

To Mr Roger Witcomb
Chairman, CMA energy market investigation panel

11 January 2015

Dear Roger

The regulation of energy marketing including doorstep selling

Thank you for the hearing on 11 December 2014 which enabled me to explain my view that certain aspects of retail energy market regulation since 2008 have had and are still having an adverse effect on competition. Specifically, the Non-Discrimination Condition SLC 25 and the subsequent Tariff Simplification Policy have restricted and distorted retail competition to the disadvantage of customers.

During the course of that hearing the panel asked for my further thoughts on where regulation should be applied, with particular reference to the regulation of doorstep selling. I have therefore examined this aspect of regulatory policy more closely and taken soundings in the sector. In the following submission I briefly review the regulation of energy marketing including doorstep selling from its beginning (in my time as regulator) to the present date. I consider whether certain aspects of this regulation have had and are having an adverse effect on competition, and suggest how to address such adverse effects.

It is important to look at the regulation of marketing generally because the world has moved on from doorstep selling: there is now little enthusiasm for the resumption of this activity. The focus has shifted to other potentially more acceptable direct marketing activities that may be hindered by present regulations.

Given the nature of the CMA enquiry, I have couched the bulk of my submission in terms of the formal questions that the CMA has to answer. In considering a potential remedy, however, I have addressed in less formal terms the particular question that the panel posed.

I am writing separately on a few other issues (notably cashout) that arose during the course of the hearing.

Yours sincerely

Stephen Littlechild

Emeritus Professor, University of Birmingham, and Fellow, Judge Business School,
University of Cambridge

Summary

- The regulators Ofgas and Offer introduced a marketing condition in order to address mis-selling when the retail energy markets first opened. Their successor Ofgem made various revisions to the marketing condition, including to address concerns about doorstep selling. These regulators considered the marketing condition to be a temporary measure, to be removed in due course in favour of reliance on consumer protection law generally. By early 2008 Ofgem's intention was to remove the marketing condition one year later.
- In 2008 Ofgem radically changed its regulation of energy marketing activities, including doorstep selling. (It also changed its regulation of energy tariffs.) It adopted a more ambitious aim (to enable customers to make well-informed decisions) and a new proactive approach involving overarching standards of conduct and more extensive and more severe obligations on suppliers, and enhanced monitoring and enforcement including naming and shaming.
- This new regulatory approach increased the cost and risk of direct marketing. It was one of the factors – but not the only one – in the decisions of major suppliers to abandon doorstep selling, and other forms of direct marketing (eg in supermarkets). Although sometimes problematic, these approaches had assisted vulnerable customers to benefit from the competitive market.
- The marketing condition is presently hampering at least one small supplier and discouraging suppliers from participating in more acceptable forms of direct marketing. These include a greater role for Third Party Intermediaries (TPIs) in advising customers, particularly vulnerable customers.
- The present marketing licence condition (SLC 25) and its interpretation have thus restricted and distorted competition in several respects, to the disadvantage of customers, particularly vulnerable customers.
- Any suggested countervailing benefits – such as the cessation of doorstep selling or the desirable aims of the policy – do not warrant the CMA not taking steps to address these adverse effects on competition. Nor should Ofgem be left to resolve the problems with respect to TPI participation.
- The CMA may not have the time or resources to revise the present marketing licence condition in detail. The condition as it was in early 2008, or reliance on consumer protection legislation, are possible alternative starting points.
- However, much has happened since 2008 that needs to be taken into account – including expanded consumer protection legislation, experience with the new licence condition, evolving public opinion, changing shopping habits including online, greater use of price comparison websites, new technologies, the Energy Ombudsman, collective switching, smart metering, etc.
- The basic problem seems to be that present regulation has gone beyond customer preferences and concerns, and taken insufficient account of the practicalities of supplier delivery. The question is how best to accommodate and reconcile all these considerations in a revised marketing condition.
- Given the time and information limitations, this could best be achieved by the CMA encouraging a customer engagement process. Customer representative groups, suppliers, TPIs including comparison and switching sites, Citizens Advice, Trading Standards Institute and other interested parties could be invited to discuss this issue with a view to proposing an agreed recommended marketing licence condition for consideration by the CMA.

1. The first marketing licence conditions

1. The domestic (residential) energy market was opened to retail competition, starting in 1996 for gas and 1998 for electricity. Doorstep selling, typically by hired sales forces, was one of the main selling and marketing techniques adopted by early energy suppliers.¹ It proved particularly effective in alerting customers of incumbent suppliers to better offers from new entrant suppliers operating out-of-area. Over time it was also used to explain to customers the advantages of buying on a dual fuel basis, which offers could be publicised within-area as well as out-of-area.
2. Ofgas introduced a marketing licence condition in about 1997. “The licence condition in gas was introduced as a result of an increasing number of complaints being received by both Ofgas and the Gas Consumers Council concerning the doorstep selling practices adopted by some gas suppliers and their agents as competition was being introduced into the domestic gas market.”² I understand that the main problem was contract staff with little training, working on commission. The condition was put in place, rather reluctantly, for a period of two years with a sunset clause. It seemed on balance preferable to impose a marketing condition in order to deal with the marketing excesses because it was so important to enable lower income, older and housebound consumers to participate in the competitive market.
3. The gas marketing licence condition “deals with a range of issues associated with marketing gas including a prohibition on suppliers contracting with agents which seek payments in advance for arranging the contract, conditions on the employment and training of staff, requirements to maintain contact with customers where early contracts are signed, provisions for the auditing of sales activity and arrangements to compensate customers where the supplier has not followed the requirements of the new condition.”³
4. OFFER (where I was Director General of Electricity Supply until December 1998) took a similar course. “During 1996 OFFER initiated a series of consultations on revisions to the licences of electricity suppliers in preparation for full competition in 1998. In response to those consultations several customer representative bodies expressed concerns about marketing activities. OFFER urged suppliers to establish a voluntary code dealing with marketing issues. The objective was to have a code which became widely recognised by customers and which provided a protection against high-pressure salesmanship whilst not precluding the development of innovative marketing techniques. OFFER indicated that if a voluntary code was not widely adopted, the Director General would need to consider the introduction of a licence condition.” (OFFER March 1998 para 4)

¹ “2.2 Most suppliers active in the gas and electricity market report that doorstep selling or other forms of direct sales (such as approaches in shopping centres and telesales) provide the most effective means of attracting customers to switch suppliers. The majority of suppliers active in the domestic market have large scale field sales forces. In many cases these are not employees of the licensee but employed (or engaged on a self employed basis) by specialist local agencies hired to work on behalf of the licensee.” *Marketing gas and electricity: consultation document*, Ofgem, January 2000.

² *The Competitive Electricity Market from 1998: Marketing electricity, a decision document*, OFFER, May 1998, para 2.3.

³ *The Competitive Electricity Market from 1998: a consultation paper on marketing electricity*, OFFER March 1998, para 11.

5. The Association of Energy Suppliers (AES) did indeed develop such a voluntary marketing code but some problems with marketing practices continued. “Not all suppliers are members of the Code at present and the Code seems not to have been sufficient to deal promptly with the poor marketing practices which have been observed. The introduction of a licence condition in the gas market has provided powers for the regulator to take prompt action where necessary. To provide customer confidence and to assure competing suppliers that all suppliers are subject to the same restrictions in respect of marketing, it seems appropriate to take similar steps in electricity to reinforce the Code with a new licence condition.” (OFFER March 1998 para 14)
6. The marketing condition was not intended to be permanent, but OFFER took a pragmatic approach. “This should be an area where, as in other industries, self-regulation should in due course be the best approach. However, the Director General has made clear that he would review the situation in the light of experience and take further action if this was required to protect customers....Marketing issues are likely to be of particular concern at the opening of the market when customers may be uncertain about the concepts involved in competition in electricity and when any self regulation by the industry through a code of practice will not be widely recognised by customers. In due course however it will be sensible to remove special restrictions on marketing in electricity. The condition provides for its own termination in March 2000 unless the Director General otherwise directs following consultation.” (OFFER March 1998, paras 13, 18)

2. Ofgem’s approach to the regulation of marketing activities 1999-2008

7. Until 2008 Ofgem’s approach to the regulation of marketing activities was consistent with that of Ofgas and OFFER. Ofgem repeatedly drew attention to the benefits of doorstep selling as a source of information for customers.⁴ This was particularly the case for vulnerable customers.⁵
8. At the same time, however, Ofgem noted complaints about mis-selling associated with doorstep selling and telesales. For example, in 1999 Cheshire Trading Standards successfully prosecuted Northern Electric and Gas plc for doorstep mis-selling. In the same year, following a number of complaints about alleged mis-selling, London Electricity, co-owner of Virgin HomeEnergy Ltd, gave voluntary undertakings to Ofgem on its marketing activities.
9. Concern about doorstep selling was considerable, but not limited to energy suppliers. For example, in 2002 the National Association of Citizens Advice Bureaux submitted a ‘super complaint’ to the OFT. Its report began “Doorstep selling is an area in which unfair practices thrive and consumers’ rights are inadequate.”⁶ More than a third of all the CAB reports concerned the sales of

⁴ “2.3 ...It is clear that direct sales represent an important source of information for customers ... the most important single source of information is doorstep selling.” (Ofgem, January 2000)

⁵ “2.5 Ofgem believes that doorstep selling is one of the most important ways in which the benefits of competition are drawn to the attention of lower income and other disadvantaged groups. If direct sales are conducted professionally and with sensitivity they are an important and valid part of the market place and one which brings important benefits to the disadvantaged.” (Ofgem January 2000)

⁶ *Door to Door: CAB clients’ experience of doorstep selling*, Susan Marks, National Association of Citizens Advice Bureaux, September 2002.

domestic fuels. But there was an ever-growing number of reports about legal services, and reports about products for customers with disabilities, and for home improvements, remained high. (para 1.6) Some consumer bodies used this report as evidence that many vulnerable customers did not in fact appreciate doorstep salespeople.⁷

10. Such problems and concerns necessitated the repeated revision and extension of the marketing licence condition. In 2000 Ofgem extended the market condition (which became SLC 48) for 2 years and made some enhancements to it. In 2001 it made some amendments after evidence of mis-selling. In 2002 the condition was extended for a further 2 years and a more rigorous approach was implemented (described as a tougher approach to compliance and enforcement, with possibility of penalties for failure to comply). Later that year Ofgem fined London Electricity £2m for further breaches of the marketing licence condition. In 2003 the condition was slightly modified. In 2004 it was extended for another 2 years until March 2006.
11. Ofgem had an active programme to seek compliance with the marketing condition and to improve practice. Nonetheless, there were relatively few formal investigations and fewer findings against the suppliers. For example, in April 2004 Ofgem opened an investigation into SSE's marketing practices over the period June 2003 to April 2004. It concluded in June 2005 that there was insufficient evidence that SSE was in breach of its obligations. In assessing complaints, Ofgem placed considerable weight on whether management had taken all practical steps to avoid breaches of the marketing condition, and whether management responded positively as soon as it became aware of potential breaches.
12. Ofgem's view was still that the marketing condition was a transitional provision that could and should be removed in due course, leaving the energy market subject to general customer protection legislation.⁸ After a few years Ofgem began to sense that the time might be ripe for doing this. Thus, in March 2006 Ofgem extended the condition for another 2 years until March 2008, but noted a substantial reduction in the number of complaints about marketing to energywatch and indicated that it might take a different view about the need for the marketing condition if, for example, self-regulation by the Association of Energy Suppliers Energy Selling Code of Practice were to be enhanced to closely meet the requirements of the OFT Consumer codes Approval Scheme. At the same time Ofgem removed the marketing condition on telephone sales given that there had been a strengthening in general consumer law. The marketing licence conditions were further simplified as

⁷ "... although Ofgem surveys consistently claim that doorstep selling is vital in terms of reaching those who are in particular need to switch to cheaper providers and which is welcomed by consumers, their findings are in direct contradiction of other surveys on doorstep selling....All of these found the majority of consumers did not appreciate doorstep salespeople, which we think is more reflective of the real situation." *Age Concern's response to Making markets work for consumers: The regulation of gas and electricity sales and marketing*, October 2003.

⁸ "2.20 Doorstep sales, by their very nature, are likely to be associated with a degree of customer concern. In mature markets this is handled effectively with existing customer protection legislation. As a general approach Ofgem considers it appropriate to remove sectoral specific regulation from customer protection where practicable. ... As customers become used to competition and the market matures then it would be desirable to revert to sole reliance on general customer protection legislation." (Ofgem January 2000)

part of Ofgem's review of the supply licence conditions in August 2007, when reporting requirements were removed.

13. In December 2007, noting significant improvements in performance, Ofgem consulted on whether the condition (now renumbered to SLC 25) should be renewed for just one more year, or whether industry self-governance arrangements were sufficiently effective that the condition could be removed at the end of March 2008. On 22 February 2008, noting some relevant changes in Government policy and other areas, Ofgem decided in favour of retaining the condition for one more year. However, it turned down a proposal to extend the marketing condition to online selling.⁹ It also noted that the ERA [Energy Retail Association] "reported that sales complaints recorded by energywatch had fallen to 3% of the level experienced in 2002 and in October 2007 represented 0.04 complaints per 1,000 transfers."¹⁰

3. Ofgem's approach to marketing activities since 2008

14. And then Ofgem changed the emphasis of its policy. In March 2008 it announced its Probe into energy supply markets. Its Probe Initial Findings in October 2008 deemed Sales and Marketing to be an area of concern, and proposed to strengthen the rules on sales and marketing activities. In January 2009 Ofgem fined Npower £1.8m for mis-selling.
15. The Probe Remedies document in 2009 maintained Ofgem's view as to the importance of direct selling, particularly for lower and disadvantaged groups.¹¹ But Ofgem argued that the marketing condition as then formulated focused on issues that were the primary concern at the time of market opening rather than on Ofgem's current concerns, about whether customers could make well-informed decisions.¹²
16. Ofgem now adopted what it later called "a new proactive approach" to marketing activities. It prescribed a set of overarching standards of conduct: "standards that we expect suppliers to take all reasonable steps to adhere to in their dealings with domestic and small business consumers". The first of these standards was "You must not sell a customer a product or service that he or

⁹ "However, in recognition of the improved performance of the industry and the introduction of the Distance Selling Regulations, we removed the application of the licence condition to telesales. We considered that the development of the Distance Selling Regulations meant that the lifting of the licence conditions from applying to telesales did not result in the loss of necessary consumer protection and was in line with our commitment to Better Regulation." (*Regulation of marketing to domestic customers*, Ofgem letter, 3 December 2007)

¹⁰ *Decision document: Regulation of marketing to domestic customers*, Ofgem, 22 February 2008, p 2.

¹¹ "4.1 Direct selling of gas and electricity, particularly on the doorstep, has an important impact on domestic consumers and on competition. Over half of switching takes place in response to direct sales activity, the majority of which takes place on the doorstep. Direct selling is also an important way in which the benefits of competition are drawn to the attention of lower income and disadvantaged groups." (*Energy Supply Probe – Proposed Retail Market Remedies*, Ofgem, Ref 99/09, August 2009)

¹² "4.3 While enforcement action is already available to tackle mis-selling, there are certain weaknesses in the current marketing licence condition. In particular, it focuses on the issues that were the primary concern at the time of market opening, such as ensuring customers are aware that they are signing a contract and are content to do so. Current concerns are much more about whether the information consumers are given on tariffs and the savings they will make are accurate and adequate to enable well-informed decision making. The current licence condition also focuses on the inputs to the sales and marketing process such as training and recruitment rather than the outcomes for consumers." (Ofgem, August 2009)

she does not fully understand or that is inappropriate for their needs and circumstances”. With respect to marketing activities, Ofgem proposed “to introduce a new objective and to require licensees to take all reasonable steps to secure achievement of that objective. The objective ... is in essence that: information provided during the sales process should be complete and accurate, understandable, appropriate and not misleading; and sales activities should be conducted in a fair, transparent, appropriate and professional manner.” (Ofgem August 2009 para 4.11) This objective would apply to telesales as well as face-to-face marketing activities. Many new and detailed obligations on suppliers were incorporated into SLC 25.¹³ There was no longer a sunset clause because there was no reason to assume the problems associated with direct sales would go away in the foreseeable future.¹⁴

17. These requirements came into effect between October 2009 and January 2010. In April 2010 Ofgem issued Guidance on the interpretation of SLC 25 because “It has come to our notice that some suppliers may not be exercising due diligence while executing some of the new provisions of SLC 25.” In September 2010 Ofgem opened investigations into compliance with the new licence conditions by four major suppliers (SSE, SP, EdF and Npower).
18. In November 2010 Ofgem launched its Retail Market Review (RMR) to review how suppliers had implemented its Probe reforms. The Summary of its Findings in March 2011 said “Some suppliers have shown improvements in their communications with customers but shortfalls remain”, which it regarded as “slightly improved” relative to the Probe findings. It found “Poor supplier conduct: Questionable supplier behaviour and inadequate response to remedies introduced following the Probe, has contributed to a broad mistrust of suppliers and anxiety amongst consumers.” (para 2.3) On marketing activities: “2.22. We have been monitoring suppliers’ compliance with SLC 25 and, on the basis of the information available to us, we are concerned by certain suppliers’ efforts to date.”
19. To address these problems, Ofgem proposed strengthening licence conditions “to give suppliers less freedom in how they interpret these conditions”. (para 1.24) Where licence modifications were not necessary, Ofgem would enhance its monitoring, which would include “naming and shaming” underperforming

¹³ Prior to completing a sale, sales agents must provide the consumer with a written estimate and, in certain cases, a written comparison with the consumer’s current deal. ... The written estimate should be expressed in terms of the projected cost per year in pounds of the relevant tariff and must take account of the consumer’s annual consumption. Where a sale is completed, suppliers should keep the records for a period of no less than two years. Suppliers should provide additional information to consumers after a sale has been concluded, including: a copy of the contract; an explanation of what happens next; a reminder to the consumer to check the product is right for them (including where to find impartial advice and information, such as Consumer Direct); an explanation of their cancellation rights; and what to do if they have any concerns (including Consumer Direct’s phone number). The supplier should check that the customer understands the principal terms of the contract and has received a written estimate and, where appropriate, a written comparison.

¹⁴ “4.24. We also propose that the new licence condition will not have a sunset clause. While we would expect to review the condition in the light of any developments in relation to wider consumer protection legislation or strengthening of self-regulation, for example, we see no reason to assume that problems associated with direct sales will go away in the foreseeable future. Indeed, with more effective competition between suppliers in the future the problems might arguably become greater.” (Ofgem, August 2009)

companies and placing such suppliers in the public spotlight.¹⁵ Ofgem would increase its speed of reaction to concerns. “3.40 ...In cases in which we suspect non-compliance, we intend to carry out swift assessments rapidly moving to appropriate enforcement activity where we find our suspicions are reinforced.” Ofgem also raised the possibility of including new Standards of Conduct as enforceable licence conditions.

20. In December 2011 Ofgem proposed to embody new Standards of Conduct in a licence condition that could be enforced.¹⁶ Progress on RMR was then delayed. In March 2013 Ofgem proposed to take a principles-based approach, embodied in a new Standard Licence Condition that would require suppliers and their representatives to treat customers fairly and take customer needs into account. There would also be a range of more specific principles. These new Standards of Conduct, “to ensure each domestic customer is treated fairly”, came into force in August 2013.
21. Ofgem was now taking what others have called a “zero tolerance” approach to the interpretation and enforcement of the marketing condition. This “significantly increased the amount of enforcement work”.¹⁷ Ofgem also introduced a “new enforcement vision” to complement its RMR reforms, which “makes clear the commitment to deliver credible deterrence and meaningful consequences for businesses that fail consumers and don’t comply”.¹⁸

4. The end of doorstep selling

22. Meanwhile, with respect to doorstep selling specifically, there was increasing public pressure on suppliers, including from Consumer Focus and Which?. In 2009 the Trading Standards Institute highlighted misleading tactics used by utility doorstep salespeople and called for a ban on doorstep energy sales. The major suppliers agreed not to operate in areas known as No Cold Calling Zones. In May 2011 Surrey County Council Trading Standards successfully prosecuted SSE for misleading selling practices. In the same month, Barry Gardiner MP, a member of the Select Committee on Energy and Climate Change, challenged suppliers to stop doorstep selling.

¹⁵ “3.39 Where we consider modifications to a licence condition are not necessary, we propose enhancing our monitoring. In these cases we propose to increase our efforts to provide a greater amount of transparency on suppliers’ compliance with the licence condition. For example, this may include regularly naming and shaming of companies that we believe consistently perform below a satisfactory level of compliance and publishing more regular reports that place questionable behaviour by suppliers in the public spotlight.” *Retail Market Review – Findings and Initial Proposals*, Ofgem, Ref 34/11, 21 March 2011.

¹⁶ *The Retail Market Review: Domestic Proposals*, Ofgem Ref 166/11, 1 December 2011, para 4.4.

¹⁷ *Enforcement Guidelines on Complaints and Investigations*, Ofgem Ref 82/12, 28 June 2012, p 2.

¹⁸ *Ofgem proposes changes to enforcement regime*, Ofgem press release 28 March 2013. Also “Enforcement is central to Ofgem’s work in protecting consumers. We have a strong track record of dealing with enforcement cases, having imposed over £85m of penalties and redress since 2010 on energy companies who fail to meet their obligations. Our investigations help to secure robust decisions and act as a strong deterrent to prevent future poor behaviour. ... Ofgem has announced that it has decided to place a greater emphasis on deterrence when imposing penalties for future breaches. ... This is likely to mean a substantial increase in the levels of penalty that it has typically imposed to date.” *Ofgem appoints new enforcement panel*, Ofgem press release, 16 April 2014. I understand that the total of penalty payments has since increased to over £100m.

23. In July 2011 SSE, the second-largest supplier, announced that it would cease doorstep selling. In August BG, the largest supplier, followed suit (initially for 3 months). The smaller major suppliers, no doubt feeling increasingly exposed, gradually followed: EdF announced in September and NPower and SP in October.
24. This left E.On as the only major supplier to continue doorstep selling. In April 2012 Ofgem opened an investigation into E.On's compliance with the marketing condition. In May it published the first of its decisions on the investigations begun in September 2010, imposing a penalty payment of £4.5m on EdF for breaches of doorstep and telesales regulations, even though these breaches were "not as serious as those in former investigations in 2008 and 2002". In July 2012 E.On announced that it too would cease doorstep selling.
25. Between May 2012 and July 2014 Ofgem concluded its investigations into the five major suppliers (SSE, SP, EdF, Npower and E.On), finding them in breach of doorstep and telesales regulations over the period since October 2009. I understand that no less than 87 breaches of 46 different licence conditions were identified. Ofgem fined the five suppliers or secured penalty payments totalling some £39m.

5. The effects on competition: doorstep selling

26. Ofgem has always stressed the importance of direct marketing activities, including appropriate doorstep selling, in enabling customers, particularly vulnerable customers, to engage in the competitive market. In 2008 it took "a new proactive approach" to improve doorstep selling, and to that end in October 2009 imposed new obligations on suppliers. But within two years major suppliers had abandoned doorstep selling rather than improved it.
27. Several factors must have influenced the decisions of major suppliers to cease doorstep selling. The weighting of these factors differed from one supplier to another: no doubt the CMA, if it wished, could establish which factors were most important for each supplier by checking Board papers associated with the decisions.
28. Increasingly, some suppliers did not see doorstep selling as a sustainable way of attracting and engaging customers: for example, customers acquired from doorstep selling tended to have a disproportionately high rate of cancellations, first year losses and relatively high debt rates. Some suppliers had self-imposed limitations, for example, trying not to sell to unaccompanied elderly people even while doorstep selling to other customers. Doorstep sales forces were difficult to monitor and manage. General Consumer Protection legislation was imposing higher standards that made compliance more challenging.¹⁹ Suppliers were also increasingly conscious of consumer and consumer group opposition to doorstep selling, and of the adverse public and media pressures.
29. Ofgem's change in policy was surely another important determinant. The new obligations geared to ensuring customers took well-informed decisions; the

¹⁹ Relevant consumer protection legislation includes The Consumer Protection (Distance Selling) Regulations 2000, the Cancellation of Contracts Regulations 2008, and the Consumer Protection from Unfair Trading Regulations 2008.

more extensive, detailed and onerous procedures; the enhanced monitoring and enforcement approach; the perceived greater difficulty of defending against the new principle-based regulations: all significantly increased the cost and risk of doorstep selling.

30. Some of the new requirements seem to have been more problematic than others. For example, some suppliers were able to use hand-held devices to improve the provision and auditing of information. But the obligation to estimate consumption is heavily prescribed.²⁰ Suppliers have to seek out much information.²¹ Finding acceptable ways of predicting savings when customers' consumption levels are uncertain (given changes in climate, price, lifestyle, financial circumstances etc) seems to have posed particular challenges. The five major suppliers were found to have committed about 40 breaches of 20 different aspects of the provision of estimates and comparisons.
31. Moreover, customers too found some aspects of the new approach burdensome: according to one supplier the required confirmatory telephone calls from the sales office to the customer could take up to half an hour. It is also possible that Ofgem's "new proactive approach" heightened the concerns of consumer groups and other public pressures.
32. The major suppliers not only ceased doorstep selling. They also ceased face-to-face marketing in other venues such as supermarkets and community events. This is presumably attributable mainly to the effect of regulatory policy rather than to customer or media pressure against doorstep selling.
33. One consequence of the ending of doorstep selling and other direct marketing was the accentuation of the decline in customer switching that had been initiated by Ofgem's Non-Discrimination Condition. (See my submission to the CMA 27 October 2014.) This in turn meant that less competitive pressure was placed on suppliers.²² This reduction in competitive pressure was associated with an increase in suppliers' profit margins. (See my earlier submission to the CMA 18 August 2014.)
34. These consequences were unintended: Ofgem's aim was to prevent licence breaches which "may have an adverse impact on competition by reducing consumers' confidence, engagement and willingness to switch suppliers. Consumer inactivity may reduce the effectiveness of competition in the retail market."²³ In the event, Ofgem's revised regulations and its interpretation of them seem to have been a major factor (though not the only factor) in the elimination of doorstep selling and other direct marketing activities, a

²⁰ SLC 25 provides that where a customer's actual consumption is not known, the supplier must base any comparison of charges on its best estimate of consumption which must be based on any relevant information available. Ofgem has indicated that "requirements for a supplier to provide a 'best estimate' would not be satisfied purely on the basis of pre-formulated information that fails to take into account relevant customer characteristics, such as, the age and size of the premises, the number and type of electrical or gas appliances, and the number of occupants", and these are "illustrative and non-exhaustive examples". (*Guidance on the marketing licence condition SLC 25*, Ofgem 27 April 2010.)

²¹ In order to provide their best estimate, suppliers are expected to ask for the current supplier, product, and payment method; establish the main heating fuel type (i.e. whether the estimate is for gas only, electricity only, or dual fuel); establish the customer's metering type (standard electricity or economy 7), postcode or Grid Supply Point area; occupancy (1 or 2, 3 or 4, 5 or more); and number of bedrooms (1 or 2, 3 or 4, 5 or more). And this list is not exhaustive.

²² See for example Ofgem's reference to a possible "adverse impact on competition by reducing consumers' confidence, engagement and willingness to switch suppliers. Consumer inactivity may reduce the effectiveness of competition in the retail market."

²³ *SSE Penalty Notice*, Ofgem May 2013 para 10

consequent reduced customer engagement and willingness to switch suppliers, and thereby a reduced effectiveness of competition in the retail market. Ofgem's regulation of doorstep selling and associated marketing activities since 2008 has thus restricted and distorted competition.

6. Effects on competition: vulnerable customers

35. There has been a similar unintended consequence with respect to the engagement of certain types of customers that might be regarded as vulnerable. As noted, Ofgem has always been conscious of the benefits as well as disadvantages of direct selling. It recently commented that "for many customers doorstep selling is their only engagement in the market".²⁴
36. A consequence of Ofgem's post-2008 policy, along with the other factors mentioned, has been that what Ofgem calls this "only engagement in the market" has been largely precluded. Competition to supply these vulnerable customers has been restricted, and distorted towards other forms of marketing activities (eg online selling) that may now be more profitable, but less effective in reaching these vulnerable customers. In 2011, Ofcom reported a lower proportion of certain vulnerable customer groups engaging in customer switching.²⁵
37. Having said this, not all suppliers are keen to target some vulnerable customers, for example those with low consumption and hence low profit margin. There are alternative ways of reaching vulnerable customers, such as collective switching (see below). Increasingly, vulnerable customers have access to online switching. (I am told that internet access at home is now over 80% and smartphone penetration is above 50% even among lower socio-economic groups.) Other recent evidence suggests that switching among some vulnerable groups has increased.²⁶ The impact of regulatory policy is thus one of degree.
38. The CMA will be aware that one supplier, [X], still engages in doorstep selling, and indeed obtains the majority of its customers in this way. It also offers a product that is particularly valued by vulnerable customers. And by carefully choosing its selling areas it can keep its customer acquisition costs below the commissions charged by comparison switching sites. Yet its ability to compete has been restricted by present regulations imposing simple tariffs, and by the present marketing condition and its method of enforcement.
39. On the first point, one of the features of [X]'s product that its customers most valued was its tariff with no standing charge. Such tariffs were effectively prohibited by Ofgem's simple tariffs restrictions (more precisely, the declining unit rates that made no-standing-charge tariffs viable for suppliers were prohibited). No exemption was granted despite the majority of [X]'s customers capable of being categorised as vulnerable.

²⁴ *EdF Penalty Notice*, Ofgem May 2012, para 2.6

²⁵ For example, "the proportion of those consumers who claim they have never switched is 10 per cent higher amongst consumers in social grades DE than the average". *RMR Findings and Initial Proposals*, Ofgem, 21 March 2011, para 2.69.

²⁶ For example, "switching is up amongst black and minority ethnic (BME) respondents (bringing them level with the remainder of the population). Those with a physical or mental impairment now show an annual switching rate that is not notably different to the wider population." Ipsos Mori, *Customer Engagement with the Energy Market: Tracking Survey 2014*, Report prepared for Ofgem, June 2014, para 2.1.

40. On the second point, Ofgem has raised some issues with [X] for alleged breaches of SLC 25. The company rejects these allegations, but also considers that it is being required to comply with inappropriate marketing conditions designed to remedy earlier mis-selling on the basis of lower price. In contrast, [X]'s proposition (smart meter prepayment) is a more convenient product at a price below that of the major suppliers: it is not claimed to be cheaper than all other suppliers in the market. [X] is thus a square peg being pushed into a round hole because the marketing condition focuses unduly on price comparisons and does not adequately accommodate differences between suppliers and their products.
41. Thus, both these regulations, on tariffs and marketing, seem to have the effect of restricting competition for vulnerable customers, at least to some extent.

7. Effects on competition: TPIs

42. The adverse effects of the present marketing condition on competition extend beyond doorstep selling per se to other forms of direct selling. Various Third Party Intermediaries including customer associations and comparison and switching sites would like to assist customers, particularly vulnerable customers, to assess the best energy deal on offer and if appropriate to switch supplier. They report that many suppliers resist this and refuse to cooperate.
43. For their part, suppliers say that the present licence regulations on marketing and information (in SLC 25) hold them responsible for any advice given by TPIs in the course of such switching. Given the variety of approaches of different TPIs, and the fact that they have to deal with different suppliers, it is too risky for suppliers to accept this responsibility.²⁷
44. Ofgem has affirmed the importance of TPIs and their ability to innovate.²⁸ It has issued a clarification, saying that “we do not consider SLC 25 to have the effect of prohibiting TPIs from engaging with customers face-to-face to offer ‘across the market’ comparisons – if appropriate systems and processes are in place.”²⁹ However, this still seems to leave suppliers responsible for the activities of the TPIs, and provides no further clarification or relaxation of what are “appropriate systems and processes”. This “clarification” provides little reassurance, particularly to suppliers that Ofgem has recently fined many millions of pounds for failure to establish appropriate systems and processes.

²⁷ “2.14. There are instances when TPIs are classified as a supplier’s representative, as defined in the standard licence condition 1 (SLC1) of the gas and electricity supply licences. Ofgem has the power, in those instances, to enforce against a supplier in respect of the actions of their representatives. We know from our previous stakeholder engagement that this can cause challenges for both suppliers and TPIs. An example would be in respect of standard licence condition 25 (SLC 25), the marketing licence condition. Different parties interpret SLC 25 differently and TPIs may not always be clear as to when their activities are captured by it.” *Domestic third party intermediaries: Confidence Code and wider issues*, Ofgem Consultation, 7 August 2014.

²⁸ “Third party intermediaries (TPIs), such as price comparison sites, play an increasingly important role in the market by helping consumers to make well-informed decisions. New services are emerging, and existing ones are expanding into new areas. We want to allow TPIs to innovate and provide useful services, while making sure consumers remain protected.” Ofgem August 2014, p 1.

²⁹ *Marketing of energy supply to domestic customers by Third Party Intermediaries (TPIs) – Clarification of Standard Licence Condition (SLC) 25 of the gas and electricity supply licences*, Ofgem, 8 October 2012.

45. Ofgem recognises suppliers' concerns, although simply reiterating its previous statement provides no further reassurance.³⁰ Ofgem does, however, indicate its willingness to look again at SLC 25 in order to allow innovation in TPIs, and face-to-face marketing in particular.³¹ It is not clear from the wording whether the proposed "guidance", "intervention" and "specific measures" might include revising the obligations and responsibilities in SLC 25, which seem to be the source of the problem. Ofgem has earlier said not.³²
46. Thus, the present marketing regulations SLC 25 seem to be thwarting potentially valuable forms of person-to-person information, advice and assistance by TPIs, especially to vulnerable customers. The precise nature of the obstacles – whether the marketing regulations are unduly extensive, severe and/or ambiguous, and/or Ofgem's enforcement of them is unduly inflexible and/or unpredictable, and how far general consumer protection legislation is also an obstacle – is something on which suppliers, TPIs and others are better placed to advise.
47. No doubt such alternative approaches have their own potential risks, which need to be considered and addressed too. Mis-selling by any party, on the doorstep or elsewhere, can impact adversely on all suppliers and TPIs, even those whose own performance is exemplary. But the present regulatory approach seems to restrict the ability of suppliers and TPIs to explore and implement better ways of engaging customers in the competitive market. This is a further adverse effect on competition of the present regulation of marketing activities.

8. Whether to address these adverse effects on competition

48. If the CMA finds that Ofgem's post-2008 policy on regulation of marketing activities has had adverse effects on competition, the next question is whether the CMA should take steps to address those adverse effects, or whether that regulatory policy has countervailing benefits sufficient to warrant leaving it in place.
49. Could it be argued that doorstep selling is so undesirable that the policy is justified on the grounds that it prevents doorstep selling or helps to do so? This would be too sweeping: while there would be resistance to a large scale resumption of doorstep selling in its original form, many might welcome other forms of direct selling or face-to-face marketing and advice that are presently being restricted.

³⁰ Ofgem, August 2014, para 2.34.

³¹ "2.35. We will continue to prioritise facilitating face-to-face services, particularly in providing support to harder to reach groups. This will involve further consideration as to whether additional guidance or intervention is needed from us relating to SLC 25. We may also consider whether it would be appropriate to expand the Confidence Code to cover face-to-face services. We are also keen to learn from pilots of innovative face-to-face services and approaches taken. We expect to set out our proposals for facilitating face-to-face services in spring 2015, including any specific measures which may be necessary in relation to SLC 25." Ofgem August 2014

³² "We have previously issued guidance as to how we interpret that obligation and as a part of that we made clear that it will interpret the definition of 'representative' very broadly. For the avoidance of doubt, RMR obligations that give suppliers responsibilities for 'representatives' and other third parties will not be reviewed as part of the TPI work but will be considered during the 2017 RMR review." *Third Party Intermediaries – exploration of market issues and options*, Ofgem consultation Ref 103/13, 28 June 2013, para 4.8.

50. Could it be argued that the policy itself is desirable, even though it might have adverse effects on competition, and therefore should be left intact? It is difficult to quarrel with the basic aims of the policy: for example, to improve customers' ability to make well-informed decisions in response to direct sales approaches, to improve the regulatory framework to allow more effective enforcement of the rules governing sales and marketing, and to build consumer confidence in the competitive market.³³
51. However, it is equally difficult to argue that the changes in regulatory policy since 2008 have achieved or are likely to achieve these aims. Customers' ability to make well-informed decisions in response to direct sales approaches will not be improved if the rewriting of the rules governing sales and marketing, and their more effective enforcement, have led instead to the cessation of such approaches or their failure to materialise. And Ofgem's announcements over the last six years, with their emphasis on finding and naming and shaming underperforming companies, and imposing substantial penalty payments, have hardly documented or assisted the building of consumer confidence in the competitive market.

9. Is reform with respect to TPI activities and governance already in hand?

52. I have argued above that present regulatory policy on marketing is restricting the development of other more acceptable forms of direct selling, particularly involving TPIs in more directly assisting customer engagement, especially for vulnerable customers this advice. Ofgem's purported clarification of SLC 25 is ineffective. But can it be argued that Ofgem already has further reform in hand, so that the CMA does not need to address this particular adverse effect on competition?
53. As noted above, Ofgem has indicated its keenness to encourage TPIs and appropriate face-to-face marketing, its willingness to revisit this particular issue related to SLC 25, and the possibility of extending the current Confidence Code (previously established by Consumer Focus) to includes-face-to-face marketing. Once again, one can sympathise with the aim of Ofgem's policy.
54. However, it presents at least three difficulties. First, as explained, Ofgem has indicated that revisiting this issue would not include consideration of modifying or removing the SLC 25 responsibility on suppliers, which seems to be the fundamental obstacle to a greater role for TPIs in facilitating customer engagement. Second, even if suppliers were exempt from responsibility under SLC 25 provided that they dealt with suitably qualified TPIs – for example those accredited under an appropriate Confidence Code – this is basically a “work-around” the problem. It does not address the fundamental problem of the costs and risks imposed by SLC 25 and its present interpretation. If TPIs continue to expand and innovate, as Ofgem wishes, then over time more exemptions will be demanded for new sorts of services, necessitating further delays, costs and regulatory uncertainty, thereby restricting competition and innovation. Third, the proposed solution embodies the same regulatory approach that has already caused problems with other marketing activities.

³³ *SSE Penalty Notice*, Ofgem, May 2013, para 10.

55. To explain this last point, when Ofgem was given responsibility for the TPI Confidence Code in March 2013 it embarked on a review that noted a “shift in governance philosophy away from that of a business facilitator” to supporting and accommodating Ofgem’s policy on RMR.³⁴ This does not bode well: I explained to the CMA at the hearing my impression from around the world that the UK has the best switching sites, in number and variety, and that this has occurred because of what is here called “business facilitator” governance and because they have not been used as an instrument of regulatory policy.
56. Ofgem (August 2014) has since set out its “overarching vision” for the domestic TPI market and has proposed specific changes to the Confidence Code “to further embed the overarching principles of good intermediation”. (paras 1.25, 1.26) The proposed changes include the following:

Proposal: Sites should provide a clearly identified list of suppliers with whom they have a commission arrangement within two clicks of the energy homepage. We also propose that they should clearly explain how these arrangements influence the results a consumer will see, including any default or optional filtering sites have.

Proposal: Sites should provide clearly identified links to the websites of the Energy Saving Trust, Energy Company Obligation, and the government’s energy grants calculator. These should be no more than two clicks from the energy homepage.

Proposal: We propose to strengthen requirements to ensure consumers can quickly and easily compare the whole market, and are aware that they can do so. ...

We consider that sites should make consumers aware that a whole of market view is available to them. We propose to allow sites to continue to display only those tariffs to which a consumer can switch through their site as a default. However, we propose to strengthen existing requirements to ensure that this messaging is prominent and informative. The message should be clear and transparent, so that consumers understand the choice available to them.

Proposal: Sites should provide a clear explanation of their methodology for supplier ratings, should they choose to produce them. ...

4.15. To make sure we can assess if the ratings are impartial, we want sites to tell us how they compile the ratings when these are first displayed or updated on their site. In developing the methodology, sites should consider:

- Offering comprehensive and consistent coverage of suppliers
- Impartiality and robustness of data used
- How regularly the data is updated and ratings refreshed
- Clarity and transparency of any explanatory messages.

We think that any information that sites provide should be accurate so that consumers can have confidence in their decisions. Sites should have effective arrangements in place to keep this information up to date and it should be clear to consumers when the information

³⁴ “We are now conducting a review of the Confidence Code that has the following objectives: assess the current functioning of the code – given the different regulatory remit Ofgem has from Consumer Focus, and given the shift in governance philosophy away from that of a business facilitator as provided by Consumer Focus; align with the RMR – consider RMR proposals and how the Code can support and accommodate specific policy changes as well as general aims of the RMR (i.e. to increase and improve consumer engagement in the energy market)....” Ofgem June 2013 para 5.3

was last updated. Where sites have used estimates or assumptions in forming their advice, they should make this clear to the consumer.

Proposal: Sites should use the Personal Projection methodology when calculating the annual cost of both current and new tariffs.

Proposal: Sites should include a Tariff Information Label for each tariff they display.

Proposal: Sites should adhere to minimum standards for their complaints handling processes.

Proposal: Sites should include a warning that consumers may lose the WHD [Warm Home Discount] when switching suppliers, and sites should provide links to the government's WHD eligibility webpage.

Proposal: We will develop a robust marking system against all Code requirements to enable us to provide sites with an overall audit rating.

Proposal: We will change the current Code enforcement process to align it more closely with Ofgem's overall approach to enforcement.

Proposal: We will amend the process for changing the Code to allow sites to recommend changes, and establish a regular forum to discuss potential changes and other issues.

57. This is a very lengthy list. At first sight many of these proposals may seem unobjectionable. However, the same could have been said of Ofgem's post-2008 revisions to the marketing condition SLC 25, and of its obligations on suppliers generally. The proposals present at least two challenges from the perspective of the CMA's statutory duties.
58. First, the proposals substitute Ofgem's view of what all TPIs ought to provide, and what all customers ought to want and ought to have, for the ever-changing variety of arrangements that result from the choices of participants in the competitive market process. Consequently, they restrict the rivalrous discovery process that is the essence of competition. They limit the extent to which TPIs can innovate and learn how best to attract the attention and participation of customers, and offer the comparisons they deem most helpful. And they limit the ability of customers to influence how TPIs – and ultimately suppliers - respond to their preferences.
59. Second, is there any reason to think that Ofgem's approach to the monitoring and enforcement of its revised Confidence Code will be any different from its approach to the monitoring and enforcement of its rules on suppliers and their marketing activities, and any more successful?
60. Admittedly Ofgem's research shows that customers generally like and trust TPIs at present³⁵, which was not the case for suppliers' activities with respect to doorstep selling, but this raises the question why Ofgem considers that it should and could take steps to increase trust in TPIs. Admittedly the Confidence Code is voluntary rather than compulsory, but one would expect that on sensitive matters suppliers would be required to deal with TPIs that have been accredited under the Code. And admittedly Ofgem has no power to impose penalty payments on TPIs for breaches of Code provisions, though of course it can and presumably would withdraw accreditation. But would these factors change Ofgem's approach?
61. A regulatory approach to TPIs corresponding to Ofgem's post-2008 approach to suppliers would seem to imply a scenario along the following lines:

³⁵ "... trust in them [TPIs] [is] very high – 94% of consumers consider comparison sites to be reliable". Ofgem August 2014, para 1.1.

Ofgem makes changes to TPI Confidence Code in pursuit of its overarching vision and to further embed the overarching principles of good intermediation – monitoring by Ofgem increases costs of compliance and monitoring, ultimately paid for by customers – Ofgem changes current Code enforcement process to align it more closely with Ofgem’s overall approach to enforcement - Ofgem finds TPIs fail to comply with revised Code – names and shames TPIs – raises questions of trust in TPIs – embarks on TPI Probe – suspects reduction in competition between TPIs and finds that fewer customers have been using TPIs – attributes this to unnecessary complexity and differences between TPI sites, lack of ability of customers to compare TPIs, declining customer trust in TPIs - decides that in order to restore trust in TPIs the same standardisation and restrictions should apply to TPIs as to suppliers, including non-discriminatory commission rates, fair and simple charging structures, prohibition on discounts and special offers to customers, enforceable Standards of Conduct – embarks on TPI Review – finds that number of customers using TPIs has halved since 2014 – concludes that further regulation is needed – consults again on whether single comparison and switching site run by Ofgem might be less confusing for customers and restore faith in the competitive market....

62. Unfortunately, experience suggests that further regulation by Ofgem to improve trust could be the kiss of death for TPIs. Thus, if the CMA finds that post-2008 regulatory policy with respect to marketing and TPI activities has had and is having an adverse effect on competition, it would be more appropriate for the CMA to address this itself.

10. Addressing the adverse effects on competition

63. If the CMA finds that the post-2008 regulatory policy with respect to supplier marketing activities, including but not limited to doorstep selling, has an adverse effect on competition, and needs to be addressed, how should it do so?
64. One possibility would be for the CMA to design a new and detailed set of marketing regulations from scratch. In practice, this would not seem feasible, not least because of the time constraints and the CMA’s limited previous experience in this area. It would clearly not be appropriate for the CMA simply to rely on the advice of Ofgem, insofar as it is Ofgem’s regulations that, ex hypothesi, are the source of the problem.
65. Insofar as Ofgem’s post-2008 policy on marketing activities has restricted and distorted competition, would the most effective way of addressing this be simply to remove all the post-2008 modifications to that marketing condition? This might be a better starting point than the present set of regulations, but the situation is more complex in at least two respects.
66. First, once the initial teething troubles associated with opening the market had been addressed, it was a long-standing Ofgem intention to abolish the marketing condition entirely in order to make suppliers subject to consumer protection law generally. At the beginning of 2008 Ofgem decided to continue

the marketing condition for just one final year, with a view to fulfilling this policy aim the next year. Hence, to reinstate in full even the early 2008 version of the marketing condition would not fully capture Ofgem's thinking at that time. Consideration therefore needs to be given to the possibility of removing some or all of the marketing conditions even as they stood in early 2008. An alternative starting point would thus be to ask whether, why and how retail energy regulation ought to go beyond the customer protection law that Parliament has deemed appropriate in other sectors of the economy.

67. Second, many things have changed since early 2008. There is now experience of operating with the revised licence condition and Ofgem's revised policy stance. Industry thinking and public opinion have evolved. There have been problems with doorstep selling in other sectors such as broadband. Customer shopping habits are changing, with online becoming more important. Price comparison websites and other TPIS now play a much more significant role. New technologies like tablets have made it easier to provide information to customers, in some respects replicating what a comparison website can do, while at the same time allowing a better record to be kept of what information and advice is provided to the customer. The Ombudsman Services, extended in 2006 to resolve consumer complaints in the energy sector including about company sales activities, now have a substantial record and could perhaps play a greater role. The Government's Cheaper Energy Together Fund has supported new concepts such as collective switching, with some success in reaching some groups of vulnerable customers.³⁶ Smart metering has begun to be introduced for domestic customers and is scheduled to be rolled out for all or most customers in the next few years, which is leading to discussions on smart meter install code of practice (smicop) and on what is consistent with the Data Protection Act. All these subsequent developments need to be taken into account in fashioning an appropriate market licensing condition for 2015 onwards.

11. Where and how to regulate?

68. At the hearing I was asked whether I would remove all regulations on the market and "let it rip", or whether it was appropriate to regulate certain activities such as doorstep selling? In the latter case, how to determine where and how to regulate?

69. I have argued previously that Ofgem's policy on the Non-Discrimination Condition and its Tariff Simplification policy have restricted and distorted competition, at the expense of customers, and that the most effective way of addressing this would be simply to remove all those regulatory restrictions implemented since 2008. This was not because regulations per se are necessarily undesirable, it was because these particular regulations could have been expected to have adverse effects, and did indeed have.

³⁶ "Over the short period that this fund was available between December 2012 and March 2013, schemes succeeded in engaging over 190,000 households with over 21,000 households switching energy suppliers and saving an average of £131 on their bills. Many of the households supported were vulnerable, showing that collective switching can help the most in need, including those who may be in fuel poverty." *Helping Customers Switch: Collective Switching and Beyond*, DECC Policy Paper, 30 October 2013, p 5.

70. I have explained above that, as regulator, I considered it appropriate to introduce the first marketing licence condition in the electricity sector. The aim was to protect and reassure customers at a time when there was evidence of considerable misselling, and a likelihood of the concept of competition itself being brought into disrepute.
71. So I have no objection in principle to the introduction of regulation to address an issue of customer concern, in such a way as to protect customers and promote competition, consistent with regulatory and CMA duties. Although I was surprised at Ofgem's change of stance in 2008, I do not object in principle to its decision to continue a marketing licence condition, and to revise that condition to better address the concerns of 2008 rather than the conditions I faced in 1998.
72. My concerns about the present marketing licence condition are thus of a pragmatic nature rather than of principle. As explained above, since 2008, Ofgem has substantially extended its view about what the marketing condition should do, and this has caused difficulties in two main respects.
73. First, its view that the condition should enable "well-informed decision-making", while well-intentioned, has led Ofgem to go beyond the actual concerns that customers and others have (including about being importuned, pressured or misled), towards a programme of specifying what information customers ought to have and how they ought to take decisions.³⁷
74. Second, this same view has led Ofgem to impose obligations on suppliers that have taken inadequate account of the costs and risks involved, with the result that potentially valuable forms of marketing (quite apart from doorstep selling) have been abandoned or not introduced, and innovation is being thwarted. So customers including vulnerable customers are not as well-served by present marketing regulation as they might be.
75. Given this diagnosis, it seems to me that the solution is to look for a marketing condition that more closely addresses the actual concerns of customers and more closely reflects the practical problems of suppliers. This might or might not go beyond what present consumer protection law provides. The question then is how best to identify a marketing condition that meets these conditions.

12. A customer engagement process

76. There is a way forward that is increasingly being recognised and implemented in UK (and overseas) utility regulation, including by the CAA, Ofwat, WICS and Ofgem itself (with respect to network price controls). It has also been used with success by the CMA's predecessor the Competition Commission in setting a price control for Stansted Airport. That approach is the use of customer engagement involving customer groups, regulated companies and

³⁷ This is true also of post-2008 regulations concerning presentation of the bill and the information that is required, which the CMA asked me about at the hearing. Ofgem's prescriptions go beyond what customers want to know (notably their account balance and what they have to pay) to what Ofgem thinks they ought to have, including detailed prescriptions of words to be used, their position on the bill and even font size. This of course restricts competition between suppliers to discover and provide what sort of bill format customers prefer.

other interested parties to discuss and seek agreed conditions to propose to the regulator or other decision-maker.³⁸

77. Customer engagement in the present context does not simply mean a regulator taking the advice of customer advisory panels, or noting the views expressed by a few hundred customers in a survey, then taking its own decisions in the light of them. That is valuable up to a point, but Ofgem has already done that.
78. Rather, it means an organised and facilitated process by which the interested parties are invited to work through the issues together, seek to come to agreement on a way forward, and thereby propose agreed arrangements for consideration by the regulator or in this case the CMA.
79. In the present case, the devil is in the practical detail. The question is not simply whether or not to allow doorstep selling. It is what kinds of energy marketing ought to be allowed and encouraged and under what conditions and by what means. (This includes the question whether energy is different from other products and needs special treatment beyond what general consumer protection measures provide.) There is a need to understand the key present concerns of customer groups, and to address them in ways that suppliers find practicable. TPIs and others, such as Citizens Advice and Trading Standards Institute, also have valuable practical experience of customer concerns and practicality of solutions to bring to the table. And discussions might well extend to whether and how to modify the Confidence Code on TPIs.
80. Regulators (including competition authorities) cannot match the practical experience that suppliers, comparison switching sites, customer representative groups, local authorities and other bodies have in dealing with customer numbers ranging from thousands and tens of thousands to millions. Nor is there any way in which a regulator assessing the arguments put forward by the many interested parties can match the insights that are gained, and the tradeoffs that become possible, by suppliers, switching sites, customer representative groups and other interested parties sitting around the table, exploring the issues, understanding the practicalities and concerns, trying to find common ground, and learning which concerns are more or less critical and what accommodations might or might not be feasible.
81. Experience elsewhere shows that regulated companies are able to take a more constructive and imaginative approach when dealing with customers than with the regulator; that parties prefer and are more committed to the outcomes that they themselves negotiate; and that all parties benefit from the greater understanding and trust that develops over time.

13. Practical implementation

82. It would be for the CMA to initiate such a process and to set timelines. For example, if the CMA were actively considering the possibility that the marketing condition as presently worded and interpreted constituted an Adverse Effect on Competition, its annotated issues statement in Jan/Feb 2015 might indicate this and suggest that a revised condition agreed by the parties

³⁸ I have written on such processes at some length, most recently “RPI-X, competition as a rivalrous discovery process, and customer engagement,” (paper presented at Conference on The British Utility Model: Beyond Competition and Incentive Regulation?, LSE 31 March 2014) *Utilities Policy* vol 31, December 2014, 152-161, and “The Customer Forum: customer engagement in the Scottish water sector”, *Utilities Policy* vol 31, December 2014., 206-218.

would be helpful. The CMA might invite the parties to engage in order to understand each others' positions, and to work towards a revised marketing condition addressing the adverse effects on competition that the CMA has provisionally identified, with this revised condition being consistent with the CMA's statutory duties and having regard to Ofgem's statutory duties. The parties would seek to understand Ofgem's views while recognising that this process is a matter for the CMA not Ofgem. The parties might be required to report on views and progress by March 2015, being the deadline for submissions before provisional findings.

83. In the light of that report, and its own further deliberations, the CMA might indicate in May/June 2015 whether it provisionally found the present marketing condition to be an AEC, whether an agreed revision to that condition would constitute an appropriate remedy, and provide whatever guidance or comments on that revised condition it deemed appropriate. The parties would then be invited to agree a revised marketing condition for consideration by the CMA at a specified date in advance of publication of the CMA's final report in November/December 2015.
84. As a practical matter, the CMA might wish to establish a steering group and/or a negotiating group comprising a small number of representatives of the different groups of parties, with an appropriate chairman and specified rules of procedure.
85. It should be emphasised that the CMA is not committed to accepting any marketing condition even if agreed by all the parties. The CMA has to use its own judgement and to be satisfied that any condition it approves is appropriate in all the circumstances. It needs to take account of the views of those who were not party to the negotiations or who disagreed with any agreement reached.
86. Experience suggests that negotiations are more productive and likely to be successful if the parties have a reasonably common expectation of what sort of agreement is likely to be acceptable or unacceptable to the ultimate decision-maker, and if there is a reasonable expectation that an agreement reached is likely to be endorsed rather than rejected or substantially modified.
87. The CMA could therefore usefully indicate in advance any additional considerations that would be conducive to the parties reaching an agreed licence condition that would be acceptable to the CMA. For example, if the CMA provisionally considered that some forms of direct marketing should effectively be prohibited but others allowed under appropriate conditions, it would be helpful to indicate this rather than leave market participants maintaining or trying to reconcile unrealistic positions. Or if the CMA provisionally considered that it was necessary to provide more protection than present consumer legislation required, but that the present marketing condition seemed unduly costly, risky or restrictive, then this could usefully guide the parties in their discussions.
88. I do not know whether the parties would reach agreement. However, rapidly growing experience in the UK airport, water and energy sectors suggests that regulated companies and their customer groups are ready, willing and able to negotiate on a range of matters and to reach agreement. This is especially the case if they believe that this will reduce regulatory uncertainty and offer a greater prospect of a form of regulation that better reflects customer

preferences and supplier ability to deliver. There is no reason to think that this would not be the case in the present instance.

89. Even if the parties did not reach agreement, or agreed only in part, or if some dissented, this would nonetheless represent a useful clarification of the issues to facilitate the CMA's subsequent deliberation and decision.

14. Conclusion

90. Doorstep selling as practiced from 1996 to 2012 had some serious problems, at least for a significant minority of customers. Regulators including myself thought it appropriate to regulate marketing activities. Post-2008 Ofgem regulated more severely. Its marketing licence condition SLC 25 was just one of the factors that led the major suppliers to cease doorstep selling. There seems little appetite to bring it back in its original form. But as a result some customers including vulnerable customers became less engaged in, and less able to access, the competitive market. Suppliers, TPIs and others now want to find more acceptable ways of reaching such customers, and Ofgem is keen to assist. But the present marketing licence condition seems to be impeding this search for new and better ways of marketing, thereby constituting an adverse effect on competition.
91. Progress seems to necessitate changes to the marketing licence condition, to align it more closely with the concerns of customers and the abilities of suppliers to deliver. I have argued in this submission that the key is to actively involve those market participants themselves that are most interested and experienced in this area, including customer groups, suppliers, TPIs and others. They will be best able to specify what kinds of standards and safeguards not only address actual customer concerns but are also practicable to deliver. They would be able to look not only at the past and present, but also at the changing conditions of the next few years.
92. The CMA has presumably already asked for the views of these parties. I suggest that, in order to deliver a workable revised marketing licence condition, the CMA now invite the parties to discuss and seek to agree among themselves a marketing condition that can be proposed to the CMA. If appropriate, this might extend to the TPI Confidence Code. The CMA would indicate its preliminary views, and the parties would also wish to take account of the views of Ofgem. It would then be for the CMA to decide whether to adopt the proposed condition (and Confidence Code) as part of its remedies for any adverse effect on competition.