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| Proposed variation:  | <b>CR 037 – Enabling IHD Alternative Trial Derogation under SMICoP</b> |                      |          |
| Decision:            | The Authority <sup>1</sup> has decided to withhold approval of CR037   |                      |          |
| Target audience:     | SMICoP Governance Board, SMICoP Members, all interested parties        |                      |          |
| Date of publication: | 27/09/2016   | Implementation Date: | 28/09/16 |

**Authority decision on proposed Change Request CR037, “enabling IHD alternative trial derogation under SMICoP”, produced under Section B2 of the Smart Meter Installation Code of Practice (“SMICoP”)**

**Background to the Change Request**

Energy suppliers are required to offer the consumer an In Home Display (IHD) where they install a smart meter. In January 2016, the Department for Energy & Climate Change (now the Department for Business, Energy & Industrial Strategy (BEIS)) made the decision to allow Suppliers to offer, on a trial basis, an alternative to the IHD (subject to that trial having been approved by the Secretary of State).

The SMICoP currently requires suppliers to carry out various obligations associated with the offer and provision of an IHD. Change Request 037 (“CR037”) aims to update the SMICoP to align with the new Licence Conditions introduced by BEIS<sup>2</sup>. These Licence Conditions establish a derogation mechanism which came into force on 30 March 2016. CR037 aims to enable the industry to research the benefits of alternatives to the IHD currently provided by Suppliers to their Domestic Customers (in line with their Supply Licence Conditions). It seeks to achieve this aim by recognising within the SMICoP that Members are not required to offer an IHD, or adhere to the additional requirements that sit alongside this offer<sup>3</sup>, when carrying out an alternate trial.

**The Change Request**

CR037 was raised by SSE on 25 July 2016 for a decision by the SMICoP Governance Board (“SGB”). Due to the extent of amendments required to the drafting, the SGB agreed that CR037 should be reissued to the Change Advisory Group (“CAG”) members for further consideration on 28 July 2016 with responses due on 11 August 2016. Six parties unanimously accepted the proposal, the implementation date and technique but provided a number of comments. One party rejected the proposal, the implementation date and technique. Based upon the responses received, the SGB agreed a number of amendments to the legal text.

The Final Change Report (“FCR”)<sup>4</sup> for CR037 was issued to Ofgem on 30 August 2016. Parties had two weeks to make representations to us about the request, after which we had until 11 October 2016 to make a decision.

One party made a representation concerning this change request on 13 September 2016 concerning the rejection of the proposal by another party. They outlined that whilst in

<sup>1</sup> The terms ‘the Authority’, ‘Ofgem’ and ‘we’ are used interchangeably in this document. Ofgem is the Office of the Gas and Electricity Markets Authority.

<sup>2</sup> Electricity Act 1989 Standard conditions of electricity supply licence clause 40.9 and the Gas Act 1986 Standard conditions of gas supply licence clauses 40.27

<sup>3</sup> SMICoP Licence conditions Section A 3.5.2, and 3.5.3 and Section B 3.4.2

<sup>4</sup> The Final Change Report can be found at

<http://www.smicop.co.uk/Shared%20Documents/Final%20Change%20Report%20CR%20037.pdf>

other circumstances they would have sought to postpone the vote and seek the convention of the Working Group to discuss further the reservations put forward by the objecting party, they did not in this instance because BEIS have started their project for Alternative Trial requests/approvals and so a swift decision needed to be made to ensure Members were not facing a breach of the SMICoP.

This change request proposed three changes to the SMICoP:

- a) amend Section A : "3.5 In Home Display (IHD)";
- b) amend Section B: "3.4.2" under "3.4 Customer Surveys"; and
- c) add a new SMICoP definition to the Glossary of Terms.

The drafting of the proposed amendments can be found at Annex 1.

### **The SGB Recommendation**

On 25 August 2016, the SGB voted to reject CR037 and its implementation date of 27 September 2016.

### **Our decision**

We have considered the issues raised by CR037, the details set out in the FCR, and the votes of the SGB to reject the FCR for CR037. We have considered the Change Advisory Group's responses and comments, which are in Appendix B attached to the FCR. We also considered these factors in light of whether CR037 would better facilitate the achievements of the objectives set out in Standard Conditions 41.2 and 42.1 of the Electricity Supply Licence and Standard Licence Conditions 35.2 and 36.1 of the Gas Supply Licence ("SMICoP Objectives"). We have concluded that implementation of CR037, if it had delivered on its intended outcomes, would have a broadly neutral, but potentially both positive and negative, impact on the achievement of the SMICoP Objectives. However, we are not confident that the proposed legal text will ensure the intended outcomes and creates a risk of diluting suppliers' obligations under the SMICoP in situations where they install an IHD.

The modification falls short on three accounts:

- The proposed amendment to Section A 3.5 by inserting the phrase "where a Customer has not accepted an Alternate IHD" causes ambiguity as the wording does not make clear whether the clause applies to Customers on the trial, not on the trial, or both sets of Customers. As such, one reading of the clause changes its meaning so that it would only apply in situations where a trial is taking place (but where the consumer has not accepted an Alternate IHD). This would suggest that if a Customer is not part of the trial, Members would be exempt from their responsibilities under this section.<sup>5</sup>
- The proposed SMICoP drafting in the FCR also contained a wording error. The proposed change to amend Section B 3.4.2 to add "excluding Customers that are part of the Alternate IHD" is, we assume, missing the word "trial" at the end.
- We also note that CR037 introduces a definition of Alternate IHD, but that under Section A 3.5 it also includes a footnote that defines an Alternate IHD. This duplication is unnecessary. Further, both instances of the definition appear to

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<sup>5</sup> We note that section 3.5.1 of the SMICoP requires an IHD to be offered, and that this is also required under the supply licences (condition 40 of the electricity supply licence and condition 34 of the gas supply licence)

have a typo as the phrase “set out under the Trial a derogation granted” is nonsensical.

As such, we have decided to withhold our approval of Change Request CR037. In making this decision, we note this situation (where Ofgem is supportive of the intent but there are significant deficiencies in the drafting) is occurring with worrying regularity. We urge suppliers and the administrator of the SMICoP to consider how they can ensure the necessary legal expertise is involved in the development of modifications.

As noted by the SGB, the proposed implementation date of CR037 is before the decision is due from the Authority on the CR and as such the Authority has made this decision in advance of the required deadline.

In coming to our decision we have also considered our wider statutory duties, including particularly our principal objective to protect the interests of existing and future energy consumers.

### **Reasons for our decision**

#### Consideration against the SMICoP objectives

We have considered the impact of CR037 against each of the SMICoP objectives, which are listed below.

**Objective (a): the licensee and any Representative provides and maintains a standard of service which helps to ensure that Domestic Customers’ experience of the installation of Smart Metering Systems at their premises meets their reasonable expectations**

**Objective (b): all activities undertaken by the licensee and any Representative in relation to the installation of Smart Metering Systems are conducted in a fair, transparent, appropriate and professional manner**

**Objective (c): Domestic Customers are given information about, and during, the installation of Smart Metering Systems which:**

**(i) is complete and accurate;**

**(ii) does not mislead them; and**

**(iii) informs them about the benefits of Smart Metering Systems and about what to expect in relation to the installation process;**

**Objective (d): Domestic Customers are not subject to unwelcome Marketing during any visit to their premises for the purposes of installing Smart Metering Systems.**

We consider that CR037, if it had delivered on its intended outcomes, could have a negative impact on objective (a) but that this is mitigated by various factors, and would have a neutral impact on objectives (b), (c) and (d).

CR037 exempts a Member’s responsibility, where a Customer has accepted an Alternate IHD, to ensure that the IHD is installed in an appropriate location and set up as far as practical to meet the needs of the household. There is a small risk that by not extending

these requirements to the provision of an Alternate IHD, CR037 could have a negative impact on ensuring that the installation of the smart metering system meets with consumers' reasonable expectations (Objective (a)). However, if these requirements were extended to the provision of an Alternate IHD, it could force a particular approach that might limit the innovative approaches that Members may propose. Also, we take comfort from the fact that BEIS will review suppliers' derogation applications and can specify any requirements they consider necessary. Furthermore, suppliers will want their trials to be successful in changing consumers' behaviour, so will have an incentive to provide the best experience possible. As such, we believe that although CR037 could have a negative impact on objective (a), this is mitigated by the Members' desire that the trial goes well.

CR037 would have a neutral impact on whether the installation is conducted in a fair, transparent, appropriate and professional manner (Objective (b)) and on the information given to groups of customers about smart metering systems (Objective (c)). CR037 will also have a neutral impact on the provision of marketing (Objective (d)).

#### Consideration against our principal objective

We also considered the impact of CR037 against our principal objective and general duties. Our principal objective is to protect the interests of existing and future energy consumers.

CR037 would provide comfort to suppliers who trial innovative approaches that provide consumers feedback on their energy use. Technology has been advancing quickly, in particular with the rise of smart phones and tablets. Allowing trials will allow Members to gather evidence on whether innovative consumer engagement approaches could bring about equivalent or greater benefits at lower cost compared to IHDs. These improvements could add to the current evidence regarding the benefits that IHDs provide if, for example, trials are carried out on alternative engagement tools that replicate some IHD functionality.

In addition to the issues highlighted in the 'Our Decision' section, we note a further concern regarding the impact CR037 would have on the scope of customer surveys. The proposed change to Section B 3.4.2 notes that customers that are part of an Alternate IHD trial would not be part of the pool of customers that may be invited to complete a customer survey. Some customers may be part of the Alternate IHD trial, but could be placed in the control group, and as such offered a standard IHD. It is not clear why those customers should be excluded from responding to a customer survey, particularly as suppliers may have an incentive to give them a worse experience than those who are receiving an Alternate IHD.

#### **Interim Guidance regarding compliance with the SMICoP where carrying out an Alternate IHD trial**

This Change Request may have a positive impact by allowing Members to carry out Alternate IHD trials without being in breach of the SMICoP. However, due to the ambiguity arising from the poor proposed legal drafting, we are unable to approve it.

We do not want our decision on CR037 to prevent suppliers from carrying out Alternate IHD trials, where that trial has been approved by the Secretary of State. As such we offer the following interim guidance to suppliers.

Where a supplier is carrying out an Alternate IHD trial as approved by the Secretary of State and where the customer has accepted an Alternate IHD, until such time as a suitable change request is made to align the relevant SMICoP conditions with the new BEIS licence conditions<sup>6</sup>, we do not consider the inability to meet the existing SMICoP IHD clauses listed below a regulatory priority:

1. Section A: 3.5; and
2. Section B 3.4.2 (i.e. the supplier shouldn't provide customer data to the independent body (who carries out customer surveys) for those customers who are part of the trial and have accepted an Alternate IHD). This will ensure the customer survey results are not skewed by the responses of customers who have legitimately not been offered an IHD.

However, we would flag suppliers still have obligations to comply with wider licence and SMICoP requirements. When considering whether to take enforcement action for any possible non-compliance we would act in line with our enforcement priorities<sup>7</sup> and guidelines<sup>8</sup>.

### **Decision notice**

In accordance with the Section 2.7 of SMICoP, we hereby withhold our approval.

We suggest that SGB consider the issues highlighted above and bring forward a further change request that will deliver on the intended outcomes of CR037.

We strongly recommend that the SGB and proposers of future change requests carefully scrutinise their submissions in future, to avoid the risk of having otherwise acceptable change requests rejected due to poor legal drafting.

Yours faithfully,

**Rob Salter-Church**

**Partner, Consumers & Competition**

*Signed on behalf of the Authority and authorised for that purpose*

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<sup>6</sup> Electricity Act 1989 Standard conditions of electricity supply licence clause 40.9 and the Gas Act 1986 Standard conditions of gas supply licence clauses 40.27

<sup>7</sup> <https://www.ofgem.gov.uk/publications-and-updates/annual-enforcement-priorities-201617>

<sup>8</sup> [https://www.ofgem.gov.uk/system/files/docs/2016/09/enforcement\\_guidelines\\_september\\_2014\\_settlement\\_committee\\_change\\_sept\\_2016.pdf](https://www.ofgem.gov.uk/system/files/docs/2016/09/enforcement_guidelines_september_2014_settlement_committee_change_sept_2016.pdf)

## **ANNEX 1**

### **CR037 Proposed Legal Text**

**Add a new SMICoP Definition** to the Glossary of Terms:

“Alternate IHD” means an alternative to the IHD offered to Customers by Suppliers in circumstances agreed and set out under the Trial a derogation granted by the Secretary of State against the Electricity Act 1989 Standard conditions of electricity supply licence clauses 40.1 and 40.6 and the Gas Act 1986 Standard conditions of gas supply licence clauses 34.1 and 34.6, under the powers granted under paragraphs 40.10 and 34.12 respectively.

#### **Amended Legal Drafting Proposed.**

**a. Amend Section A : “3.5 In Home Display (IHD)”;**

“It is each Member’s responsibility, where a Customer has not accepted an Alternate IHD<sup>9</sup>, to ensure that;”

**b. Amend Section B: “3.4.2” under “3.4 Customer Surveys”;**

“Individual Members will provide Customer data (for all completed installations) to the independent body, excluding Customers that are part of the Alternate IHD<sup>10</sup>.”

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<sup>9</sup> Where “Alternate IHD” means an alternative to the IHD offered to Customers by Suppliers in circumstances agreed and set out under the Trial a derogation granted

<sup>10</sup> This can include all groups set out in the trial