

Email: retailpriceregulation@ofgem.gov.uk

Date: April 2021

Confidentiality Ring Template Undertakings: Adviser

DISCLOSURE RELATING TO THE (A) NON-PASS THROUGH SMART METER NET COST CHANGE ALLOWANCE FOR CREDIT CUSTOMERS (B) NON-PASS THROUGH SMART METER NET COST CHANGE ALLOWANCE FOR PREPAYMENT METER CUSTOMERS

UNDERTAKINGS GIVEN BY [Name of the Adviser] REGARDING ACCESS TO THE CONFIDENTIALITY RING FOR DISCLOSED SMNCC & PPM DATA

WHEREAS

- (1) The Domestic Gas and Electricity (Tariff Cap) Act 2018 ("**the Act**") places a duty on the Gas and Electricity Markets Authority ("**the Authority**") to implement a temporary cap on Standard Variable Tariffs and default rates ("**the Default Tariff Cap**"). On 6 November 2018, the Authority published the final Decision to implement the Default Tariff Cap which took effect on and from 1 January 2019.
- (2) The Authority proposes to publish consultations on the Publication Date¹ setting out its proposals to adjust the methodology it will use to calculate the Default Tariff Cap in in the seventh cap period (from 1 October 2021 to 31 March 2022) and subsequent cap periods. The consultations set out proposals to update:

¹ The Authority currently expects that the Publication Date will be in the last week of April or the first week of May 2021

- (i) the non-pass through Smart Meter Net Cost Change allowance for credit customers (“**SMNCC**”), which accounts for the net impact of the smart meter rollout on the operating costs of a supplier operating efficiently; and
 - (ii) the non-pass through Smart Meter Net Cost Change allowance for prepayment meter (“**PPM**”) customers, following on from our decision in August 2020 to protect default tariff PPM customers beyond the expiry of the existing PPM cap (together, “**the SMNCC & PPM Consultations**”).
- (3) The Authority has decided to disclose the data described in Schedule 1 (the “**Disclosed SMNCC & PPM Data**”) by means of a confidentiality ring commencing on the Publication Date (the “**SMNCC & PPM Data Confidentiality Ring**”). A reference to the Disclosed SMNCC & PPM Data in these undertakings includes references to any part of the Disclosed SMNCC & PPM Data. The Authority may identify additional information to be disclosed as part of the Disclosed SMNCC & PPM Data after the commencement of the SMNCC & PPM Data Confidentiality Ring. In this event, the Authority will notify the Adviser that this subsequent disclosure forms part of the Disclosed SMNCC & PPM Data and accordingly these undertakings shall apply equally to this subsequent disclosure.
- (4) The Disclosed SMNCC & PPM Data contains information that is confidential to BEIS and is provided by BEIS for disclosure as part of the SMNCC & PPM Consultations on the basis that appropriate protections are put in place to ensure the continued confidentiality of the material. The Authority considers that the Disclosed SMNCC & PPM Data also includes information about particular third party businesses and consequently that information is caught by the prohibition on disclosure in section 105 Utilities Act 2000 (“**UA 2000**”). The Authority may disclose such information in a manner consistent with the ‘disclosure gateways’ contained in section 105 UA 2000.
- (5) Access to the SMNCC & PPM Data Confidentiality Ring and the Disclosed SMNCC & PPM Data is restricted to the external legal and/or economic advisers of the “**Relevant Party**”². Access is provided for the “**Permitted Purpose**” that is the sole purpose of allowing the advisers of a Relevant

² A **Relevant Party** for the purposes of these undertakings could be any party which will be affected by this Consultation, specifically supply licence holders, Citizens Advice or Citizens Advice Scotland and any other party which the Authority determined in its absolute discretion as likely to be affected by the proposed consultation.

Party, on behalf of the Relevant Party, to review and understand the Disclosed SMNCC & PPM Data, in order to:

- a) prepare submissions and representations to the SMNCC & PPM Consultations; and
- b) to enable the Relevant Party (if relevant) to prepare and conduct an appeal against any decision of the Authority in connection with the SMNCC & PPM Consultations, including an appeal in which the Relevant Party is, or is intending to apply to be, an intervener, in which case the arrangements established by these Undertakings may be extended to apply for the purposes of such appeal.

(6) Access to the SMNCC & PPM Data Confidentiality Ring will only be granted to an Authorised Adviser³ in accordance with the arrangements in recital (8):

- a) who has been approved, in writing, by the Authority;
- b) who has given written undertakings acceptable to the Authority ("**Adviser Undertakings**");
- c) in respect of whom the Adviser's firm/ employer ("**the Firm**"), has provided written undertakings acceptable to the Authority (the "**Firm Undertakings**");
- d) in respect of whom the Relevant Party has provided written undertakings acceptable to the Authority ("the **Relevant Party Undertakings**"); and
- e) if the Firm has provided, in writing, an Approved Compliance Document (as defined in the Firm Undertakings) acceptable to the Authority.

(7) The number of Authorised Advisers is limited to ten (10) for each Relevant Party.

³ For the purposes of these undertakings Advisers will include the partners, members, employees and consultants of the Authorised Firm.

- (8) The arrangements for obtaining the Authority's approval of a Adviser and for giving undertakings in respect of a Adviser are:
- a) notice of not less than 1 **Working Day** must be given to the Authority of the date on which the Adviser first wishes to be granted access to the SMNCC & PPM Data Confidentiality Ring (**'the Access Date'**);
 - b) by 17:00 on the Working Day before the Access Date the Adviser Undertakings signed by the Adviser and, if relevant, the Firm Undertakings signed on behalf of the Firm and the Relevant Party Undertakings signed on behalf of the Relevant Party, must be provided to (and received by) the Authority; and
 - c) before the Adviser attempts to access the SMNCC & PPM Data Confidentiality Ring confirmation in writing must be obtained from the Authority that it has approved the Adviser and has accepted the signed Adviser Undertakings and, if relevant, accepted the signed Firm Undertakings and the signed Relevant Party Undertakings and approved the Compliance Document.

A **Working Day** is any day of the week, Monday to Friday, 09:30 to 17:00 on which the Authority's offices are open (and excludes public or bank holidays).

- (9) Subject to the Adviser Undertakings, the Firm Undertakings, and the Relevant Party Undertakings the Authority will:
- a) make the Disclosed SMNCC & PPM Data available to the Authorised Advisers via a secure encrypted email ("the **"Secure Encrypted Email"**") and to receive the Secure Encrypted Email, the Firm will provide the Authority with an Authorised Adviser's name, role, and professional email address;
 - b) provide the Secure Encrypted Email within 1 Working Day of receipt of the information requested in (a) above;

- c) send out the Disclosed SMNCC & PPM Data on the Publication Date if the information in (a) above is received in advance, or not longer than 1 Working Day after their application if received after the Consultation publication.
- (10) Each Adviser will be sent the Disclosed SMNCC & PPM Data via the Secure Encrypted Email and will be permitted to download the Disclosed SMNCC & PPM Data (each permitted download resulting in a **‘Permitted Copy’** and each copy of a **‘Permitted Copy’** whether in part, adjusted, or altered is itself a **‘Permitted Copy’**). Permitted Copies must be downloaded, stored and worked with in accordance with the Approved Compliance Document and the Permitted Arrangements (as defined in the Firm Undertakings).
- (11) Disclosure of the Disclosed SMNCC & PPM Data, or any other part thereof, by the Authorised Advisers other than in accordance with the Adviser Undertakings is not permitted without the Authority's express and prior written consent. Breach of the Adviser Undertakings by an Authorised Adviser may result in the Authority:
- a) terminating the Authorised Adviser’s access to the SMNCC & PPM Data Confidentiality Ring and refusing the Authorised Adviser access to any subsequent disclosure room or confidentiality ring run by the Authority, whether relating to the Consultation or update of any other allowance contained in the Default Tariff Cap for a prescribed period of time, such period to be determined by the Authority at its sole discretion (acting reasonably);
 - b) terminating the Authorised Adviser’s and/or Firm’s right to hold the information, and demanding it be deleted or returned immediately;
 - c) taking additional steps in relation to that particular Authorised Advisor and Firm in any future exercises involving the disclosure of confidential information, such as the imposition of more onerous restrictions, additional requirements and guarantees or refusal of access;
 - d) taking appropriate legal action to protect the data;

- e) where relevant, referring the breach to the Authorised Adviser's regulatory body which may decide to take disciplinary action in relation to the breach and;
- f) informing other parties of the breach, as deemed necessary by the Authority.

(12) Section 105 of the UA 2000 makes it an offence to disclose information other than in a manner that is consistent with the UA 2000. The Authority considers that any further disclosure of the Disclosed SMNCC & PPM Data for anything other than the Permitted Purpose, would be a contravention of the UA 2000.

(13) [Name of Firm] has been instructed by [Name of Party], which is a Relevant Party, for the purpose of providing [legal/economic] advice to [Name of Party] in relation to consultation. [Name of Adviser] is [employed by [Name of Firm] as a [legal/economic adviser] [a partner in [Name of Firm]].

NOW THEREFORE

I, [*Name of Adviser*] [*Job title*] at [*Name of Firm*], who has been engaged by [*Name of Relevant Party*] in connection with Consultation undertake to the Authority in my own name:

1. To use the Disclosed SMNCC & PPM Data for, and only for, the Permitted Purpose in accordance with the Permitted Arrangements.
2. Save as provided in paragraph 5 to hold the Disclosed SMNCC & PPM Data in strict confidence and not to discuss, disclose, transmit, communicate or otherwise make available in any manner the Disclosed SMNCC & PPM Data to any other person (being a "**Non-Authorised Person**") without the consent of the Authority except to:
 - a. another Authorised Adviser of the Relevant Party; or
 - b. a member of the Authority's staff; or

- c. an Approved Person.
3. Not to make any electronic or non-electronic copy in any format of the Disclosed SMNCC & PPM Data other than the Permitted Copies, save that I may copy the Disclosed SMNCC & PPM Data for, and only for, the purposes of preparing a report or submission within the scope of the Permitted Purpose.
4. To ensure that, save as provided in paragraph 5, any document (including any report or submission) I prepare, or analysis I undertake, which contains or refers to the Disclosed SMNCC & PPM Data or which allows any data contained within the Disclosed SMNCC & PPM Data to be inferred is not used, disclosed or made available in any way to:
 - a. disclose the Disclosed SMNCC & PPM Data to any Non-Authorised Person; or
 - b. enable or assist any Non-Authorised Person to gain an understanding of the market position of any other party other than the Relevant Party.
5. I may, in order to facilitate the Permitted Purpose and at the discretion of the Relevant Party, prepare reports for submission to Ofgem which relates to any information I propose to disclose to the Relevant Party that relates to the Disclosed SMNCC & PPM Data prior to providing such report to the Relevant Party. Ofgem will either approve the report, or provide redactions as necessary and once approved the report will become a '**Non-Confidential Report**'. I will ensure, including by making any necessary redactions, that (i) the restrictions in paragraph 4 are complied with in relation to any such Non-Confidential Report; and that (ii) the Non-Confidential Report is only shared with Relevant Party after the Authority has confirmed in writing to an Authorised Adviser of the Relevant Party that the Non-Confidential Report or submission does not include any of the Disclosed SMNCC & PPM Data and meets the requirements in paragraph 4.
6. To keep secure at all times the Disclosed SMNCC & PPM Data, the Permitted Copies and any other document prepared by, or provided to, me, which contains or refers to the Disclosed

SMNCC & PPM Data (together the ‘**Relevant Material and Documents**’). In respect of the Relevant Materials and Documents which are in physical copy I will ensure that these are securely stored and locked away when not in use and kept separate from my regular work and in accordance with the Permitted Arrangements.

7. On the expiry of the period for bringing an appeal in respect of any decision relating to the Consultation I agree to:
 - a. to delete the Permitted Copies so that the Disclosed SMNCC & PPM Data is not readily available to any person (measures must be taken to ensure no copies remain in either the recycle bin or in a backup system);
 - b. in so far as not covered by (a) above, and subject to paragraph 9 below, to destroy or return to the Authority the Relevant Material and Documents or, where the Relevant Material and Documents are in electronic form, to delete them so that they are not readily available to any; and
 - c. to notify the Authority of the manner of, and date of, the destruction and/or deletion of the Relevant Material and Documents.
8. To ensure that each Firm retains no more than one copy of any Non-Confidential Reports and to return to the Authority, save as provided in paragraph 9 below, the copy of any Non-Confidential Reports at the conclusion of the period within which any appeal may be brought concerning the Authority’s decision.
9. If it is required to comply with [Name of Firm]’s professional indemnity insurance policy or any applicable law, legislation or court order, the Authorised Advisers of [Name of Firm] may retain one copy of the I will ensure that:
 - a. the copy is stored securely in accordance with the undertaking in paragraph 6;

- b. the Authority is notified of the retention at the conclusion of the period within which any appeal may be brought concerning the Authority's decision; and
- c. the Authority is consulted as far as practicable prior to any disclosure of the copy under [Name of Firm]'s professional indemnity insurance policy or any applicable law, legislation or court order.

10. To notify the Authority immediately if I become aware of or suspect that any of the Relevant Party's Authorised Advisers have failed to comply with the Adviser Undertakings, or any of the firms that such Authorised Advisers represent have failed to comply with the Firm Undertakings.

PROVIDED THAT

The above undertakings shall not apply to any part of the Disclosed SMNCC & PPM Data that:

- i) belongs or relates solely to the Relevant Party or to the Relevant Party's business and which does not include any confidential information belonging to, relating to or deriving solely or partially from any other party;
- ii) is information that has previously been disclosed by the Authority to the Relevant Party without obligations of confidence;
- iii) at the time of disclosure is in the public domain or subsequently comes into the public domain, except through breach of the Adviser Undertaking, or any other of the Undertakings given by external legal and/or economic advisers for [Name of the Relevant Party] or any other Relevant Party in relation to the SMNCC & PPM Data Confidentiality Ring; or
- iv) is required to be disclosed by law, legislation or court order, as long as, and unless prohibited by law, legislation or court order, I consult with the Authority as far as

practicable prior to the proposed disclosure on the proposed forum, timing, nature and purpose of the proposed disclosure.

AND IN AGREEMENT THAT

This Undertaking shall be governed by and construed in accordance with English law and I submit to the exclusive jurisdiction of the courts of England and Wales to hear and decide any action or proceedings which may arise out of, or in connection with these undertakings.

I confirm that I have read and understood the Approved Compliance Document and the Permitted Arrangement.

[Name of Relevant Party] has given full and informed consent to the terms of these undertakings, including the restrictions placed upon [Name of Adviser] on the further disclosure of information, subject to the undertakings above.

.....

[Name of Adviser] [Name of Firm] [Job Title]

Date.....

SCHEDULE 1

Smart Metering Costs and PPM Cap Level

The Disclosed SMNCC & PPM Data comprises of the following:

- *Underlying data book: Annual Supplier Return data*
- *Underlying data book: Debt modelling*
- *Underlying data book: IT costs*
- *Underlying data book: Premature Replacement Charges*
- *Underlying data book: Marketing costs*
- *Underlying data book: Meter rental costs*
- *Underlying data book: SMNCC supplier analysis*

And any subsequent disclosure which Authority has notified the Adviser of as forming part of the Disclosed SMNCC & PPM Data pursuant to recital 3 above.