

The Information Commissioner's response to Ofgem's open letter of 17 December 2015: "Half-hourly settlement (HHS): the way forward".

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 ("DPA"), the Freedom of Information Act 2000 ("FOIA"), the Environmental Information Regulations ("EIR") and the Privacy and Electronic Communications Regulations 2003 ("PECR").

The Commissioner is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. He does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate regulatory action where the law is broken.

The Commissioner welcomes the opportunity to respond to this open letter on HHS, given the potential privacy impact the proposed approach has in comparison with the existing approach set out in the Smart Meter Data Access and Privacy Framework¹ (the DAPF).

The DPA applies to the processing of "personal data", placing obligations on organisations who wish to process personal data and giving individuals rights in respect of their own personal data. Consumption data collected from a smart meter is personal data when linked to the particular Meter Point Administration Number (MPAN) relating to a domestic premises or sole trader. Consumption data linked to a particular MPAN must therefore be processed in compliance with the DPA.

Individuals have a fundamental right to respect for their private life guaranteed under Article 8 of the European Convention on Human Rights (ECHR) and Article 7 of the Charter of Fundamental Rights of the European Union (the Charter). Article 8 of the Charter gives individuals a specific fundamental right to the protection of their personal data.

The Article 29 Working Party, which contains representatives of EU Member States' data protection authorities, has summarised the potential risk to individuals' privacy presented by smart meters, noting that they:

"...allow the network operator (...), energy supplier and other parties to compile detailed information about energy consumption and patterns of use as well as make decisions about individual consumers based on usage profiles. Whilst it is acknowledged such

¹ <https://www.gov.uk/government/consultations/smart-meter-data-access-and-privacy>

decisions can often be to the benefit of consumers in terms of energy savings, it is also emerging that there is potential for intrusion into the private lives of citizens through the use of devices which are installed in homes. It also marks a shift in our fundamental relationship with energy suppliers in that consumers have traditionally simply paid suppliers for electricity and gas that has been supplied. With the advent of smart meters, the process is more complex in that the data subject will provide suppliers with insights into personal routines²".

The privacy of individuals must therefore be properly considered at each stage of the smart meter rollout so that the benefits of smart metering can be realised in a way that complies with data protection law, and respects the fundamental rights to privacy and data protection. Respect for data protection and privacy rights is important, otherwise there is a risk that consumer trust will be eroded, and this could prove detrimental to the success of the smart metering programme.

The DPA does not dictate or specify what granularity of consumption data organisations should have access to. However, it does require, amongst other things, that any processing of personal data has a legitimate justification, and that the amount of data collected is not excessive for the purposes it is being processed for. In general, as consumption data becomes more granular, the inferences that can be drawn from that data become more detailed and consequently more privacy intrusive. The justification for processing consumption data will therefore need to be stronger the more granular that data is. The DAPF provides important clarity on the circumstances in which organisations can access different granularities of smart meter consumption data.

As Ofgem will be aware, the DAPF currently allows suppliers to access half-hourly consumption data only with the consent of the customer (i.e. the customer must "opt-in"). Suppliers can access daily or less granular data without customer consent, but they must give a clear opportunity to opt-out from that access. Finally, suppliers can access monthly or less granular consumption data without customer consent, and without offering an opt-out, if the consumption data is required for billing, fulfilling a statutory requirement or fulfilling a licence obligation.

It is clear, as Ofgem has recognised in a number of publications about its electricity settlement work, that any move to allow or require half-hourly settlement is likely to conflict with the current DAPF. The requirement for customers to provide opt-in consent to the collection and use of half-hourly consumption data - being extremely granular data which has the

² http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp183_en.pdf

potential to be very intrusive - is one of the key safeguards in place to ensure individuals remain in control of the data their meter generates.

We are aware that many suppliers are already rolling out smart meter installation programmes and that many smart meters have already been installed and are in use today. As use of a smart meter is not compulsory, it is important that individuals are able to make an informed decision about whether to have one installed or not. Individuals are currently being offered smart meters on the basis set out in the DAPF, namely that half-hourly consumption data will not be collected by any party, including their supplier, without their explicit opt-in consent (except in certain very limited circumstances, such as for use in approved trials with a clear opportunity for the customer to opt-out). Many individuals will have accepted the installation of a smart meter on this basis.

The Commissioner is very concerned that a move to both elective and/or mandatory half-hourly settlement will result in suppliers having full access to half-hourly consumption data without customers' consent, or potentially in conflict with a direct refusal to give consent. This would be a major change to the terms under which individuals agreed to have a smart meter installed. A change this fundamental to the DAPF after large numbers of smart meters were installed could be considered unfair and in breach of the first data protection principle. We also believe it would have the potential to seriously undermine public trust in smart metering, and in turn this could adversely impact upon the success of the initiative

We note that during the meetings of the Electricity Settlement Expert Group³, the issues of data privacy and the restrictions on processing half-hourly consumption data within the DAPF were considered. In particular, it was proposed that a central provider could aggregate half-hourly consumption data before suppliers could access it. However, it was deemed that suppliers that would need access to disaggregated half-hourly consumption data in order to manage exceptions effectively. We also note that anonymisation was discussed, but that this was also considered to be inappropriate for exception management as suppliers would need to be able to identify specific sites.

We also note that at the end of 2014, both Ofgem and the Expert Group concluded that "*...further work is required to explore the interactions between settlement reform and data privacy and access rules*". To date, we are not aware of any further formal work to address this issue.

³ <https://www.ofgem.gov.uk/electricity/retail-market/forums-seminars-and-working-groups/electricity-settlement-expert-group>

We strongly advise that any move towards half-hourly settlement does not take place until the issue of how it will interact with the DAPF has been fully considered. We would also strongly recommend that the possibility of anonymising or aggregating half-hourly consumption data for settlement purposes is fully explored to establish the extent to which this would be incompatible with half-hourly settlement (e.g. would problems in resolving exceptions be common or would this only occur in a small minority of cases?). Only once other more privacy friendly alternatives have been ruled out should any changes to the DAPF be considered, particularly where they would weaken the restrictions on use of the most granular consumption data and reduce the amount of control that individuals would have over access to it. To address these issues we suggest that a privacy impact assessment (PIA) be undertaken, to work through all of the possible consequences of the change and to identify the best course of action from a privacy perspective. Information on carrying out a PIA can be found on our website⁴.

European data protection law is currently undergoing significant reform. Political agreement has been reached on the text of a new General Data Protection Regulation (GDPR), and we expect this to come into force, with direct effect, in 2018. The GDPR contains measures aimed at strengthening "consent" and individuals' rights in relation to the use of their data. Weakening the level of control individuals have would be at odds with the direction of travel, and consideration should be given to how any proposed changes will translate into the new legal requirements. The GDPR also contains obligations for organisations to utilise 'privacy by design' principles (including designing systems to minimise the collection of personal data and limit data retention), and to consider the privacy impacts arising from any new processing or technologies. In light of these concerns we are keen to engage with Ofgem, DECC, suppliers and other relevant parties to ensure that any changes to the DAPF appropriately take into account the matters raised above.

Finally, we note that DECC is currently consulting on draft legislation that includes granting the Gas and Electricity Markets Authority the power make modifications to licensing requirements where it considers it necessary or desirable for the purposes of enabling or requiring half-hourly settlement. We also note that Ofgem is consulting on whether to launch a Significant Code Review as part of the process for investigating mandatory half-hourly settlement of all customers. We intend to respond to these consultations highlighting the potential impact on individuals' privacy.

⁴ <https://ico.org.uk/for-organisations/guide-to-data-protection/privacy-by-design/>