

The Information Commissioner's response to Ofgem's Call for Evidence on the potential impacts on consumers following market-wide settlement reform

About the ICO

The Information Commissioner has responsibility for promoting and enforcing the EU General Data Protection Regulation ('GDPR'), the Data Protection Act 2018 ('DPA'), the Freedom of Information Act 2000 ('FOIA'), the Environmental Information Regulations 2004 ('EIR) and the Privacy and Electronic Communications Regulations 2003 ('PECR'). She is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

The Commissioner welcomes the opportunity to respond to Ofgem's Call for Evidence on the potential impacts on consumers following market-wide settlement reform.

Views on communication to facilitate/encourage consumers to engage

The Commissioner acknowledges there are benefits for both suppliers and consumers in ensuring increased engagement within the energy market. In facilitating this, the sector must be transparent in how this is to be achieved so consumers find themselves in a fully informed position.

The Commissioner is not in a position to 'rubber stamp' or promote particular forms of communication believed to lead to increased engagement within the sector. In this context the Commissioner will look to highlight the requirements of both the GDPR, the DPA and PECR should certain avenues of communication be explored.

Whilst it is permissible for specific information to be communicated to consumers in an attempt to engage them in the energy market, Ofgem and energy suppliers must ensure this is considered appropriately and undertaken in a fair and lawful manner. Processing of personal data must always be fair as well as lawful. This

means that a data controller must process personal data transparently and only handle personal data in ways that people would reasonably expect.

In the context of communications that facilitate or encourage engagement within the energy market, Ofgem and suppliers will need to be mindful that such communications may constitute direct marketing.

The definition of direct marketing covers both the promotion of aims and ideals as well as the sale of products and services. Where consumers are being encouraged to consider the benefits of engaging with a certain system or provider, the data controller will need to be able to demonstrate that consent was knowingly and freely given, clear and specific, in relation to the provision of marketing materials for the topic.

Guidance published by the Commissioner has made it clear that consent requires an individual to opt-in to the marketing by undertaking a clear and affirmative action, such as actively ticking a consent box. Data controllers should also keep clear records of what the data subject has consented to, to ensure the processing does not exceed what has been outlined. Suppliers should also be mindful that the rights of the data subject include the entitlement to withdraw consent for the processing to occur at any time.

Whilst it is recognised that, in some circumstances, suppliers are under a legal requirement to undertake certain initiatives, such as the roll-out smart meters, the requirement does not override the obligations set out in both the GDPR and PECR. This means that if the supplier does not have appropriate consent to send marketing materials to the data subject, the communication will need to be worded neutrally, providing information without any encouragement or promotion.

It is good practice to allow people to easily access and update their consent. It should be kept under review and refreshed if anything changes – for example, if processing operations or purposes evolve, the original consent may not be specific or informed enough. Data controllers should also consider whether to automatically refresh consent at appropriate intervals.

The above may also lead to the need for a data protection impact assessment ('DPIA') to be undertaken. The DPIA process is an integral part of data protection by design and by default and can help in identifying the type of technical and organisational measures needed to ensure the intended processing complies with the requirements of GDPR.

Additionally, whilst it is expected that the majority of individuals that Ofgem and suppliers are looking to consider in these proposals are those categorised as 'disengaged' customers, individuals who already make use of a smart meter must also be considered. These customers will have engaged in the smart metering programme on the basis that they will be asked for consent for access to half hourly consumption data in all circumstances.

Should suppliers look to produce communications that include this level of granularity without the data subject opting into the processing, this is likely to conflict with what is outlined within the Data Access and Privacy Framework ('DAPF') and is also likely to be in contravention of the fairness and lawfulness principles of data protection legislation. However, it is acknowledged that Ofgem is reviewing access to half hourly data, to establish whether the conditions for settlement purposes need amending.

Aside from communication, what other measures or initiatives would encourage consumers to become more confident about engaging with their energy use?

Whilst it is not the role of the Commissioner to endorse particular practices when engaging with consumers, it is important that the principle of transparency is factored into the work being undertaken by Ofgem and suppliers.

Transparent processing ensures a data controller is clear, open and honest about the processing being undertaken and the implications that may arise for the data subject. Using a transparent methodology when processing data and engaging with a consumer should increase consumer confidence and encourage individuals to engage in new initiatives, such as access to half hourly smart meter data.

Transparency is particularly important where the consumer has a choice as to whether to engage with an organisation and the initiative being promoted. If individuals know at the outset how their personal data is being processed, they will be able to make an informed decision.

In this context, the data subject will be better informed about the metering arrangements available to them and how these are measured. As a result, consumer confidence in the arrangements and tariffs available to them may conceivably increase.

Finally, the Commissioner would welcome further consultation with Ofgem regarding the issues covered in this call for evidence. She is supportive of initiatives that allow personal data to be utilised in beneficial ways for individuals and has set out her commitment to increasing consumer trust in the processing of personal data.

In particular, the Commissioner would like to take this opportunity to highlight the requirements of Article 36(4) of the GDPR, which requires member states to consult with the supervisory authority during the preparation for a proposal of a legislative or regulatory measure. This, in practice, requires UK Government departments, such as Ofgem, to consult with the ICO on such policy proposals.