Competition Act 1998

Non-infringement Decision of the Gas and Electricity Markets Authority

Investigation into EDFE's alleged abuse of dominance by refusing to supply meter data services

This is the non-confidential version of this non-infringement decision. Confidential information and data contained in the original version have been redacted. Redactions are indicated by [excised] or, where practicable, excised information has been substituted by alternative wording in [ ].

SUMMARY

1. The Gas and Electricity Markets Authority (the "Authority") has concluded that EDF Energy plc ("EDFE") has not infringed section 18 (the "Chapter II prohibition") of the Competition Act 1998 (the "Act") or Article 82 of the EC Treaty ("Article 82") in relation to its decision to withdraw data collection and data aggregation services (together "meter data services") from electricity suppliers that are not affiliated to EDFE.

2. The Authority's decision follows an investigation prompted by complaints submitted from energywatch, and two other complainants, arising from the actions of EDFE. In particular, it was alleged that EDFE's actions were foreclosing the electricity supply market for small suppliers and that this was harmful to competition.

3. The existence of a dominant position is a pre-requisite for the application of the Chapter II prohibition and Article 82. This decision sets out the Authority's finding that EDFE does not hold a dominant position in a relevant market for the purposes of those provisions.

4. The Authority notes that the complainants are able to obtain meter data services from third parties, albeit at higher prices. Moreover, while in this case closure decision we have focussed on the markets relating to meter data services (in the various forms described below) and have decided to close the case due to the absence of a dominant position on those markets, we also note (based on our ongoing monitoring of the markets) that the market(s) for electricity supply are highly competitive (and EDFE faces and will continue to face strong competition from a number of sources in the supply market(s)), such that we are sceptical as to the existence of a realistic possibility of consumer harm arising out of the complaints made against EDFE.[1]

BACKGROUND

5. The complaints made and the subject matter of this decision relate to the withdrawal of services by EDFE in relation to the collection, processing and aggregation of data retrieved from non-half-hourly electricity meters.

6. Consumers of electricity contract for the supply of electricity to their premises with suppliers holding a licence to do so.[2] Consumers are billed for

[1] See Ofgem's Domestic Retail Market Reports: March 2006 (Ref 110/06), September 2005 (Ref 23/06) and June 2005 (Ref 24/06).
[2] Section 4(1) of the Electricity Act 1989 prohibits supply without a licence.

their consumption as ascertained by an approved meter.[3] In order to bill customers accurately and to ensure that each electricity supplier is billed for the actual amount of electricity it takes from the system,[4] the Balancing and Settlement Code (the "BSC") requires licensed electricity suppliers to collect, process and aggregate data from each of the meters installed at their customers' premises.[5] To achieve this, electricity suppliers must appoint suitably accredited and certified "data collectors" and "data aggregators" for each meter point they supply.[6]

7. Data collection comprises data retrieval ("DR"), namely, the retrieval of meter reading data either remotely or by way of a visit to the customer's premises, and data processing ("DP"), the processing of this data. Data aggregation ("DA") is the aggregation of this data for settlement purposes.

8. Elexon is responsible for the accreditation and certification of data collectors and data aggregators. Separate schemes apply for the two types of electricity meters: half-hourly ("HH") meters and non-half-hourly ("NHH") meters. HH meters are generally read remotely on a half-hourly basis and are often installed on larger industrial sites. NHH meters are generally read by a visit to the customer's premises and are used by both domestic and non-domestic end-customers with lower electricity consumption. [7]

9. From privatisation in 1990 until the introduction of competition in 1998, 14 companies ("Public Electricity Suppliers") had a monopoly in the supply and distribution of electricity in their designated areas. Each Public Electricity Supplier ("PES") carried out the full range of electricity distribution and supply services including DR, DP and DA. PESs were required under their licences to offer these services to all electricity suppliers using NHH meters.[8] Since 2000, however, electricity suppliers have been able to choose from competing accredited data collectors and data aggregators.

10. Under the Utilities Act 2000, electricity distribution and supply became separate licensable activities. The current electricity supply and distribution licences do not require electricity suppliers or distributors to provide DR, DP and DA services. The Authority decided to withdraw conditions requiring former PESs to offer terms for the provision of meter data services and not to discriminate in their provision. It was the Authority's view that a licence

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[3] Paragraph 1 of Schedule 7 to the Electricity Act 1989 provides that where a customer of an authorised supplier is to be charged for his supply wholly or partly by reference to the quantity of electricity supplied, the supply shall be given through, and the quantity of electricity shall be ascertained by, an appropriate meter.

[4] The allocation of volumes of energy to suppliers to ensure that each supplier is billed for the actual amount of energy they take from the system is known as "settlement".

[5] The BSC governs the Supplier Volume Allocation (SVA) process, which was designed and implemented as part of the programme to introduce competition in supply to the below 100kW market (in 1998) and agency services (introduced fully in 2000). The BSC also defines the obligations on Elexon (the BSC company) in providing or procuring the services necessary to operate the BSC arrangements efficiently. An overview of the BSC can be found at: www.elexon.co.uk/documents/Publications/Publications_-_Information_Sheets/Trading_Arrangements.pdf. Suppliers are required to comply with the BSC under Standard Licence Condition ("SLC") 10 of the Electricity Supply Licence.

[6] See Section J (Party Agents) of the BSC; and, in particular, see paragraph 1.2.1 and Part 2 (Accreditation and Certification Requirements) of that section.

[7] See Section L 2.2.1 of the BSC.

[8] Since 1998, competition has been introduced in supply, therefore these 14 suppliers are now known as ex-PES suppliers.

condition requiring electricity suppliers to provide these services could in itself prevent the further development of competition in this area.[9]

THE FACTS

The Undertakings

11. EDFE Energy plc ("EDFE"), whose registered office is at 40 Grosvenor Place Victoria London SW1X 7EN, is the holding company for an integrated energy group with expertise in the generation, distribution and supply of electricity.

12. EDFE supplies around five million customer product accounts through its retail brands: Seeboard Energy, SWEB Energy, London Energy and EDFE Energy. Its network branch is responsible for the electricity distribution networks that provide power to 7.8 million homes and businesses across London, the East of England and the South East. In addition, it is a major generator, operating coal-fired and gas-fired power stations, combined heat and power (CHP) plants and wind farms.

13. In the financial year to March 2005, EDFE had a turnover in the UK of £4,050m.[10] EDFE is an undertaking for the purposes of the Chapter II prohibition and Article 82.[11]

14. Within EDFE, ECS Metering Services Limited and ECS Data Services Limited (together referred to as "ECS") provided NHH DR, DP and DA services to suppliers in the former PES regions of London and SWEB. The business activities of ECS were transferred to London Energy plc on 6 May 2005.[12] Since that time, London Energy plc has operated the ECS business activities under the trade name of EDFE Energy Customer Field Services.[13]

15. London Energy plc is a wholly owned subsidiary of EDFE and is the holder of a licence for the supply of gas and electricity in Great Britain.

16. Given that ECS and London Energy plc are wholly owned subsidiaries of EDFE, the Authority considers that these entities comprise a single undertaking for the purposes of this investigation.

The complaint

17. In June 2004, EDFE made a decision to stop operating a standalone DR, DP and DA services business. As a consequence, EDFE decided that it would

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[9] Ofgem Document, Utilities Act Standard licence conditions, Volume 1, Final proposals, October 2000, paragraph 5.28

[10] EDFE website: http://www.edfenergy.com/html/showPage.do?name=edfenergy.about.financial.til

[11] The European Court of Justice has stated that "the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed" Case C-41/90 *Höfner & Elser v Macrotron GmbH* [1991] ECR I-1979, [1993] 4 CMLR 306, paragraph 21.

[12] EDFE's response (dated 8 September 2005) to the Authority's section 26 notice dated 28 July 2005.

[13] ECS Metering Services Limited changed its name to EDFE Energy Customer Field Services (Metering) Limited on 6 May 2005. ECS Data Services Limited changed its name to EDFE Energy Customer Field Services (Data) Limited on 6 May 2005.

not continue to carry out these services for other suppliers; going forward it would only provide such services to EDFE supply businesses.[14]

18. On 11 August 2004, EDFE wrote to all of the suppliers to which it provided NHH DR, DP and DA services in the London and South West regions advising them that it wished to cease providing those services at a time still to be decided. This letter was followed by a letter on 12 November 2004, advising suppliers that EDFE had decided that it would cease providing those services on 31 May 2005. Formal notice to terminate EDFE's agreements with the suppliers was given on 1 December 2004.[15]

19. Following EDFE's actions, the Authority received three complaints (one from energywatch) setting out the view that EDFE's decision to withdraw its NHH DR, DP and DA services from electricity suppliers not affiliated to EDFE could amount to an anti-competitive refusal to supply in the London and South West regions. Two complainants also referred to the fact that they believed EDFE intended to withdraw services in the South East region but had yet to give written notice.[16]

20. One complainant argued that the withdrawal of these services would materially affect its ability to compete as a supplier in the London and South West regions. It had particular concerns about the withdrawal of DR services. It argued that any alternative agent (i.e. with a smaller presence) providing such services would be forced to charge a higher price for an inferior service. This is because of the importance of economies of scale: this complainant is of the view that meter reading density and local knowledge (for example, history of access) are key factors affecting performance in this area.[17]

21. The complainant explained that good service levels are particularly important since poor quality metering data means that it is difficult to raise a credible invoice, which leads to increased queries on invoices, increased reconciliations (which is ultimately an expensive exercise as rebilling tends to be a manual process) and a reduction in consumer confidence.

22. The second complainant alleged that EDFE's refusal to supply electricity meter data services could amount to an abuse of dominance, given the prevailing market conditions and the likely exclusionary effects on the market for electricity supply.

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[14] See Part D of EDFE's response (dated 23 September 2005) to the Authority's section 26 notice dated 28 July 2005.

[15] EDFE response (dated 23 September 2005) to the Authority's section 26 notice dated 28 July 2005. However, EDFE has stated (in section A7 of its response (dated 8 September 2005) to the Authority's section 26 notice dated 28 July 2005) that it will continue to provide some suppliers with DR, DP and DA services, on the basis of their existing agreements, pending the outcome of the Authority's investigation. EDFE has also made contact with each electricity supplier in order to offer to provide support with migration issues.

[16] It should be noted that EDFE has stated (in its response dated 8 September 2005 to the Authority's section 26 notice dated 28 July 2005) that it worked with suppliers to ensure a smooth transition to alternative meter data service providers and put arrangements in place to support those suppliers who experienced problems in finding such alternative providers. EDFE has stated that it would continue to provide meter data services to certain suppliers pending the outcome of this investigation.

[17] Letter to Nigel Nash at Ofgem, dated 10 December 2004.

23. This complainant argued that competition to ECS is limited in scope because potential competitors to ECS are unable to compete effectively on price and in terms of performance. It argued that there are significant barriers to entry to the meter data services market as the information necessary to offer a competitive service (for example, coding information; that is, the information necessary to understand how the meters have been set up and how they are registering) is not easily obtainable from former PES meter data services providers. It also stated that performance difficulties are particularly problematic for smaller, relatively new suppliers since the resulting billing problems can cause customers to switch back to the incumbent supplier (or other suppliers using the incumbent's meter data services provider).[18]

24. Thus, both complainants are of the view that the refusal to supply meter data services could amount to an exclusionary tactic against suppliers trying to enter (or sustain positions in) the electricity supply market in competition with EDFE. This is because EDFE's withdrawal of meter data services could raise the costs, and detract from the performance, of suppliers seeking to compete with EDFE in the supply market.

25. Having considered these complaints, the Authority was of the view that it had reasonable grounds to suspect that a breach of competition law may have occurred. Accordingly, on 4 July 2005, the Authority informed the OFT that it wished to exercise its concurrent powers to investigate the complaint under the Act.[19] Agreement by the OFT was given in a letter dated 5 July 2005.

LEGAL AND ECONOMIC ASSESSMENT

Introduction

26. Article 82 prohibits,

> "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it…in so far as it may affect trade between Member States."

27. The Chapter II prohibition is based on Article 82; it prohibits,

> "…any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market…if it may affect trade within the United Kingdom."[20]

28. Article 3 of the Modernisation Regulation[21] requires the designated national competition authorities ("NCAs") of the Member States[22] and the courts of the Member States to apply and enforce Article 82 as well as national competition law when national competition law is applied to an abuse prohibited by Article 82.

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[18] Letter to Philip Davies at Ofgem, dated 18 April 2005.
[19] In accordance with regulation 4(1) of the Competition Act 1998 (Concurrency) Regulations 2004 SI 2044/1077.
[20] Section 18(1) of the Act.
[21] EC Regulation 1/2003 OJ [2003] L 1/1, [2003] 4 CMLR 551.
[22] The Gas and Electricity Markets Authority is an NCA.

29. Section 43(3) of the Electricity Act 1989 provides that the Authority has concurrent jurisdiction with the OFT under the Act, as regards both domestic and European competition laws, where such conduct relates to commercial activities connected with the generation, transmission or supply of electricity.

30. The European Commission has published guidelines on the effect on trade concept contained in Article 82.[23]

31. Paragraph 93 of these guidelines states that where an undertaking, which holds a dominant position covering the whole of a Member State, engages in exclusionary abuses, trade between Member States is normally capable of being affected.

32. Paragraph 97 of the notice provides that where a dominant position covers only part of a Member State, guidance may be derived from the condition in Article 82 that the dominant position must cover a substantial part of the common market. If the dominant position covers part of a Member State that constitutes a substantial part of the common market and the abuse makes it more difficult for competitors from other Member States to gain access to the market where the undertaking is dominant, trade between Member States must normally be considered capable of being appreciably affected. Paragraph 98 of the notice states that, in applying these criteria, regard must be had to the size of the market in question; regions may, depending on their importance, constitute a substantial part of the common market.

33. This investigation concerns an allegation that EDFE is engaging in a strategy which could have the effect of excluding competitors from the relevant market. Therefore, the Authority considers that the conduct under investigation is, by its nature, capable of having an effect on trade between Member States. Accordingly, the investigation has been conducted under both the Chapter II prohibition and Article 82.

34. When applying the Act, the Authority must ensure, so far as is possible (having regard to any relevant differences between the provisions concerned), that questions arising under the Act in relation to competition in the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.[24] In determining any question, the Authority must ensure that there is no inconsistency between the principles it applies and the principles laid down by the EC Treaty and the European Court of Justice (the "ECJ").[25] In addition, the Authority must have regard to any relevant decision or statement of the European Commission.[26]

35. In order to assess whether EDFE has infringed the Chapter II prohibition and Article 82, the Authority must consider:

- the relevant market and whether EDFE is dominant in that market; and
- if it is dominant, whether EDFE's behaviour is abusive.

[23] OJ [2004] C101/81
[24] Section 60(1) of the Act.
[25] Section 60(2) of the Act.
[26] Section 60(3) of the Act.

36. While this decision is to close the investigation due to our conclusions on the absence of dominance in a relevant market on the part of EDFE, it is also relevant to note that the investigation sought from its inception to identify any direct or indirect evidence of an intention or motivation on the part of EDFE to exclude other parties (including the complainants other than energywatch) from putative markets so as to reserve the market to itself or to increase market share. To put this in its legal and economic context, the suggestion in the complaints was that there was an exclusionary *tactic* on the part of EDFE (see paragraph 24 above). If there was evidence of such a tactic or intention or motivation this would be relevant to the assessment of abuse. Our investigation revealed no such evidence.

Market definition

37. For the purposes of the Chapter II prohibition and Article 82, dominance must be assessed within a relevant market. Market definition is therefore an integral part of any assessment of dominance; it is a key step in identifying the competitive constraints acting on a supplier of a given product or service, and therefore provides a framework for assessing dominance and the effects of alleged anti-competitive behaviour.

38. The relevant market can be characterised by two dimensions:

- the relevant goods or services (the product market); and
- the geographic extent of the market (the geographic market).

39. Paragraph 13 of the Commission's Notice on market definition summarises the framework within which markets are defined for the purposes of enforcing competition law:

"Firms are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the market, demand substitutability constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular relation to their pricing decisions." [27]

40. In this investigation, the Authority has assessed the nature and characteristics of the services in question and the likelihood of demand-side substitution taking place in relation to the services that are the subject of the complaint. For the reasons set out below, the conclusion is that there are currently no effective demand-side substitutes to DR, DP or DA services.

41. The Authority also considered supply-side substitution; that is whether suppliers of other services are likely to be able to switch resources quickly to meet relevant demand and, hence, potentially exert a strong and near immediate competitive constraint on existing suppliers. For the reasons set out below, the conclusion is that there is potential for supply-side substitution in the market for DR services from suppliers of the equivalent service to gas meters but there is no such potential in the market for DP or DA services.

[27] Notice of the European Commission on the definition of the relevant market for the purposes of Community competition law (OJ C372, 9.12.1997, p.5).

42. Finally the Authority considered the geographical scope of the relevant market and, for the reasons set out below, concluded it to be national for DP and DA services and wider than ex-PES regional for DR services.

43. In carrying out this assessment the Authority has relied upon its own knowledge of the metering sector as well as the views provided by key stakeholders in response to questions asked in information requests issued pursuant to section 26 of the Act.

The product market

44. The ECJ has stated that in order to define the relevant product market it is necessary to consider,

> "[those] characteristics of the products in question by virtue of which they are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products".[28]

45. The same concept is applied in the Commission's Notice on market definition, which states that "a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[29]

Demand-side substitutability

46. The Authority began the process of defining the relevant market by looking at the services that were the subject of the investigation, namely, the provisions of NHH DR, DP and DA services.

47. As explained, DR is the retrieval of data from the meter and DP is the processing of this data. DA is data aggregation for settlement purposes.

48. As regards demand-side substitution, the Authority considers DR, DP and DA to be complementary rather than substitute services; it considers that there are no demand-side substitutes for these services. Accordingly, for the reasons set out below, the Authority has concluded that there are three separate product markets.

DR, DP and DA

49. Although from the point of view of the BSC, DR and DP are roles for which an accredited "Data Collector" is responsible, electricity suppliers require agents to provide **both** DR and DP services to meet their obligations under the SVA; the two roles are very different.

50. DR is the collection of meter readings either remotely or manually by visiting customers' premises. This data is then passed on to a data processor.

51. The Electricity Supply Licence requires the licensee to use all reasonable endeavours to ensure that, "at least once in every period of two years…it

[28] See Europemballage Corpn and Continental Can Co Inc v Commission Case 6/72 [1973] ECR 215, [1973] CMLR 199, paragraph 32.
[29] Notice of the European Commission on the definition of the relevant market for the purposes of Community competition law (OJ C372, 9.12.1997, p.5).

inspects [i.e. and takes a meter reading] any NHH meter at premises at which it has at all times during that period been the supplier".[30] The meter read must be carried out by a person of "appropriate skill and experience".[31] In practice, companies generally wish to read NHH meters more frequently than this. The Electricity Supply licence also requires parties to be a party to the BSC Framework Agreement and to comply with the BSC.[32] Suppliers are, accordingly, subject to requirements to read meters contained in the BSC.[33]

52. DP is largely a software function. The DP service provider is responsible for the validation of meter readings. This is done by assessing whether or not the data obtained from a meter read falls within a range of "expected" readings; thus the data processor is able to determine whether the meter read has been taken properly.[34]

53. The DP service provider also uses the data obtained from the meter read to produce an estimate of annual consumption.[35] This data is then passed on to the data aggregator.

54. Although many metering service agents offer DR and DP services in a bundled package, some offer DR and DP services separately. The Authority is aware that "a number of parties have indicated their willingness to separate out DR and DP".[36] For example, competitors do not necessarily directly offer DR services to NHH electricity meters; rather these services may be offered via a partner.[37]

55. On the demand-side, therefore, DR and DP are likely to be considered a complement rather than a substitute to each other.

56. DA is another separate service.[38] It is the aggregation of data provided by the data processor in preparation for the settlement of volumes of energy between suppliers.[39] Meter agents are required to submit aggregated

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[30] SLC 17.1 and 17.2 of the Electricity Supply Licence.
[31] SLC 17.2 of the Electricity Supply Licence.
[32] SLC 10 paragraph 1 "Balancing and Settlement Code and NETA Implementation"
[33] See, for example, section S of the BSC.
[34] The range of "expected" readings is based on past readings taken from the meter in question.
[35] For the purposes of estimating consumption, the DP service provider determines the "Meter Reading Advance". This is the difference between the last two sequential readings. Using the Meter Advance and Profile data, the data processor determines an "Annualised Advance": namely, the annualised (equivalent to 12 months) consumption that is implied by the Meter Advance. The data processor also updates the "Estimated Annual Consumption", which is the projection of the annualised consumption following the latest meter reading. See: Elexon's Simple Guide to Market Entry August 2005, version 3.0, section 2.1.2.
[36] [Customer] letter to Nigel Nash dated 10 December 2004.
[37] [Competitor's] response (dated 27 September) to the Authority's section 26 notice dated 23 August 2005.
[38] "Data Aggregator" is defined in Section X of the Balancing and Settlement Code as "a Party Agent appointed by a Supplier in accordance with Section S to carry out the aggregation of metering data received from Data Collectors and to forward such aggregated data to the SVAA". Section 2.4 of Section S sets out the principal functions of data aggregators.
[39] Data is aggregated by "Grid Supply Point Group" and by supplier. "Grid Supply Point Group" is defined in Section X of the BSC as:
"a distinct electrical system, consisting of:

consumption data on behalf of suppliers in order to inform the allocation of volumes of energy to suppliers i.e. the volume of energy that each supplier will be deemed to be responsible for ("settlement").

57. DA is carried out by industry-standard software, for which a licence is required. It is not an alternative to DR and DP; rather, it is an additional requirement.

58. A number of respondents to the Authority's section 26 Notices have stated that they treat DR separately from DP and DA in their arrangements. For example, one respondent has informed the Authority that its contract,

"…made provision for data processing and data aggregation to be moved to [its] in-house data collector and data aggregation business".[40]

59. This indicates that DR, DP and DA services are separate functions which, using the narrowest possible market definition, could be analysed as separate markets.

Data processing and data aggregation demand-side substitutes

60. It is the Authority's view that there are no viable demand-side substitutes for DP and DA services given that the electricity supplier has an obligation under the BSC to process and aggregate data from the meter points that it supplies.

Data retrieval demand-side substitutes

61. As explained above, DR may be carried out remotely or manually by a visit to the customer's premises. Most NHH electricity meters are currently read manually; but remotely read NHH meters are being introduced. For example, in 2005 BGlobal Metering began providing DR and DP services for NHH remotely read meters located on the premises of small and medium sized businesses (SMEs).[41] We have, therefore, considered the extent to which Automated Meter Reading (AMR) could act as a competitive constraint on manual DR for NHH electricity meters.

62. Responses to the Authority's section 26 notices have indicated that investment costs are relevant in this respect. It has been suggested that it would not be cost effective to move from manual reading to AMR. One respondent was of the view that the cost of remote meter reading is likely to be excessive in response to only a small increase in the cost of DR services;

(i) the Distribution Systems which are connected to the Transmission System at (and only at) Grid Supply Points which fall within one Group of GSPs, and
(ii) any Distribution System which:
(1) is connected to a Distribution System in paragraph (i), or to any other Distribution System under paragraph (ii), and
(2) is not connected to the Transmission System at any Grid Supply Point,
and the total supply into which is determined by metering for each half hour."

A "Grid Supply Point" is defined as: "a Systems Connection Point at which the Transmission System is connected to a Distribution System".

[40] [Customer's] response (dated 13 September 2005) to the Authority's section 26 notice dated 22 August 2005.

[41] BGlobal's response (dated 25 September 2005) to the Authority's section 26 notice dated 23 August 2005.

it stated that that AMR could, in relation to certain customers, lead to an 800% increase in costs for the provision of meter data services.[42]

63. One respondent to a section 26 notice has stated that although it is actively involved in bringing AMR to the market, it does not see this as a short or medium term solution to manually read meters. It states that, among other things, AMR meters are only economically viable for certain consumers (namely, larger commercial and I&C[43] customers) and even then cost effectiveness varies region by region. Further, supporting agents within the industry are few in number with many agents refraining from involvement. The respondent believes that the impact of a 5-10% increase in the price of manually read meters would have a negligible impact on the take up of AMR services.[44]

64. One respondent has suggested that there is a lack of incentive to switch to AMR due to customer churn in the supply market.[45] Another respondent has stated that existing licence requirements[46] for meter inspections act to reduce the benefit from the adoption of AMR technology as they continue to require physical visits to meters.[47]

65. Accordingly, the evidence does not suggest that AMR is a viable substitute for all NHH meters in the short term. This applies in particular to NHH meters in domestic premises, where BGlobal, for example, does not provide AMR. This may be explained by the fact that manual meter reading for meters in domestic premises occurs more infrequently and density is greater; this means that manual meter reading has a lower unit cost.

66. Therefore, for the purposes of this investigation, the Authority considers the relevant market on the demand-side to be distinct for DR carried out on a manual basis as compared to DR carried out remotely.

67. However, it is important to note that market conditions may change over time. Therefore, the Authority may reach a different conclusion on the relevant market in future cases. As noted above, one meter data provider has already begun providing DR services for NHH remotely read electricity meters located at SME premises. Lower customer density, the fact that many of these NHH meters are read monthly (which results in higher unit cost of manual DR) and the fact that AMR costs are falling means that AMR may become a viable alternative in the future.

68. HH meters are generally a particular type of AMR meter; HH meter data is collected on a half-hourly basis.

69. The Authority has also considered whether electricity suppliers would substitute HH meters for some larger NHH customers, where it would be

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[42] [Customer's] response (dated 14 September 2005) to the Authority's section 26 notice dated 22 August 2005.
[43] Industrial and Commercial.
[44] [Customer's] response (dated 19 September 2005) to the Authority's section 26 notice dated 22 August 2005.
[45] [Customer's] response (dated 13 September 2005) to the Authority's section 26 notice dated 22 August 2005.
[46] For example, SLC 17 of the Electricity Supply licence; and SLC 10 of the Electricity Supply Licence, which requires licensees to comply with meter reading obligations in the BSC.
[47] [Customer's] response (dated 2 September 2005) to the Authority's section 26 notice dated 22 August 2005.

economically viable to do so. One respondent to a section 26 notice has stated that the cost differential between HH and NHH DR, DP and DA services are such that an increase of between 5 to 10% in price for the provision of the NHH services would not drive it to switch to alternative solutions.[48] Therefore, it is the Authority's view that a relevant distinction appears to exist between DR services for NHH and HH meters.

70. However, as the current proportion of HH meters is less than 1% of electricity meters (as shown in table 1 below), it would not affect the Authority's conclusion on dominance if such meters (with the capacity to be read remotely) were substitutes to manually read meters.

Table 1: Number of electricity meters by type

Meter type	Number of meters	Percentage of total meters
NHH domestic electricity meters	26.7 million	91%
NHH non-domestic electricity meters	2.5 million	8.5%
HH meters	110,000	0.4%
Total	29..31	100%

Source: Data provided by electricity distribution companies published on Ofgem website on 14 August 2006.

Supply-side substitutability

71. It is also necessary to consider the degree of substitutability on the supply-side of the market. If prices rise, companies that do not currently provide the products or services may be able to do so at short notice (for example, less than one year) and without incurring substantial sunk costs, thus constraining the behaviour (and limiting any potential market power) of a company producing the product in question.

72. At paragraph 20 of its Notice on market definition, the Commission says that where suppliers are able to switch production to other products and to market them "in the short term" without incurring significant additional costs or risks in response to small and permanent changes in relative prices, then the market may be broadened to include the products that those suppliers are already producing.

73. The Authority has considered the degree of supply-side substitution between DR, DP and DA and has concluded that any such substitution is limited. The Authority also considers that there is limited supply-side substitution for DA and DP. However DR from non-domestic electricity meters or gas meters is likely to present some substitution possibilities.

DR, DP and DA

74. DR, DP and DA have different characteristics from a supply perspective. DR is a labour intensive service and economies of scale are likely to be important. The cost of providing DR services is increased where there is a low density of meters. There are obvious efficiencies in sending people to read meters if they can visit a number of places within the same area.

[48] [Customer's] response (dated 13 September 2005) to the Authority's section 26 notice dated 22 August 2005.

75. In contrast, DP and DA are IT based functions, which can more easily be centrally based. For example, DP is provided on a national basis for both [*customer*] (which uses [*service provider*] to carry out processing services for the majority of its customers)[49] and [*customer]* (whose DP and DA services are provided in-house)[50].

76. Accordingly, the Authority is of the view that DR is in a separate market to DP and DA on the supply-side.

77. However, it is possible that supply-side substitution arguments could lead to a conclusion that DP and DA are in the same markets. Given that the functions of DP and DA are computer based, it would be a low cost activity for an agent providing DP services to switch to providing DA services (and *vice versa*). Further, Elexon has advised one respondent that DP and DA is ideally done by the same party due to issues and risks associated with managing the interface between two separate parties.[51] However, given the conclusions below in relation to the geographic market it is unnecessary to form a firm view on this point. Therefore the Authority does not consider it necessary to consider this argument further.

Data processing and data aggregation supply-side substitutes

78. It is the Authority's view that DP and DA services for other types of meters (such as gas) do not represent viable substitutes for DP and DA services for NHH electricity meters. The way that data retrieved from gas meters is used for agreeing the amount of gas taken off the system by gas suppliers is governed by an entirely separate code, the Uniform Network Code (the "UNC"). Under the UNC gas suppliers are not required to submit meter read data for each domestic-sized gas meter in order to calculate the actual amount of gas a gas supplier has taken from the system (this contrasts with the provisions of the BSC for electricity suppliers). As a result, DP and DA activities for domestic-sized gas meters are entirely different.

Data Retrieval supply-side substitutes

i) Non-Domestic NHH Meters

79. Different sizes of NHH electricity meters are available to measure different levels of consumption. Electricity meters in Great Britain are classified according to the customer's consumption profile, also known as load factor. As shown in table 2 below there are eight different profile classes. Two of these are for domestic end-customers: unrestricted and Economy 7. The economy 7 profile class is for customers who receive a lower tariff for off-peak electricity consumption. There are six profile classes for non-domestic customers. The main difference is the maximum demand of the end-customer. The meters of some of the larger energy users (profile classes 6, 7 and 8) are also likely to be read more frequently, for example on a monthly basis.

[49] [Customer's] response to the Authority's section 26 notice dated 22 August 2005.
[50] [Customer's] response (dated 13 September 2005) to the Authority's section 26 notice dated 22 August 2005.
[51] [Customer's] response (dated 19 September 2005) to the Authority's section 26 notice dated 22 August 2005.

80. The Authority has considered whether DR from non-domestic meters is fundamentally different from domestic DR for the purposes of product market definition (that is, it has considered whether DR for non-domestic NHH electricity meters is in a separate market to DR for domestic NHH electricity meters).

Table 2: Types of NHH electricity meters

Profile class of NHH electricity meters	Type of consumer % consumption	Number of meters
1	Domestic unrestricted	25.7 million
2	Domestic Economy 7	
3	Non-domestic unrestricted	2.5 million
4	Non-domestic Economy 7	
5	Non-domestic Max Demand load factor 0- 20%	
6	Non-domestic Max Demand load factor 20- 30%	
7	Non-domestic Max Demand load factor 30- 40%	
8	Non-domestic Max Demand load factor 40% +	

Source: Electricity distribution companies.

81. As noted above there is no specific accreditation required to carry out DR services in relation to NHH meters. Therefore, providers active in the provision of DR from domestic NHH meters are able to provide DR for non-domestic NHH meters (and *vice versa*).

82. The principle difference between these metering types is in relation to the issue of "meter mapping" – namely the configuration of meters. Ex-PES incumbents have additional information about how larger and more complex meters were configured in the past within the former PES region.[52] The Authority has therefore considered whether this means that only an ex-PES incumbent can operate effectively in the non-domestic DR market.

83. Whilst this information may give an ex-PES provider of non-domestic DR an advantage in a particular region it is not clear that it is a significant barrier to other providers who wish to enter the market. It would only be if the information was something that inherently accrued to the incumbent provider and could not be established by a new entrant that this could be argued. The fact that there has been successful entry into the DR market by non ex-PES providers such as AccuRead, Siemens and the re-entry of Lowri-Beck clearly indicates that it is not a natural monopoly.

84. Although one competitor in the market has expressed concerns to Elexon and electricity suppliers that reading these meters is difficult, the Authority understands that progress is being made in sharing the necessary information. In particular, the competitor has stated that it is satisfied that EDFE is co-operating in this respect. One new entrant to the electricity supply market has stated that it has had difficulties in gaining site access and obtaining meter reads from more complex NHH meters; this has caused

[52] PES regions are explained in the background section

difficulties in billing customers. However, the Authority understands that new contractors can gain the skills necessary to overcome these issues in a few months (i.e. 3-9 months)[53].

85. Further, responses to the Authority's section 26 notices do not suggest that providers of DR services only provide such services for domestic meters and not other NHH meters.

86. Accordingly, it appears to the Authority that DR for non-domestic NHH electricity meters is not fundamentally different from domestic DR. But in any event, this distinction is not significant. Patterns of market power are similar in both domestic and non-domestic meter reading and therefore any conclusion on this point is unlikely to have a significant influence on any conclusions as to dominance.

ii) HH Meters

87. The differences between the entry processes[54] and DR requirements of NHH and HH electricity meters suggest that the scope for supply-side substitution from HH meter data service providers is limited.

88. For HH metering, the retrieval of meter reads is typically done remotely by dialling the meter. As explained above, meter reads from NHH meters are predominantly acquired by a service provider's representative physically visiting a site and reading the meter.

89. Therefore, it appears to the Authority that DR providers for NHH are unlikely to be an effective supply side substitute for HH DR.

iii) Domestic Sized Gas Meters

90. It appears to the Authority that DR for domestic-sized gas meters[55] and NHH electricity meters are sufficiently close supply-side substitutes for the purposes of product market definition and are likely to be in the same market. DR for domestic-sized gas meters also involves visiting a customer's premises to collect meter-reading data.

91. Most providers of meter reading services for NHH electricity meters also read domestic-sized gas meters. Responses to the Authority's section 26 notices indicate that gas DR and electricity DR involve the same skill set and are essentially the same activity. For example,

> "Similarities exist between the meter read (DR) activities of gas and electricity in terms of the requirements to obtain meter reading. Both will be scheduled in to cyclic read patterns and both are likely to have a "special" read activity for ad-hoc meter read visits.[56]

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[53] Customer meeting with Ofgem, 8 November 2005.
[54] See below for a description of the entry process tests.
[55] Gas meters can be classified according to the maximum volume of gas that can flow through the meter, while the meter operates within the bounds of accuracy. The smallest size of meter allows a maximum volume of six cubic meters per hour and is generally installed in domestic premises. These meters account for around 98% of gas meters in Great Britain. Therefore, given it does not affect the conclusion on dominance whether gas meters designed to measure higher capacity are substitutes or not.
[56] [Competitor's] response (dated 23 September 2005) to the Authority's section 26 notice dated 23 August 2005.

92. AccuRead has stated that,

> "…the basic principles of meter read services remain the same regardless of meter type, whereby a metering representative makes a visit to a site to visually read the meter".

93. One respondent to a section 26 notice has contracted with three DR service providers to collect meter readings from both electricity and gas meters.[57] The Authority further notes that two of another respondent's customers receive a dual fuel meter reading service[58] and that another respondent, manages the DR, DP and DA activities for a supplier in the electricity market, but carries out only the transactional meter reading (DR) activities for that supplier's gas consumers.[59]

94. One respondent has stated that, because maximising the number of visits made in a certain meter reader's "patch" during a single visit to that patch can yield productivity gains, many companies operate multi-utility solutions so that the read requests for electricity, water[60] and gas can be combined into the same work package for a single operative.[61]

95. One competitor currently only provides DR services for gas meters and has chosen not to offer DR for electricity meters. It based its decision, inter alia, on the fact that (a) additional accreditation and systems are necessary to carry out DC (i.e. anything more than basic DR services; however, as explained below, the Authority notes that DR does not require accreditation); and (b) DC may require investment and take time to set up (the competitor in question suggests 12 months). Nevertheless, the competitor states that there are similarities between gas and electricity DR. Both require mobile computing technology to provide details of the properties to be visited and the meters to be read, and a workforce which has undergone similar training in such areas as customer service and health and safety.[62]

96. Finally, there are no barriers in terms of separate accreditation for DR. Similarly, accreditation is not required for gas meter reading. Ofgem currently publishes a list of gas meter readers that comply with Ofgem's guidance notes but this does not constitute approval.[63]

Conclusion on the product market

97. On the basis of the analysis above, the Authority is of the view that there are three relevant product markets in this case:

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[57] [Customer's] response (dated 2 September 2005) to the Authority's section 26 notice dated 22 August 2005.
[58] [Competitor's] response (dated 27 September 2005) to the Authority's section 26 notice dated 23 August 2005.
[59] [Competitor's] response (dated 23 September 2005) to the Authority's section 26 notice dated 23 August 2005.
[60] It is possible that the relevant market could include water DR; however, any conclusion on this point is unlikely to have a significant influence on any conclusions as to dominance.
[61] [Competitor's] response (dated 27 September 2005) to the Authority's section 26 notice dated 23 August 2005).
[62] [Competitor's] response (dated 27 September 2005) to the Authority's section 26 notice dated 23 August 2005.
[63] For the list of approved gas meter readers see Ofgem's website: http://www.ofgem.gov.uk/ofgem/work/index.jsp?section=/areasofwork/metering/metering03

- the market for DR for domestic-sized gas and NHH electricity meters;
- the market for DP for NHH electricity metering; and
- the market for DA for NHH electricity metering.

The Geographic market

98. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services in which the conditions are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated.[64] The geographic market is an area in which the objective conditions of competition must be the same for all traders.[65] The geographic market can be defined either on a regional, national or international basis.

Data processing and data aggregation geographic scope

99. As explained above, DP and DA activities involve the manipulation of information using computer systems. There is no requirement for the computer systems in question to be in a specific location. For example, DP is provided on a national basis for certain customers. Given that there is no geographic restriction, agents providing DP and DA services could easily begin to provide such services in a new region.

100. As noted above, providers of DP and DA must be accredited and certified. In order to provide these services for electricity metering, service providers must undergo the following entry testing:
    - accreditation of the company;
    - certification of processes; and
    - testing to participate in the settlement processes (SVA entry processes).

101. Under the BSC, Elexon is responsible for facilitating the accreditation and certification of agents.[66] Accreditation and certification are designed to ensure that all agents have developed their systems and processes to accepted industry standards, and are able to fulfil the requirements of the BSC.[67]

102. Accreditation relates to the company providing an agency service; an accreditation application is made by a company wishing to become an

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[64] *United Brands v Commission* Case 27/76 [1978] ECR 207, [1978] CMLR 429, paragraphs 10-11.
[65] Ibid. See also *Decca Navigator System* OJ [1989] L 43/27, [1990] 4 CMLR 627, paragraphs 88-90.
[66] See Section J 3 (Accreditation and the Performance Assurance Board) and Annex J-1of the BSC.
[67] It should be noted that accreditation and certification is required in relation to data collection and data aggregation activities. However, there is no direct requirement for accreditation or certification of DR activities; the accreditation and certification requirements essentially cover DP activities.

accredited person and operate certified systems and processes. Accreditation is carried out on a national basis.[68]

103. Certification relates to the systems and processes used to provide the service; it is carried out on a national basis.[69]

104. Once a company has been accredited and certified it must maintain its accredited and certified status. This involves maintaining compliance with the BSC. In addition, companies must undertake re-certification, where necessary. Re-certification is triggered by "significant changes" to the company's systems and processes.[70]

105. Accredited persons must also submit an Annual Statement of Certification Status to Elexon confirming either that it has implemented no significant changes or that the appropriate re-certification was undertaken.

106. The provider must also complete entry process tests which are carried out in conjunction with the electricity supplier and are designed to ensure that the agent is able to interact effectively with the relevant suppliers and agents within the supplier hub (i.e. the grouping of the meter operator agent with which the supplier wishes to operate) and with the local distribution network operator ("DNO").[71] Since the DNOs are natural monopolies in the ex-PES regions, this testing is done on a regional basis.

107. Entry process tests were primarily developed to provide a means of testing suppliers and agents to gain initial entry into the SVA sector of the electricity market. However, occasionally a need arises for existing market participants to undergo a revised set of entry process tests, for example, when a substantive change affects the way the market will operate.

108. The entry process tests usually take between six and eight weeks for a supplier operating with its appointed agents who have previously undertaken entry processes with another supplier. Where a supplier uses an agent new to the market, the testing period would typically extend to 12 or 13 weeks.[72]

109. The Authority does not consider that such tests would amount to a significant barrier to operating on a wider than ex-PES regional or national basis.

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[68] The procedure involves submitting an Accreditation Application letter to Elexon, signed by a Company Director. Accreditation is endorsed by the Performance Assurance Board and a BSC Panel Committee, simultaneously with Certification once that procedure is complete.

[69] The process includes the completion of a self assessment certification return, which is then reviewed by a certification agent or Elexon, together with any evidence provided in support of the application. The certification agent or Elexon will report to the Performance Assurance Board with a recommendation. The Performance Assurance Board decides whether to certify an applicant. There are three different kinds of certification process: high, medium and low risk. The level of risk is determined by the results of the Certification Assurance Level Matrix (CALM). The CALM is undertaken by applicants and confirmed by Elexon. For high and medium risk certifications supporting evidence must be assessed at a site visit. For high risk applications a certification fee must be paid by the applicant; medium and low risk certifications are free to the applicant.

[70] A "significant change" under BSCP 531 is a proposed change to the agent's certified systems and/or processes that is either a large change to those systems and/or processes or has the potential to significantly affect Settlement if implemented incorrectly.

[71] Section J.5 of the BSC

[72] See Elexon's *Simple Guide to Market Entry* dated August 2005, version 3.0, section 3.6

110. Accordingly, the Authority is of the view that the DP and DA markets are national markets.

Data Retrieval geographic scope

111. In relation to DR services, the Authority does not consider that there are any viable demand-side substitutes in respect of a supplier's choice to obtain meter-reading services from different geographical locations. That is to say, the meter that must be read is in a specific location and reading a meter in another location is not a sufficient substitute.[73] Therefore, the key consideration when assessing the geographic definition of the market is the potential for supply-side substitution.

112. The Authority commenced its analysis by considering whether the market for DR is based on ex-PES regions. Both complainants referred to their difficulties in obtaining alternative services in the London and SWEB ex-PES regions. Since PESs originally operated in particular regions across England, Wales and Scotland, this would have been the starting basis for competition in DR when it was introduced in 2000. However, since 1998, electricity suppliers have been providing electricity (and also gas) outside of their traditional PES areas and as such invitations to tender for meter reading services can be on a wider than ex-PES regional basis.

113. One competitor in the market considers that competition in meter read services generally takes place at the national level and that this is achieved through invitation to tender. It has said that the invitation to tender is likely to be against defined zones which can lead to tenders being provided for specific areas based on volume and density, which give a competitive price. Nevertheless, it has also said that its in-house DR service provider provides DR services in gas and electricity outside its previously defined (PES) geographical boundary. For example, it provides gas and electricity DR services to a supplier across [excised] and to a supplier in the [excised] (ex-PES) regions.[74]

114. One respondent to a section 26 notice has informed the Authority that it invited tenders for the provision of dual fuel metering data collection services, on the basis of eight UK areas which are not based on ex-PES regions. These regions cover parts of more than two contiguous former PES regions.[75]

115. Another respondent who invited tenders for meter reading contracts decided to contract with 3 meter reading service providers for its electricity and gas consumer customer base. The new contracts were awarded on a wider than ex-PES region basis. The customer base was divided geographically between the three service providers to allow sufficient density and customer numbers for each to offer an optimum level of service and cost. The respondent considers that there is a national market for competition in DR. It is of the

[73] To a limited extent there is a degree of substitutability as an electricity supplier can trade off between the settlement consequences of poor meter read reliability for one meter point and better meter read reliability at another. However, for reasons of accurately billing customers and meeting the 2-yearly must read obligation, the reading of different meters are not substitutes.

[74] [Competitor's] response (dated 23 September 2005) to the Authority's section 26 notice dated 23 August 2005.

[75] [Customer's] response (dated 3 October 2005) to the Authority's section 26 notice dated 22 August 2005.

view that suppliers may choose to purchase DR services from a mixture of national and regional service providers in order to offer an optimum level of service and cost.[76]

116. Another respondent underwent a tender process, as a result of which it now contracts data metering services to a particular service provider; but the DR services are, in turn, sub-contracted to four other service providers on a wider than ex-PES region basis.

117. As a result of these various tenders, a number of providers of DR services are present in a number of ex-PES regions. As shown in table 3 below AccuRead provides data collection services in all of the ex-PES regions in England. Only one competitor concentrates its activities in one ex-PES region. [*Competitor*] currently operates mostly in the South-East of England; however, following the announced withdrawal of EDFE it partnered with [*competitor*] (which will provide the DR services) to offer combined DR, DP and DA services in the London and SWEB regions. Indeed it is [*competitor's*] view that:

"With EDFE's decision to withdraw third party NHH metering services in the London and SWEB areas, [*we*] saw this as an opportunity to create a strategic partnership with [*competitor*] to provide these services to second-tier customers in these regions."[77]

118. Another notable trend is for providers of DR to expand outwards from regions where they first operate. Competitors operate in a cluster of neighbouring ex-PES regions. The view has been expressed by some providers of DR services that competition can take place on a regional and national level. All of this suggests that the relevant geographical market is no longer restricted to the former ex-PES regions.

Table 3: Ex-PES regions in England and Wales in which data collectors[78] are present

Data collector	*[Number of]* Ex-PES regions in England and Wales[79] which they have a presence (i.e. a market share between 0.5% and 5%)	*[Number of]* EX-PES regions in England and Wales where market share is greater than 5%
AccuRead	*[3 regions]*	*[9 regions]*
IMServ		*[1 region]*
EDFE		*[2 regions]*
Metering services Ltd	*[1 region]*	*[5 regions]*
Npower	*[1 region]*	*[2 regions]*
Powergen Retail Ltd		*[1 region]*
SSE	*[2 regions]*	*[7 regions]*
Siemens	*[2 regions]*	*[4 regions]*

[76] [Customer's] response (dated 2 September 2005) to the Authority's section 26 notice dated 22 August 2005.
[77] [Competitor's] response (dated 27 September 2005) to the Authority's section 26 notice dated 23 August 2005
[78] Ofgem's data does not distinguish between DR and DP services; therefore data collection is being used as a proxy for providers' presence in the ex-PES regions.
[79] Ofgem does not have the relevant data for Scotland but this will not alter the findings as the complaint focuses on regions in England.

SP Dataserve	*[1 region]*	*[1 region]*

119. The view has been expressed that DR service providers face the following requirements to expand into neighbouring regions:

- set up costs;
- fulfilling any entry requirements;
- securing a workforce in the area; and
- securing a contract with density in the volume of meters.

i) Set Up Costs

120. The main set up costs appear to be the purchase of hand-held meter reading terminals, IT infrastructure, vehicles and uniforms and training. These costs do not seem significant given the on-going requirements faced by service providers.

ii) Entry Requirements

121. As regards the Elexon entry process, as explained above, accreditation and certification are required in relation to data collection activities. This includes DR by definition. However, in practice, there is no direct requirement for accreditation or certification of DR activities; the accreditation and certification requirements essentially equate to DP activities.

122. In any event, as explained above, the Authority is of the view that the requirements as to Elexon's entry processes and the requirements in relation to DR service providers for gas metering do not amount to a significant barrier to agents wishing to operate on a wider than ex-PES regional or national basis.

iii) Securing a Workforce

123. With respect to staffing, the Authority understands that it is common for DR service providers to recruit all or a large proportion of their meter reading staff on temporary contracts using employment agencies. This recruitment method appears to be due to the high turnover of staff.[80]

124. This recruitment method appears to have benefits in terms of flexibility, since DR service providers are likely to be able to reduce or increase their staffing levels at short notice. Given that large supply businesses normally enter into contracts with DR service providers for approximately three years and after a tender process, this recruitment method appears to be the most commercially viable way of operating and the Authority expects that the future trend will be to recruit staff using employment agencies.[81]

[80] This high turnover of staff is due to the fact that meter reading is a low paid, outdoor activity and there are a wide range of jobs frequently available at similar salary scales.
[81] The Authority notes that some service providers continue to employ meter readers on permanent contracts; however, such arrangements appear to relate to past employment practices used by the former regional monopoly supply companies or have resulted from

125. In addition, when winning a contract to provide meter-reading services to a supplier, TUPE[82] may apply. In certain circumstances, the workforce engaged in providing a meter reading service can be transferred to the new employer, on substantively equivalent terms and conditions. A company seeking to enter the market, or enter a different region, may therefore gain access to a workforce.

126. Given that recruitment can be sub-contracted, it does not appear to be necessary for DR service providers to have premises in any of the locations where meters are located. Rather, a company could operate with a small office in any location and utilise a home-based workforce. Indeed, the Authority notes that AccuRead, which operates on a national basis, states on its website that it has "2,000 field based staff located throughout Great Britain" and that "The field workforce are supported by a number of departments all located in Newcastle upon Tyne".

127. The Authority does, however, note that in practice some service providers have chosen to set up offices throughout the main areas of Great Britain where they operate or are able to use the regional premises owned by their company group. The Authority is also aware that some service providers may have obtained regional premises as a result of acquiring meter reading businesses from a supply business which was a former regional monopoly.

128. Notwithstanding this, the Authority takes the view that a new entrant would not *require* any regional premises to operate a meter reading business.

129. Accordingly, the Authority is of the view that the need for the DR service provider to acquire a work force, and the means by which he is able to do this, do not amount to a significant barrier to service providers wishing to operate on a wider than regional basis.

iv) Density in the volume of meters

130. It has been stated by one respondent to a section 26 notice that to undertake gas and electricity meter reading services in a different geographical area, a DR provider would need to win a contract where the frequency of reading and volumes of customers is sufficient to support practical staff levels on an annual basis. A number of respondents to section 26 notices have noted that the key drivers behind growth and expansion into other geographical locations are the volume and density of the customer base under offer within the tender.

131. Smaller suppliers are clearly less able to offer a density of meters in a concentrated area. As a result, following EDFE's decision to cease supplying third-parties, some meter readers refused to offer services to small suppliers or those without density in these areas. For example, one competitor in the market explained that that it was unwilling to make an offer where economies of scale were unattractive.[83] Another competitor did

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the acquisition of meter reading businesses where the Transfer of Undertakings (Protection of Employment) Regulations 1981 (as amended) applied.

[82] Transfer of Undertakings (Protection of Employment) Regulations 1981 SI 1981/1794; and, from 6 April 2006, the Transfer of Undertakings (Protection of Employment Regulations) 2006 SI 2006/246.

[83] [Competitor's] response (dated 13 September 2005) to the Authority's section 26 notice dated 23 August 2005.

not offer DR services, *inter alia*, where it did not have any presence in the general location.[84]

132. However, the evidence suggests that where a meter reader has contracts for meters in particular areas or where small suppliers are willing to contract with the meter reader for all of its meters across Great Britain rather than only for those meters in a particular area, meter readers are willing to provide services. For example, [*competitor*] has made offers to suppliers (including many small suppliers) following EDFE's decision to cease providing meter reading services.[85] [*Competitor*] has also made offers to a number of suppliers, including some small suppliers in the SWEB areas and to some for parts of the London area.[86] As noted above, [*competitor*] and [*competitor*] have formed a partnership following EDFE's withdrawal and offered services to all suppliers. In their view:

"Existing work, together with the additional work, created reasonable density to provide these services at realistic prices, creating competition in an area where competition was previously not economical."[87]

133. Although small suppliers and those with limited meters are likely to face higher prices due to the lack of economies of scale caused by meter readers having to travel greater distances between customers, this does not mean that the alternative providers are not viable substitutes. For example, one competitor considers that competitive prices can be offered where the fit with a current portfolio is good.[88] As noted above almost all of the larger suppliers have undergone a tendering process for meter reading. Therefore, meter readers can expect opportunities to bid for new contracts in the future, which may result in more new entrants.

134. Therefore, it is the Authority's view that although density is clearly a factor for meter readers in being able to offer services, it does not prevent them from offering services to small suppliers. Following EDFE's decision to cease providing third parties, alternative offers were made. It is also our view that it is logical for prices to reflect the density of the meter population.

Conclusion on geographic market

135. On the basis of the arguments above, the Authority is of the view that the geographical markets for DP services and DA services for electricity metering are at least national in scope; and the market for domestic sized gas and NHH electricity DR is at least significantly wider than ex-PES regional and likely to be national in scope.

Conclusion on the relevant market

136. The Authority has concluded that the following three markets are relevant in this case:

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[84] [Competitor's] response (dated 23 September 2005) to the Authority's section 26 notice dated 23 August 2005.
[85] [Competitor's] response (dated 26 September 2005) to the Authority's section 26 notice dated 23 August 2005.
[86] [Competitor's] response (dated 28 October 2005) to the Authority's section 26 notice dated 23 August 2005.
[87] [Competitor's] response (dated 27 September 2005) to the Authority's section 26 notice dated 23 August 2005.
[88] [Competitor's] response (dated 23 September 2005) to the Authority's section 26 notice dated 23 August 2005.

- the market for DR services for domestic-sized gas and NHH electricity meters, which is at least significantly wider than ex-PES regional and potentially national in scope;

- the market for DP services for NHH electricity meters in, at least, Great Britain; and

- the market for DA services for NHH electricity meters in, at least, Great Britain.

Dominance

137. Article 82 and the Chapter II prohibition apply only where an undertaking has a dominant position on the relevant market.

138. The ECJ has laid down the following test for dominance:

> "…a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[89]

139. The ECJ has stated that dominance can be presumed at 50%, in the absence of exceptional circumstances pointing the other way. That is: if an undertaking has a market share of over 50%, that undertaking would bear the burden of establishing that it is not dominant.[90]

140. The ECJ has held that certain firms with market shares in the 40-50% range are dominant.[91] In this percentage range, factors other than market share were considered to be significant and the market share alone would not have been sufficient to sustain a finding of dominance. Other factors indicating dominance include the position of other undertakings on the same market and how market shares have changed over time. An undertaking is more likely to be dominant if its competitors enjoy relatively weak positions or if it has enjoyed a high and stable market share.

141. In assessing whether there is dominance the Authority has considered whether, and to what extent, EDFE has faced constraints on its ability to behave independently. Those constraints could potentially include:

    - existing competitors: the extent to which such competitors act as a constraint may be indicated by market shares; and

    - potential competitors: the extent of any such constraint will depend upon the size of any entry barriers and the existence of other undertakings which might easily enter the market.

142. As set out in the market definition section, there are a number of providers of DR, DP and DA services operating in Great Britain. In order to analyse the market share of EDFE in the relevant markets, Ofgem obtained information from Elexon about the number of meter points at which each company is registered as the data collector or data aggregator.

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[89] *United Brands v Commission* Case 27/76 [1978] ECR 207, 1 CMLR 429, paragraph 65.
[90] *AKZO v Commission* Case C-62/86 [1991] ECR I-3359, paragraph 58- 62
[91] For example, *United Brands v Commission* Case 27/76 [1978] ECR 207.

143. EDFE's market share in the national market for DP services is (at most[92]) 11.8%.[93] EDFE's market share in the national market for DA services is 11.7%.[94] The Authority is therefore of the view that EDFE is not dominant in the relevant markets for DP and DA services.

144. As explained in the market definition section above, it is the Authority's view that the relevant market for DR is likely to be national in scope; EDFE's market share on a national basis is 10%, well below the legal presumption of dominance. Furthermore, as explained below the Authority considers that both existing and potential competitors in the provision of DR services are likely to place a competitive constraint on EDFE because of the ability to enter the market quickly without incurring significant sunk costs. As such, the Authority concludes that EDFE is not dominant.

Sensitivity analysis of conclusions on data retrieval

145. Since meter reading was historically conducted on an ex-PES regional basis, the Authority further tested its conclusion that EDFE is not dominant by considering EDFE's position in a narrower market. We conducted sensitivity analysis of EDFE's market shares using different proportions of the meter points in neighbouring ex-PES regions to test our conclusion based on a regional market, of a wider than ex-PES basis. The neighbouring regions included are those regions that share a boundary with either the London or SWEB ex-PES regions. These include for London area: Eastern, Seeboard and Southern ex-PES regions; and for SWEB area: Midlands and Southern ex-PES regions.

146. The Authority began by considering EDFE's share of domestic gas and NHH electricity DR in the former ex-PES regions in question, namely, London and SWEB (which broadly covers Cornwall, Devon and Somerset). Data for electricity meters was readily available. However, to obtain a market share for a product market including DR services for gas meters, it was necessary to combine the electricity data with that for gas meters. Since total numbers of gas meters are not available on an ex-PES regional basis, the Authority made an estimate based on a survey of the percentage of domestic electricity customers in each ex-PES region, who reported having gas mains in their home.[95] These results are illustrated in table 4 below.

Table 4 Estimated number of domestic gas meters by ex-PES region

Ex-PES Region	Total Electricity meters	Per cent of customers with mains gas	Estimated number of domestic gas meters
East Midlands	2,392,615	84	2,009,797
Eastern	3,224,958	78	2,515,467
London	1,990,300	88	1,751,464

[92] The lack of certainty arises because Elexon's statistics bundle DR and DP together and it is only possible to calculate a market share for the combined activities.
[93] Source: Elexon Data provided on 9 January 2006 in response to Ofgem's section 26 of 22 December 2005.
[94] Source: Elexon Data provided on 9 January 2006 in response to Ofgem's section 26 of 22 December 2005.
[95] Customer experience survey conducted by Accent for Ofgem, March 2005.

Manweb	1,352,894	55	744,091
Midlands	2,231,973	84	1,874,857
Northern	1,458,008	82	1,195,567
Norweb	2,150,651	93	2,000,105
Scottish Hydro	752,674	56	423,360
Scottish Power	1,965,745	81	1,598,394
Seeboard	2,020,333	86	1,737,486
Southern	2,690,295	79	2,125,333
Swalec	1,005,261	77	774,051
Sweb	1,385,619	66	914,508
Yorkshire	2,073,557	84	1,741,788
Total	*26,694,883*		*21,406,271*

147. As with all survey data the figures in table 4 should be treated with caution, however, the total of the estimated number of gas meters in each ex-PES region derived from the percentage of electricity domestic customers with gas mains is close to the total number of domestic gas meters (21,403,959)[96] and therefore appears to be reasonably accurate. The market shares were then calculated using data from Elexon and EDFE in respect of the number of electricity and gas meters being read by EDFE.

148. Table 5 shows EDFE's market share in each of the two regions based on the inclusion of a range of 10-100% of the neighbouring regions being included in the relevant geographical market. The dilution effect of these neighbouring regions is that with a small share of meters from neighbouring regions included in the relevant market, EDFE's market share falls below the legal presumption of dominance (50%). If all neighbouring regions are included the market share falls to just over 20%. Furthermore, the Authority has considered the competitive constraint provided by existing competitors in non-neighbouring regions and new entrants.

Table 5: Sensitivity of market share calculation to proportion of neighbouring region meter

	EDFE Market share in	
% of neighbouring regions to include (p)	London	SWEB
0 = own region only	52	56
10	45	48
25	38	39
50	31	30
75	26	25
100 = all neighbouring regions	23	21

Data Retrieval: Potential Competitors

149. Even if the geographic market is narrowly drawn, the Authority considers that existing competitors in the provision of DR services in other non-neighbouring regions are likely to place a competitive constraint on EDFE because of the ability to enter quickly different regions of Great Britain without incurring significant sunk costs.

[96] Domestic Retail Market Report, March 2006, table A7 "Total number of domestic gas and electricity meter points."

150. As explained previously, the Authority considers that there are relatively low barriers to entry into the market for DR. The set-up costs are relatively low involving primarily a workforce, vans and hand-held terminals. There is no specific accreditation required to provide DR services, although a new entrant may wish to gain accreditation to provide a combined DR, DP and DA service. Furthermore, staff appear to require relatively short periods of basic training: responses to our information requests suggest that this would typically be a few weeks.

151. The density in the volume of meters and the access to the meters on offer is a factor that meter readers will need to consider. However, the evidence is that there are alternatives available to small energy suppliers. Indeed in some respects EDFE's decision to withdraw services has created an opportunity for new entry. [*Competitor*] considers the former PES to be a "historical barrier to entry" with whose "low cycle price reads" it was unable to compete and that EDFE's decision creates an opportunity for them to compete.

152. Although there are clear economies of scale in visiting large numbers of meters in the same area, a number of larger energy suppliers have carried out tendering processes for the provision of these services. Therefore, there is scope for new entrants to compete for sizeable contracts providing the necessary scale economies, which will allow them to offer similar services to smaller suppliers.

153. Given the number of competing providers already active in other parts of Great Britain and the low barriers to entry it is the Authority's view that even on a narrowly drawn geographic market definition there are sufficient pressures from potential competitors such that EDFE is not dominant.

Conclusion on dominance

154. The Authority has concluded that EDFE does not hold a dominant position in the relevant markets for DR, DP and DA.

155. The Authority has come to this conclusion on the basis of EDFE's market shares in the relevant markets; and because actual and potential competitors in the provision of DR, DP and DA services provide a competitive constraint on EDFE.

Abuse

156. In the absence of dominance, there can be no abuse of a dominant position for the purposes of the Chapter II prohibition and Article 82.

157. Accordingly, the Authority does not consider that it is necessary to make a decision on whether or not EDFE's decision to withdraw DR, DP and DA services from suppliers not affiliated to EDFE would be capable of amounting to an anti-competitive refusal to supply.

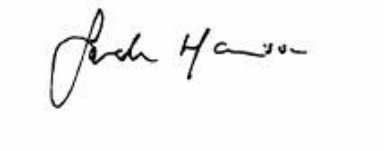
158. As set out above, the Authority notes that the complainants are able to obtain meter data services from third parties, albeit at higher prices. Moreover, while in this case closure decision we have focussed on the markets relating to meter data services (in the various forms described below) and have decided to close the case due to the absence of a dominant position on those markets, we also note (based on our ongoing monitoring

of the markets) that the market(s) for electricity supply are highly competitive (and EDFE faces and will continue to face strong competition from a number of sources in the supply market(s)), such that we are sceptical as to the existence of a realistic possibility of consumer harm arising out of the complaints made against EDFE.[97]

Decision

159. Following the analysis set out above, the Authority has concluded that EDFE has not infringed Article 82 or the Chapter II prohibition in relation to its decision to withdraw meter data services from electricity suppliers that are not affiliated to EDFE.

160. The Authority has concluded that EDFE is not dominant in any of the three markets that are relevant in this case (under any reasonable market definition) and therefore has no grounds for action.



Sarah Harrison
Managing Director - Corporate Affairs

[97] See Ofgem's Domestic Retail Market Reports: March 2006 (Ref 110/06), September 2005 (Ref 23/06) and June 2005 (Ref 24/06).