

Effective Paths for Consumer Empowerment and Protection in Retail Energy Markets

Maria Ioannidou¹ 

Received: 1 June 2017 / Accepted: 22 February 2018 / Published online: 18 April 2018
© The Author(s) 2018

Abstract Consumer empowerment and protection are frequently discussed in contemporary energy policy debates. The process of consumer empowerment through information and consumer education has great potential, yet consumer switching as the concomitant outcome of this process remains low. Additional protection for vulnerable consumers is called for. This article is centred on the path to achieving consumer empowerment and protection. In particular, it stresses that empowerment should be viewed as a long-term process. Regulators should not focus on the mere outcome of switching and adopt remedies aimed at changing consumer behaviour in the short term. The discussion highlights how attempts to protect vulnerable consumers through an ancillary application of competition law distort the competitive process and should be avoided. Personal vulnerabilities, such as low income, can be better tackled with targeted social policy measures, whereas instances of vulnerabilities pertaining to the market context, such as difficulties in assessing different energy offers, are better phased out through the market mechanism.

Keywords Consumer empowerment · Consumer vulnerabilities · Retail energy markets · Competition · Regulation · UK energy market investigation

Consumer empowerment forms a leading slogan in contemporary EU policy discourses (EC 2007, 2011a, b, 2012a), including energy market liberalization (EC 2015a, b). This is reflected in the construction of a “New Deal” for consumers, as part of the promotion of an integrated energy market (EC 2015b), and is explicit in the proposed lengthy and detailed regulatory

✉ Maria Ioannidou
m.ioannidou@qmul.ac.uk

¹ Centre for Commercial Law Studies, Queen Mary University of London, 67-69 Lincoln’s Inn Fields, London WC2A 3JB, UK

framework for a “consumer-centred clean energy transition” comprising, in essence, the Fourth Energy Package (Winter Package).¹

To this end, the European Commission (EC) has proposed a wide range of different measures empowering consumers to act (EC 2015b). These measures centre around the provision of information and include mechanisms for more accurate metering and billing and improved access to energy consumption data. The roll out of smart meters is seen as instrumental in that regard. Smart meters measure energy consumption accurately and provide more information than conventional meters. They can transmit and receive data for information and monitoring purposes using electronic communication (EC 2016f, Article 2(18)). In addition, the EC wants to educate consumers on the possibility of switching and make switching easier by reducing the burden and time involved and improving comparison tools (EC 2015b). Empowering consumers, which encompasses attempts to enlist them as active market participants through the provision of information (process) and the concomitant triggering of consumer switching (outcome), can be seen as a partial solution to delivering better performing retail energy markets. A short-term approach to consumer empowerment focuses only on switching as a measurable outcome.

At the same time, the EC emphasizes the importance of full consumer protection and catering for vulnerable consumers and energy poverty, and whereas this falls under the remit of individual Member States, the EC accepts that common minimum criteria may be considered (EC 2015b). It should be mentioned at this junction that the causes of consumer vulnerabilities are multiple and comprise both personal and market vulnerabilities. Elderly people, people on low income or with disabilities suffer from personal vulnerabilities and energy poverty presents an example of personal vulnerability linked to low income. Market vulnerabilities are linked to the inability to process the relevant information because of reasons pertaining to the specific market context. For example, in liberalized retail energy markets consumers may find it difficult to evaluate different offers, because of their respective complex structure.

Against this backdrop, this article focuses on the interplay between empowerment and protection and adopts a pragmatic approach. It does not challenge the liberalization paradigm nor does it aim at formulating an alternative normative policy proposal. This is not to suggest that it is not worth pondering about the risks of this market-driven approach (Bartl 2015). Instead, this article attempts to provide a pragmatic exposition of how the existing paradigm can work better. There is a problem with the existing approach—not because of the proposed measures conferring more information to consumers expecting active consumer behaviour—but rather because of the lack of proper debate in relation to the possible impact of such measures. The assumption is that consumers will act upon the information provided thereby triggering competition between different providers. But what happens when consumers do not take any action? Does that suggest that the market is failing? What are the reasons for such inactivity?

Over-reliance on consumer switching as the means to pursue and trigger competition in retail energy markets is misplaced, since consumer inactivity is not always an indicator of a problem requiring regulatory intervention. Yet, it may be a sign that certain categories of vulnerable consumers are excluded from reaping the benefits of liberalized retail energy markets and for those categories additional protection is needed. The way national regulatory

¹ The material is available at <<https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition>> (accessed 6 March 2017).

and competition authorities strike this balance has an impact on the functioning of retail energy markets, especially given their highly politicized nature that may trigger political intervention, which then in turn adversely impacts the competitive process. Therefore, the EC approach in relation to empowering consumers through specific measures (empowerment as a process) is a step in the right direction, but may take time to materialize and result in high switching level (empowerment as an outcome).

Embarking from the European Commission's approach to empowering consumers while guaranteeing protection for the vulnerable, this article argues that empowerment should be seen as a long-term process that is worth nourishing. The EC and national regulatory authorities should focus on measures to improve the empowerment process and not equate empowerment with the mere act of switching between different energy suppliers. Focusing on empowerment as a process calls for improving access to information and consumers' ability to assess it and does not necessarily lead to tangible results in the short-term, absent switching. The fact that consumers do not switch may indicate a problem with empowerment as a process; it may suggest that consumer education takes time to materialize or equally it may represent a conscious consumer choice. Examining all these scenarios and the potential of empowerment as a process will prevent misperceived regulatory interventions and aid the phasing out of certain vulnerabilities pertaining to the market context. Measures providing more information to consumers in order to trigger active consumer behaviour, as per the EC proposals, need time to materialize. This is linked first to the nature of empowerment, which is very difficult to measure as psychology, behavioural economics and marketing literature suggests. Second, the fact that consumers do not actively switch does not necessarily suggest that they are not empowered. Inactivity may well represent a deliberate choice after careful evaluation of all available information. Third, retail energy markets—given their politicized nature and the importance of energy for consumers—may invite short-term political intervention not allowing sufficient time to measures triggering switching to materialize.

Hence, this article employs three main reasons to support a long-term approach to the process of empowerment, which are linked to the nature of empowerment, the actors and the market context, and is structured as follows. “[EU Energy Policy: Delivering for Consumers](#)” maps out the role of consumers in the context of EU energy policy debates. “[Consumer Empowerment as a Process](#)” builds on theories of empowerment in psychology, marketing studies and behavioural economics and distinguishes between measures advancing empowerment and their respective results. “[Consumers as Market Actors: Multiple Consumer Images](#)” focuses on the role of consumers in competitive markets post liberalization and discusses the key characteristics of multiple consumer images. “[Retail Energy Markets: ‘Inherently Flawed Markets’ and the UK Example](#)” examines the “inherently flawed” nature of retail energy markets. The UK retail energy market serves as an example to highlight the complexities and provide a pragmatic exposition of the preceding theoretical analysis, which alludes to different mismatches and paradoxes.

EU Energy Policy: Delivering for Consumers?

The article's focus on the process of consumer empowerment rather than the act of switching needs to be understood against the backdrop of the EU approach to the role of consumers in liberalized energy markets. This section critically discusses the relevant legislative framework,

its evolution and current marked focus on promoting empowerment while at the same time catering for the needs of vulnerable consumers through specific measures.

EU Internal Energy Market and Consumers: The Framework

The adoption of EU energy legislation is a difficult exercise in balancing various Member States' interests and the EU striving to achieve open and competitive markets. This balancing is encapsulated in the notion of services of general economic interest (SGEI). Despite the elusive and constantly evolving scope (EC 2003, 2012b), SGEI comprise the provision of services that are so important that the market alone cannot provide for them (EC 2011c). Therefore, public intervention is required. The supply of energy constitutes a SGEI (Case C-393/92 1994, paras 46–48; Case C-159/94 1997, para 57) allowing Member States to derogate from the competition law provisions by virtue of Article 106(2) TFEU. This primary Treaty rule derogation is further developed in the secondary energy legislation discussing public service obligations (such as security of supply, regularity, quality and price) (Directive 2009/73/EC 2009, Article 3(2); Directive 2009/72/EC 2009, Article 3(2)). Similar provisions featured in the First and Second Electricity and Gas Directives. Directive 96/92/EC, Article 3(2); Directive 98/30/EC 1998, Article 3(2). Directive 2003/54/EC 2003, Article 3(2). Directive 2003/55/EC 2003, Article 3(2)) and universal service obligations for the supply of electricity, of a certain quality and price, as well as the possible appointment of a supplier of last resort (Directive 2009/72/EC 2009, Article 3(3)).

Member States may also provide protection from disconnection, adopt measures for the alleviation of energy poverty, provide for social security benefits and adopt measures to improve energy efficiency (Directive 2009/73/EC 2009, Articles 3(3)–(4); Directive 2009/72/EC 2009, Article 3(7)–(8)). Increased focus is placed on the protection of vulnerable consumers, as each Member State is required to define the concept of vulnerable customers and ensure that rights and obligations linked to them are applied (Directive 2009/72/EC 2009, Article 3(7); Directive 2003/54/EC 2003, Article 3 (5); Directive 2003/55/EC 2003, Article 3(3); Directive 2009/73/EC 2009; Article 3(3)).

The progressive liberalization of energy markets in the EU follows a well-known pattern predicated on the assumption that liberalized energy markets will deliver the most and safeguard the interests of consumers (Johnston 2016). Consumer active participation in markets corresponds to this liberal paradigm and is progressively strengthened. Energy market liberalization has been incremental and faced three main legislative stages to date. The First Energy Package comprised primarily Directive 96/92/EC 1997 and Directive 98/30/EC 1998. The Second Energy Package repealed these Directives on electricity and gas and also contained legislation improving cross border electricity exchanges (amongst others) (Directive 2003/54/EC 2003; Directive 2003/55/EC 2003; Regulation 1228/2003/EC 2003). The Third Energy Package repealed the Directives on the internal market in electricity and gas, the cross-border Regulation and the Regulation on access to gas transmission networks. It also established the Agency for the Cooperation of Energy Regulators (ACER) (Directive 2009/72/EC 2009; Directive 2009/73/EC 2009; Regulation (EC) No 714/2009; Regulation (EC) No 715/2009; Regulation (EC) No 713/2009).

Improving consumer protection was one of the drivers behind the Third Energy Package at EU level, which is reflected in the enhanced measures adopted to that end (Johnston and Block 2012, pp. 162). The Third Electricity and Gas Directives strengthened Member States' obligation to ensure that consumers have all of the necessary data (Directive 2009/72/EC

2009, Article 3(16), Annex I, para 1(h) and (i); Directive 2009/73/EC 2009, Article 3(6) and Annex I). The provision of information on their consumption data together with the introduction of smart meters (Directive 2009/72/EC 2009, Annex 1 para 2) is expected to assist consumer participation. Finally, these Directives have sought to improve dispute resolution and complaints handling (Directive 2009/72/EC 2009, Article 3 (12)–(13); Directive 2009/73/EC 2009, Art 3(9); Directive 2012/27/EU 2012, Articles 9–11). The above measures suggest a shift towards increased consumer participation and empowerment but coupled with increased protection for vulnerable consumers. The Vulnerable Consumer Working Group (VCWG) was established in order to support the implementation of the Third Energy Package (VCWG 2013).

Commission's New Proposals

On 30th November 2016 the European Commission published its Winter Package premised on three main goals: putting “energy efficiency first”, the EU becoming the global leader in renewables, and achieving a fair deal for consumers (Lavrijssen 2017). The proposed recast of the Electricity Directive has a dedicated chapter on consumer empowerment and protection and includes proposals to improve active consumer participation while protecting the most vulnerable consumers and consumers suffering from energy poverty (EC 2016f).

These proposals include basic contractual rights and dynamic price contracts, which effectively allow consumers to better control their electricity consumption responding to real time price signals (EC 2016f, Articles 2(11),10–11), switching rights (EC 2016f, Article 12) including switching within three weeks without any charge, access to price comparison tools (EC 2016f, Article14), safeguarding the rights of “active customers” (EC 2016f, Article 15), which are defined as those “who consume, store or sell electricity generated on their premises, including through aggregators, or participate in demand response or energy efficiency schemes provided that these activities do not constitute their primary commercial or professional activity” (EC 2016f, Article 2(6)). The proposals also include adhering to minimum requirements for billing information (EC 2016f, Article 18), introducing smart meters where possible (EC 2016f, Articles 19–21) and accurately measuring actual consumption, even for customers on conventional meters (EC 2016f, Article 22). A conventional meter, contrary to a smart meter, does not have the capability to transmit and receive data (EC 2016f, Article 2 (17)).

These proposals appear to enhance the process of consumer empowerment by focusing on the realization of consumer active participation in the market as well as on improving electricity self-generation (EC 2016f, paras. 25, 29). In the same vein, the recast Renewable Energy Directive contains provisions that incentivize consumers to generate, self-consume and sell electricity and generally actively participate in the market (EC 2016c, Articles 21 and 22).

In terms of consumer protection measures and protecting vulnerable and poor consumers, the recast Electricity Directive suggests that Member States should only resort to price regulation in exceptional circumstances (EC 2016f, recital 14; Article 5(2)–(4)). Alongside the provision for vulnerable consumers (EC 2016f, Article 28), Member States must also define a list of indicators for measuring energy poverty, monitor households in energy poverty and report on relevant measures to the European Commission every two years (EC 2016f, Article 29).

Apart from the recast Electricity Directive, the EC has proposed changes to the Energy Efficiency Directive in a bid to further empower and protect vulnerable consumers (EC 2016a). These changes include improvements on the provision of information about energy

consumption, accurate metering and billing and access to the respective information (EC 2016a, Articles 7a–11a). In regard to addressing energy poverty, the amended Energy Efficiency Directive encourages Member States to take energy poverty into account when devising energy efficiency obligation schemes (EC 2016a, Articles 7a, para. 5) and alternative measures to achieve energy savings (EC 2016a, Articles 7b, para. 2). Furthermore, the amended Directive on the Energy Performance of Buildings includes provisions for investments in energy efficient housing that will help tackle energy poverty (EC 2016b).

Overall, the focus on further empowering all consumers and protecting vulnerable consumers is echoed throughout the proposals and policy documents, and while the European Commission acknowledges that the measures introduced in the Third Energy Package have enhanced consumers' role in energy markets, its hope is that these new proposals can improve consumers' position further (EC 2016f).

Assessing the EU Framework

Despite efforts to increase consumer empowerment in the Third Energy Package, consumers remain insufficiently informed and fail to actively participate in energy markets (EC 2016j). Hence, the measures proposed in the new Commission's package focus on better provision of information through more accurate billing information, access to price comparison websites and smart meters, facilitating switching, and incentivising self-generation. Such proposals follow the traditional approach according to which consumers as rational market actors are active in the market, triggering competition between suppliers and lowering energy prices.

However, empirical evidence indicates low levels of consumer activity. The average EU provider switching rate is around 12% (ranging from 3 to 25% in individual Member States), increasing to an average of 24%, if tariff switching with the current provider is taken into account (as switching is possible between offers from competing suppliers as well as between offers from the same supplier) with the UK exhibiting high switching rates compared to other Member States (EC 2016h). Despite doubling in the last six years EU switching rates remain quite low. Consumers' lack of switching can be partly explained by the existence of end-user price regulation in many Member States (14 Member States for electricity and 13 Member States for gas) (ACER/CEER 2015; Directorate General for Health and Consumers 2010). The ACER/CEER Market Monitoring Report 2015 indicates a moderate increase in switching rates, with overall levels remaining quite low (ACER/CEER 2016b). The last consumer scoreboard has also underlined the various difficulties with consumer switching in retail energy markets (EC 2016i). Despite a record low in wholesale energy prices in 2016, retail energy prices have risen, pointing towards the need to further improve competition in retail markets (EC 2016d). Measures to increase consumer switching have been moderately successful with the EC focusing its efforts on introducing further improvements. In conjunction with measures triggering consumer engagement, the EC Package includes measures to protect vulnerable consumers and there is a clear focus on tackling energy poverty. Generally, in regard to protecting the vulnerable, the European Commission takes a clear stance against retail price regulation, while acknowledging the potential need for transitory social tariffs (EC 2016j).

Many Member States provide for a certain degree of protection for vulnerable consumers. Non-economic support includes protection from disconnection (Johnston and Block 2012, para. 7.91). A recent report on energy poverty and vulnerable consumers concluded that across Member States a wide range of measures have been adopted to tackle consumer vulnerabilities and energy poverty (INSIGHT_E 2015). The report identifies some key measures to protect

vulnerable consumers. First, this can be achieved through targeted financial interventions through the social welfare system. It can also be promoted through more specific instruments, namely protection from disconnection, billing information, codes of conduct, debt protection, campaigning and smart meters. In addition, another option would be to support targeted energy efficiency measures, such as energy efficient refurbishments (INSIGHT_E 2015).

The rules proposed by the EC are a step in the right direction in principle. The Commission's proposals aim to enhance the process of empowerment through the provision of information and even if switching levels (as the desired outcome) are not high; evidence suggests that the situation is improving (ACER/CEER 2016b). Hence, this situation supports the focus on empowerment as a long-term process. At the same time, these proposals call upon Member States to deliver full protection for the vulnerable, yet the focus is on energy poverty. The EC proposals appear to draw a distinction between market-based solutions premised on the provision of information to consumers and more protective regulatory measures for certain consumer categories. The concomitant question, which is unclear in the Commission's Winter Package, is the extent to which the measures to increase empowerment also have the potential to cater for market-based vulnerabilities, such as consumers' inability to assess complex information. The way different Member States deal with such market-based vulnerabilities may have an adverse impact on the competitive process as the UK example suggests and as such they should steer away from employing competition law tools with a regulatory mindset.

Consumer Empowerment as a Process

As the previous discussion showed, central to the EU legislative framework on energy market liberalization are tools to empower and protect consumers. The European Commission defined empowered consumers as those able to "make optimal decisions by understanding their own preferences and the choices available to them. They know their rights, recognize when these have been breached and if so, complain and seek redress when necessary" (EC 2011b). The process of consumer empowerment is thus premised on information and the exercise of consumer choice complemented by the necessary tools of redress, if consumer rights have been breached. The approach to consumer empowerment under EU law corresponds to what Micklitz has termed "access justice," namely the mechanisms allowing consumers to participate in markets (access to markets) as well as the instruments allowing them to enforce their rights (access to justice) (2011, pp. 21–23). Consumer empowerment encapsulates both the process of information disclosure as well as the outcome of acting upon such information. Absent of the latter, the provision of information (process of empowerment) is criticized for failing to cater to consumers' needs. This section argues that in instances where evidence of consumer behaviour is low, regulators should first focus on improving the different stages of the process, while acknowledging the difficulties in measuring empowerment, and, as a second step, complement the information paradigm with regulatory measures.

In order to sustain the need to improve the process of empowerment, rather than focusing on outcomes, the analysis in this section explores the cross-disciplinary nature of empowerment. Empowerment as a concept is explored from different perspectives in many disciplines. This article looks first into psychology and marketing literature, in a bid to show that empowerment is multifaceted and is understood mainly as the process and the way people interact with their environment. Hence, for the purposes of this article, which focuses on consumer empowerment, and argues that regulators should primarily focus on improving the

process of empowerment, it is important that other disciplines provide evidence that support the focus on the process.

Second, this article draws from behavioural economics in order to allude to the limits and shortcomings of the empowerment process. Behavioural economics point to limits in rationality and the ability of consumers to evaluate their interests due to various cognitive limitations and behavioural biases. However, insights from behavioural economics, instead of challenging the idea of consumer empowerment as an aid to the competitive discipline, should be used in order to improve the empowerment process and progressively phase out these biases, at least in relation to some consumer groups, through consumer education.

According to Perkins and Zimmerman empowerment is an open-ended term and “definitions of empowerment abound” (Perkins and Zimmerman 1995, pp. 570). They offered a concise account of the relevant psychology literature, highlighting the identification of capabilities and pointing to empowerment both as a process and an outcome, which permits the study of the consequences of the relevant empowerment processes (Perkins and Zimmerman 1995). Zimmerman’s research on psychological empowerment (distinct from organizational or community empowerment) suggested that the development of a universal and global measure of empowerment is neither feasible nor desirable (Zimmerman 1995).

Our discussion here focuses on a different construction of empowerment, namely consumer empowerment; nonetheless, interesting analogies can be drawn with Zimmerman’s findings on psychological empowerment defined as “empowerment at the individual level of analysis [integrating] perceptions of personal control, a proactive approach to life and a critical understanding of the sociopolitical environment” (1995, pp. 581). Zimmerman constructed a “nomological network of psychological empowerment” comprising an intrapersonal, interactional and behavioural component (1995, pp. 588). The intrapersonal component refers to people’s perception of themselves and their skills; the interactional component refers to people’s understanding of their environment and the behavioural component refers to empowerment actions taken to influence outcomes (Zimmerman 1995). Similarly, consumer empowerment encapsulates both consumer capabilities and the respective interaction with their market environment, implicitly adopting the intrapersonal, interactional and behavioural components. Since the outcome of empowerment is difficult to measure and is influenced by many different variables, the focus should lie on measuring different indicators pertaining to the process.

The understanding of empowerment as a process is also supported by the marketing literature. Denegri-Knott et al. (2006), in their study on synthesising various theories on consumer empowerment, presented three dominant models (Nardo et al. 2011). The consumer sovereignty model, premised on the rational consumer, focuses on consumers’ abilities as well as their actions in defence of their rights, which can alter suppliers’ behaviour. The cultural model, premised on conflict—the interaction between consumers and markets—focuses on different consumer strategies of resistance to market forces. The discursive model is not premised on a conflict between consumers and markets but rather on a symbiotic interaction. The above succinct presentation of these three models of consumer empowerment suggests that these models have in common the exploration of the interplay between consumers and markets and a focus (albeit with different intensities) on improving consumers’ skills (process) and the various outcomes in the form of consumer active behaviour, either individually or collectively.

Both the marketing and behavioural economics literatures have highlighted the difficulties in devising a workable process of empowerment. Shankar, Cherrier and Canniford employed a Foucauldian approach to suggest that more choice may lead to “choice paralysis” (2006), while behavioural economics challenges the assumption that consumers are rational decision

makers and suggest that they are constrained by a number of biases (BIT 2016; OFT 2010, 2011; Stucke 2007), which limit their ability to act upon the information given. Regulators suggest that consumers should have access to information, and the ability to assess it and act upon it (OFT 2010; Ofgem 2011; OFT, Ofgem and CMA 2014, para 3.1; CC3, para 296). Yet, consumer behavioural biases are present at all different stages of the decision-making process. These biases are linked to both the quality and quantity of information. For example, framing bias suggests that the way a certain situation is presented may induce consumers to act accordingly (Tversky and Kahneman 1981). In addition, consumers may choose not to act because of loss aversion and status quo bias, according to which people are more concerned about losing rather than gaining something and are likely to retain the status quo and prefer the default option (Stucke 2007).

Related to this is the question of what is the “right” amount of information as too much information may induce consumers to make the wrong choices. According to quantitative studies, lower switching rates are observed when consumers are presented with more options (Wilson and Waddams Price 2006). Therefore, the question arises as to whether the provision of more information facilitates the exercise of choice as more information may result in confusion, creating the so-called confusopoly problem (Mehta and Sugden 2013). The existence of such biases can be exploited by energy suppliers and impact on consumers’ search and switching costs, thereby preventing the realization of consumer empowerment. The focus should be on how to address these biases while taking into account the impact of the adopted remedies on the competitive process. In addition, remedies should account for the fact that non-switching cannot always be attributed to consumers’ behavioural biases; it may be a balanced choice to remain with their supplier.

As pointed out in the ACER/CEER Market Monitoring Report “when assessing competition using switching rates, it is also important to consider the reasons for not switching” (2015, pp. 69). Crampes and Waddams (2017) identify four main reasons for consumers’ inactivity: insufficient (actual or anticipated) gains, lack of trust in new suppliers, complexity of the switching process and loyalty to the existing supplier. All these reasons can be indicative of different failures in the process of empowerment, first in the provision of information/ access, as well as in the ability to assess such information. Here policy makers can play an important role with targeted campaigns informing consumers about the benefits of switching and the options available (Crampes and Waddams 2017). However, consumers’ inactivity may represent a rational choice not to switch after having compared the prices of different providers or the fact that they value the good quality of the service provided (passive engagement—no action). For example, loyalty to existing suppliers may be attributed to consumers’ status quo bias or to consumers’ satisfaction with the current supplier. Such inactivity may also be read as a sign of resistance to market forces pertaining to the cultural model of consumer empowerment in the marketing literature.

Active engagement is the most complete type of empowerment and leads to measurable outcomes, since the active engaged consumer group has access to, assesses and acts upon the information. Passive engagement lacks the latter element, as consumers consciously choose not to act on the information for a number of reasons such as, for example, satisfaction with their current supplier (ACER/CEER 2015). Sophisticated and rich consumers may, thus, fall within the passive engaged consumer group. On the contrary, disengagement is different to passive engagement, as it encapsulates instances where consumers fail to either access, assess and act upon the information due to many different reasons corresponding to different causes of vulnerability.

In sum, different approaches to empowerment in psychology, marketing and behavioural economics suggest that the focus should be on the process of improving consumer skills and addressing consumers' often inherent inability to participate as actors in retail energy markets. At the same time, one should be cautious as instances of consumers' passive behaviour cannot necessarily be equated with a failure of the process of empowerment. They may simply form an instance of passive engagement.

Consumers as Market Actors: Multiple Consumer Images

The above analysis on the process of empowerment suggests that consumers may participate in markets with different levels of intensity. Consumers can be placed on a spectrum comprising empowered consumers, i.e., active engaged consumers and passive engaged consumers, as well as disengaged consumers. The emphasis is on empowered active consumers as a trigger to the competitive process (OFT 2010, pp. 18; CC3 2013, para 295). Passive engaged and disengaged consumers have in common their inactivity, i.e., the fact that they do not switch between different suppliers. Nonetheless, passive engaged consumers have the ability to access and assess the information and their lack of action is a conscious choice and should not be equated with vulnerability. An emerging paradigm of multiple consumer images is observed (Lavrijssen 2014). Despite overlaps between the different groups, all of these images are present in energy policy debates and influence the adoption of different remedies to empower and protect consumers.

The concept of the empowered consumer finds its expression in EU consumer law in the concept of the average consumer, who is defined as “well informed and reasonably observant and circumspect” (Case C-210/96 1998, para. 31; Directive 2005/29/EC 2005, recital 18). As such, the model of average consumer is based on the provision of information and has been criticized for the restrictive assumptions at its base, since consumers often fail to measure up to the rational consumer model (ECCG 2013; Howells and Wilhelmsson 2003; Stuyck 2014). The image of the average consumer formulated by the European Court of Justice has strengthened the internal market to the detriment of more protective national measures (Mak 2011). It has been occasionally complemented by other consumer models, where the Court or EU legislature felt that consumers were not corresponding to the average consumer model and stricter consumer protection rules were needed (Case C-382/87 1989; Regulation (EU) No 254/2014; EP 2012; ECCG 2013). Alongside the average consumer, the notion of “vulnerable consumer” had entered EU law (Reich 2016, pp. 139), albeit in a fragmented manner. An example here can be drawn from the Unfair Commercial Practices Directive, which in Article 5(3) refers to the “average vulnerable consumer” by reference to “[...] a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity” (Directive 2005/29/EC 2005).

In the same manner that the average consumer model allows for market deregulation, since there is no need for protection through consumer law measures, the notion of the empowered consumer as a trigger to competition calls for less regulatory intervention and puts an increased onus on consumers. Consumers are empowered through the provision of information and the exercise of choice, which in turn disciplines market players. The active empowered consumer is the model consumer in retail energy markets. Passive consumers complicate intervention as

it is difficult to distinguish the various reasons behind this inactivity and calls for more cautious regulatory interventions based on a better understanding of consumer behaviour (Flores and Waddams Price 2013). The process of empowerment can improve access and the ability to assess, but cannot guarantee a given positive outcome, in this case switching. An important factor in driving consumer behaviour is confidence in the process and the resulting gains from switching (Deller et al. 2014; Waddams Price et al. 2013; Waddams Price and Zhu 2016). However, switching does not guarantee the cheapest deal, which undermines market confidence and acts as a disincentive to consumer engagement (Wilson and Waddams Price 2010). Such wrong switching decisions can have a chilling effect on consumer activity resulting in less engagement.

The inactivity is the link between the passive empowered consumer group and the vulnerable consumer group, which is by no means homogeneous. The fact that some consumers remain passive does not mean that they are not empowered. Yet at the same time it may be taken as an indicator of consumer vulnerabilities, which can be linked to personal attributes or the specific market context (EC 2016g). The EC recognized that vulnerability is not a static situation and refers to both consumers' personal characteristics and capabilities as well as the context of market transactions (EC 2016g). Both personal and market vulnerabilities may exacerbate consumer biases and tamper with their ability to engage and exercise empowerment.

Vulnerabilities can be personal or market related and have attracted the attention of national regulators (FCA 2013, 2015; Ofgem 2013), who stress that everyone can be potentially vulnerable (FCA 2013). The distinction between personal and market vulnerabilities corresponds to Reich's tripartite analysis of vulnerabilities between physical disability, intellectual disability and economic disability (Reich 2016). Personal vulnerabilities comprise physical and economic disabilities, whereas market-related vulnerabilities correspond to intellectual disabilities relating to various difficulties in exercising consumer choice. The UK energy regulator—the Office of Gas and Electricity Markets (Ofgem)—discusses both the personal circumstances and the respective market context in its approach to consumer vulnerabilities (Ofgem 2013). Personal circumstances include, for example, age, disabilities, sickness and low income (Ofgem 2013, paras 3.10–3.11). Energy poverty linked to low income is an example of personal vulnerability, and is generally defined as the inability of consumers to heat their homes or enjoy other energy services at an affordable cost (INSIGHT_E 2015; Trinomics 2016). One indicator is expenditure on energy compared to household income. This may vary in different Member States. In the UK, a household is considered to be fuel poor if 10% of its income is spent on fuel in order to heat at an adequate level (DECC 2013). The EC has calculated that the lowest income households in the EU spend approximately 9% of their income on energy, 50% more than what they were paying 10 years ago (EC 2016e). Affordability is thus one expression of consumer vulnerabilities, which are more complex and multi-dimensional (Crampes and Waddams 2017).

Consumers' inability to process complex information may be given as an example of vulnerability related to the specific market context. This is the area where the process of empowerment through the provision of information should primarily focus. If the provision of information together with consumer abilities and skills is improved, this type of market vulnerability will progressively subside. On the other hand, the competitive process cannot cater for personal vulnerabilities and needs to be complemented with additional regulatory and social measures. The focus on measures to tackle energy poverty reflects this approach. Such an approach draws the right balance between market-related measures and measures protecting

consumers directly in retail energy markets, in the light of the inherent characteristics of these markets, discussed in the following section.

Retail Energy Markets: “Inherently Flawed Markets” and the UK Example

This section embarks on a concise exposition of the nature of retail energy markets. The analysis examines certain characteristics of the respective markets, namely their highly politicized nature, the inevitable interplay between competition and regulation as well as the importance of energy for consumers, and exemplifies these characteristics in the context of the UK retail energy markets. By using concrete examples of failed regulatory interventions in the UK context, the analysis ultimately reveals that a short-term focus on consumer switching—as the outcome of the empowerment process—adversely impacts consumer welfare. Rather, the focus should be on the long-term process of empowerment and avoid short-term political interventions.

In the UK, the short-term focus on switching as the measurable outcome of the empowerment process resulted in wrong regulatory interventions. Here, we employ two examples of remedies proposed by Ofgem to exemplify this point; first, the non-discrimination obligation imposed on electricity suppliers (preventing them from charging different prices in different regions) and second, the imposition of an obligation to simplify and limit the number of available offers.

The UK Competition and Markets Authority (CMA) undertook the last review of the UK retail energy market. The CMA equally focused on triggering switching through improving consumer information as well as protecting vulnerable consumers through the imposition of a transitional price cap. The CMA accepts that measures to promote consumer engagement require time to deliver results. Yet, in the interim, the CMA retreated to more traditional interventionist measures.

The Nature of Retail Energy Markets

The nature of retail energy markets may further exacerbate consumers’ personal and market vulnerabilities, the former because of the essentiality of energy and the latter due to various complexities in evaluating different offers. Acknowledging these limitations aids in a refocusing of empowerment on the process rather than the outcome of switching and in the concomitant construction of adequate remedies to tackle personal vulnerabilities, primarily energy poverty.

Retail energy markets present inelastic demand, regulatory intervention and a politicized nature in the light of their importance for consumers. Energy is essential to our everyday lives. It is a homogenous product, which, in light of its importance, must be priced at affordable levels (Bartl 2010; Deller and Waddams 2015; Pront van Bommel 2016). Energy markets may present high levels of concentration, vertically integrated firms and problems with access to distribution infrastructure, which can affect the levels of competition. In the light of these characteristics, energy markets can be seen as “inherently flawed” markets.² “Inherently flawed” markets appear not to deliver the best offers to consumers; nonetheless, this cannot

² Another term that has been used is “problem markets.” See the excellent presentations at the annual CCP conference 2014 on problem markets, available at <http://competitionpolicy.ac.uk/events/annual-conferences> <accessed 22 September 2016>.

be clearly attributed to a competition law infringement. For example, in the context of the UK retail energy markets, the regulators have observed rising energy prices, an increase in the profits of the vertically integrated main energy suppliers and low levels of consumer trust and satisfaction (OFT, Ofgem and CMA 2014, paras 1.1, 1.4, 1.15, 1.16). These may have been indicative of serious competition law problems such as coordination between suppliers and preventing the expansion of smaller suppliers (OFT, Ofgem and CMA 2014, paras 1.26–1.28, 1.36–1.39). However, the CMA detailed investigation into the retail energy markets did not confirm these assumptions (CMA 2015, paras 69–79, 136).

Another way to view energy markets is as markets with “wicked problems.” Kolk (2012, pp.180) has described “wicked problems” as “difficult to solve, not for technical reasons [...] but because of social complexities, including interdependencies, multi-causalities, divergent perceptions, involving a multitude of stakeholders, and an evolution in several of these aspects over time as well, with sometimes unforeseen consequences of measures taken.” These problems can be linked to the various images of consumers and the fact that the market may cater for certain groups, i.e., engaged consumers but not others, i.e., the disengaged.

The competitive process does not cater for every consumer, nor does it necessarily guarantee ethically acceptable results (Hammond 1993). Whereas some consumers benefit from market liberalization by shopping around and looking for better deals, others, for a constellation of different reasons, remain with their suppliers and end up paying a higher price. The concomitant question is whether and to what extent it is ethically acceptable for disengaged consumers to be exploited. This is especially so when the disengaged consumer category comprises the most vulnerable consumers, such as the elderly, disabled and poor. Competition law has inherent limits in catering for personal vulnerabilities and often needs to be complemented with regulatory measures to deliver affordable prices to certain categories of consumers. Such regulatory intervention may adversely impact the competitive process, as indicated by Ofgem’s intervention following its two reviews of the UK retail energy markets.

In effect, in retail energy markets, the most appropriate reaction to an identified market malfunctioning is hard to identify and place within the competition law or regulatory realm. The application of competition law with a regulatory mindset can be accepted to the extent that competition and regulation share some of the same aims such as maximising efficiency and improving consumer choice. However, they employ different tools to attain these and, as Justice Breyer, eloquently stated “antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies”(Town of Concord v. Boston Edison co 1990).

In simple terms, competition enhances the available offers, in terms of price, quality and choice, thereby allowing consumers to choose between different products that suit their needs. Such demand-side responses in turn create a virtuous circle, as the exercise of that choice prompts suppliers to improve in order to gain consumer trust. Hence, the competitive process progressively educates consumers to react to market signals and assess the relevant offers based on the given information and as such, competition law has the potential to ameliorate vulnerabilities pertaining to the market context.

The relationship between competition law and regulation creates difficulties in situations where they pursue conflicting aims. The conflict may be internal in cases where both competition and regulation pursue the economic goal of efficiency maximization with regulation adopting a short-term approach, or external given that regulation may pursue a wider range of goals ranging from economic to a diverse array of non-economic goals (Prosser 2010). The different mandates of energy regulators and competition authorities reflect this

diversity in goals. For example, the CMA is entrusted with the promotion of competition for the benefit of consumers, whereas Ofgem's principal objective is to protect the interests of existing and future energy consumers, pursuing a range of public interest objectives such as the reduction of greenhouse emissions and security of energy supply and having regard to the interests of vulnerable customers, such as those who are chronically sick, of pensionable age and on low incomes (OFT, Ofgem and CMA 2014, paras 2.4, 3.32).

Finding a proper balance between accommodating economic and non-economic goals in retail energy markets is essential given the unavoidable symbiotic relationship between competition and regulation and the fact that the existence of different public interest goals, such as the protection of certain vulnerable consumers, may have negative spillover effects on competition. This balance is linked to the question of the attribution of different responsibilities and roles between competition and energy regulators. As the UK example showcases, the energy regulator, Ofgem, should be more cognizant of the impact of regulatory remedies on the competitive process. At the same time, the competition regulator, the CMA, should not step into the market to covertly protect certain vulnerable groups.

UK Retail Energy Markets: Mapping the Issues

The British residential gas market was fully liberalized in May 1998 with the electricity market following in May 1999. For the transitory period price caps were introduced, which were subsequently removed in April 2002 (Waddams Price 2005). By 2008 following subsequent consolidations, the original incumbents (Big Six) represented almost all the electricity and gas markets (Hviid and Waddams Price 2012; OFT, Ofgem and CMA 2014, para 2.6). At that time, in the light of rising energy prices, Ofgem undertook an investigation into the liberalized energy market (Energy Supply Probe) (Ofgem 2008). Recognising that the energy market was not delivering the desired outcome for consumers and observing an increase in energy prices, it launched its Retail Market Review (RMR) in late 2010 (Ofgem 2010). The adopted regulatory remedies attracted wide criticism (Hviid and Waddams Price 2012; Littlechild 2012; Littlechild 2014; Pollitt and Haney 2014; Waddams Price and Zhu 2013). This criticism was directed at Ofgem for failing to assess the impact of its regulatory intervention for the protection of vulnerable groups on the competitive process. Such intervention resulted in an adverse effect on competition, harming the very consumers it sought to protect.

First, following the Energy Supply Probe, Ofgem introduced non-discrimination obligations for energy retailers with a three-year sunset clause. These obligations: (a) prevented the charging of different prices in different regions and (b) the discrimination between different payment methods (with the exception of introductory offers), the latter following EU legislation.

In relation to regional price discrimination, before energy liberalization there was one electricity and gas supplier per region. After liberalization, new entrants (who were the main suppliers in other regions) offered lower prices in new regions in order to attract customers from the incumbents. It was observed that new entrants offered lower prices, while the incumbents charged 10% more to their existing customers, thereby exploiting the loyalty of the consumers in their home markets, who were overall reluctant to switch to a new entrant despite the better prices offered (Hviid and Waddams 2012). One of Ofgem's prime considerations was the fact that vulnerable consumers were less prone to switching and were not benefiting from better offers. Ofgem introduced a prohibition on price discrimination since active consumers switching between suppliers could not bring prices down for

the inactive group, which comprised predominantly vulnerable consumers. Therefore, the regulator driven from fairness consideration and the idea that the active consumer group cannot benefit at the expense of the inactive group (which included primarily vulnerable consumers) stepped in to protect the vulnerable consumer group (Hviid and Waddams 2012).

The introduction of non-discrimination obligations regarding payment methods also sought to favour vulnerable consumers (Hviid and Waddams 2012). There are three payment methods: standard credit by quarterly cheque, direct debit monthly through standing order from the bank account and prepayment (pay-as-you-go). Prepayment meters are installed when customers have a poor payment record (CMA 2015, paras 92–94). For energy suppliers, direct debit customers are preferable to the other two groups. Research suggests that it could be beneficial for lowering prices, if there is competition for direct debit customers (Hviid and Waddams 2012). Competition for direct debit customers would result in lower prices and as suppliers could not discriminate between direct debit, standard credit and prepayment customers, the latter groups would also benefit from lower prices. Unfortunately though, competition was undermined by the introduction of non-discrimination obligation between different regions, since this resulted in chilling competition and a rise in prices. This rise in prices affected the more vulnerable groups, since, as Ofgem pointed out, vulnerable consumers are less likely to switch, while active empowered consumers could still benefit from different offers. The introduction of regional non-discrimination clauses reduced the potential gains from switching and thereby had a dampening effect on the switching levels, as consumers' decisions are driven by the potential benefits (Waddams Price 2013).

A second example of regulatory intervention that was not well thought out comes from Ofgem's second review of the retail electricity markets. In the RMR, Ofgem introduced a simplification of tariffs ("simpler choices" component), despite warnings from the incumbents and new entrants about the potential detrimental effects on tariff innovation and customer engagement (OFT, Ofgem and CMA 2014, paras 3.38–3.43). The "simpler choices" component included (a) a ban on complex tariffs; (b) a maximum limit on the number of tariffs that suppliers offer; and (c) a simplification of cash discounts (CMA 2016b, para 170). The simplification aimed at facilitating consumer switching (CMA 2016b, para 171) and was premised on behavioural economics claims that consumers will fail to assess information and act upon it when provided with too much information. After analysing the "simpler choices" element of the RMR rules, the CMA concluded that the simplification had the opposite result. It had not increased consumer engagement but rather impacted negatively on suppliers' incentives to engage in innovation and also on price comparison websites' (PCW) incentives to compete (CMA 2016b, paras 172–177). In effect, the chosen tariff simplification revealed the limits of behavioural economics informing the adoption of workable remedies. Despite the importance of behavioural economics in explaining consumer behaviour, when they inform the structure of particular remedies, they may yield negative results on the competitive process.

Against this backdrop of regulatory interventions in the retail energy markets, wide consumer discontent prevailed, prompting the Office of Fair Trading (OFT), the CMA and Ofgem to launch a joint state of the market assessment on the competition levels and how these were catering to the interests of consumers and small firms (OFT, Ofgem and CMA 2013; OFT, Ofgem and CMA 2014). Ofgem decided to make a market investigation reference to the CMA under section 134 Enterprise Act 2002. The observed rise in domestic energy prices was the key driver behind the market investigation reference (CMA 2015, para 19). The documents leading to the CMA's decision showcase Ofgem's wider array of objectives and its caution with regard to focusing on its principal objective, to promote effective competition (Ofgem

2014, paras 2.3–2.4), while considering other objectives, including the interests of vulnerable consumers (Ofgem 2014, paras 2.3–2.4, 2.8, 2.25–2.26). On the other hand, the CMA remit in the context of a market investigation consists of identifying any feature that is causing an adverse effect on competition (AEC) and identifying possible market failures either on the demand or the supply side. In assessing whether an AEC exists, the CMA examines any features that may distort competition in the relevant market (CC3 2013, para 94). The benchmark against which an AEC is found is that of a well-functioning market (CC3 2013, para 30). The CMA points to the distinct characteristics of energy markets and acknowledges that the benchmark of a well-functioning market does not correspond to the ideal of a perfect market but rather to a realistic assessment of the market situation without the AEC. Given the nature of retail energy markets, a certain degree of regulatory intervention is unavoidable (CMA 2014, para 17).

Arguably, Ofgem's previous involvement and the two reviews of retail energy markets have influenced the following CMA market investigation (Littlechild 2015). Ofgem failed to assess the impact of the proposed remedies on competition placing the onus on the CMA to address various problems, some of which possibly outside its mandate to promote competition for the benefits of consumers. The CMA identified weak customer engagement as one of the AECs in its investigation (CMA. (2016b), para 125). As such, the CMA proposed remedies to promote consumer empowerment and active engagement. These remedies have been criticized as intervening in the market to prompt or “nudge” (Baldwin 2014, Thaler and Sunstein 2003; Thaler and Sunstein 2008) consumers and trigger engagement may result in an interventionist approach (Littlechild 2014). Nonetheless, it remains within the CMA's remit to improve demand side responses in the context of a market investigation.

However, it is less clear whether the CMA can propose remedies for the protection of vulnerable consumers—without distinguishing between market and personal vulnerabilities. For this reason, the CMA phrased the remedies that favour primarily vulnerable groups in terms of promoting the engagement of more disengaged groups (CMA 2016c, paras 9.14–9.15, 9.60). The proposed remedies though suggest that the CMA has taken into account the interests of vulnerable consumers directly (CMA 2016c, paras 12.448, 14.463, 16.12). The CMA's decision addressed both personal reasons as well as market-related reasons for consumers' inactivity. In relation to personal attributes the CMA observed that disengaged customers present characteristics, such as low incomes, low qualifications, living in rented accommodation or aged over 65 years (CMA 2016b, para 135).

Following its market investigation, the CMA proposed remedies aimed at triggering switching and directly protecting vulnerable consumers. Apart from removing large elements of the “simpler choices” component, the CMA proposed an Ofgem led programme providing for a more evidence-based intervention based on testing and trialling (CMA 2016b, paras 229–230; CMA 2016c para. 20.24). In addition, the CMA focused on “principles rather than rules” and recommended that Ofgem changes Standard Licence Condition 25C requiring that suppliers have due regard in the design of tariffs to customers' ability to compare (CMA 2016a, para 98; CMA 2016c, para 20.26).

The remedies focused also on strengthening third-party intermediaries' role by removing regulatory restrictions and granting access to customers' data (CMA 2016a, paras 100–105; CMA 2016c, para 20.24). These remedies included an Ofgem controlled database of disengaged customers (the Database Remedy), which would allow rival suppliers to send a letter to consumers that have remained on a Standard Variable Tariff (SVT), for more than three years—prompting them to switch. SVT is the tariff charged, where consumers do not choose a

specific plan or when a fixed term non SVT expires. Consumers can opt out of such prompts and suppliers having access to this database would be subject to strict scrutiny. The CMA recognized that there is a fine balance between triggering customer switching and aggressive marketing practices (CMA 2016a, paras 106–110; CMA 2016c, para 20.24). The CMA further placed a lot of hope in smart meters' contribution to customer engagement and therefore has put pressure on suppliers to ensure the roll-out of smart meters by 2020 (failing which Ofgem would be expected to impose penalties) (CMA 2016a, paras 114–115; CMA 2016c, paras 208–210).

One of the most controversial and widely discussed remedies is the imposition of a transitional price cap for customers on prepayment meters for a transitional period (2017–2020). The CMA found that often-vulnerable consumers are on prepayment meters and therefore the introduction of this remedy aimed at directly protecting them. The CMA was cautious not to excessively intervene in the market and therefore the initial proposal to apply the price a cap to all SVT customers was dropped (CMA 2016a, paras 143–145; CMA 2016c, paras 243–244 and para. 20.24). Interestingly though, the competition regulator proposed a price cap aiming at directly protecting the vulnerable consumers, exposing the regulatory undertone of the proposed remedies.

UK Retail Energy Markets: Exemplifying “Inherently Flawed Markets” and Implications for Consumer Empowerment and Protection

Time will tell whether these remedies will contribute to lower retail energy prices. However, we need to acknowledge the multiple variables shaping energy prices, of which consumer switching is only one. The ACER/CEER Reports suggest that the problem is not with consumer switching levels but with the weak link between electricity wholesale prices and the energy component of retail prices as this weak link may be indicative of competition problems (amongst others) (ACER/CEER 2015, pp. 9; ACER/CEER 2016a, para 12). Even though wholesale prices decreased, there was a rise in retail electricity prices because of the increase in non-contestable charges (taxation and network charges) (ACER/ CEER 2015, para 26). At the same time, the UK was identified amongst the most competitive retail electricity and gas households market in the EU (ACER/CEER 2015, pp. 51; ACER/CEER 2016b, para 87). The ACER/ CEER Market Monitoring Report 2015 noted that the UK performs better on market structure indicators than on market conduct and competition performance indicators and pointed to the findings of the CMA regarding the lack of consumer engagement. This finding does not fit well with the findings of the Report on the existence of high switching rates in the UK (ACER/CEER 2016b, para 87). The ACER/ CEER Report also noted that UK consumer switching rates are amongst the highest in the EU, although the largest decrease in switching rates was observed in 2014 (compared to 2013). It also pointed to the existence of new entrants (ACER/ CEER 2015).

Ofgem announced that in 2016 switching saw a six-year high coupled with an increasing number of new suppliers (Barnes 2017). On these switching rates, Ofgem's CEO Dermot Nolan commented that while these latest figures indicate good progress, the market is not as competitive as the regulator would have liked. This situation justified the introduction of the temporary price cap (Ofgem 2017). However, it is inherent in the nature of competitive markets that some consumers will not reap the benefits. High switching rates and the increase in new entrants suggest that the market is competitive. For certain consumer groups that do not engage with the competitive process and hence are unduly disadvantaged additional protection is needed, but this should come as a complement to the competitive process, rather than suggesting that the market is not competitive.

Overall, the experience in the UK retail energy markets suggests that in “inherently flawed” markets, regulators should be cautious regarding the appropriate mix of competition and regulatory remedies. Triggering consumer empowerment in retail energy markets is complicated by the nature of the market, which calls for a more process-based approach and a clearer delineation between different consumer groups. The process-based enforcement strategies rest on information disclosure and better consumer education. Crampes and Waddams (2017) have suggested that different information campaigns may be needed for different consumer groups. For example, a tailored campaign stressing the actual gains from switching has the potential to incentivize older consumers that, as evidence suggests, seem to underestimate the potential gains from switching. Better information campaign stressing the gains from switching can address consumers’ perception about low gains from switching and incentivize more consumers to actively engage, as research shows that the anticipated gains are a main factor driving switching behaviour (Deller et al. 2014). Yet, non-switching may indicate a satisfaction with the current supplier (Zhu 2013). Process-based enforcement strategies call for more reliance on market forces. At the same time, they accept the limits of the market mechanisms in situations, where consumers are unable to engage with the market due to personal vulnerabilities pertaining to personal attributes such as age, disabilities and low income. In these cases, tailored measures to protect these consumer groups are needed in the short term, as reliance to switching to deliver lower prices is a long-term process.

The CMA’s suggested remedies were guided by a quest to protect consumer groups with certain characteristics, which place them in a vulnerable position, in a bid to motivate them to engage in the market. This is a worthy goal, yet it is unclear how the introduction of a price cap can assist in this direction. In addition, remedies to prompt switching—such as the Database Remedy—may fail to engage consumers, given consumers’ attitudes towards receiving “prompts.” Remedies to promote engagement need time to unravel their potential and they may fail due to the many variants driving consumer behaviour. In the meantime, the CMA has opted for a retreat to traditional intervention, introducing a price cap in order to directly protect prepayment meter customers, while acknowledging the tensions that such a remedy may create with the levels of competition and engagement and stressing that the design of this remedy will allow competition to co-exist (CMA 2016b, para 207).

In sum, the suggested approach is reliance on the process of empowerment coupled with targeted social policy measures. Competitive markets cannot cater for certain personal vulnerabilities. Regulatory measures can improve the functioning of markets for certain consumer groups. This is not to suggest that consumers with personal vulnerabilities, such as the fuel poor, do not have the ability to engage with the market. For reasons of justice and fairness, they need to be supported in the interim with additional measures because they lack the ability to afford their energy bills. This approach corresponds to the “regulatory welfare state” (Haber 2011; Levi Faur 2014). At the same time, regulators need to be particularly cautious about the impact of the suggested remedies to empower and protect consumers on the competitive process, since as the UK experience suggests, remedies with the intention to deliver fairer market outcomes led to worse outcomes for all consumer groups and did not solve the “poor pay more” problem (Caplovitz 1967). Instead, they made it worse.

Conclusion How effective has our quest for consumer empowerment been? Could it be that a narrow definition of its goals and subsequently narrow measurement provide us with distorted outcomes? This article has advanced the claim that in retail energy markets, regulators should focus on empowerment as a process rather than focusing on the outcome of switching. After all,

if empowerment is seen as the outcome of switching it does not accommodate the multiple consumer images, as it does not account for the category of passive, yet empowered consumers. As noted, empowerment as a process has inherent limits, as examined by the psychology, marketing and behavioural economics literature, since the process is linked to specific outcomes that cannot always be measured. Equally, when the process does not lead to the desirable outcome, in our case switching suppliers, one should ponder why the desired outcome has not materialised and may be attributed to various consumer biases. These limits can be overcome through consumer education, which is a time-intensive process. In addition to the above, the nature of retail energy markets as inherently flawed calls for a symbiotic relationship between competition and regulation. Allowing time for the process of empowerment has the potential to progressively phase out vulnerabilities linked to the market context. The UK example suggests that this approach is prophylactic to short-term political interventions in retail energy markets.

On the contrary, if the focus is on triggering switching in the short-term, with an underlying rationale of protecting vulnerable groups (without clearly distinguishing between market and personal vulnerabilities), this will have an adverse impact on the competitive process and adversely affect the very consumers that it sought to protect, as shown by the example of the UK retail energy markets. Following two market reviews by Ofgem, in which it failed to properly assess the competition implications of its proposed remedies, the CMA became involved and had to act in favour of vulnerable groups who potentially fall outside its remit. This article focused on specific Ofgem interventions that impaired the outcome for vulnerable consumers and critically assessed selected remedies proposed by the CMA in a bid to show that they will most likely fail to invigorate competition to the benefit of consumers. CMA remedies focus on empowerment as the measurable act of switching and depict a mismatch between the competition mandate of the CMA and the regulatory nature of the said remedies.

The Commission's and UK regulators' approach is correct in advocating better information proliferation to consumers through, for example, the roll-out of smart meters. Ultimately though this is a time consuming and on-going process and any measures adopted in the interim to protect vulnerable consumers should take account of the potential adverse effects on competition. They should also reflect on the underlying reasons triggering vulnerability. For example, as consumers progressively become more familiar with the respective conditions in liberalized retail energy markets, they will be more capable of assessing various offers. Information disclosure and consumer education coupled with competition gradually address market vulnerabilities. The emphasis should be placed on vulnerabilities caused by personal attributes, such as low income and for such vulnerabilities; a regulatory approach through the social welfare system or direct financial assistance is warranted. Such an approach is alien to the mandate of competition authorities and should be administered by sectoral regulators or the legislature, in consultation with the competition authority's opinion on any adverse impact of the suggested measures on competition.

Acknowledgements The author would like to thank Dr Despoina Mantzari, Professor Ariel Ezrachi, Professor Ioannis Kokkoris, Dr Julian Nowak, Mr Stylianos Alexandridis and the anonymous reviewers for their constructive comments on earlier drafts as well as Dr Andromachi Georgosouli and Dr Marek Martyniszyn and the participants at the following seminars, where earlier versions of this article were presented: "Energy markets: lessons from the UK experience", New Voices in Commercial Law seminar series, Centre of Commercial Law Studies, Queen Mary University of London, 5th November 2015; "Protecting and Empowering Consumers: lessons from the UK energy market investigation", Queen's University Belfast, 12th May 2016; SLS Annual Conference 2017, Energy Law Section, University College Dublin, 8th September 2017. All errors remain my own

Open Access This article is distributed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted use, distribution, and reproduction in any medium, provided you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license, and indicate if changes were made.

References

- ACER/CEER. (2015). *Annual report on the results of monitoring the internal electricity and natural gas markets in 2014*. Ljubljana/Brussels: Agency for the Cooperation of Energy Regulators/Council of European Energy Regulators.
- ACER/CEER. (2016a). *Annual report on the results of monitoring the internal electricity and gas markets in 2015 - Key insights and recommendations*. Ljubljana/Brussels: Agency for the Cooperation of Energy Regulators/Council of European Energy Regulators.
- ACER/CEER. (2016b). *Annual report on the results of monitoring the internal electricity and gas markets in 2015 - Retail markets*. Ljubljana/Brussels: Agency for the Cooperation of Energy Regulators/Council of European Energy Regulators.
- Baldwin, R. (2014). From regulation to behaviour change: Giving nudge the third degree. *Modern Law Review*, 77, 831–857.
- Barnes, N. (2017). Why energy consumers are voting with their feet? Retrieved from https://www.ofgem.gov.uk/news-blog/our-blog/why-energy-consumers-are-voting-their-feet?utm_medium=email&utm_source=dotMailer&utm_campaign=Daily-Alert_27-02-2017&utm_content=Why%20energy%20consumers%20are%20voting%20with%20their%20feet&dm_i=1QCB,4SK5O,F31C77,11M3X,1.
- Bartl, M. (2010). The affordability of energy: How much protection for the vulnerable consumers? *Journal of Consumer Policy*, 33, 225–245.
- Bartl, M. (2015). Internal market rationality, private law and the discretion of the Union: Resuscitating the market as the object of the political. *European Law Journal*, 22, 572–598.
- BIT. (2016). *Applying behavioural insights to regulated markets*. London: Behavioural Insights Team.
- Caplovitz, D. (1967). *The poor pay more*. New York: The Free Press.
- Case C-382/87, *R. Buet and Educational Business Services SARL v. Ministère public* [1989] E.C.R. I- 1235.
- Case C-393/92, *Municipality of Almelo and Others* [1994] ECR I-1508.
- Case C-159/94, *Commission v France* [1997] ECR I-5819.
- Case C-210/96, *Gut Springenheide GmbH, Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* [1998] E.C.R. I-4657.
- CC3 (Revised). (2013). *Guidelines for market investigations: Their role, procedures, assessment and remedies*. London: Competition and Markets Authority.
- CMA. (2014). *Energy market investigation – Statement of issues*. London: Competition and Markets Authority.
- CMA. (2015). *Energy market investigation – Summary of provisional findings report*. London: Competition and Markets Authority.
- CMA. (2016a). *Energy market investigation – Provisional decision on remedies*. London: Competition and Markets Authority.
- CMA. (2016b). *Energy market investigation – Summary of final report*. London: Competition and Markets Authority.
- CMA. (2016c). *Energy market investigation - Final report*. London: Competition and Markets Authority.
- Crampes, C., & Waddams, C. (2017). Empowering electricity consumers in retail and wholesale markets. (CERRE project report). Retrieved from http://www.cerre.eu/sites/cerre/files/170309_CERRE_EnergyConsumers_Final.pdf.
- DECC. (2013). *Fuel poverty report. Annual report on statistics 2013*. London: Department of Energy and Climate Change.
- Deller, D., & Waddams, C. (2015) Affordability of utilities' services: Extent, practice, policy. Research paper 3: Policies used to tackle utility affordability in different member states. CERRE. Retrieved from <http://www.cerre.eu/sites/cerre/files/Affordability_ResearchPaper_3.pdf>.
- Deller, D., Giulietti, M., Young Jeon, J., Loomes, G., Moniche, A., & Waddams, C. (2014). Who switched at the 'big switch' and why? University of East Anglia: ESRC Centre of competition policy. Retrieved from <http://competitionpolicy.ac.uk/documents/8158338/8194340/Big+Switch+-+Results.pdf/2e01588d-6564-4e28-b06d-233eaaad389c4>.
- Denegri-Knott, J., Zwick, D., & Schroeder, J. E. (2006). Mapping consumer power: An integrative framework for marketing and consumer research. *European Journal of Marketing*, 40, 950–971.

- Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1997] OJ L27/20.
- Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [1998] OJ L204/1.
- Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC [2003] OJ L176/37.
- Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] L 176/57.
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] L 149/22.
- Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55.
- Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L 211/94.
- Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on Energy Efficiency amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC.
- Directorate General for Health and Consumers. (2010). *The functioning of retail electricity markets for consumers in the EU. Final Report*. Brussels: European Commission.
- EC. (2003). *Green Pa per on services of general interest. COM(2003) 270 final*. Brussels: European Commission.
- EC. (2007). *EU consumer policy strategy 2007–2013. COM(2007) 99 final*. Brussels: European Commission.
- EC. (2011a). *Single Market Act —Twelve levers to boost growth and strengthen confidence. (Communication). COM(2011) 206 final*. Brussels: European Commission.
- EC. (2011b). *Consumer empowerment in the EU. SEC(2011) 469 final*. Brussels: European Commission.
- EC. (2011c). *A quality framework for services of general interest in Europe. COM(2011) 900 final*. Brussels: European Commission.
- EC. (2012a). *A European consumer agenda - Boosting confidence and growth. COM(2012) 225 final*. Brussels: European Commission.
- EC. (2012b). *Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest. OJ C, 8/4*. Brussels: European Commission.
- EC. (2015a). *A framework strategy for a resilient Energy Union with a forward-looking climate change policy. COM (2015) 80 final*. Brussels: European Commission.
- EC. (2015b). *Delivering a new deal for energy consumers. COM(2015) 339 final*. Brussels: European Commission.
- EC. (2016a). *Proposal for a directive of the European parliament and of the council amending directive 2012/27/ EU on energy efficiency. COM(2016) 761 final*. Brussels: European Commission.
- EC. (2016b). *Proposal for a directive of the European parliament and of the council amending directive 2010/31/ EU on the energy performance of buildings. COM(2016) 765 final*. Brussels: European Commission.
- EC. (2016c). *Proposal for a directive of the European parliament and of the council on the promotion of the use of energy from renewable sources (recast). COM(2016) 767 final*. Brussels: European Commission.
- EC. (2016d). *Energy prices and costs in Europe. COM(2016) 769 final*. Brussels: European Commission.
- EC. (2016e). *Clean energy for all Europeans. COM(2016) 860 final*. Brussels: European Commission.
- EC. (2016f). *Proposal for a directive of the European parliament and of the council on common rules for the internal market in electricity (recast). COM(2016) 864 final*. Brussels: European Commission.
- EC. (2016g). *Consumer vulnerability across key markets in the European Union – Final report*. Brussels: European Commission.
- EC. (2016h). *Second consumer market study on the functioning of the retail electricity markets for consumers in the EU*. Brussels: European Commission.
- EC. (2016i). *Consumer markets scoreboard*. Brussels: European Commission.
- EC. (2016j). *New electricity market design: A fair deal for consumers. (MEMO)*. Retrieved from https://ec.europa.eu/energy/sites/ener/files/documents/technical_memo_marketsconsumers.pdf. Brussels: European Commission.
- ECCG. (2013). *Opinion on consumers and vulnerability*. Brussels: European Consumer Consultative Group.
- EP. (2012). *Strengthening the rights of vulnerable consumers. Resolution of 22 may 2012 on a strategy for strengthening the rights of vulnerable consumers. (2011/2272(INI)*. Brussels: European Parliament.
- FCA. (2013). *Applying behavioural economics at the financial conduct authority (Occasional paper No 1)*. London: Financial Conduct Authority.
- FCA. (2015). *Consumer vulnerability (Occasional Paper No 8)*. London: Financial Conduct Authority.

- Flores, M., & Waddams Price, C. (1007). Consumer behaviour in the British retail electricity market. CCP working paper 13-10. Retrieved from <<http://competitionpolicy.ac.uk/documents/8158338/8235394/CCP+Working+Paper+13-10.pdf/2ee68805-470a-4fea-b5f7-7678f52b9971>>.
- Haber, H. (2011). Regulating-for-welfare: A comparative study of “regulatory welfare regimes” in the Israeli, British, and Swedish electricity sectors. *Law & Policy*, 33, 116–148.
- Hammond, P. (1993). Credible liberalization: Beyond the three theorems of neoclassical welfare economics. In D. Bös (Ed.), *Economics in a changing world, Vol. 3: Public policy and economic organization* (pp. 21–39). London: Macmillan.
- Howells, G., & Wilhelmsson, T. (2003). EC consumer law: Has it come of age? *European Law Review*, 28, 370–388.
- Hviid, M., & Waddams-Price, C. (2012). Non-discrimination clauses in the retail energy sector. *Economic Journal*, 122, 236–252.
- INSIGHT_E. (2015). Energy poverty and vulnerable consumers in the energy sector across the EU: Analysis of policies and measures. (Policy Report).
- Johnston, A., & Block, G. (2012). *EU energy law*. Oxford: OUP.
- Johnston, A. (2016). Seeking the EU ‘consumer’ in SGEI. In D. Leczykiewicz & S. Weatherill (Eds.), *The images of the consumer in EU law: Legislation, free movement and competition law*. London: Hart.
- Kolk, A. (2012). The role of consumers in EU energy policy. *Carbon Management*, 3, 175–183.
- Lavrijssen, S. (2014). The different faces of energy consumers: Towards a behavioural economics approach. *Journal of Competition Law and Economics*, 10, 257–292.
- Levi Faur, D. (2014). The welfare state: A regulatory perspective. *Public Administration*, 92, 599–614.
- Littlechild, S. (2012). Ofgem’s retail choice: A response to Ofgem’s consultation on SLC 25A. Littlechild, S. (2014). The competition assessment framework for the retail energy sector: Some concerns about the proposed interpretation. *European Competition Journal*, 10, 181–202.
- Littlechild, S. (2015). The CMA energy market investigation, the well-functioning market, Ofgem, government and behavioral economics. *European Competition Journal*, 11, 574–636.
- Mak, V. (2011). Standards of protection: In search of the ‘average consumer’ of EU law in the proposal for a consumer rights directive. *European Review of Private Law*, 19, 25–42.
- Micklitz, H.-W. (2011). Social justice and access justice in private law. EUI Working Papers – Law 2011/02. Retrieved from <http://cadmus.eui.eu/bitstream/handle/1814/15706/LAW_2011_02.pdf>.
- Nardo, M., Loi, M., Rosati, R., & Manca, A. R. (2011). *The consumer empowerment index. EUR - Scientific and Technical Research Reports*. Luxembourg: Publications Office of the European Union.
- Ofgem. (2008). *Ofgem launches probe into energy supply markets*. London: Office of Gas and Electricity Markets. Retrieved from <<https://www.ofgem.gov.uk/publications-and-updates/ofgem-launches-probe-energy-supply-markets>>.
- Ofgem. (2010). *Retail market review*. London: Office of Gas and Electricity Markets.
- Ofgem. (2011). *What can behavioural economics say about GB energy consumers?* London: Office of Gas and Electricity Markets.
- Ofgem. (2013). *Consumer vulnerability strategy*. London: Office of Gas and Electricity Markets.
- Ofgem. (2014). *Decision to make a market investigation reference in respect of the supply and acquisition of energy in Great Britain*. London: Office of Gas and Electricity Markets.
- Ofgem. (2017). *Switches up by nearly 30% as millions go ‘energy shopping’*. Press Release. London: Office of Gas and Electricity Markets.
- OFT. (2010). *What does behavioural economics mean for competition policy?* London: Office of Fair Trading.
- OFT. (2011). *Consumer behavioural biases in competition: A survey. Final Report*. London: Office of Fair Trading.
- OFT, Ofgem, & CMA. (2013). *State of the market report – Assessment framework*. London: Office of Fair Trading, Office of Gas and Electricity Markets, & Competition and Markets Authority.
- OFT, Ofgem, & CMA. (2014). *State of the market assessment*. London: Office of Fair Trading, Office of Gas and Electricity Markets, & Competition and Markets Authority.
- Perkins, D., & Zimmerman, M. (1995). Empowerment theory, research and application. *American Journal of Community Psychology*, 23, 569–579.
- Pollitt, M. G., & Haney, A. B. (2014). Dismantling a competitive retail electricity market: Residential market reforms in great Britain. *The Electricity Journal*, 27, 66–73.
- Pront van Bommel, S. (2016). A reasonable price for electricity. *Journal of Consumer Policy*, 39, 141–158.
- Prosser, T. (2010). *The regulatory enterprise: Government, regulation, and legitimacy*. Oxford: OUP.
- Regulation 1228/2003/EC of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity [2003] OJ L 176/1.
- Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators [2009] OJ L 211/1.

- Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 [2009] OJ L211/15.
- Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36.
- Regulation (EU) No 254/2014 of the European Parliament and of the Council of 26 February 2014 on a multiannual consumer programme for the years 2014–20 and repealing Decision No 1926/2006/EC.
- Reich, N. (2016). Vulnerable consumers in EU law. In D. Leczykiewicz & S. Weatherill (Eds.), *The images of the consumer in EU law: Legislation, free movement and competition law*. London: Hart.
- Shankar, A., et al. (2006). Consumer empowerment: A Foucauldian interpretation. *European Journal of Marketing*, 40, 1013–1030.
- Stucke, M. (2007). Behavioral economics at the aate: Antitrust in the twenty-first century. *Loyola University of Chicago Law Journal*, 38, 513–591.
- Stuyck, J. (2014). Consumer concepts in EU secondary law. (Paper presented at University of Bochum, “Verbraucherleitbilder – Interdisziplinäre und Europäische Perspektiven” 12th and 13th February 2014).
- Thaler, R. H., & Sunstein, C. R. (2003). Libertarian paternalism is not an oxymoron. *University of Chicago Law Review*, 70, 1159–1202.
- Thaler, R. H., & Sunstein, C. R. (2008). *Nudge: Improving decisions about health, wealth and happiness*. New Haven: Yale University Press.
- Town of Concord v. Boston Edison co., 915 F.2d 17,22 (1st Cir. 1990).
- Trinomics. (2016). Selecting indicators to measure energy poverty. (EU Framework Contract Framework Contract ENER/A4/516–2014). Retrieved from <https://ec.europa.eu/energy/sites/ener/files/documents/Selecting%20Indicators%20to%20Measure%20Energy%20Poverty.pdf>.
- Tversky, A., & Kahneman, D. (1981). The framing of decisions and the psychology of choice. *Science*, 211, 453–458.
- VCWG. (2013). *Guidance document on vulnerable consumers*. Brussels: Vulnerable Consumer Working Group.
- Waddams Price, C. (2005). The effect of liberalizing UK retail energy markets on consumers. *Oxford Review of Economic Policy*, 21, 128–144.
- Waddams Price, C. (2013). Shedding light on consumer behaviour in energy markets. In J. Mehta (Ed.), *Behavioural economics in competition and consumer policy*. (ESRC Centre for Competition Policy). Retrieved from <http://competitionpolicy.ac.uk/documents/8158338/8193541/CCP+economics+book+Final+digital+version++colour.pdf/30214557-cace-4b0b-8aac-a801bbde87bc>.
- Waddams Price, C. et al. (2013). Searching and switching: Empirical estimates of consumer behaviour in regulated markets. (CCP working paper 13–11).
- Waddams Price, C., & Zhu, M. (2013). Prices and consumer switching in the British retail electricity market. (CCP Working Paper 13–12).
- Waddams Price, C., & Zhu, M. (2016). Empirical evidence of consumer response in regulated markets. *Journal of Competition Law and Economics*, 12, 113–149.
- Wilson, C., & Waddams Price, C. (2010). Do consumers switch to the best supplier. *Oxford Economic Papers*, 62, 647–668.
- Zhu M. (2013). Searching and switching across markets: Is consumer ‘inertia’ the result of a mistake or a preference?”. In J. Mehta (Ed.), *Behavioural economics in competition and consumer policy*. (ESRC Centre for Competition Policy). Retrieved from <http://competitionpolicy.ac.uk/documents/8158338/8193541/CCP+economics+book+Final+digital+version++colour.pdf/30214557-cace-4b0b-8aac-a801bbde87bc>.
- Zimmerman, M. (1995). Psychological empowerment: Issues and illustrations. *American Journal of Community Psychology*, 23, 581–599.