

ENERGY MARKET INVESTIGATION

Draft Explanatory Note

Energy Market Investigation (Database) Order 2016

This note is not a part of the Order

Introduction

1. The Competition and Markets Authority (CMA) published its findings in a report under section 136 of the Enterprise Act 2002 (the Act) entitled *Energy market investigation: Final Report* on 24 June 2016 (the Report).
2. The Report set out the CMA's findings that there are features of the energy markets in Great Britain which, alone or in combination prevent, restrict or distort competition and, therefore, have an adverse effect on competition (AEC).
3. The CMA decided on a package of remedies to be implemented by it to remedy, mitigate or prevent the adverse effects on competition (and associated detriment) that it found.
4. The Energy Market Investigation (Database) Order 2016 dated [x] December 2016 (the Order) gives effect to one of these remedies, ie the Database Remedy. The Database Remedy is a three-stage remedy involving (a) a requirement on suppliers to disclose to the Gas and Electricity Markets Authority (GEMA¹) certain details of their domestic and microbusiness consumers who have been on their standard variable, or any other default, tariff for three or more years (stage 1), and (b) a recommendation that GEMA retain, use and disclose these details (via a secure database) to rival suppliers for the purposes of prompting such customers to engage in the retail energy markets (stages 2 and 3). The CMA considers that in acting upon this recommendation, GEMA would be assisting the CMA to fulfil its duty to

¹ GEMA is the legal entity that has the statutory functions, duties and powers to regulate the gas and electricity markets and it is also the board that provides corporate governance for Ofgem, as its executive arm.

address the AEC pursuant to its functions in section 34 of the Gas Act 1986 and section 47 of the Electricity Act 1989.

5. Section 15 of the Electricity Act 1989 and section 27 of the Gas Act 1986 provide that where the CMA makes an order under section 161 of the Act, such order may also provide for the modification² of the conditions of a particular licence, or the standard conditions of licences of any type (including supply licences for gas and electricity) to such extent as may appear to the CMA to be requisite or expedient for the purpose of giving effect to, or taking account of, any provision made by the order.
6. The Order introduces a new electricity supply licence condition [x], and a new gas supply licence condition [x] (the Electricity Licence Condition and the Gas Licence Condition, together the Licence Conditions). This Explanatory Note applies to the Order and the Licence Conditions.
7. Nothing in this Explanatory Note is legally binding.
8. Terms defined in the Order, the Electricity Supply Licence or the Gas Supply Licence (including in the Licence Conditions) have the same meaning in the Explanatory Note. In the event of a conflict between this Explanatory Note and any provision of the Order or the Licence Conditions, the Order and Licence Conditions shall prevail.
9. To the extent the Database Remedy involves the processing of personal data, it was designed so as to be compliant with the relevant UK and EU data protection legislation (see paragraphs 95 to 100 below).

Possible consequences for non-compliance

10. Section 167 of the Act places a duty on any person to whom the Order applies to comply with it. Any person who suffers loss or damage due to a breach of this duty may bring an action.
11. The CMA has power under the Order to give directions, including directions to a person in their capacity as an office holder, for the purpose of carrying out, or ensuring compliance with, the Order.
12. Section 167 of the Act also provides that the CMA can seek to enforce the Order by civil proceedings for an injunction or for any other appropriate relief or remedy.

² The term 'modification' includes additions, alterations and omissions.

13. The obligations set out in Parts 2 and 3 of the Order have been introduced into the Electricity Supply Licence and the Gas Supply Licence, respectively. To the extent that the obligations set out in the Order have been introduced into the Gas Supply Licence and the Electricity Supply Licence, GEMA has a duty to monitor compliance and, where appropriate, to use its powers under sections 28 to 30 of the Gas Act 1986 and 25 to 28 of the Electricity Act 1989, including where appropriate by imposing on the licensee a penalty of such amount as is reasonable in all the circumstances of the case. The CMA intends to collaborate with GEMA so as to put in place processes to monitor and ensure compliance with the obligations set out in the Order and associated conditions of the Licence Conditions, where appropriate through enforcement measures.

Review of the Order

14. The CMA has a duty under section 162 of the Act to monitor the operation of the Order. This includes a duty to consider, from time to time, whether the Order should be varied or revoked in the light of a change of circumstances. Suppliers may apply for a variation or cancellation of all or part of the Order on the basis of a change of circumstances, or recommend that the CMA reviews the need for the Order or part of it.
15. GEMA has a general duty, under section 34 of the Gas Act 1986 and section 47 of the Electricity Act 1989, to monitor activities connected with regulated energy activities (including supply) in a manner which it considers will best further its principal objective to protect the interests of existing and future consumers. It similarly has a duty to provide advice, information and assistance to the CMA (on GEMA's own initiative or where expressly requested).
16. In view of these duties, the CMA expects GEMA to consider, from time to time, the need for the Order (and associated obligations set out in the Licence Conditions), and informs the CMA of any change of circumstance which in its view might require the termination or variation of the Order (and any consequential change to the Licence Conditions).

Structure of the Order

17. The Order is divided into four Parts and has three Schedules:
 - (a) Part 1 contains general provisions, which include specifying when the Order comes into force, the scope of the Order and the definitions that are used throughout the Order (and which are also used in this Explanatory Note).

- (b) Part 2 contains an obligation on suppliers to supply certain customer information to GEMA, and provides details of the manner and timeframe for complying with this obligation.
- (c) Part 3 contains an obligation on gas and electricity suppliers to send a communication to certain customers to allow them to opt out of having their customer information supplied to GEMA, and provides that the contents, format and structure will be determined by GEMA, subject to having the minimum content requirements specified in the Order.
- (d) Part 4 contains provisions for monitoring compliance, including provisions allowing the CMA to give directions as to compliance with the Order and to require the supply of information for the purposes of monitoring compliance with the Order and reviewing its operation.
- (e) Schedule 1 contains new Electricity Supply Licence Condition [X].
- (f) Schedule 2 contains new Gas Supply Licence Condition [X].
- (g) Schedule 3 contains a Template Database Remedy Compliance Statement.

Part 1 – General and interpretation

- 18. Article 1 provides that the Order applies to suppliers, defined as any person authorised to supply gas by virtue of a Gas Supply Licence and any person authorised to supply electricity by virtue of an Electricity Supply Licence. We expect that the Order will, in practice, apply to active suppliers. Article 1 also provides that the Order shall come into force on [day after the order] December 2016. The Order will not be subject to a sunset clause as we consider that the need for rival suppliers to identify the Disengaged Customers, and offer such customers better deals is an ongoing need.
- 19. Article 2 includes definitions of various terms used in the Order, and in a number of instances cross-refers to terms defined in the Licence Conditions or defined elsewhere in the Electricity Supply Licence or Gas Supply Licence. To the extent possible, the terms used in the Order have been defined to have the same meaning as in the Electricity Supply Licence and the Gas Supply Licence (as applicable). For the avoidance of doubt, when a word or expression has been expressly defined in the Order, the definition set out in the Order shall prevail over other definitions.

Part 2 – Disclosure of Relevant Customer Data to GEMA

20. The aim of Article 3 of the Order is to impose a legal obligation on suppliers (subject to having complied with the requirements of Part 4 concerning the First Contact Communication) to supply the Relevant Customer Data (as defined below) to GEMA, which GEMA will retain, use and disclose (via a secure database³) to rival suppliers for the purposes of prompting customers to engage in the retail energy markets. See paragraphs 95 to 100 below concerning compliance of this obligation with data protection legislation.

Disengaged Customers

21. The Relevant Customer Data includes certain items of information (see below) concerning Disengaged Customers.
22. ‘Disengaged Customer’ has been defined in the Order to mean, for each supplier, a Domestic Customer or Micro Business Consumer (on any meter type) who has been supplied by that supplier on one or more Default Tariffs offered by that supplier, including its standard variable tariff, for three or more years as at the time of complying with Articles 4.1 or 4.2 (as applicable).
23. Default Tariffs are essentially (a) non-fixed term tariffs or (b) those that are automatically applied to a Domestic Customer or a Micro Business Consumer in the event that the customer does not make a choice (eg a roll-over situation). In respect of Domestic Customers, the definition will capture all non-fixed term tariffs applied to evergreen⁴ and deemed contracts⁵. In the case of Micro Business Consumers, the definition will capture tariffs offered in fixed and non-fixed term contracts (eg out-of-contract contracts, auto-rollover contracts and evergreen contracts) and deemed contracts.⁶
24. For the avoidance of doubt, a customer will be a Disengaged Customer if they have been subject to one or more types of Default Tariff offered by the same

³ We expect that the Relevant Customer Data will be stored in a secure password protected cloud-based database which will (i) be accessed via secure data links between suppliers and Ofgem, (ii) have relevant security protocols in place, (iii) only be accessed from the UK, and (iv) provide for a mechanism to ‘clean’ the Relevant Customer Data (eg the uploaded data is checked for viruses, formatted and validated). Audits may take place to ensure data quality and security.

⁴ Evergreen tariffs include the standard variable tariff.

⁵ Suppliers are currently prohibited by SLC 22C from rolling Domestic Customers onto any type of fixed-term contract. However, if this prohibition were to be amended by GEMA following the Order, fixed-term tariffs will equally be caught by the definition of Default Tariff where a Domestic Customer has not made a choice to be rolled onto such tariffs.

⁶ For the avoidance of doubt, this definition captures all types of evergreen and any automatic rollovers which are for a fixed-term period following the first fixed-term period.

supplier over a period of at least three consecutive years. By way of illustration, the following will be considered as Disengaged Customers:

- (a) a customer who has been on a deemed tariff for one year, a standard variable tariff for another year, and any other evergreen tariff for another year with the same supplier; and
 - (b) a dual fuel customer who is engaged in one fuel but has become subject to one or more Default Tariffs on the other fuel offered by the same supplier over a period of at least three consecutive years⁷.
25. Pursuant to the Order, a customer will be a Disengaged Customer even where the domestic customer has actively chosen an evergreen tariff (for instance, due to its specific features). We note that some suppliers do not offer fixed-term tariffs and, therefore, in theory each of their domestic customers could fall within the definition of Disengaged Customer if they have received gas or electricity (or both) pursuant to such non-fixed-term contracts for three or more years.
26. The database will not include information of customers who are Disengaged Customers at the time of receipt of the First Contact Communication but become engaged⁸ before suppliers are required to send the Relevant Customer Data to GEMA.
27. For completeness, we note that the Order uses the same definition for Micro Business Consumer as is defined in the supply licences. To the extent that a supplier faces practical difficulties in identifying whether a particular customer falls within this definition (eg as regards the turnover and number of employees), we would expect suppliers to include such customers within the definition of Disengaged Customer.
28. In this regard, if the name of a Micro Business Consumer changes, but the identity of the bill-payer otherwise remains the same (eg a change of company name, but no change to the company registration number; or a change of trading name), such Micro Business Consumer should be treated as the same Micro Business Consumer for the purposes of determining whether they are a Disengaged Customer.

⁷ As further explained below, in these instances the supplier supplying the 'disengaged' fuel will be required to provide Ofgem with the Relevant Data in relation to that meter associated with the disengaged fuel.

⁸ To 'become engaged' a Domestic Customer or Microbusiness Consumer must either switch to a tariff that is not a default tariff or switch energy supplier. A change in payment method or other payment terms would not result in a Disengaged Customer being regarded as 'becoming engaged'.

The Relevant Customer Data

29. Article 3.1 contains an obligation on suppliers to supply the Relevant Customer Data to GEMA, subject to Article 4.1 which contains an obligation on suppliers to send the First Contact Communication to each Disengaged Customer (as defined below).
30. The Relevant Customer Data comprises two components: the Domestic Customer Data and the Micro Business Consumer Data for each Disengaged Customer who has not Opted-out and who continues to be supplied by the same supplier on one or more Default Tariffs (as defined below) for three or more years as at the time the supplier provides the Relevant Customer Data to GEMA. These terms are further explained below.
31. The Domestic Customer Data and the Micro Business Consumer Data contain the same core component customer information that will form the basis of the data supplied to GEMA, namely: for each meter, the customer's full name; billing address; consumption address;⁹ current supplier; name and details of their current tariff (including tariff rates and payment method); Annual Consumption Details; and MPAN/MPRN and the Standard Settlement Configuration code (which will specify the electricity meter type).
32. The Licence Conditions allow GEMA to specify additional fields of information regarding Domestic Customers or Micro Business Consumers (that are Disengaged Customers) to be provided by suppliers in circumstances where such additional information is necessary to address a change of the market conditions or to maximise the impact and effectiveness of the database.
33. We expect suppliers to be consulted on the feasibility and timings of providing any additional fields of information, where appropriate.
34. The Licence Conditions prohibit suppliers from providing data which is not Relevant Customer Data to Ofgem, eg data of otherwise eligible customers who have opted-out.
35. For the avoidance of doubt, the Relevant Customer Data will be provided by suppliers on a meter by meter basis. If one customer has more than one meter supplied by different suppliers, suppliers will be required to provide GEMA with the information concerning the meters they supply.

⁹ Where the consumption address is different to the billing address. For Micro Business Consumers, the requirement to submit the registered address will only apply when the registered address has direct relevance to the energy supply.

36. We acknowledge that requiring suppliers to provide information on a meter-by-meter basis will result in multiple entries for customers with more than one meter (for example, customers with restricted meters). To address this, suppliers should, where possible, report entries relating to same customer and address in adjacent line entries. As an alternative, GEMA could add a unique customer identifier to the list of required information to better ensure that data is grouped not only for multiple meters but also for gas and electricity supply points. Rival suppliers should contact customers at a customer level to avoid contacting the same customer more than once.
37. In the Report¹⁰, the CMA identified that suppliers should provide the name of each Disengaged Customer's current tariff. The intention behind this requirement was for rival suppliers to be able to identify, through being informed of a Disengaged Customer's current tariff, the tariff rates (standing charges and unit rates) and payment method applying to that tariff. This has been clarified in the definition of Domestic Customer Data and Micro Business Consumer Data. The overarching purpose behind providing rival suppliers with such information is to enable them to offer customers more accurate information about the savings they can make if they were to switch to one of the rival supplier's tariffs.
38. For the avoidance of doubt, 'current' tariff means the tariff applied to the Disengaged Customer at the time the customer is identified by their supplier as being a Disengaged Customer, ie the tariff applied at the time of complying with the obligation to send the First Contact Communication (see below). Thereafter, for any Domestic Customer or Micro Business Consumer who continues to be a Disengaged Customer, when their supplier provides updated information, the 'current' tariff means the tariff applied at the time of complying with the requirement to provide updated information.
39. Annual Consumption Details has the meaning set out in the Electricity Supply Licence and Gas Supply Licence, and means actual (or estimated) energy consumption of a Domestic Customer or Micro Business Consumer during the previous 12-month period. Where a Domestic Customer or Micro Business Consumer has held their energy supply contracts for at least 12 months with a supplier and the supplier has obtained actual meter readings from the customer which can reasonably be considered to cover the whole or part of that 12-month period, Annual Consumption Details means the quantity of electricity and gas which was treated as consumed by the Domestic Customer

¹⁰ Paragraphs 13.132 and 17.233(a).

or Micro Business Consumer (as applicable) during the previous 12 months on the basis of those meter readings.

40. Where the Domestic Customer or Micro Business Consumer have held their energy supply contracts for (at least 12 months and the supplier has not obtained actual meter readings, Annual Consumption Details means the supplier's best estimate of the quantity of electricity that the customer may be expected to consume during a 12-month period having regard to any relevant information that is available to the supplier or which the supplier could otherwise have reasonably ascertained (including any actual meter readings that have been obtained and which cover part of the previous 12 months).
41. In the Report,¹¹ the CMA said that for Domestic Customers on restricted meters¹² a requirement on suppliers to provide more granular information was essential to achieving the aims of the remedy. In particular, suppliers should be required to provide (a) more granular information about the Domestic Customers' consumption during different consumption windows, (b) details of the standing charges and unit rates applied to these consumption windows, and (c) further details on the length of time and the hours within which time is recorded for these consumption windows.
42. In the Report, the CMA left open whether, for the same reasons, suppliers should be required to provide additional information, where relevant, in other instances (eg for Domestic Customers with smart meters and Domestic Customers on multi-tier default tariffs). In addition, in the Report,¹³ the CMA left open whether suppliers should be required to provide any additional information for Micro Business Consumers.
43. We acknowledge that, in certain circumstances, it may be necessary to provide GEMA with more granular data in order for rival suppliers to be able to offer both Domestic Customers and Micro Business Consumers a better deal and to provide these customers with personalised and reliable quotes. Accordingly, these requirements have been clarified in the definition of Domestic Customer Data and Micro Business Consumer Data.
44. In particular, for both Domestic Customers and Micro Business Consumers, suppliers will need to provide GEMA with (a) the consumption volumes to which different unit rates applied; (b) a breakdown of the annual consumption

¹¹ Paragraph 13.144.

¹² I.e, domestic customers with (a) one electricity meter whereby electricity consumption in two or more consumption windows is separately recorded on two or more registers; or (b) two or more electricity meters (each with one or more registers) installed in the same premises whereby electricity consumption for distinct purposes is separately recorded on such electricity meters.

¹³ Paragraph 17.233(a).

details by each consumption window for which data is available; (c) the length of time and the hours within which time is recorded for each consumption window; and (d) details of the standing charges and unit rates applied for each consumption window.

45. Ofgem will decide whether more granular data is required in relation to restricted meter customers or in the instances identified above.
46. Each Domestic Customer's and Micro Business Consumer's electricity meter has a Meter Point Administration Number (also known as MPAN, Supply Number or S-Number). This is a 21-digit reference used in Great Britain to uniquely identify electricity supply points (such as individual domestic residences). The gas equivalent is the Meter Point Reference Number. A rival supplier needs this information for customers who want to switch to them.
47. A basic table illustration (showing column headings but leaving the main body blank) showing the fields that a supplier must populate when supplying information for Domestic Customers and Micro Business Consumers is attached at Annex 1. Each row of data corresponds to one electricity or gas meter.
48. We expect GEMA to consider whether to issue guidance on the criteria that suppliers should apply when supplying the data required to populate this table to ensure consistency in approach across all suppliers. As indicated above, GEMA may consider adding new fields of information. GEMA could also issue some guidance to ensure consistency across the data submitted by suppliers, and address any data quality issues which may make it difficult for supplies to use the Secure Database.

The manner and timeframe with which the Relevant Customer Data must be supplied to GEMA

49. Article 3.2 provides that the manner and timeframe for supplying the Relevant Customer Data to GEMA is set out in the Licence Conditions.
50. The Licence Conditions require suppliers to provide the first tranche of the Relevant Customer Data to GEMA (in such a manner and containing such additional information as the Authority may direct) by 1 October 2017, or at such later date as may be specified in a direction issued by GEMA.
51. The manner in which suppliers must provide the first tranche of the Relevant Customer Data will be specified in a direction issued by the Authority. As indicated in paragraph 32 above, GEMA may also direct suppliers to provide additional information in circumstances where such additional information is

necessary to address a change of the market conditions or to maximise the impact and effectiveness of the database.

52. We expect that the roll out of the database will be a staged process, and that the database will go live by 30 April 2018.¹⁴ The Licence Conditions give GEMA flexibility to specify a date later than October 2017 for receiving the Relevant Customer Data from suppliers. The rationale behind this flexibility is to avoid certain risks such as having to update the database several times before the data is used by rival suppliers.
53. We expect that GEMA will provide suppliers with a schedule of when test data would need to be supplied and in what format to ensure file transfers can be tested thoroughly with each supplier ahead of the date when suppliers will be required to submit the Relevant Customer Data to GEMA.
54. Following compliance with Article 3.1, suppliers must comply with the obligation contained in Article 3.3 to provide GEMA with the Relevant Customer Data (in such a manner as GEMA may direct) on a monthly basis, except where there are good operational reasons for supplying the Relevant Customer Data more frequently than monthly, where such alternative frequency may be specified in a direction issued by GEMA. This obligation is subject to Article 4.3 which contains an obligation on suppliers to send the First Contact Communication to these customers prior to supplying the Relevant Customer Data to GEMA (see further below).
55. The aim of Article 3.3 is to enable GEMA to update the information contained in the database so that this information is (to the extent possible) up to date. In practice, the requirement to provide updated information to GEMA will require a supplier to (i) submit data for new Disengaged Customers who have not opted-out (subject to suppliers giving Disengaged Customers a reasonable timeframe to opt out, having received the First Communication Letter, as explained below); (ii) exclude any Disengaged Customer that has opted-out or no longer falls within the definition of Disengaged Customer; and (iii) re-submit updated data for those customers who continue to be Disengaged Customers. In relation to (iii), the technical infrastructure of the database will determine whether the supplier will be required only to submit the data items that have changed since the last update, or whether the supplier will be required to submit a full set of data for the customers who continue to be Disengaged Customers.

¹⁴ [Ofgem's response to the CMA's final report.](#)

56. The requirement to update the database will help ensure the accuracy of the information contained in the database, that the database is targeted and effective, and minimise any risk that a Disengaged Customer, that has Opted-out or is no longer on a Default Tariff with their incumbent supplier, is contacted by GEMA or a rival supplier having accessed the database (see also paragraph 59 below). In addition, whilst most of the Relevant Customer Data items are relatively static (ie do not vary over short periods of time), if rival suppliers are to use the consumption data for the purpose of providing accurate comparative quotes, the consumption data will need to be reasonably current.
57. The manner in which suppliers must provide the updated information to GEMA, and any additional information that suppliers must provide to GEMA, will be specified in a direction issued by GEMA. GEMA will specify the approach for updating the Secure Database and, in particular, whether each update is a total refresh of the database (ie GEMA deletes the current database and replaces it with the new submissions from suppliers) or whether each update is limited to the specific fields of information concerning the Relevant Customer Data (eg consumption data) that have changed since the latest update.
58. The Order provides for suppliers to provide GEMA with the updated information on a monthly basis, except where there are good operational reasons for supplying the Relevant Customer Data more frequently than monthly where such alternative frequency has been specified by GEMA. The circumstances when, for operational reasons, GEMA could require more frequent updates from suppliers include (i) where GEMA has put in place a technical infrastructure that facilitates the more frequent updates of the database (eg the database infrastructure can be easily linked to the data storage systems of suppliers); (ii) where the more frequent updates are not disproportionately more costly or burdensome for suppliers than monthly updates; and (iii) where the more frequent updates are necessary to address any potential unintended consequences arising from suppliers' use of out-of-date information.
59. One of the factors that GEMA will need to weigh before requiring suppliers to provide data more frequently than monthly is the costs associated with more frequent updates to suppliers and to third parties. We understand that added technical functionality may be required in order for suppliers to be able to update the information more frequently than monthly, and that such added technical functionality may involve additional costs for suppliers¹⁵. In this

¹⁵ However, we have not received evidence of the likely quantification of such costs.

context, we expect GEMA to conduct a cost/benefit analysis before determining that, for operational reasons, suppliers should be required to provide data more frequently than monthly. GEMA will also take into account the legitimate interest of consumers that Relevant Customer Data is accurate and up to date so that they do not receive unwanted communications or inaccurate offers.

60. We have received submissions raising concerns that if the database was updated on a monthly basis, there would be a potential risk of one or more customers, who have opted out or no longer fall within the definition of Disengaged Customers (eg because they have switched energy supplier or tariff), nonetheless being inundated with marketing correspondence from rival suppliers using out-of-date information from the database. However, we expect that such concerns will be addressed by GEMA, through its ability to put restrictions in place in the agreements with rival suppliers concerning access to the database, for instance, regarding the timing and frequency of such correspondence (eg so that any marketing correspondence is sent within a specified window after the database has been updated). For instance, if a supplier has been given access to the database on 1 January, and the next update takes place on 1 February, such supplier could be restricted to send marketing correspondence to the Disengaged Customers only during the first two weeks after the date when it was given access to the database, ie in the period 1 to 15 January.
61. We expect that GEMA will work with suppliers to find the right balance between their operational needs and the need to maintain an up-to-date database. All suppliers will need to meet the same standard of interaction of providing updated information at the same maximum frequency.
62. Any alternative frequency will be specified in a direction issued by GEMA.

Access to the Relevant Customer Data

63. While the Report recommended GEMA to provide access to the Relevant Customer Data to rival suppliers,¹⁶ GEMA may wish to give other parties (eg other government or consumer bodies) access to the Relevant Customer Data, subject to adequate safeguards being in place and compliance with relevant legislation (including data protection legislation). For instance, it is possible that GEMA may work in partnership with the Behavioural Insights Team or Citizens Advice to monitor the impact of the database and, to facilitate this, such government or consumer bodies will, subject to complying

¹⁶ Paragraph 13.146(b)(v).

with data protection legislation, also be given restricted access to certain aspects of the database.

Part 3 – First Contact Communication

64. The aim of Article 4 is to place a legal obligation on suppliers to send a First Contact Communication, subject to certain minimum content requirements (see below), to each Disengaged Customer, to give such customer an opportunity to opt out of having their customer data supplied to GEMA by their current supplier pursuant to Article 3.
65. By sending a First Contact Communication, the data transfer and processing requirement will be more transparent and fair to Domestic Customers and Micro Business Consumers, in accordance with the Data Protection Regime (see paragraphs 95 to 100) which requires data subjects to be informed of the proposed disclosure and use of the data, and the reasons for this. The First Contact Communication is also one of the safeguards to protect customers' interests in the context of the database remedy as a whole (see compliance with data protection legislation below). In addition, the First Contact Communication provides a mechanism which may lead to the exclusion of customers who do not want to be included in the database. In this way, the First Contact Communication also helps to ensure that the database remedy is targeted and effective.
66. Article 4.1 contains an obligation on suppliers to send an initial First Contact Communication. suppliers must send the initial First Contact Communication in such a manner (eg by post or email) as GEMA may specify by publishing a notice or issuing a direction to suppliers. We acknowledge that allowing suppliers to send the First Contact Communication through email will enable suppliers to track 'bounce-backs', opened/unopened mails and reduce some of the costs that suppliers would face when writing to large numbers of customers in a short period. However, before specifying email as the means (or one of the means) for sending the First Contact Communication, we expect that GEMA will take into account issues such as customers' access to the internet or emails. For dual fuel customers, suppliers may have the option to send a single combined letter.
67. Suppliers must send the initial First Contact Communication to their Disengaged Customers by 31 July 2017, or at such later date as may be specified in a direction issued by GEMA. As indicated above, we expect that the roll out of the database will be a staged process, and that the full database will go live by 30 April 2018. While suppliers must be ready to send the First Contact Communication to the Disengaged Customers from 31 July 2017, the Licence Conditions give GEMA flexibility to postpone this deadline. The

rationale behind this flexibility is to avoid certain risks such as customers experiencing delay between the First Contact Communication and the first contact by rival suppliers.

68. Article 4.3 contains an obligation on suppliers to send subsequent First Contact Communications to any additional Domestic Customer or Micro Business Consumer who has become a Disengaged Customer since complying with Article 4.1. Suppliers must send the subsequent First Contact Communications in such a manner as GEMA may specify by publishing notice in writing or by issuing a direction to suppliers (the same principles set out in paragraph 66 above concerning the initial First Contact Communication would apply to the subsequent First Contact Communications). Suppliers must send the subsequent First Contact Communications at least one calendar month prior to complying with the obligation to submit the Relevant Customer Data to GEMA, or within such other timeframe specified in a direction issued by GEMA.
69. The timeframe of at least one month for sending the First Contact Communication determines, in part, the initial timeframe given to each Domestic Customer and Micro Business Consumer to opt out before their data is supplied to GEMA, and the timeframe given to suppliers to process opt-out applications. The reasoning behind the timeframe of at least one month is to ensure that Domestic Customers and Micro Business Consumers are given a reasonable amount of time to opt out, and suppliers are given a reasonable amount of time to process the opt-out applications before sending the Relevant Customer Data to GEMA. However, for the avoidance of doubt, Domestic Customers and Micro Business Consumers will be allowed to opt out of the database at any time (see paragraph 78(d) below).
70. We expect that any alternative timeframe specified by GEMA will give Domestic and Micro Business Consumers a reasonable amount of time to opt out, and will give Retail Energy Suppliers reasonable time to process the opt-out applications.
71. We also expect that GEMA will specify a schedule to inform suppliers of the relevant timeframes for identifying the Disengaged Customers, sending the First Contact Communication and supplying the Relevant Customer Data to GEMA, and the equivalent timeframes for updating the database.
72. The decision to opt out should be, at all times, instigated by the Disengaged Customer. Suppliers must not prompt any Disengaged Customer to opt out (eg by telephoning or emailing them directly). As indicated above, the rationale behind the First Contact Communication is to give customers an opportunity to understand the disclosure process, to freely assess the

advantages and disadvantages of being in the database and to make a decision on a voluntary basis. Any pressure from suppliers on Domestic Customers or Micro Business Consumers during the opt-out process would negatively affect the effectiveness of the database. We would expect GEMA to monitor any such conduct, and take appropriate action such as the potential withdrawal of access to any such supplier from access to the database and/or regulatory enforcement proceedings.¹⁷

73. The Licence Conditions prohibit suppliers from initiating any communication with a Disengaged Customer about the database (including the process for opting out) following the First Contact Communication. This generally includes having a section on their website with an explanation of issues such as the background to the database, what data is being provided, how customers are selected, the nature of the service and how customers can opt out. Suppliers will also not be allowed to include any message in their communications with customers (eg bills and annual statements) about the database or the opt-out process (eg reminding them of the First Contact Communication).
74. However, suppliers will be permitted to include hyperlinks on their websites, or otherwise direct their customers, to areas on Ofgem's website where such information is provided. Customers will also be able to contact government or consumer bodies to obtain any information or clarification.
75. In circumstances where a Disengaged Customer instigates contact with a supplier via telephone, email, post, face-to-face, web chat or otherwise, specifically to seek further clarification of the purpose of the database or the customer's right to opt out, suppliers may explain the nature and purpose of the database as outlined in the First Contact Communication and that there is a process to opt out. However, staff and representatives will not be allowed to advise customers to opt out or describe the database in a manner intended to elicit an opt-out. We expect that suppliers will ensure that training materials and policies are drafted accordingly. GEMA may monitor compliance, for example, by requesting sample transcripts, training materials and policies or by carrying out mystery shopping exercises.
76. The prohibition contained in the Licence Conditions does not prevent suppliers from making brief references to the Secure Database in communications with customers where there is a compelling reason to do so (eg in instances where a supplier suffers a data protection breach and needs

¹⁷ Ofgem has powers to impose financial penalties under section 30A of the Gas Act 1986 and section 27A of the Electricity Act 1989.

to explain to its customers what has happened to reassure customers who might otherwise be worried that their data had been compromised).

77. The database will not include information of Disengaged Customers who have opted out between the date of receipt of the First Contact Communication and the date when suppliers are required to comply with the obligation to send the Relevant Customer Data to GEMA.

Requirements concerning the First Contact Communication

78. Article 4.4 contains certain requirements concerning the First Contact Communication. The First Contact Communication must have such contents, format and structure as may be specified from time to time by GEMA, subject to having the following minimum contents:
- (a) a clear explanation of the legal requirement established by the Order requiring the relevant supplier to supply the Relevant Customer Data to GEMA;
 - (b) a clear explanation of how the Relevant Customer Data will be stored on the Secure Database that will be updated from time to time by GEMA;
 - (c) a clear summary of the safeguards in place to protect Disengaged Customers' interests concerning the Relevant Customer Data, which should include details of (i) how only suppliers and GEMA will be allowed access to the database; (ii) the limited use to which the suppliers and GEMA would be able to put the Relevant Customer Data, including limitations on the means for contacting the Disengaged Customers (ie direct marketing by postal correspondence or by any other means specified by GEMA subject to compliance with data protection and privacy legislation), and limitations on the total number and frequency of such correspondence; (iii) the amount of time the suppliers and GEMA may retain the Relevant Customer Data; and (iv) the consequences of misuse or mis-selling as a consequence of having access to the database; and
 - (d) clear details of the mechanism for the Disengaged Customer, at any point in time, to object to their Domestic Customer Data or Micro Business Consumer Data, as applicable, being stored on the Secure Database, including by post, by email or telephone.
79. For the avoidance of doubt, suppliers will not have flexibility to draft the First Contact Communication, subject to the specified minimum contents and subsequent approval by the CMA and GEMA. Suppliers will be constrained by the direction issued by GEMA which will stipulate the precise contents, format and structure of the First Contact Communication, and will satisfy the

minimum content requirements. GEMA will be able to specify (a) the format of the envelope (including any mandatory labelling) for the First Contact Communication, where relevant, and (b) the areas in the First Contact Communication allowing for some design input from suppliers (eg spaces for company logos). GEMA will also be able to vary the First Contact Communication to reflect customer circumstances (eg information about restricted meters could be omitted from letters to non-restricted meter customers).

80. The minimum content requirements will help to make the data transfer and processing more transparent and fair in accordance with data protection principles which require data subjects to be informed of the proposed disclosure and use of the customer's data and the reasons for this (see above).
81. The requirement to include a clear summary or explanation of the items identified above does not mean that the First Contact Communication must include a high degree of detail on such items. The First Contact Communication must contain sufficient information to give Domestic Customers and Micro Business Consumers fair notice of the disclosure process (including the restrictions on the use of the Relevant Data by GEMA and suppliers), and their right to opt out.
82. As set out in paragraph 78(c) above, the First Contact Communication will contain a clear summary of the safeguards that GEMA will put in place to protect the interests of the Disengaged Customers. As explained below, these safeguards are necessary to ensure the compliance of the operation of the database with data protection and privacy legislation. We expect GEMA to provide detailed information to suppliers on the relevant safeguards and require suppliers to adhere to such safeguards as a condition of accessing the database. Subject to these safeguards, suppliers will be able to access and to use the Relevant Customer Data to prompt Domestic and Microbusiness Consumers of rival suppliers. We expect that any direct marketing by suppliers will be conducted through postal communications, or by any other means allowed by GEMA (eg email) subject to compliance with data protection and privacy legislation. For instance, GEMA could require suppliers to seek opt in for electronic marketing.
83. As set out in paragraph 78(d) above, the First Contact Communication must give the Disengaged Customer the opportunity to opt out at any time, and through a wide range of means (eg telephone and email). This means that the Disengaged Customers will be able to opt out even when their information has already been supplied to GEMA by suppliers. In this case, the information of these customers will be removed from the database in the next database

update (ie the Relevant Customer Data for that customer would no longer be disclosed to GEMA on a monthly basis).

84. An initial draft of the First Contact Communication, fulfilling the minimum content requirements of Article 4, is set out in Annex 2 to this Explanatory Note (the 'Initial Draft First Contact Communication'). While we invite comments from parties on the Initial Draft First Contact Communication during the formal consultation, we intend to forward all comments received during the consultation process to GEMA. Subject to retaining the minimum content requirements of Article 4.4, GEMA will update the Initial Draft First Contact Communication based on parties' comments and the results of any testing. The first version of the First Contact Communication is expected to be confirmed to suppliers by GEMA at least one month in advance of the deadline for sending the First Contact Communication. GEMA may create a different version of the First Contact Communication that suppliers are required to send by means other than post (eg email) to certain Disengaged Customers. For the avoidance of doubt, the published version of the final Explanatory Note will not include a draft of the First Contact Communication.
85. The Order and Licence Conditions note that the First Contact Communication should be subject to the CMA's and GEMA's approval before it is sent to the Disengaged Customers. For the avoidance of doubt, the CMA's approval will be deemed to have been given where the requirements set out in Article 4.4 are satisfied. The First Contact Communication specified in the direction issued by GEMA will be deemed to be approved by GEMA.
86. Ofgem may require cooperation from suppliers before the date when the Order comes into force to make sure they are ready to respond to Ofgem's directions when the Order is finalised. For example, it may require cooperation in identifying consumers for early trials.

Part 4 – Monitoring and compliance

87. Article 5 of the Order and paragraphs 8 to 10 of the Licence Conditions set out the detailed compliance reporting requirements in relation to Parts 2 and 3 of the Order and the Licence Conditions, respectively.
88. Articles 5.1 to 5.4 require suppliers to submit compliance statements to the CMA in the format specified in Schedule 3 to the Order. The first compliance statement must be submitted to the CMA by 31 October 2018. Each subsequent compliance statement must be submitted to the CMA by 31 October in each year.

89. These compliance statements and reports are required to assist the CMA in complying with their statutory duty to monitor compliance with the Order and Licence Conditions, respectively.
90. Paragraph 9 of the Licence Conditions require suppliers to provide any information that GEMA reasonably requests concerning compliance with the Licence Conditions. This would include providing evidence of (oral and written) opt-out requests received from Disengaged Customers. In order to facilitate compliance with this requirement, paragraph 8 of the Licence Conditions also require suppliers to keep record of any opt-out requests from Disengaged Customers (including the means by which the Disengaged Customer has opted out).
91. We do not expect GEMA to record opt-out requests. Where opt-out requests are sent directly to GEMA by the Disengaged Customers, GEMA will redirect such requests to the suppliers.
92. We believe that monitoring the impact and effectiveness of the database will also be very important going forward. Accordingly, paragraph 10 of the Licence Conditions also give GEMA the power to request any information that GEMA reasonably requests to monitor the impact and effectiveness of the database. We expect that GEMA will put in place a programme for monitoring the impact and effectiveness of the database, including evaluation criteria. GEMA will, therefore, determine the evaluation criteria and methodology. The information requested by GEMA will facilitate the assessment of the impact of the database against these criteria.
93. Article 6 provides that the CMA may give directions as to compliance with the Order.
94. Article 7 provides for any person to whom this Order applies to provide information required by the CMA to allow it to monitor and review compliance with and operation of the Order. GEMA has a general power, under the Electricity Supply Licence and the Gas Supply Licence, to obtain from licensees information that it considers may be necessary to enable it to perform any functions given or transferred to it by or under any legislation.

Compliance with data protection law

95. To the extent the Database Remedy involves the processing of personal data within the meaning of the Data Protection Act 1998 ('DPA'), it was designed so as to be compliant with the following relevant UK and EU data protection

legislation: (i) the DPA; (ii) the EU Directive 95/46/EC;¹⁸ the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR); and (iv) the new EU General Data Protection Regulation¹⁹ (collectively, the 'Data Protection Regime'), as set out in paragraphs 13.161 to 13.171 of the Report.²⁰

96. The key principles under the Data Protection Regime include that personal data should be (a) processed fairly and lawfully; and (b) obtained only for specified and lawful purposes, and should not be further processed in any manner incompatible with that purpose or those purposes. In assessing the compliance of the Database Remedy with these principles, the CMA considered each of the stages of data processing involved in this remedy, and the condition(s) required for lawful processing of personal data as set out in Schedule 2 to the DPA.
97. The Order and the Licence Conditions impose a legal obligation on suppliers to send the First Contact Communication and provide the Relevant Customer Data to GEMA. The legal obligation to provide the Relevant Customer Data to GEMA arising from the Order is the relevant basis for the processing of personal data to be carried out by current suppliers at stage 1. In addition, the First Contact Communication will notify customers of the further proposed processing before their data is passed on to GEMA or rival suppliers. Therefore, stage 1 of the Database Remedy will satisfy the data protection principles.
98. The CMA cannot control whether the processing of personal data to be carried out at stages 2 and 3 of the Database Remedy is compliant, in practice, with the data protection principles because it is ultimately the responsibility of those who control and process personal data to ensure that such processing is compatible with the Data Protection Regime (ie GEMA and the suppliers). However, the Order and the recommendations to GEMA included in the Report will help ensure compliance of these stages with the Data Protection Regime.
99. In addition, the Order and certain limbs of the recommendation to GEMA incorporate safeguards to strike a fair and proportionate balance between the

¹⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23/11/1995.

¹⁹ Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

²⁰ The design of the Database Remedy takes account of discussions between the CMA and the Information Commissioner's Office (ICO), and external legal advice received by the CMA. The relevant published documents reflecting the CMA's engagement with the ICO can be accessed at the following links: (i) [The Information Commissioner's response](#) and (ii) [ICO statement in relation to Competition and Markets Authority report](#).

various interests at stake, and to avoid undue prejudice to the rights and interests of the data subjects. Such safeguards include:

- (a) the requirement (imposed by the Order) on suppliers to allow consumers to opt out of processing of their data on an ongoing basis;
- (b) the recommendation that the database offers appropriate assurances of security and protection to ensure that the Relevant Customer Data is held and processed securely;
- (c) the requirement (imposed by the Order) on suppliers to keep the relevant data up to date to limit the risk of customers who have engaged from being contacted repeatedly by suppliers;
- (d) the recommendation that GEMA enters into binding agreements with suppliers seeking access to the relevant data concerning how the data may be accessed and used, which may include (i) limits to the number of postal communications that a supplier may send to any individual customer, (ii) the frequency with which any communication can be sent to any individual customer, (iii) the amount of time a supplier may retain the relevant data before it must be deleted or destroyed, (iv) the use to which the relevant data can be put, and (v) whether such use should be restricted to particular forms of direct marketing; and
- (e) a recommendation to GEMA to put in place enforcement mechanisms to ensure that suppliers comply with the rules relating to access to the database and use of the relevant data.

100. In light of the above, the CMA's expectation is that the Database Remedy will be implemented in a manner consistent with the Data Protection Regime.

Annex 1: Domestic Customer and Micro Business Consumer information

[See excel table circulated separately]

Annex 2: Initial draft First Contact Communication

Dear (xxx),

We are writing to you because you may well be paying too much for your energy.

As one of our customers who has been on our [insert name of suppliers' default tariff] for three or more years, there are likely to be other deals out there that could save you a lot of money, possibly over £300 a year.

So energy suppliers including [insert company name] are being required to provide limited information (see below) on customers like you to Ofgem, the UK's energy regulator, who will store it on a secure database. This is so other suppliers can access your energy use information and contact you with cheaper offers based on it.

You will also receive information about how to switch your energy supplier. If you decide to do so, the process of switching is very simple and will not disrupt your energy supply. Once you have switched, your details will be removed from the database.

We will be supplying the following basic details to Ofgem;

- Your name and surname [or name of your business]
- Your billing (and usage) address
- The name of your current deal
- Your annual energy use
- Your meter number

For certain customers²¹, some additional information will be supplied²².

Your interests will be **safely protected** as Ofgem will:

- ensure that your information is held securely
- regulate:
 - o the number of communications you receive from suppliers
 - o the period of time for which suppliers retain your information, and
 - o how suppliers use your information
- be able to take action against any suppliers who misuse your information or make misleading claims in their correspondence with you which could include stopping them from accessing the database

If you do not wish us to supply your information to Ofgem, please tick the relevant box included in the slip below and return the slip to us by post. Alternatively, you can email us at [email address] stating your name, address and customer [ref number] and that you would like to opt out of your information being shared or call us at this number [xxx].

You can choose to opt out now, or at any point in the future.

If you have any questions about this letter please contact [xxx].

Yours sincerely,

²¹ Eg customers on restricted meters (eg Economy 7 or Economy 10) or smart meters.

²² Eg consumption by specified periods of time (eg peak heating and off-peak heating) or details of the charges applying to these specific periods of time.

Opt-out slip

Name:

Address:

Customer Ref:

I object to my information being disclosed to Ofgem and other energy suppliers;

being used by Ofgem to send communications to customers; and, being used by other suppliers for marketing purposes.

To be returned by:

Post at [enter address];

Or you can:

Email us at [enter address] stating your name, address and customer reference number and that you would like to opt out of having your information being shared;

or

Freephone: [xxx]

Background note

Why have I received this letter?

You've received this letter because you've been on a default tariff with your current energy supplier for three years or more and you might be paying more for your energy than you need to.

A recent investigation by the Competition & Markets Authority (the CMA – the UK's primary competition and consumer protection agency) found that:

- Customers on default energy tariffs (the tariffs you go on to if you haven't actively and recently chosen your energy supplier or your tariff) are paying much more than they would if they regularly switched their energy company or tariff.
- 70% of customers of the Six Large Energy Firms: Centrica, EDF Energy, E.ON, RWE Npower, Scottish Power and SSE are on default tariffs and in 2015, these customers could have saved around £300 a year if they had switched to another supplier.

What will happen to my information?

The CMA decided that would be a good idea if there was a way that other energy companies could directly contact you with offers tailored to your needs, and make it easier for you to find a better deal for your energy.

The information about your current energy use and the deal you are currently on that is set out on page one of this letter:

- Will allow other suppliers to contact you to offer you better deals based on your energy use, and
- Gives you the information you will need to switch supplier if you want to by making it easier for you to find a better energy deal and switch to it.

Only the information set out on the front of this letter will be included on the database.

What do I need to do?

If you **want** to receive offers from other energy companies, then you don't need to do anything. As you've been on a default tariff for at least three years your energy use and tariff details will be provided to the switching alert service, which is controlled by Ofgem (the UK's energy industry regulator), who will keep them on a secure database that only energy suppliers licensed by Ofgem can access.

If you **don't want** to receive offers from other energy companies, let us know by returning the Opt out slip attached to this letter, emailing us at [email address] stating your name, address and customer ref number and that you would like to opt out of your information being shared, or call us at this number [xxx].

If you switch your supplier or switch to a different tariff with your current supplier then you'll be removed from the database.