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Dear Paul,

Supporting effective switching for domestic customers with smart meters: additional statutory consultation and notice – A response from Energy UK

Following your updated statutory consultation and notice in relation to a potential conflict with the principles under the Data Protection Act 1998 (the DPA), Energy UK and its members have reviewed the issues raised and have the following comments to make.

Is the basic data held on a device personal?

Government has been very clear throughout the lifetime of the Smart Metering Implementation Programme that energy consumption information generated from smart meters must be regarded as personal data. Much of the reasoning behind this stance relates to the fact that consumption data is viewed as being personal data as it relates to a living individual and the data controller can match the data to an identifiable individual. The frequency and granularity of this data increases the risks and the privacy concerns but nonetheless consumption data is personal data regardless of the frequency. Where data might reveal information about a consumer's personal lifestyle and habits there is potential for breaches in the DPA if the data is not handled correctly¹. Industry and the programme as a whole have moved forward with this common understanding.

In terms of the issue raised in this consultation, and particularly for ADM/early smart meters, any historical energy consumption information that might be visible to an incoming tenant at a property would be visible only on an In-Home Display device installed as part of the ADM/smart meter equipment – this information could not be seen on the meter itself. Whilst other means of displaying or accessing this granular information are expected to be available for the enduring solution, it is unlikely these will be rolled-out in significant volumes during the Foundation stage (particularly the early/mid stages of Foundation) of the programme.

The images below show what level of information would be available on a typical Foundation stage IHD device²:



¹ Smart Metering Prospectus: Data Privacy & Security consultation July 2010

² Energy UK is aware that more advanced IHD's are currently available, but believe the volumes are significantly lower than the example shown above

The image on the left displays a total consumption amount for the past 28 days, along with a graph indicating daily fluctuations in consumption. The image on the right shows similar information, but displays this for each month over the previous 12 months. At no point can you determine any detail such as the exact consumption amounts (daily, weekly or monthly), and you cannot determine what appliances or individual has consumed the energy. However, as this does show consumer consumption over a specified period, there is a view from some members that this could be construed as personal information as it can be related to the customer at the time. This is not a unanimous view though.

Based on this evidence, many of our members would question whether this level of basic information, regardless of who the data belongs to, or what period the data relates to, should be regarded as personal data at all. Others however have the view that this data can be directly linked back to the previous tenant/occupier, and must therefore be considered personal.

With mixed views between our members, it is becoming clear that further guidance from the Information Commissioner's Office and Ofgem is essential to give certainty and clarity. Only then can suppliers move forward on an appropriate course of action in order to mitigate potential breaches of the DPA if this is needed. Many of Energy UK's members believe that if there is a need to put in place mitigating actions, then there must be an agreed solution rather than relying purely on another suppliers' interpretation of the DPA.

Clarity on the definition of Data Controller:

The consultation document highlights the potential issues in relation to suppliers' Data Controller responsibilities under the DPA.

Energy suppliers will retain the responsibility of Data Controller under the DPA for the whole period they were responsible for supplying energy to a particular customer. Therefore if the customer has an ADM or smart meter installed (operating in smart mode) and is able to store and make available for viewing any historic energy consumption information, and the customer switches energy supplier, the initial supplier has Data Controller responsibilities for any data that is stored (made available for viewing or not) on the ADM/smart meter for the period it supplied the customer. However, in this event the old supplier is faced with the problem of having no control of data it is responsible for under the DPA as the access to the smart meter will be with the new supplier.

At the point any new supplier takes over responsibility for supplying energy to the customer, the new supplier has full Data Controller responsibilities for any data generated from the ADM/smart meter, stored and/or made available from that point onwards.

In the case there is also a subsequent change of tenancy event (after the new supplier has taken over supply responsibilities), the Data Controller responsibilities for both the outgoing tenant (from the point the new supplier was responsible for supplying energy), and for the incoming tenant must lie firmly with the current (new) supplier and there is an argument that suggests the Data Controller should make the data subject aware that their consumption information may remain on the IHD.

Where the new supplier operates the ADM or smart meter in dumb mode we believe that the new supplier should only have Data Controller responsibilities for manual reads generated and not be responsible for data generated, stored and/or made available from the ADM or smart meter in the home as they will not have any control over how this data is generated, processed or used.

There also appears to be a scenario where the new supplier is operating the ADM or smart meter in dumb mode and hence when a CoT event subsequently occurs they are unable to remotely delete or prevent the previous tenant's consumption history from being viewed by the new tenant. This is unlikely to be able to be done via a site visit either. Therefore the previous consumer's historical consumption history will still be

visible via the IHD. There doesn't appear to be a solution currently that satisfies the requirements for suppliers being the Data Controller for devices they do not have remote access to, or control of. Therefore Energy UK requests clarity from Ofgem on how they believe this scenario can be managed as part of the proposed licence conditions.

Energy UK and its members would also suggest that it would be helpful for the Information Commissioners' Office to clarify whether or not our understanding of the Data Controller responsibilities are correct, and for Ofgem to confirm this as a matter of urgency.

Complying with the proposed obligations and general DPA legislation

One of the key objectives from the effective switching proposals is to ensure that consumers are fully aware of any changes to the services they are currently receiving as a result of a change of supplier event where an ADM/smart meter is installed. In terms of the historical consumption information held or stored on any device/s within the home, if the outgoing supplier does not believe it will be able to comply with its Data Controller responsibilities under the DPA, then the supplier will have no choice but to remove any risk of non-compliance with the DPA, and remove/delete, or where possible restrict access to the relevant data from point they lose the customer, and communicate this to the customer as part of the loss process.

This also applies to the new supplier when operating the ADM in dumb mode and where a COT event subsequently occurs. The new supplier cannot delete or disable the previous tenants historical consumption history whilst they are the Data Controller, only the Installing Supplier in this scenario would be able to take any action to delete or disable the historical consumption data for the period they are the Data Controller. Hence the new tenant will be able to view whatever data is available through the IHD.

Even in the case where the new supplier chooses to take the full suite of smart services being offered from the previous supplier, the concept of the previous supplier retaining rights to delete data on a device within the home that it is no longer responsible for (unless requested to do so by the new supplier) cannot be right – and once again, the previous supplier has no ability to carry out its Data Controller responsibilities. As such, it would appear sensible to assume that the new supplier should inform the customer that access to historical consumption data on a device/s within the home may also be lost as a result of changing supplier.

In terms of providing energy consumption information to consumers where data is deleted/removed, or access to it is restricted from a device/s within the home, Energy UK's members do not see any difference to existing arrangements whereby the consumer can contact his/her previous supplier and request any details relating to their account – even if the consumer is no longer a customer of the supplier. As a point of clarification, suppliers will only be able to provide information that is recorded on their internal billing systems, rather than a duplication of the information stored on the ADM/smart meter.

Whether or not suppliers choose to provide that information as part of the final bill, or make consumers aware that the information is available upon request from the customer should be a supplier choice. In either circumstance, Energy UK's members would provide such information to the customer on a free of charge basis once. Should customers make repeat requests for the same information, Energy UK's members would expect to be able to recover their reasonable costs for providing it should they wish to do so.

Summary:

The consultation sets out a very specific problem, which will require energy suppliers to make a judgement call on whether or not they believe action is required to prevent a potential breach of the Data Protection Act. Some suppliers share the view that due to the very basic nature of information that may continue to be displayed on an IHD that relates to a previous tenant/occupier, the data cannot be attributed to an individual,

and therefore cannot be regarded as personal data. Whereas others have a view that the data can inevitably be linked back to the previous tenant/occupier and must therefore be regarded as personal data. Before making any decision in this area, Energy UK strongly suggests that Ofgem engage formally with the Information Commissioner's Office to provide further guidance, and if necessary, to engage with suppliers further to put in place any appropriate arrangements to mitigate the potential breach of the DPA.

Data Controller responsibilities under the DPA are complicated under a scenario of a Change of Supplier followed by a Change of Tenancy. Where the old supplier is responsible for the data displayed on an IHD, they have no control of the data it is responsible for. Strictly speaking, this applies to both the Foundation stage, and to the Enduring stage. During Foundation, neither supplier will be in a position to remove/delete or restrict access to any data on the IHD, whereas during the Enduring phase, the original supplier must rely on the new supplier to restrict access to historical data. Energy UK believes that this specific issue needs further consideration by the Smart Metering Implementation Programme, and will raise the issue with the relevant officials within the programme.

Where an energy supplier chooses to delete historical consumption information from a device/s within the home, Energy UK's members agree that consumers can simply contact their supplier to obtain details of their energy consumption. No new arrangements or obligations are needed in this regard, and in the majority of cases, such information will be provided to consumers on a Free of Charge basis.

Energy UK believes that the likely implementation date of these conditions will be the end of October / early November. This assumes that Ofgem will provide their conclusions by the end of August / early September and the period of 56 days prior to implementation. Due to the delays in the implementation of these obligations, which were originally scheduled for July / August, some members believe that Ofgem should consider moving this implementation to January 2013 to coincide with the second set of service obligations. This would result in the customer receiving one clear message during this period and not requiring suppliers to develop a communication strategy and change plans for October / November and then for January, however this is not a unanimous view across all members.

Whilst this response is likely to raise more questions than answers, I trust that these comments and observations are useful. If you would like to discuss any aspect of this response, please do not hesitate to contact my colleague Rosie McGlynn on 07931 525 324, or by email at rosie.mcglynn@energy-uk.org.uk.

Yours Sincerely,

Lawrence Slade

Chief Operating Officer

Energy UK