertical relationships between SSE and/or innogy and the Parties.⁴¹

3.34 The CMA also suggests that any incentive on MergeCo to increase its SVT prices in order to increase its wholesale prices to Utility Warehouse would "*be small*" since:

- (i) the revenues that would be generated from Utility Warehouse are small compared to the revenues generated from MergeCo's domestic retail business;
- (ii) if Utility Warehouse were to lose customers, MergeCo would lose wholesale revenue and switching data does not suggest that many of these customers would be recaptured by MergeCo (any any such customers would join on an FTC, with low margins); and
- (iii) [~~§~~].⁴²

3.35 The CMA therefore appears to base its remaining concern about the Utility Warehouse contract on the competition concerns it had identified separately in relation to SVT pricing.⁴³ For the reasons set out in Section 5 below, this theory of harm is not viable, so the CMA should have no concerns that the Transaction will reduce the level of competitive constraint on SVT pricing.

3.36 In addition, the conclusion in the Phase 1 Decision that [~~§~~]⁴⁴ [~~§~~].⁴⁵

3.37 As a result, the CMA can have no concerns about the impact of the Transaction on Utility Warehouse.

⁴¹ Phase 1 Decision, paragraph 221.

⁴² Phase 1 Decision, paragraph 230.

⁴³ Phase 1 Decision, paragraph 231.

⁴⁴ Phase 1 Decision, paragraph 227.

⁴⁵ See Issues Paper Response, paragraphs 44.7 to 44.12.

The Transaction does not raise any prospect of coordinated effects

- 3.38 The Parties also welcome the CMA's conclusion that the Transaction will not give rise to any realistic prospect of coordinated effects, since the potential coordination mechanisms identified are neither internally nor externally sustainable.⁴⁶
- 3.39 In reaching this conclusion, the Phase 1 Decision referred to the findings of the EMI, which concluded that the evidence showed that there was no tacit coordination between domestic energy suppliers and in particular that there was no evidence of suppliers having the ability to engage in tacit coordination through price announcements.⁴⁷
- 3.40 Since the EMI, the CMA has found "*no evidence*" of pre-existing coordination.⁴⁸ In fact, the CMA has recognised that changes in the market, such as increasing customer switching and engagement, decreasing barriers to entry and expansion, increasing use of price comparison websites ("**PCWs**") and the increase in the number of suppliers, mean that tacit coordination between suppliers is now "*less likely than at the time of the EMI*" (emphasis added).⁴⁹
- 3.41 The CMA has also accepted that the Transaction would not increase the internal or external sustainability of any potential coordination mechanisms, given the "*increased differences between the SLEFs*" and "*the competitive pressure of other suppliers*".⁵⁰
- 3.42 The Parties therefore agree with the CMA's conclusion that the Transaction does not give rise to any realistic prospect of an SLC as a result of coordinated effects.

Procedural concerns in respect of the Phase 1 process

Supplementary Issues Paper

- 3.43 Following the broad agreement between the CMA and the Parties on the fundamentals of the market structure and dynamics as described above, it was very disappointing for the Parties to be confronted, on the evening of working day 29 of the Phase 1 process, with a new theory of harm relating to the process of SVT price setting. This concern appears to be based on the CMA's misinterpretation of certain of the Parties' internal documents, which the CMA had received in December 2017 and February 2018. The CMA therefore had ample opportunity to raise questions in relation to these documents earlier in the Phase 1 process, but failed to do so.

⁴⁶ Phase 1 Decision, paragraphs 199 to 218.

⁴⁷ EMI Final Report, 24 June 2016, paragraph 9.374.

⁴⁸ Phase 1 Decision, paragraph 211.

⁴⁹ Phase 1 Decision, paragraphs 208 and 210.

⁵⁰ Phase 1 Decision, paragraphs 216 and 217 "*Even if the Merger might change some aspects of the market structure, which might enhance the ability of some parties to reach an understanding on the terms of coordination, this would not be either internally or externally sustainable given the increased differences between the SLEFs, even if the Merged Entity and British Gas became more similar.*"

- 3.44 Although the Parties used their best endeavours to address the new theory of harm in the four working days available to them, it is clear that the CMA was not in the position to take proper account of the Parties' written response to the Supplementary Issues Paper in its decision-making process. The Parties submitted a 54 page response to the Supplementary Issues Paper before the deadline set by the CMA, at 22:22 on 18 April 2018. The Parties understand that a second Case Review Meeting was held on the morning of 19 April 2018. The CMA therefore could not have had proper regard to the Parties' detailed submission ahead of this meeting.
- 3.45 This is also clear from the Phase 1 Decision itself, which fails to engage with the arguments and detailed evidence put forward by the Parties in the Supplementary Issues Paper Response. The Parties wish to avoid a repeat of any such issues and would welcome a close dialogue with the CMA case team and inquiry group during the Phase 2 process.

Role of Ofgem

- 3.46 [X].⁵¹ [X]⁵² [X]
- 3.47 This is particularly relevant given the fact that a number of the submissions Ofgem made during Phase 1 directly contradict recent statements Ofgem has made publicly. For example, Ofgem is quoted in the Phase 1 Decision as stating that *"most of the competitive pressure exerted on the individual six large suppliers for the most dynamic segment of the market (typically non-default fixed-term tariffs) comes from the other large suppliers, with the small and mid-tier suppliers unable to act individually as significant competitive constraints."*⁵³
- 3.48 By contrast, in its 2017 State of the Energy Market Report, Ofgem states that *"since 2012, new suppliers have intensified competition, shrinking the six largest energy suppliers' share of the market from nearly all consumers to just 80% of them."*⁵⁴ Indeed, in that report, the larger suppliers are stated to have lost *"almost four percentage points of market share in the last year in both fuels"* and lost *"2.1 million and 4.3 million meter points in gas and electricity respectively"* since June 2012, *"reducing their market share by around 17% for both gas and electricity."*⁵⁵ Ofgem also refers to *"substantial new entry and falling concentration"* in the domestic retail energy market, citing a net increase of 11 gas and electricity suppliers in the period June 2016 to June 2017.⁵⁶

⁵¹ Issues Paper, paragraph 7.

⁵² See Issues Paper Response, paragraph 13.1 and Supplementary Issues Paper Response, paragraph 1.9.

⁵³ Phase 1 Decision, paragraph 166.

⁵⁴ Ofgem, State of the Market 2017 Report, page 6.

⁵⁵ Ofgem, State of the Market 2017 Report, page 20.

⁵⁶ *Ibid.*

4. The Phase 1 Decision failed to take account of the effect of relevant and indisputable evidence on current and future market conditions

4.1 The CMA's approach to assessing the GB domestic retail energy sector in the Phase 1 Decision is undermined by significant factual and analytical errors as it relies on a historic, and outdated view of market conditions. In particular, the Phase 1 Decision:

- (i) fails to recognise the evolution in competitive dynamics in the market since the conclusion of the EMI in 2016,⁵⁷ placing undue reliance on the EMI data collected between 2014 and 2016 at the latest, in spite of the availability of more recent and compelling data and evidence that provides a different view of the market;
- (ii) fails to take into account the significant and continuing market impact of the regulatory remedies imposed by the CMA following the EMI, which the CMA designed to correct the identified market concerns; and
- (iii) fails to take into account the forthcoming SVT price cap legislation – which will imminently have a significant impact on SVT price setting across the market – in its assessment of the counterfactual.

The competitive dynamics across domestic retail energy supply in GB have fundamentally changed since the EMI

4.2 In its Issues Paper and Supplementary Issues Paper, the CMA made reference to a number of EMI findings, as well as data gathered during the EMI. The Parties provided extensive information to the CMA that the EMI findings could not be relied upon.⁵⁸ The domestic retail energy market has changed significantly since the EMI data was gathered, such that this data is no longer relevant. Against that background, the Parties were disappointed that the most recent evidence was not reflected in the Phase 1 Decision.

Competitive constraint imposed by SAMS

4.3 The Phase 1 Decision appears to base its finding that some customers may not consider SAMS as alternatives to larger suppliers due to *“brand recognition, perceptions about reliability or service, lack of awareness or information”* on a survey carried out for the EMI dated February 2015, which indicated that *“around a quarter of customers who had shopped around in the previous three years had only considered the SLEFs”*.⁵⁹

4.4 This finding does not withstand scrutiny once that evidence is considered alongside the more recent data available to the CMA.

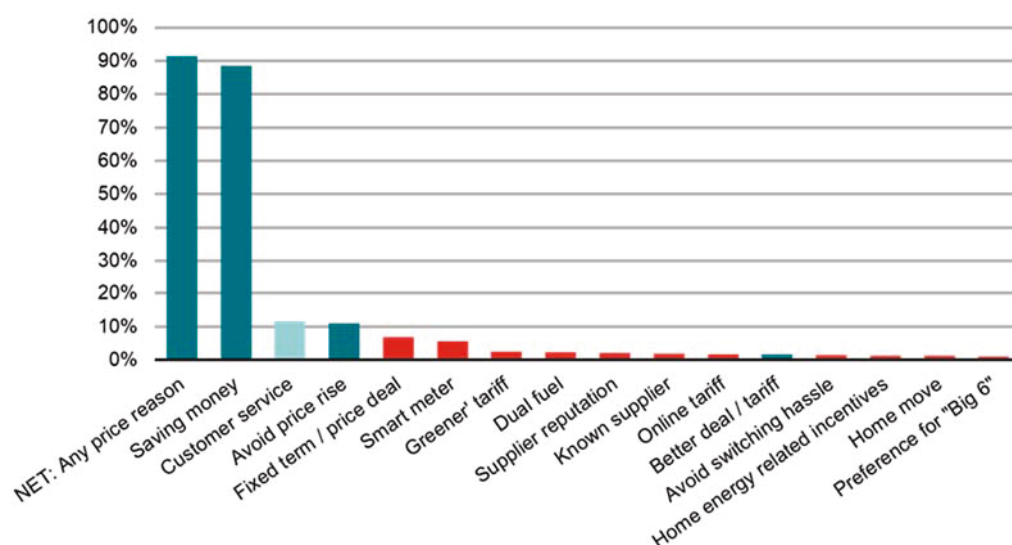
⁵⁷ While the date of the final EMI decision is 2016, much of the evidence on which that decision is based is older. By way of example, the EMI customer survey referred to in paragraph 4.5 was completed in February 2015, while interviews with the suppliers were conducted between 30 September and 17 November 2014.

⁵⁸ See Issues Paper Response, Section 12; Supplementary Issues Paper Response, paragraph 1.8.

⁵⁹ Phase 1 Decision, paragraph 94(a)

- 4.5 First, the analysis of the EMI survey in the Phase 1 Decision fails to recognise that since the customers surveyed had switched in the previous three years, some of those were discussing a switching event at the start of 2012 and even during that period, three quarters of customers were considering a wider range of competitors, which indicates the level of constraint SAMS were already imposing on the larger suppliers at that time. This is notwithstanding the fact that the February 2015 survey was done at a time when there were significantly fewer SAMS than there are today (less than 30⁶⁰ as opposed to over 60 today).
- 4.6 Moreover, the much more recent Ofgem Customer Engagement Survey 2017 directly contradicts the EMI survey results, showing that the proportion of customers that choose a supplier on the basis of branding or reputation is minimal (below 1%) as shown in Figure 4.1 below. As noted in the Phase 1 Decision “[t]he Parties submit that as seen in the Ofgem Customer Engagement Survey from September 2017, the primary factor a customer will consider when switching is saving money, but a number of other factors are also taken into account (eg customer service). Based on that survey, supplier reputation and brand do not appear to be significant factors in customers’ decision-making”.⁶¹ The Phase 1 Decision fails, however, to take the more recent and more relevant Ofgem Customer Engagement Survey into account.

Figure 4.1
Proportion of customers with a preference for the larger suppliers



Source: Frontier analysis of Ofgem Customer Engagement Survey 2017; Q160.
“Thinking of the last time you Switched supplier, what were your

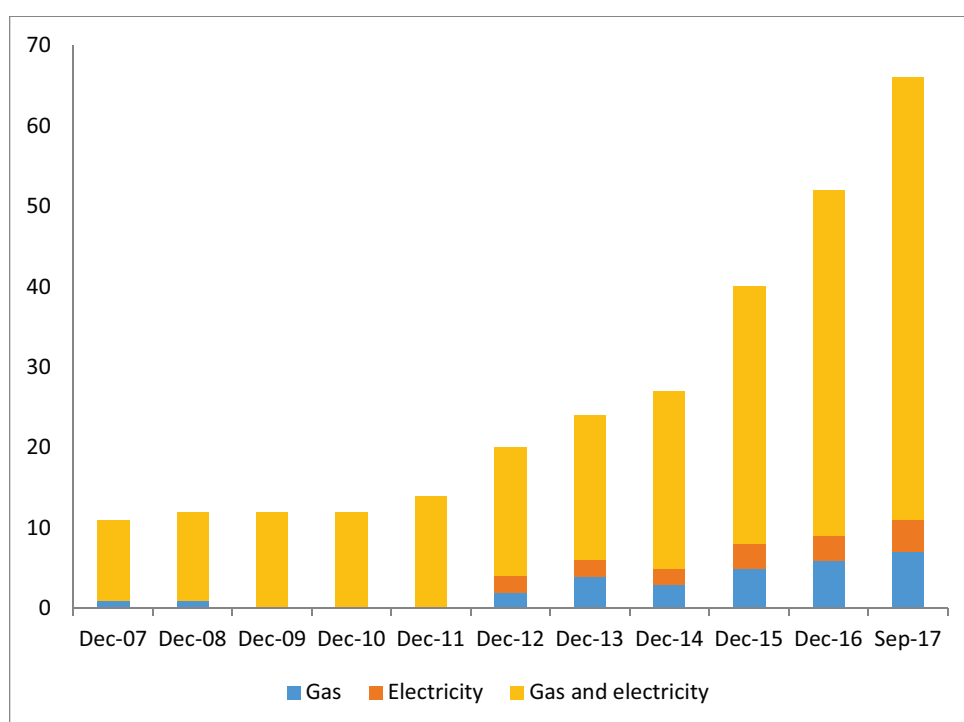
⁶⁰ Ofgem’s “Number of domestic suppliers” at <https://www.ofgem.gov.uk/data-portal/number-active-domestic-suppliers-fuel-type-gb> shows that there were only 29 suppliers in total in March 2015.

⁶¹ Phase 1 Decision, footnote 47.

priorities?"; Weighted base = Switched supplier (n=703); no prompting unless answer 'Saving money'; up to 3 responses recorded.⁶²

- 4.7 The Phase 1 Decision also fails to put that survey result properly in the context of the broader available evidence, which demonstrates that SAMS have been increasing in number, share of supply and degree of competitive pressure since the date of that survey.
- 4.8 Ofgem's most recent figures (as set out in Figure 4.2 below) demonstrate the exponential growth in the number of active domestic suppliers in Great Britain. Since December 2014, the number of suppliers have grown from 27 to 69.

Figure 4.2
Active domestic suppliers by fuel type (GB)



Source: Ofgem Retail Market Indicators

- 4.9 During that period, the SAMS' share of supply has also rapidly increased from below 5% in January 2013 to nearly a quarter of the market by January 2018 (see below in Figure 4.3).

⁶² As demonstrated at paragraphs 22.2 to 22.3 and Annex 3 of the Issues Paper Response, the proportions of customers that identified any preference for supplier reputation or brand remain low across all demographics.

Figure 4.3

[REDACTED]

- 4.10 In particular, the growth of the SAMS has been increasingly strong over the last 12 months. Between January 2017 and January 2018, the SAMS made net additions of [REDACTED] million customer accounts in electricity and [REDACTED] million customer accounts in gas, an increase of [REDACTED] and [REDACTED] with respect to the net additions achieved in the previous year.⁶³ This accelerating growth is illustrated in Figure 4.4 below, which shows the evolution of net gains of SAMS' electricity and gas customer accounts respectively over time.

Figure 4.4

[REDACTED]

- 4.11 The accelerating growth of the SAMS also appears to have had an increasing impact on the Parties, with both Parties experiencing significantly higher net customer losses in 2017 than 2016. For example, Cornwall data shows that the SSE had net losses of [REDACTED] customer accounts for electricity and [REDACTED] for gas in 2017, compared to net losses of [REDACTED] customer accounts for electricity and [REDACTED] for gas during 2016.⁶⁴ Similarly, Npower saw net losses of [REDACTED] and [REDACTED] customer accounts in electricity and gas respectively in 2017, as compared to net losses of [REDACTED] and [REDACTED] customer accounts for electricity and gas in 2016.⁶⁵
- 4.12 This growth in competitive pressure from the SAMS has been recognised by the market, including Ofgem. By way of example, in February 2018, Dermot Nolan, CEO of Ofgem, remarked that “[t]he largest suppliers are under pressure as more consumers switch away to small and medium sized suppliers.”⁶⁶
- 4.13 Once all relevant data is taken into account, the CMA's suggestion that some customers do not consider SAMS alternatives to the larger suppliers cannot be sustained.

Increase in customer engagement and switching

- 4.14 The Phase 1 Decision based its conclusions of the existence, and behaviour, of 'disengaged' customers on the findings in the EMI (see, for example, paragraph 90 and

⁶³ Cornwall Energy, January 2018.

⁶⁴ Cornwall Energy, January 2018. Further illustrating this trend, in the financial year ended 31 March 2018, SSE reported losses of 430,000 customers in its preliminary financial results (25 May 2018), available at: <http://sse.com/media/518726/SSE-FY1718-Prelim.pdf>.

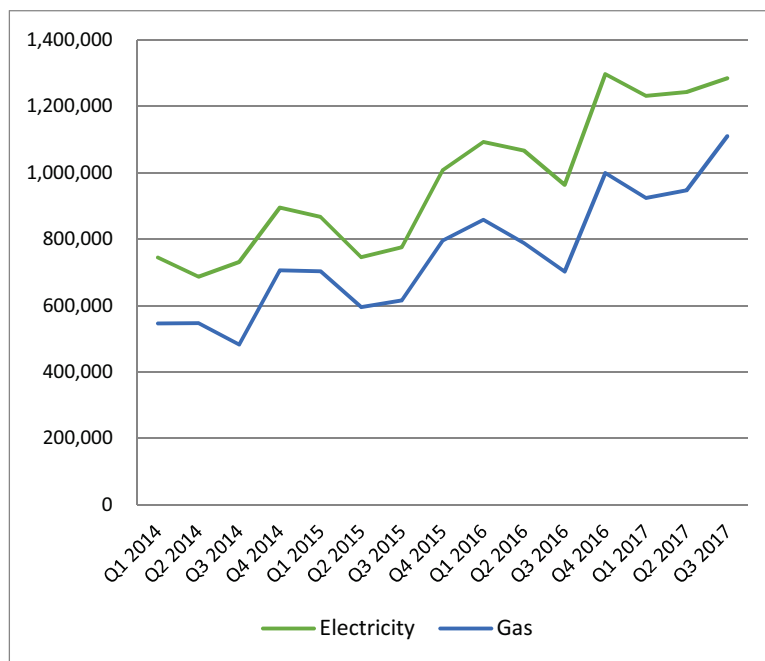
⁶⁵ Cornwall Energy, January 2018.

⁶⁶ <https://www.ofgem.gov.uk/publications-and-updates/record-number-customers-small-and-medium-sized-suppliers>

241 of the Phase 1 Decision). This analysis fails to recognise that the dynamics of the retail energy supply sector and, in particular, the level of customer engagement in Great Britain have changed significantly since the EMI.

- 4.15 As can be seen in Figure 4.5, the rate of external switching by domestic customers in Great Britain is increasing significantly over time.

Figure 4.5
External switching by domestic customers in Great Britain



Source: Department of Business, Energy and Industrial Strategy Quarterly Domestic Energy Switching Statistics

- 4.16 Ofgem recognised this trend in switching in its 2017 Consumer Engagement Survey, where it noted that “last year, 5.1 million electricity consumers and 4.1 million gas consumers in total switched supplier, the highest number for almost a decade.”⁶⁷
- 4.17 That 2017 survey also demonstrates the growth in engagement, with 77% of consumers satisfied with their suppliers (22% of which were very satisfied), representing an increase from 72% in 2014; while 41% engaged with the market (either through switching supplier, switching tariff or comparing supplier/tariff) in 2017 (up from 34% in 2014).
- 4.18 Given this more recent evidence on engagement, it is clear that the CMA cannot assume that levels of engagement are low on the basis of the EMI findings. This is particularly the case since a number of specific measures have been taken to address the very same engagement issue (including the EMI remedies), which have started to take effect in the market. The most recent evidence highlights the success of these

⁶⁷ Ofgem Customer Engagement Survey 2017.

measures (as explained in more detail below), the effect of which must be taken into account in the CMA's assessment. In addition to the EMI remedies, Ofgem policy initiatives and media attention are all further increasing customer engagement.

Conclusion

- 4.19 Relying on the EMI data while ignoring more recent data is clearly unjustifiable. Had the CMA considered the most recent evidence and current market conditions it would inevitably have reached different conclusions on the competitive constraint imposed by the SAMS and customer engagement.

Failure to take account of the significant and continuing market impact of the regulatory remedies imposed by the CMA and Ofgem following the EMI

- 4.20 There have been a range of regulatory remedies stemming from the EMI and other Ofgem initiatives implemented in relation to the domestic retail energy market recently and more are being introduced in the near future, which are summarised below. Since a number of these remedies go directly to increasing customer engagement, the CMA must take them into account when considering the Transaction.

Summary of regulatory remedies

- 4.21 Having identified certain market-wide competitive concerns in the EMI, the CMA imposed a number of regulatory remedies to address these issues, as set out in Table 4.1 below, which also provides an indication of their current status.

Table 4.1
Implementation status of EMI regulatory remedies targeted at the domestic retail energy market

| Description of Remedy | Status |
|---|---|
| Government to revise the Midata programme to ensure domestic customers can access their data electronically in order to conduct an accurate cross-market comparison. | <p>In progress</p> <p>BEIS published a call for evidence which closed in February 2017. The government response to this call for evidence will be published in Spring 2018.</p> <p>BEIS undertook an impact assessment on the steps required for suppliers to extend third party access to the Midata programme at the end of 2016 / beginning of 2017. BEIS are expected to release a formal consultation on their next steps in Summer 2018.</p> |
| <p>Tests to improve customer engagement: domestic and microbusiness.</p> <p>The CMA recommended trialling (i) a market cheapest tariff message; (ii) changes to the messaging domestic customers receive on bills once they move to a standard variable tariff; and</p> | <p>Trials are ongoing</p> <p>Ofgem is leading the implementation of these trials. A number of suppliers voluntarily participated in advance of licence conditions being introduced</p> |

| Description of Remedy | Status |
|---|--|
| (iii) changes to the names of default tariffs e.g. emergency tariff. | requiring suppliers' participation. |
| Ofgem to develop and utilise a database with details from suppliers of their domestic and microbusiness customers who have been on a standard variable or default tariff (a tariff that they have not actively chosen) for three or more years to enable rival suppliers to prompt customers to engage. | In progress Ofgem is progressing this following an Order from the CMA in December 2016. Ofgem has been conducting trials alongside larger suppliers (including Npower and EDF) and the Ofgem project is currently preparing for implementation, with Ofgem notifying suppliers to be ready to transfer customer data by September 2018 for implementation. |
| Price comparison websites to be granted access to the Electricity Central Online Enquiry Service (ECOES) and the gas Data Enquiry Service (DES) databases on gas and electricity customers to reduce errors in switching process. | Implemented CMA Order issued in December 2016 and Order now in force. First compliance statement released in March 2017 and expected annually. |
| Requirements on suppliers to encourage switching for those on restricted meters and Citizens Advice to provide information and support to customers on restricted meters. | Implemented CMA Order issued in December 2016 and is now in force. The first compliance statement was required in September 2017 (and annually thereafter). |
| Capping the price for all customers on prepayment meters. | Implemented CMA Order on suppliers issued in December 2016 to cap the price for all customers on prepayment meters. This cap applies from April 2017 to December 2020. Ofgem to ensure compliance and review the level of the cap every 6 months. |
| Allow suppliers to group prepayment meter tariffs in each region under one tariff code to enable more tariffs to be available. | Implemented / complete |
| Ofgem to take responsibility for efficient allocation of gas tariff pages (also referred to as 'slots') in order to free up gas tariff codes for use by smaller suppliers and to improve competition in the prepayment market. | Implemented / complete |
| Changes to Debt Assignment Protocol to enable customers with a higher level of debt of up to £500 to switch suppliers and improved clarity of process. | Implemented / complete |
| Ofgem to remove the simpler tariff rules from suppliers' licences (the ban on complex tariffs, the 4 tariff cap, restrictions on certain discounts and reward points, those on bundled products and those on tariffs exclusively for new customers). The CMA proposes these licence conditions | Implemented / complete |

| Description of Remedy | Status |
|--|---|
| should be replaced by a standard of conduct licence condition that would require suppliers to design tariffs that are easily comparable. | |
| Removing requirement on price comparison sites to provide a whole of market comparison. | In progress Ofgem opened a consultation process on 2 May 2018. The deadline for response of this is 30 May 2018. |
| Implement half-hourly electricity settlement. | In progress Ofgem published a consultation in 2016. Ofgem launched a Significant Code Review (SCR) in 2017 to take the work forward and intend to reach a decision on the approach to implementing market wide half-hourly settlement by the second half of 2019. New powers proposed in the Smart Meters Bill would provide Ofgem with a more efficient way of delivering these reforms. |
| Ofgem to: (i) publish annually a state of the market report (the 'State of the Market Report') (ii) create a new unit to publish annually the State of the Market Report; (iii) modify the licence conditions of the Six Large Energy Firms' generation and supply licences by introducing requirements around greater transparency for financial reporting; and (iv) develop a price monitoring regime. | Implemented Ofgem launched this new unit and Office of the Chief Economist in 2016. Ofgem published their first report in October 2017 and will publish annually in the future. |

- 4.22 A number of the CMA's EMI remedies were designed specifically to increase engagement in the market by SVT customers. Since the Final Report in June 2016, the CMA has implemented many of the remedies designed to address greater engagement by SVT customers, with the remainder expected to come into force in the next year. Indeed, the CMA expressly recognised in the Phase 1 Decision that *"the number of customers who are engaged and switching is increasing, with further remedies (including the database remedy) set to continue this trend."*⁶⁸
- 4.23 Other important remedies will further drive customer engagement and are already showing strong indications of likely success. The CMA has recently noted that certain trials had *"increased switching rates in some cases by a factor of four"*, a result described as representing a *"huge transformational effect"*.⁶⁹

⁶⁸ Phase 1 Decision, paragraph 128.

⁶⁹ Business, Energy and Industrial Strategy Committee, Oral evidence: Pre-legislative scrutiny of the draft Domestic Gas and Electricity (Tariff Cap) Bill, HC 517, 12 December 2017, at Q57. Available at https://www.eprg.group.cam.ac.uk/wp-content/uploads/2018/01/S.-Littlechild_BEIS-oral-evidence-Dec-2017.pdf.

- 4.24 For instance, Ofgem has conducted trials of its Cheaper Market Offers Letter (“**CMOL**”) initiative. The “*results showed that the CMOL increased switching rates,*” with the supplier-branded letter having the greatest effect on switching within a 30 day period. Against a baseline of 1% switching in the control group, the supplier-branded letter saw 3.4% switch, compared to 2.4% who received the Ofgem branded letter,⁷⁰ an increase of 2.4% in switching equating to more than 1,000 additional customers switching within 30 days out of the sample of 45,938 who received a supplier-branded letter. This suggests that – if rolled out to all SVT customers – this measure could lead to approximately 300,000 additional customers switching within 30 days of receiving the letter.⁷¹
- 4.25 Following the trials, Ofgem has taken a number of steps to improve customer engagement, which are underpinned by Ofgem’s research. These steps include revamping suppliers’ licence requirements in relation to customer communication to move towards a more principles-based approach,⁷² and issuing a derogation in relation to “end of fixed term” notices.⁷³
- 4.26 Similarly, initial tests of the customer database remedy have been promising. Between November 2016 and April 2017, Ofgem conducted a trial of 2,400 SVT customers who had not switched supplier for at least three years. While 6.75% of customers who were sent no correspondence initiated a switch, Ofgem noted a switching rate of 13.38% for customers who were sent up to six marketing letters from other suppliers and a switching rate of 12.13% for customers who received a Best Offer Letter (“**BOL**”).⁷⁴ This suggests that – if rolled out to all SVT customers – this remedy could lead to approximately 870,000 (or 714,000 if the BOL approach were adopted) SVT customers initiating switches, clearly increasing engagement significantly.⁷⁵ However, Ofgem

⁷⁰ Ofgem, Cheaper Market Offers Trial: Research Results

⁷¹ Based on the number of SVT customers of the ten largest suppliers, as at Ofgem’s “Number of non-prepayment domestic customer accounts by supplier: Standard variable, fixed and other tariffs (GB)” available at <https://www.ofgem.gov.uk/data-portal/number-non-prepayment-domestic-customer-accounts-supplier-standard-variable-fixed-and-other-tariffs-gb>. This gives 13,229,553 SVT customers, of which an additional 2.4% would equate to c. 317,509.

⁷² <https://www.ofgem.gov.uk/publications-and-updates/domestic-supplier-customer-communications-rulebook-reforms>.

⁷³ On 14 December 2017, Ofgem issued a market-wide derogation from several elements of standard licence condition 22C, which relates to the Statement of Renewal Terms. The objective of the derogation is to “*promote initiatives that improve customer engagement and the effectiveness of competition in the domestic retail market to achieve better outcomes for energy customers*” (see page 1), available at: https://www.ofgem.gov.uk/system/files/docs/2017/12/sort_market_wide_derogation_letter_141217_final_clean.pdf.

⁷⁴ Ofgem, Small Scale Database Trial Research Results, available at: https://www.ofgem.gov.uk/system/files/docs/2017/11/small_scale_database_trial_paper_pdf.pdf.

⁷⁵ Based on the number of SVT customers of the 10 largest suppliers, as at Ofgem’s “Number of non-prepayment domestic customer accounts by supplier: Standard variable, fixed and other tariffs (GB)” available at <https://www.ofgem.gov.uk/data-portal/number-non-prepayment-domestic-customer-accounts-supplier-standard-variable-fixed-and-other-tariffs-gb>. This gives 13,229,553 SVT customers, of which an additional 6.6% would equate to circa 873,150 and an additional 5.4% would equate to circa 714,396.

found that a digital service would better meet consumer needs and is currently rolling out a database and service to help customers switch from autumn 2018.⁷⁶

- 4.27 As the CMA itself has stated: *“Our remedies package will revitalise the energy market, intensify competition between energy companies to bear down on costs, ensuring customers can make informed decisions about the range of options open to them and encouraging the development of smarter regulations that work in consumers’ interests.”*⁷⁷
- 4.28 The Chair of the EMI Panel has also publicly noted that *“it is pleasing that one year after the publication of our final report, a number of the remedies are in place and delivering benefits to customers”*.⁷⁸
- 4.29 In its evidence to the BEIS Select Committee on 12 December 2017, the CMA cited increased consumer engagement as a key market trend: *“If you look over the years, there has been a gradual increase in consumer engagement. Switching has gone up and down a bit over the years but it has generally increased.”*⁷⁹
- 4.30 In addition to the EMI remedies detailed above, Ofgem has introduced a number of its own reforms, including a single Central Switching Service, enabling customers to switch energy suppliers reliably and quickly (i.e. by the end of the next working day).⁸⁰ Ofgem has also repealed various non-discrimination prohibitions.⁸¹

These regulatory remedies must be taken into account in the counterfactual

- 4.31 The CMA’s guidance notes that: *“The description of the counterfactual is affected by the extent to which events or circumstances and their consequences are foreseeable, enabling the Authorities to predict with some confidence.”*⁸²
- 4.32 Since a number of these remedies are already implemented, they must be considered sufficiently foreseeable to be included in the counterfactual.

⁷⁶ <https://www.ofgem.gov.uk/consumers/household-gas-and-electricity-guide/how-switch-energy-supplier-and-shop-better-deal/ofgem-disengaged-customer-database>.

⁷⁷ CMA, *Modernising the Energy Market* (June 2016), paragraph 47.

⁷⁸ Roger Witcomb: The energy investigation one year on, available at: <https://www.gov.uk/government/speeches/roger-witcomb-the-energy-investigation-one-year-on>

⁷⁹ Business, Energy and Industrial Strategy Committee, Oral evidence: Pre-legislative scrutiny of the draft Domestic Gas and Electricity (Tariff Cap) Bill, HC 517, 12 December 2017, at Q55. Available at https://www.eprg.group.cam.ac.uk/wp-content/uploads/2018/01/S.-Littlechild_BEIS-oral-evidence-Dec-2017.pdf.

⁸⁰ Ofgem’s programme to reform switching in the retail supply market and introduce a Centralised Registration Service is currently about to start the Regulatory Enactment phase with implementation currently scheduled for end of 2020. These reforms will substantially reduce the time for customers to switch.

⁸¹ Phase 1 Decision, paragraph 40.

⁸² CC2/OFT1254, *Merger assessment guidelines*, paragraph 4.3.2.

- 4.33 The Phase 1 Decision suggests that *“to the extent that the EMI remedies and other regulatory changes have been implemented, and their effect is reflected in the recent data that the CMA has used as part of its assessment, they will be included in the prevailing conditions of competition.”*⁸³
- 4.34 Such an approach fails to recognise the fact that, as set out at 4.2 *et seq* above, the Phase 1 Decision relies on old, and out-of-date, data, which will not reflect the impact the remedies have had. The CMA must, therefore, assess data and evidence available to it in light of the EMI remedies in order to reflect current market conditions.
- 4.35 In any case, only taking into account the EMI remedies and other regulatory measures that have been implemented – and ignoring those that will imminently come into force – is evidently not the correct approach. Merger control is forward looking and these additional measures are sufficiently foreseeable to meet the CMA’s test.
- 4.36 As the Parties noted in the Issues Paper Response, the CMA must take account of the effects of these EMI regulatory remedies, since:
- (i) the CMA was legally obliged to implement remedies which would be effective following the EMI (as set out above, the majority of the remedies have already been implemented), so the CMA must assume that the remedies are effective and/or will be effective in the near future (or at the very least in the timespan considered by the CMA in its assessment of the Transaction);
 - (ii) discounting the effect of the remedies runs counter to the CMA’s publicly stated position that the remedies will have – and are already having – a significant and positive impact on the domestic retail energy market and consumers;⁸⁴ and
 - (iii) the evidence available on the impact of the CMA’s EMI remedies to date demonstrates that they are already having an effect; for example, early trials of the customer database show that it increases switching levels by 50%.⁸⁵
- 4.37 Despite these arguments, the Phase 1 Decision failed to take proper account of the EMI remedies or the Ofgem regulatory initiatives in the counterfactual or even in the competitive assessment (despite stating that it would do the latter in relation to the EMI remedies).⁸⁶
- 4.38 Failure to give due consideration to this important factual backdrop has led to a material error in assessment, since these remedies and initiatives are clearly relevant to the

⁸³ Phase 1 Decision, paragraph 46.

⁸⁴ See paragraphs 4.23 and 4.27 above.

⁸⁵ Ofgem, Small Scale Database trial (2016/2017), 1 November 2017, available at https://www.ofgem.gov.uk/system/files/docs/2017/11/small_scale_database_trial_paper_pdf.pdf.

⁸⁶ Phase 1 Decision, paragraph 46.

theory of harm upon which the Phase 2 reference was based; these remedies were specifically designed to increase customer engagement in order to drive competition.⁸⁷

The CMA must take into account the SVT price cap, which is now imminent and will have a significant impact on SVT pricing

- 4.39 The Phase 1 Decision did not take into account the forthcoming SVT price cap legislation in its assessment of the counterfactual in Phase 1 on the basis that there was “*considerable uncertainty*” about the price cap.⁸⁸
- 4.40 While there may have previously been some uncertainty about the price cap during the start of Phase 1, the test for including the cap in the counterfactual, as set out at paragraph 4.31 is clearly met now, since:
- (i) the price cap is progressing through the legislative process and is expected to be introduced imminently; and
 - (ii) it is reasonably foreseeable that the price cap will have a significant impact on SVT price setting and will therefore affect the competitive analysis.

The SVT price cap will be introduced imminently

- 4.41 On 26 February 2018, the Government introduced proposals for legislation to Parliament to introduce a tariff cap for customers on SVTs. These proposals have taken the form of the Domestic Gas and Electricity (Tariff Cap) Bill 2017-19 (the “**Bill**”), which successfully completed its passage through the House of Commons on 30 April 2018 with cross-party support. The Second Reading of the Bill in the House of Lords took place on 22 May 2018, during which the House of Lords expressed a firm preference for the Bill to be given Royal Assent before Summer 2018.⁸⁹
- 4.42 Claire Perry MP, Minister for Energy and Clean Growth, noted that it is “*refreshing*” that all parties have committed to getting the Bill through the House of Lords effectively and that the aim is to be in “*good shape by the summer recess*”.⁹⁰ Similarly, Labour MP Dr

⁸⁷ See paragraphs 15.75 of the Merger Notice. In particular, the EMI remedies include, *inter alia*: (i) establishing an Ofgem-led programme to implement measures to provide domestic customers with additional billing, supplier and tariff information, with the aim of promoting engagement in the domestic retail energy markets; and (ii) the creation of a database of customers who have been on an SVT for more than three years, which will allow rival suppliers to target their marketing on those customers.

⁸⁸ Phase 1 Decision, paragraph 47.

⁸⁹ The House of Lords completed their First Reading on 1 May 2018. A transcript of the Second Reading is available at: [https://hansard.parliament.uk/lords/2018-05-22/debates/18F0B9B5-F84B-45F5-9D3A-6F1E062F3653/DomesticGasAndElectricity\(TariffCap\)Bill](https://hansard.parliament.uk/lords/2018-05-22/debates/18F0B9B5-F84B-45F5-9D3A-6F1E062F3653/DomesticGasAndElectricity(TariffCap)Bill). The Bill will enter the House of Lords Committee stage on 12 June 2018.

⁹⁰ See the Hansard of the Committee Debates of the Second Sitting of the House of Commons on 13 March 2018, available at: https://publications.parliament.uk/pa/cm201719/cmpublic/DomesticGas/PBC168_Combined_1-3_15_03_2018.pdf. Various Conservative MPs have also issued statements in support of the Bill, noting that it is the “*expectation that it will become law by this summer*”: see press releases of Paul Masterton MP (available at: <https://www.paulmasterton.org.uk/news/east-renfrewshire-mp-welcomes-commons-vote-energy-price-cap>) and Henry

Alan Whitehead has said that: *“The Committee is united on our endeavour this afternoon. We want to finish our deliberations, get the Bill passed as speedily as possible, and have it on the statute book by the summer—hopefully the early summer—so that Ofgem can execute it.”*⁹¹

- 4.43 The Bill itself requires Ofgem to introduce the cap “as soon as practicable” after coming into force.⁹² Ofgem is clearly working on the assumption that the legislation will be coming into force in the summer of 2018: it aims to take a decision on the level of the cap by autumn 2018, with the cap coming into effect before the end of 2018.⁹³ Ofgem has already published five working papers setting out its proposals for the methodology for setting the level of the cap⁹⁴ and the Parties – along with other stakeholders – are engaging with Ofgem in its information-gathering exercise for the price cap assessment.
- 4.44 As noted in its consultation paper published on 25 May 2018, the primary objective of the cap will be to protect current and future customers who pay SVTs or default tariffs. In this respect, Ofgem “expect[s] that people paying the highest prices will make significant savings” as a result of the price cap.⁹⁵
- 4.45 The initial period of the cap will run until 2020, at which point Ofgem must publish a recommendation on whether the cap should be extended. To the extent that Ofgem has concerns regarding the position of SVT and default customers at that time, it is able to extend the duration of the price cap annually until the end of 2023, over five years from now. As a result, the various Ofgem initiatives and the EMI remedies must be expected to take effect and address any historic problems with customer engagement before Ofgem elects to remove the price cap.

The effects of the SVT price cap are reasonably foreseeable

- 4.46 As explained at paragraph 5.89 below, the aim of the SVT price cap is “protecting customers until the conditions for effective competition... are in place”.⁹⁶ To the extent

Smith MP (available at <https://www.henrysmith.info/news/henry-smith-mp-welcomes-commons-vote-energy-price-cap>).

⁹¹ *Ibid.*

⁹² See section 1 of the Bill as introduced in the House of Lords, available at: https://publications.parliament.uk/pa/bills/lbill/2017-2019/0100/lbill_2017-20190100_en_1.htm.

⁹³ Ofgem, Update on our plans for retail energy price caps, 6 March 2018 (available at https://www.ofgem.gov.uk/system/files/docs/2018/03/update_on_our_plans_for_retail_energy_price_caps.pdf). See also Ofgem, Default Tariff Cap: Policy Consultation Overview document, 25 May 2018 (available at: https://www.ofgem.gov.uk/system/files/docs/2018/05/default_tariff_cap_-_policy_consultation_-_overview.pdf).

⁹⁴ The various working papers set out Ofgem’s thinking in relation to the use of a market basket approach, the level of headroom that should be worked into the cap to enable competition to co-exist, suppliers’ environmental and social obligations and the use of an updated competitive reference price for estimating the efficient level of costs to set the initial level of the cap.

⁹⁵ Ofgem, Default Tariff Cap: Policy Consultation Overview document, 25 May 2018, at Executive Summary. Available at: https://www.ofgem.gov.uk/system/files/docs/2018/05/default_tariff_cap_-_policy_consultation_-_overview.pdf.

⁹⁶ Price Cap Bill, Foreword by Rt Hon Greg Clark MP, Secretary of State for Business, Energy and Industrial Strategy.

that the CMA has concerns in relation to the effect of the merger on SVT customers (which are unfounded for the reasons discussed above), the price cap must be considered to be an effective solution, as these customers will be protected by the cap.

- 4.47 Furthermore, all evidence indicates that the price cap will result in suppliers' SVT pricing converging towards the level of the cap. In that event, the Parties' SVT pricing will not materially be affected by comparisons with those of other larger suppliers. The removal of a "comparator" will, in those circumstances, be irrelevant to the level of SVTs in the future.
- 4.48 As noted at Section 5 below, the Parties fundamentally disagree with the unorthodox theory of harm on SVT pricing set out in the Phase 1 Decision. But in any event, the CMA must consider how the theoretical concept suggested by the Phase 1 Decision would operate in the presence of the Government's intended SVT price cap, given the clear evidence that it will be in place imminently. It is clear that the effect of the price cap can be expected to negate the theoretical concerns for the reasons set out at paragraph 5.87 *et seq* below.
- 4.49 Given the imminent introduction of the price cap, the effects are clearly reasonably foreseeable in the short term. The impact of the price cap must therefore be taken into account in the counterfactual.

Conclusion

- 4.50 The domestic retail energy sector has developed significantly, even within the two years since the EMI. At Phase 2 the CMA must ensure that it fully takes into account:
- (i) the most recent data and information available to it; and
 - (ii) the market factors that are having, and will continue to have, a significant effect on the level and nature of competition in this sector.
- 4.51 Once the CMA takes these factors properly into account, the Parties believe that the CMA will rapidly conclude that no SLC arises from the Merger.

5. The CMA's theory of harm in relation to a loss of rivalry in setting SVT prices is untenable

Introduction

- 5.1 The CMA has made a Phase 2 reference on the basis of a single, highly unorthodox theory of harm.⁹⁷
- 5.2 The Phase 1 Decision states that the Transaction "*raises competition concerns as a result of the loss of rivalry in the process of setting SVT prices for the supply of gas and electricity to domestic customers in GB*".⁹⁸ Although the CMA has failed to articulate

⁹⁷ Outlined in paragraphs 100 to 140 of the Phase 1 Decision.

⁹⁸ Phase 1 Decision, paragraph 138.

this theory of harm clearly in the Supplementary Issues Statement and the Phase 1 Decision (in particular in terms of merger-specific effects), the Parties understand that the CMA's suggestion is that the Transaction could result in a loss of competition, not as the result of the closeness of competition between the Parties for new customers, but as the result of the loss of one "comparator" for the SVT pricing decisions of the Parties and all larger suppliers, which may affect prices to customers that are not currently engaged.⁹⁹

- 5.3 The CMA's suggestion is clearly not a standard theory of harm and is not consistent with its Merger Assessment Guidelines on horizontal unilateral effects (see further paragraph 5.40 below). As described in Section 3 above, the CMA has rejected all standard theories of harm at Phase 1, including any realistic prospects of an SLC (i) in relation to a loss of rivalry when competing for customers;¹⁰⁰ and (ii) in relation to coordinated effects.¹⁰¹ Put simply, there is no rivalry between the Parties that could be lost as a result of the Transaction. This reflects both the large number of credible suppliers in the market and the strength of their competitive offerings.
- 5.4 The Parties are disappointed that the CMA has failed to take into account or engage with the evidence submitted to the CMA by the Parties in Phase 1, which clearly demonstrates that the CMA's hypothesis underlying this theory of harm is incorrect. If this evidence had been taken into account, it would have been clear to the CMA that this theory of harm is not credible.
- 5.5 In the rest of this Section 5, the Parties provide further evidence to demonstrate that the CMA's highly unorthodox theory of harm concerning a loss of rivalry in setting SVT prices is untenable. There is no evidence that the Transaction will afford MergeCo (or any other supplier) the ability to increase its SVT prices to a higher level than they would be able to absent the Transaction. It is clear that, post-Transaction, market dynamics and competitive rivalry will continue to discipline the commercial behaviour of MergeCo in setting its SVT prices. In particular:
- (i) there is no rivalry on SVT prices currently and therefore no rivalry can be lost as a result of the merger;
 - (ii) costs are a primary driver of SVT price changes;
 - (iii) there is no scope for any merger-specific effect on the larger suppliers' SVT prices, given that:
 - (a) the Parties are not important comparators for each other; in particular, the CMA accepts that there is no evidence that the Parties' SVT price-setting behaviour is a particular constraint on each other;

⁹⁹ Phase 1 Decision, paragraph 137.

¹⁰⁰ Phase 1 Decision, paragraphs 172 to 174.

¹⁰¹ Phase 1 Decision, paragraph 218.

- (b) there is no evidence that the Transaction would have any effect on the SVT pricing decisions of the other suppliers, and there can therefore be no “market-wide” effect of the Transaction;
 - (c) media and other public attention is not focused on a comparison of the larger suppliers’ SVT prices, as any SVT increase will face public scrutiny irrespective of its positioning relative to other suppliers;
 - (d) MergeCo’s strategy, cost efficiency improvements and the synergies resulting from the Transaction must be expected to have significant downward pressure on SVT prices; and
- (iv) the imminent introduction of the SVT price cap removes any alleged mechanism for a loss of competition.

There is no specific rivalry on SVT prices currently and therefore no rivalry that can be lost as a result of the Transaction

- 5.6 The loss of a single comparator that provides information for the setting of one of the Parties’ prices (the SVT price) cannot be characterised as a “loss of rivalry” between the Parties. There is no specific rivalry on SVT prices as these tariffs are not used to win customers from other suppliers.
- 5.7 [REDACTED].¹⁰² [REDACTED]
- 5.8 [REDACTED].¹⁰³
- 5.9 By way of example, the spike in SVT customers switching away from both Npower and SSE (as can be seen in Figure 5.1 and Figure 5.2 below), immediately follows their respective 2017 SVT price increases. Indeed, SVT price rises are infrequent because of their significant impact on customer switching. As the Phase 1 Decision acknowledges, when customers switch they do not switch to a competitor’s SVT, they switch to an FTC.¹⁰⁴

Figure 5.1

[REDACTED]¹⁰⁵

Figure 5.2

[REDACTED]¹⁰⁶

¹⁰² Provided to the CMA in email correspondence dated 2 February 2018.

¹⁰³ Provided to the CMA in email correspondence dated 2 February 2018.

¹⁰⁴ Phase 1 Decision, paragraph 128.

¹⁰⁵ The vertical line in the chart shows the month when the SVT price increase became effective.

- 5.10 Any SVT price increase will therefore trigger a material switching response, and this is becoming even more relevant given the ever increasing levels of customer engagement, as set out at paragraph 4.14 *et seq* above.
- 5.11 As the Phase 1 Decision recognises, "*once a customer decides to switch, the majority of these customers switch to a FTC product. This includes customers on SVTs, and those that have been on an SVT for a significant amount of time.*"¹⁰⁷ When selecting their energy supplier, customers (including SVT customers) choose from the range of available FTCs offered by both larger suppliers and SAMS. Customers very rarely switch onto an SVT when deciding to switch. As such, the vast majority of customers do not compare SVT prices in the market when switching.
- 5.12 As a result, the proportion of SVT customers switching to another SVT is minimal. Once a customer is engaged and is determining whether to switch to another tariff, it is clear from the Parties' gains data (see Figure 5.3 and Figure 5.4 below) that the vast majority of those customers are considering FTCs from the full range of suppliers in the market, regardless of which tariff they are on currently. It is therefore FTCs of all suppliers in the market that are driving competition for SVT customers, as they do for customers who are already on an FTC tariff.

Figure 5.3

[X]

Figure 5.4

[X]¹⁰⁸

- 5.13 Given that the vast majority of customers switch to an FTC tariff, it is unsurprising that there is strong evidence that customer switching, including switching from SVTs, is driven by the prices of FTCs. Low FTC prices increase customers' financial gains from switching making them more likely to compare tariffs and suppliers and more likely to complete a switch after making a comparison. The key role of FTCs in driving customer switching from SVTs was recently acknowledged by Ofgem¹⁰⁹ who cite multiple sources of evidence including:¹¹⁰

¹⁰⁶ The vertical line in the chart shows the month when the SVT price increase became effective.

¹⁰⁷ Phase 1 Decision, paragraph 128.

¹⁰⁸ In order to identify those customers making an active choice, Frontier has stripped out those SSE customers that switched by default (i.e. via Partnership or other property industry channel).

¹⁰⁹ "A key driver of switching in the market is the price differential between tariffs." Ofgem, Default Tariff Cap: Policy Consultation, Appendix 14 – Initial view on impact assessment, page 29.

¹¹⁰ Ofgem, Default Tariff Cap: Policy Consultation, Appendix 11 - Headroom, pages 15-17.

- (i) data from the CMOL initiative, which show that SVT customers are more likely to switch for higher levels of saving;
- (ii) data provided by a PCW and reviewed by Ofgem show a strong positive relationship between customer switching and the estimated savings available to them; and
- (iii) stated preference surveys undertaken by Ofgem and the CMA have persistently shown that most consumers switch primarily to save money, and that having larger savings available from switching is associated with more customers being willing to switch.

5.14 [REDACTED].¹¹¹

5.15 As can be seen from the above, the SVTs of other suppliers have no relevance in the switching decisions of customers: customers readily switch in response to an SVT price increase and, when they do, they switch to FTCs either internally or, if externally, overwhelmingly to one of the SAMS. There is therefore no basis for the CMA to conclude that there is any “rivalry” between suppliers in relation to SVT pricing.

Costs are a primary driver of SVT price changes

5.16 The setting of SVT prices is an important part of the Parties’ budgetary process. It requires a detailed evaluation of the trends of a number of important cost drivers: energy and non-energy costs (use of system, government schemes, etc.) and indirect costs (sales and marketing, depreciation, etc.). To ensure that costs are accurately reflected in their SVT prices, the Parties therefore continuously monitor their costs (e.g. wholesale, network, operating etc.).¹¹²

5.17 Where that monitoring reveals that costs have changed, suppliers must make a decision about the effect those cost movements are expected to have on the budget and plans and whether or not it is feasible to reflect the totality of cost changes in an SVT price change.

5.18 To put this decision-making process in context, since 2014 SSE has increased its SVT prices once and decreased them three times, while Npower has increased its SVT prices twice and decreased them three times.¹¹³

5.19 The Parties therefore agree with the CMA’s conclusion at paragraph 116 of the Phase 1 Decision that, when setting SVT prices, *“costs are an important consideration, influencing both the timing and level of price changes”*.

¹¹¹ See for example [REDACTED]

¹¹² See paragraph 3.3 of the Supplementary Issues Paper Response for an overview of the different costs that affect SVT prices.

¹¹³ For both Npower and SSE, two of the SVT price decreases only applied to gas and for SSE, its 2017 SVT increase only applied to electricity.

5.20 The importance of ensuring that the proposed SVT price increase is cost reflective is clear from Npower's board minutes considering its March 2017 price increase:

(i) [REDACTED]

(ii) [REDACTED]

(iii) [REDACTED]

5.21 SSE's internal documents in respect of its 2017 price increase also show that the increase was cost reflective:

(i) [REDACTED]

(ii) [REDACTED]

SVT price increases will always lead to customer losses, but the Parties seek to take steps to mitigate those losses

5.22 An important consideration in all of the Parties' decisions to increase SVT prices is therefore to try and balance the need to pass on changes in costs (for the reasons set out above) with the impact of any price change on customer retention.

5.23 As set out at paragraphs 5.6 *et seq* above, any SVT price increase will result in a large number of SVT customers switching away and the main reason those customers will decide to switch is a sense that the price they are paying is too high.

5.24 As a result, within the broad range of factors the Parties take into account when assessing a potential SVT price increase, the Parties will seek to ensure that the proposed SVT price is demonstrably cost-reflective.

5.25 In this context, the Parties will consider reference points for cost inflation in the market, such as Ofgem's supplier cost index and, recently, changes to the PPM cap (see the reference to [REDACTED]).

5.26 The Parties will also monitor the publicly available costs of other suppliers in order to determine whether those other suppliers are likely to be facing similar cost pressures. Since the Ofgem requirement to publish consolidated segmental statements ("**CSS**"), which contain more detailed cost information than other financial reporting, only applies to the larger suppliers, the Parties have more information about those suppliers than they do about SAMS.¹¹⁴ Movements in costs for the larger suppliers are, however, seen as a good indicator of cost pressures across the market generally, so these can be used by the Parties to assess the cost pressures of SAMS.¹¹⁵

¹¹⁴ See, for example, paragraph 4.7 of the Supplementary Issues Paper Response.

¹¹⁵ The Parties will still monitor any public statements made by SAMS as well as their Companies House filings in order to feed into their analysis.

- 5.27 Since SVT price changes take a long time to implement, the Parties tend not to wait for other suppliers' price changes to be announced before making their own plans. Any analysis of competitors' costs is therefore based on this publicly available information.

Description of the Parties' SVT pricing decision process

- 5.28 Further detail about how each of the Parties sets their SVT pricing is provided below.

Npower

5.29 [REDACTED]

5.30 [REDACTED]

5.31 [REDACTED]

5.32 [REDACTED]

5.33 [REDACTED]

5.34 [REDACTED].¹¹⁶ [REDACTED]

5.35 [REDACTED]

5.36 [REDACTED]

SSE

5.37 [REDACTED]

5.38 [REDACTED]

5.39 [REDACTED]

(i) [REDACTED].¹¹⁷

(ii) [REDACTED]

(iii) [REDACTED]

(iv) [REDACTED].¹¹⁸ [REDACTED]

¹¹⁶ [REDACTED]

¹¹⁷ Phase 1 Decision, paragraph 116.

¹¹⁸ [REDACTED]

The Transaction will not give rise to any merger effect

- 5.40 The CMA is required to consider whether the Transaction may be expected to result in an SLC.¹¹⁹ The Phase 1 Decision fails to demonstrate any such effect arising from the Transaction. SVT customers do not switch between suppliers' SVTs: they switch onto FTCs (for which there is fierce competition, as recognised in the Phase 1 Decision). There is therefore no prospect of there being any loss of rivalry on SVTs resulting from the Transaction and it is unsurprising that the Phase 1 Decision does not articulate how such loss will result in an SLC. The Phase 1 Decision merely asserts that "*the Parties are important 'comparators' to each other and to the other SLEFs in the process of setting SVT prices*". The Phase 1 Decision then asserts that, as a result, each Party constrains the other's SVT prices and that the "*removal of one such constraint could allow the Merged Entity and the other SLEFs to increase their SVT prices to a higher level than absent the Merger*".¹²⁰
- 5.41 In fact, on a proper assessment of the evidence, there is clearly no merger effect and therefore no concerns that the Transaction will result in an SLC:
- (i) the Merging Parties are not important comparators for each other as regards SVT prices.
 - (ii) there is no "market-wide" effect from the merger.
 - (iii) media attention is not focused on comparisons between the level of suppliers' SVTs. On the contrary, comparisons are made in the media to lower-priced FTC offers that are available in the market.
 - (iv) MergeCo's strategy and cost efficient structure must be expected to result in a significant downward pressure on SVT pricing, so there can be no realistic prospect of it pricing SVTs at Npower's current level.

- 5.42 These points are developed further below.

The Parties are not important comparators for each other

- 5.43 Even if the CMA's highly unorthodox theory of harm concerning the loss of a comparator were theoretically sound – which it is not, as explained above – the Parties are in any case not important comparators for each other.
- 5.44 The CMA asserts at paragraph 137 of the Phase 1 Decision that the "*Parties are important comparators to each other*". However, the CMA has put forward no evidence to suggest that the Parties constrain each other's SVT pricing. In fact, the CMA expressly concludes in the preceding paragraphs that:

¹¹⁹ Sections 33 and 36 of the Enterprise Act 2002. See also CMA Merger Guidelines, paragraph 4.2.1.

¹²⁰ Phase 1 Decision, paragraph 137.

- (i) *“the decision on [SVT] price is not tied directly to the price of any one competitor”;*¹²¹ and
- (ii) it *“has found no evidence to indicate that the Parties’ SVT price-setting behaviour is a particular constraint on each other more than that of the other SLEFs...”*¹²²

5.45 This is not a sufficient basis for the CMA to find a theory of harm – it is necessary for the CMA to demonstrate that there will be a merger effect resulting from the Transaction. More specifically, in assessing horizontal unilateral effects, the CMA must demonstrate that the Merging Parties are important comparators for, or constraints on, one another and that the loss of that comparator or constraint due to the Transaction will result in an SLC.¹²³ The CMA has manifestly failed to demonstrate this point in its analysis.

5.46 The Parties provide further demonstration below, however, that the Parties have not, in fact, represented a constraint on each other’s SVT pricing and there is no reason to expect that they would do so going forward.

5.47 As can be seen in Figure 5.5 below, which was set out in the Supplementary Issues Paper, Npower has been at or near the most expensive SVT since the start of 2015, while SSE has moved from the most expensive (at the start of 2015) to either second or third cheapest since mid-2015.

Figure 5.5

[X]

5.48 The different positions of Npower and SSE in Figure 5.5 reflect the fact that the two Parties have very different approaches to SVT pricing. As set out below, given these different strategies, there is no reason to consider that either Party would be a relevant comparator for the other:

(i) [X]

(ii) [X]

¹²¹ Phase 1 Decision, paragraph 122.

¹²² Phase 1 Decision, paragraph 132.

¹²³ See, for example, the description of unilateral effects at paragraph 5.4.1 of the CMA’s Merger Assessment Guidelines.

5.49 The Parties' internal documents further demonstrate the fact that neither Party considers the other to be a particularly relevant comparator for SVT pricing.¹²⁴ [REDACTED]¹²⁵ [REDACTED].¹²⁶ [REDACTED]

5.50 [REDACTED]

Figure 5.6

[REDACTED]¹²⁷

5.51 In attempting to establish that there is "*constraint between the Parties*", paragraph 123 of the Phase 1 Decision cites [REDACTED] quotations from Npower documents. [REDACTED] are general statements that do not refer to SSE (and therefore cannot demonstrate the constraint of SSE)¹²⁸ and [REDACTED] quotation has been taken out of context, since the CMA has failed to recognise that:

(i) [REDACTED].¹²⁹

(ii) [REDACTED]

(iii) [REDACTED]

(iv) [REDACTED]

5.52 It is therefore clear that Npower monitors and reports on the SVT pricing decisions of a wide range of suppliers, with references to SSE no more frequent than references to a number of other suppliers, including SAMS.

5.53 The Phase 1 Decision rejects the Parties' submissions that SAMS also constrain their SVT pricing, on the basis that the CMA had (incorrectly – see paragraphs 4.46 to 4.48 of the Supplementary Issues Paper Response) [REDACTED],¹³⁰ but had found no evidence "to

¹²⁴ Indeed, at paragraph 118 of the Phase 1 Decision the CMA states that in their internal documents the Parties' monitor both the larger suppliers and SAMS, recognising both that the Parties take into account a broad range of competitors in their SVT pricing decisions and that they do not specifically focus on the other Merging Party. This is also reflected in the internal documents that the CMA quotes in paragraphs 119 to 121 of the Phase 1 Decision.

¹²⁵ [REDACTED]

¹²⁶ [REDACTED]

¹²⁷ [REDACTED]

¹²⁸ These statements refer to the fact that [REDACTED]

¹²⁹ [REDACTED]

¹³⁰ Phase 1 Decision, paragraph 121.

indicate that the SLEFs are constrained in a similar way, or to a similar extent, by the SVT pricing behaviour of the SAMS.”¹³¹

- 5.54 In fact, as set out above, the CMA has not identified any evidence to suggest that the Parties are constrained “*in a similar way, or to a similar extent*” by each other.
- 5.55 The Phase 1 Decision identifies three pricing decisions of SSE that the CMA implies might have demonstrated that it was a particular constraint on the larger suppliers.¹³² Two of those took place during the period for which the CMA has access to the Parties’ internal documents, namely SSE’s price increase in 2017 (paragraph 126(a)) and its extension of its price freeze in November 2016 (paragraph 126(b)).¹³³
- 5.56 In relation to SSE’s price increase in 2017, that announcement was made on 13 March 2017 over a month after Npower had made its SVT price announcement (on 3 February 2017) – it is therefore not clear how the actual level of SSE’s price increase can have had an effect on Npower. This is reflected in Npower’s internal documents, [REDACTED]¹³⁴ [REDACTED]
- 5.57 The treatment of SSE’s 2016 price freeze in Npower’s internal document is discussed at paragraph 5.51 above. The lack of any relevance to Npower’s pricing strategy is reflected in the fact that, although the CMA refers to a quotation from The Guardian that SSE’s 2016 price freeze was “*piling pressure on rivals to follow suit*”,¹³⁵ Npower did not announce any such price freeze.
- 5.58 The other example given in the Phase 1 Decision of an SVT pricing decision by SSE was its price freeze announcement in 2014 (paragraph 126(c)). At the time of this announcement, [REDACTED]:
- (i) [REDACTED]¹³⁶ and
 - (ii) [REDACTED]¹³⁷
- 5.59 In that context, Npower did not make any price freeze announcement and its decisions about SVT pricing were focused on [REDACTED] and were not taken by reference to, or as a result of, the SSE announcement.
- 5.60 Given the above, the CMA has no basis to conclude that SSE and Npower have constrained each other’s SVT pricing decisions to date.

¹³¹ *Ibid.*

¹³² Phase 1 Decision, paragraph 126.

¹³³ The Phase 1 Decision refers to a 2016 price freeze at paragraph 126(b); however, the price freeze was initiated in March 2014 and was merely extended in 2016.

¹³⁴ [REDACTED].

¹³⁵ Phase 1 Decision, paragraph 126(b).

¹³⁶ See, for example, [REDACTED]

¹³⁷ [REDACTED]

- 5.61 Since the CMA has provided no evidence that either Party is intending to, or can be expected to, change its current strategy to be closer to the other, the Transaction also cannot be expected to remove a constraint from either Parties' future SVT pricing.

There is no evidence that the Transaction would have any effect on the behaviour of other larger suppliers and there can therefore be no "market-wide" effect from the Transaction

- 5.62 In addition to concluding that the Parties constrain each other (which, for the reasons set out above, is not the case), the Phase 1 Decision also concludes that *"a reduction of comparative constraints from five other SLEFs to four other SLEFs would reduce competition on SVT prices for all SLEFs"*.¹³⁸

- 5.63 Having failed to demonstrate that the Parties are particular constraints on each other (as set out at paragraph 5.43 *et seq*), the CMA therefore appears to suggest that its theory of harm could be sustained on the basis of the behaviour of other larger suppliers generally and not specifically on the behaviour of MergeCo post-Transaction, i.e. that the Transaction would lead to a "market-wide" effect.

- 5.64 The CMA has not, however, put forward any evidence on the way in which other larger suppliers price their SVTs.

- 5.65 In fact, there can be no concern about the effect of the Transaction on the setting of SVT prices across the market. As discussed in paragraph 0 above, neither of the Parties can be expected to influence the SVT pricing of the other Merging Party, since they follow very different strategies and are, therefore, not of any comparative relevance to each other.

- 5.66 Without the loss of any competitive constraint between the Parties in relation to SVT pricing, there can be no suggestion that the Transaction could affect other suppliers' SVT pricing.

- 5.67 The assertion in the Phase 1 Decision that there could be a "market-wide" effect from the Transaction is therefore completely unsubstantiated and there is no evidence that Npower and SSE are of particular importance to the price-setting behaviour of the other larger suppliers or that the Transaction would have any effect on the way in which those other larger suppliers set their SVT prices.

Media attention is not focused on a comparison of larger suppliers' SVT prices

- 5.68 As the Phase 1 Decision recognises, there is a high level of press coverage of SVT price increases and these can have a reputational impact.¹³⁹

¹³⁸ Phase 1 Decision, paragraph 133.

¹³⁹ Phase 1 Decision, paragraph 124.

- 5.69 The Phase 1 Decision is not, however, correct in asserting that this high level of press coverage “*confirms that the SLEFs are an important comparator on one another with regard to their SVT pricing.*”¹⁴⁰
- 5.70 As part of the Phase 1 inquiry, the Parties made a number of submissions in relation to the way in which the media reports on SVT price increases, as summarised in paragraphs 108(b)-(d) of the Phase 1 Decision.¹⁴¹
- 5.71 The Phase 1 Decision does not, however, address those submissions. Instead, the CMA relied upon a rushed, inadequate and unrepresentative analysis of media coverage prepared by Ofgem, the inadequacies of which were acknowledged but seemingly disregarded by the CMA in the Phase 1 Decision.¹⁴² The Parties have therefore summarised again below the way in which the media reports on any SVT price increases.
- 5.72 Given its audience, it is no surprise that the focus of media reporting of an SVT price increase is on the impact of the increase on consumers. Almost all reports that the Parties considered in its Supplementary Issues Paper Response contained details of the effect of the increase on a customer’s bill (in absolute terms or as a percentage increase) and the majority of such reports also cited the number of customers affected.¹⁴³
- 5.73 As previously highlighted by the Parties, a large proportion of the reports include quotations from other market commentators including Ofgem, PCWs, consumer groups (such as Which?) and politicians, all of which are critical of the SVT price increase.¹⁴⁴
- 5.74 A significant number of the articles reference the potential saving that can be achieved by switching to the cheapest tariffs in the market, i.e. FTCs, and one article specifically names an alternative supplier to whom customers ought to switch (“*[b]ut consumer and price comparison experts said customers could save more than £350 a year by transferring to a cheaper rival. Price comparison website uSwitch.com said it was possible to save up to £369 a year by moving to the small supplier Utility Point, which has a tariff charging £792.*”). Some of the papers also directly advise customers to switch:
- (i) The Sun: “*We’d urge our readers to start shopping around.*”¹⁴⁵

¹⁴⁰ Phase 1 Decision, paragraph 124.

¹⁴¹ The Parties provided packs of national press coverage for the most recent SVT price increases by British Gas and EDF as Annexes 2 and 3 of the Supplementary Issues Paper Response, but these documents are not mentioned in the Phase 1 Decision.

¹⁴² Phase 1 Decision, paragraph 110. Furthermore, footnote 59 of the Phase 1 Decision notes that the period covered by Ofgem’s press coverage did not include any commentary on Scottish Power, however, the CMA still considers a small number of reports on Scottish Power’s SVT price increase at paragraph 112 of the Phase 1 Decision. It is not clear how the CMA assessed whether those reports were representative.

¹⁴³ See Supplementary Issues Paper Response, paragraph 4.16.

¹⁴⁴ The Telegraph reports: “*Energy regulator Ofgem described the increase as “unwelcome”, while consumer groups including Which? joined in urging shoppers to search online for better deals.*”

- (ii) The Daily Star: *"Daily Star says switch to lower bills"*.¹⁴⁶
- (iii) The Daily Star: *"There is a way to stop paying into the coffers of the Big Six though. Just switch supplier."*¹⁴⁷
- (iv) The Independent: *"There is no reason to pour their money into its coffers, as five minutes on a price comparison website would make clear..."*¹⁴⁸

5.75 While these articles may, therefore, compare SVTs to the cheapest FTCs available, there is, by contrast, no focus in these reports on comparing the SVTs of other suppliers or any suggestion that consumers should switch to a competitor's SVT. There are only a limited number of reports that refer to specific other suppliers at all and those references are to report factually on the level of the other supplier's SVT price increase, not to draw a comparison between tariffs.¹⁴⁹

5.76 In most cases, the references to another supplier are in the context of those suppliers that have already announced their SVT price increase. As a result, the first supplier to announce its SVT price increase tends to face:

- (i) a significant amount of media attention immediately following their price announcement; and
- (ii) ongoing attention as they are referred to again in the context of subsequent press announcements.

5.77 This media attention explains why, as set out at paragraphs 5.34 to 5.39(iv) above, the Parties aim to avoid being the first supplier to announce a price increase and can be expected to have the same impact on MergeCo's strategy for timing its SVT price increases.

5.78 Given the lack of any relevance of comparisons between suppliers' SVT prices on media and other public commentary, the Transaction cannot be expected to have any effect on the way in which any SVT price increases are reported.

MergeCo's strategy and level of cost efficiency means that it is implausible that it will price SVTs at a level equivalent to Npower

5.79 The Parties have previously explained that the Transaction is a reaction to a 'sea-change' in the retail energy supply industry, which has resulted in intense competition across Great Britain. Against a backdrop of increasing competition, increasing

¹⁴⁵ See Supplementary Issues Paper Response, Annex 2, page 11.

¹⁴⁶ See Supplementary Issues Paper Response, Annex 2, page 13.

¹⁴⁷ *Ibid.*

¹⁴⁸ See Supplementary Issues Paper Response, Annex 2, page 21.

¹⁴⁹ The Guardian reports *"E.ON announced a stealth rise on energy bills of up to £50 for some customers in March"*.

customer engagement and record levels of switching (see paragraphs 4.2 to 4.19), the Parties have entered into the Transaction to create MergeCo as a new, independent energy supplier that will deliver key customer benefits, including a combination of the best features of each business, a sole focus on the retail market, and reducing the current cost to serve.

- 5.80 The rationale for the creation of MergeCo is to bring about a new breed of competitor, which will be focused on competing in the retail market, in order to increase its customer base, taking advantage of synergies and cost savings to offer existing and new customers a more attractive proposition. Customers, the media and other stakeholders will hold MergeCo to this standard.
- 5.81 A high SVT is not conducive to MergeCo's aims: MergeCo will need to grow its customer base through an effective customer acquisition and retention strategy. As explained at paragraph 5.48(i), the level of Npower's SVT is driven entirely by its current cost base, which is higher than that of the other larger suppliers.¹⁵⁰ Since SSE has a lower cost-to-serve, it is able to ensure that its SVT price remains low.¹⁵¹
- 5.82 MergeCo will be highly cost efficient and will benefit from significant synergies. It therefore cannot be assumed that it would still maintain a high SVT price despite those savings, since this would significantly undermine its strategy.
- 5.83 MergeCo can be expected to reflect the synergies in its SVT pricing, particularly since the CMA has recognised that costs are an important consideration for SVT prices.¹⁵² Accordingly, Ofgem's unsubstantiated assertion that MergeCo will charge the higher of the two tariffs charged by SSE and Npower as set out in paragraph 135 of the Phase 1 Decision has no basis.
- 5.84 This is particularly the case given the fact that it is unavoidable that MergeCo will face significant media and other public attention post-Transaction on a scale much greater than either Party faces now. A substantial amount of media coverage and speculation has already been devoted to the Transaction, including in respect of the CMA's findings at Phase 1,¹⁵³ which has set the scene for continued, detailed media scrutiny once MergeCo is formed.
- 5.85 The CMA must therefore expect that MergeCo will face a significant constraint on its SVT pricing behaviour from the potential for negative media commentary. This constraint will be particularly acute given the intended MergeCo strategy to gain customers.

¹⁵⁰ This can be seen from the CSS for 2017, which show that Npower has the highest total cost per customer/site for gas, and the second highest total cost per customer/site for electricity.

¹⁵¹ Indeed, the CSS for 2017 show that SSE has the second cheapest total cost per customer/site for gas, and the fourth cheapest total cost per customer/site for electricity.

¹⁵² Phase 1 Decision, paragraph 116.

¹⁵³ By way of example, the CMA's press announcement of its phase 1 decision on 26 April 2018 was reported by, *inter alia*, the Daily Mail, the Daily Telegraph, the Express, i, the Express, the Financial Times, the Independent, the Guardian, Sky News, the BBC, the Herald, the Daily Record, the Evening Standard, City AM and the Metro.

- 5.86 Given the above, the Transaction is in fact likely to have a positive benefit for the Parties' SVT customers, particularly Npower's customers, who may experience a decrease in their SVT tariffs as MergeCo begins to take advantage of the synergies arising as a result of the Transaction and starts to look to pass some of these savings onto consumers.

The introduction of the price cap removes any mechanism for a loss of competition

- 5.87 The SVT price cap is expected to be in effect during the Winter of 2018/19 and must, for the reasons set out at paragraph 4.39 *et seq*, be taken into account in the counterfactual. Once introduced, the price cap will undermine the basis of the CMA's theory of harm in relation to SVT pricing.
- 5.88 First, to the extent that the CMA has concerns in relation to the effect of the Transaction, those concerns can only apply to disengaged SVT customers. For the reasons set out above, such concerns are unfounded; however, even if the CMA were to disagree, the SVT price cap must be considered to be an effective solution to any remaining concern, as SVT customers will be protected by the cap until the EMI remedies have fully come into effect.
- 5.89 The Government's stated aim in introducing the price cap bill is "*protecting customers until the conditions for effective competition... are in place*".¹⁵⁴ This is reflected in the fact that, in setting the level of the price cap, Ofgem is required to have regard to "*the need to protect existing and future domestic customers who pay standard variable and default rates*".¹⁵⁵
- 5.90 SVT customers will therefore only pay SVTs at (or below) the level that Ofgem considers adequately protects these customers. Furthermore, the price cap will only be removed once Ofgem (and the Government) are fully satisfied that the market is competitive. In these circumstances, disengaged SVT customers are fully protected by regulation and there can be no adverse merger effect in relation to them.
- 5.91 Second, to the extent that the CMA has concerns about the loss of a comparator for the SVT price setting process, the cap will render such comparisons irrelevant.
- 5.92 This is because, for customers, the price cap is likely to give a more definitive benchmark as to what level of price change is cost-justified. To the extent that the CMA's theory of harm is based upon an assumption that customers currently use the other larger suppliers' prices as a benchmark to judge cost-reflectivity (which is not the case, as set out at paragraphs 5.6 to 5.15), any such SVT price comparison will be replaced by the level of the cap, and the relevance of the other larger suppliers will cease.

¹⁵⁴ Price Cap Bill, Foreword by Rt Hon Greg Clark MP, Secretary of State for Business, Energy and Industrial Strategy.

¹⁵⁵ Price Cap Bill, clause 1(6)(a).

- 5.93 Consequently – and consistent with past experience from the PPM price cap – the introduction of a price cap is likely to result in suppliers positioning their tariffs just below the level of the cap. This effect is acknowledged by the CMA at paragraph 193 of the Phase 1 Decision, which notes that the PPM price cap has led to a convergence of prices, with almost all suppliers moving their price to just below the cap. This can be seen in Figure 5.7, which plots the PPM SVT tariffs of each of the larger suppliers over time.¹⁵⁶ From the introduction of the PPM price cap, the range in PPM tariffs offered by the larger suppliers is significantly reduced, and there are extended periods where the larger suppliers offer very closely priced tariffs. Moreover, the tariffs are clearly clustered at the level of the cap, and closely track the cap when it changes. This suggests that the price cap acts as a strong benchmark against which suppliers price their tariffs, reducing the importance of rival suppliers as relevant benchmarks.

Figure 5.7

[X]

- 5.94 This is similar to experience from other markets. For instance, following the SME banking market investigation in 2002, the four main clearing banks in England and Wales gave transitional undertakings, which broadly required them to offer all SME customers either interest on credit balances at a specified rate, or free core money transmission services. When the OFT reviewed these price control undertakings in 2007, it concluded that they should be released due to their distortive effect on competition. In particular, the OFT noted that: *“These constraints on the pricing structure can have a number of effects... [S]ome observers have commented that the transitional undertakings lead banks’ offerings to be increasingly similar.”*¹⁵⁷
- 5.95 Therefore, following the introduction of the SVT price cap any possible concern regarding the loss of an SVT “comparator” – even if that was a credible theory of harm (which it is not) – would fall away.

6. Conclusion

- 6.1 It is clear from the evidence available to the CMA that there is a large measure of agreement between the Parties and the CMA on the conditions of competition in retail energy supply. This led the CMA to conclude, correctly, that the Transaction will not give rise to unilateral effects, vertical effects or co-ordinated effects on any standard merger control analysis.

¹⁵⁶ The Parties have compared PPM SVT tariffs only in this comparison as *“the safeguard tariff is aimed at protecting prepayment meter customers, primarily those on poor value standard variable tariffs, from paying too much for their energy”* (Ofgem), making it a closer comparator to the SVT cap. Source: <https://www.ofgem.gov.uk/publications-and-updates/ofgem-cuts-prepayment-meter-safeguard-tariff>.

¹⁵⁷ OFT, SME Banking – Review of the undertakings given by banks following the 2002 Competition Commission report, August 2007, paragraph 5.80.

- 6.2 The point of departure between the Parties and the CMA is an unorthodox and untenable proposition related to comparative SVT pricing. This theory of harm is self-evidently deficient. In particular:
- (i) There is no rivalry between SVT prices for customers, who are focused on how much they can save by switching onto an FTC, so the Transaction cannot result in a loss of any such rivalry;
 - (ii) The Transaction does not give rise to any merger effect in relation to SVT pricing, since the Parties are not important comparators to each other or across the larger suppliers, the Transaction will have no effect on the way in which the media and public commentators discuss SVT prices and MergeCo's strategy and synergy benefits can be expected to drive its SVT prices down, not up; and
 - (iii) The imminent SVT price cap will remove any residual concerns in relation to this theory of harm, since the cap will form the relevant 'comparator' against which the SVT prices of all suppliers is measured and evidence indicates that all suppliers will cluster around the level of the cap and closely track changes in the cap in their pricing.
- 6.3 The Parties look forward to engaging constructively with the CMA in its Phase 2 investigation to assist the CMA in reaching the conclusion that the Transaction should be cleared unconditionally.