

npower
Database order consultation
Response dated 17 October 2016

1. npower broadly supports the CMA's proposed database remedy subject to assurances from the Information Commissioner's Office (ICO) that the sharing of information complies with the Data Protection Act (DPA), the Privacy and Electronic Communications Regulations (PECR) and any additional requirements of the new European General Data Protection Regulations (EUGDPR), the outcome of the current European review of the E-Privacy Directive (implemented as the PECR) and the potential placing of the ICO's Direct Marketing Guidance on a statutory footing under the UK's proposed Digital Economy Bill.
2. In our responses to the SSRN¹ and PDR², we set out our concerns regarding assumed consent and that sharing customer data with Ofgem (and potentially a third party acting on Ofgem's behalf in maintaining the database) and other energy suppliers based on this, goes against best practice guidance by the ICO that people should be allowed to opt-in to marketing communication (as opposed to the opt out mechanism being suggested here). The ICO advises that all organisations adopt this opt-in approach.
3. npower considers that the specific safeguarding measures for customer protection and data control should be mentioned within the order. Without understanding the proposed measures suppliers could still be exposed to additional risk associated with sharing customer data with a third party.
4. npower believes the First Contact Communication should also promote customer engagement more broadly and include details on switching tariffs with the customer's existing supplier more prominently.

Possible consequences for non-compliance

5. npower assumes that the "any person" referred to in paragraph 10³ of the Explanatory Note would, in line with other data protection laws, be a named individual within npower, but would ask that the CMA clarify this.

Part 2 – Disclosure of Relevant Customer Data to GEMA

Disengaged Customers

6. npower is also concerned that the definition of default tariffs '*...where no part of the Tariff which currently applies to a Domestic Customer is for a fixed term*

¹ npower's response to the SSRN page 5 paragraph 16.

² npower's response to the PDR page 64 paragraph 53.2

³ "Section 167 of the Act places a duty on any person to whom the Order applies to comply with it."

period, ' will capture evergreen tariffs that suppliers may choose to offer that ought not be regarded as default tariffs (including innovative, alternative tariffs that the removal of the RMR simpler choices rules aims to promote). By capturing tariffs that are not default tariffs, the proposed order extends the scope of the database beyond that set out in the CMA Final Report and is not therefore compliant with section 138(3) of the Enterprise Act 2002. In turn, this will reduce suppliers' incentive to offer evergreen tariff propositions, reducing innovation and the notion of customer choice. This is of particular concern in the prepayment market because, as the CMA acknowledges⁴, suppliers' incentives to launch fixed term tariffs will be reduced once the price cap is in operation. The combination of the Database and Price Cap remedy will act to decrease competition within the prepayment segment.

7. Evergreen tariffs other than standard variable tariff should be excluded from the definition of Default Tariff, on the basis that an engaged customer makes an informed choice to take such a tariff.
8. Similarly where a customer holds both gas and electricity with the same supplier but only one fuel is on a default tariff, npower believes this customer is not disengaged since they have actively chosen a fixed term contract for one fuel and either the second fuel is in the process of being switched or they have actively chosen not to switch both fuels. npower believes these customers should not be included within the central database.
9. For microbusiness customers npower supports the CMA's definition of 'Default Tariffs' ('contracts') as auto-rollover contracts, evergreen contracts, deemed contracts and/or out-of-contract contracts for three or more years.

The Relevant Customer Data

10. The CMA has detailed that for each meter, the customer's full name; billing address; consumption address; current supplier; meter type; name and details of their current tariff (including tariff rates and payment method); Annual Consumption Details; and MPAN/MPRN should be supplied. npower is unclear who will be responsible for validating the quality of the data being passed to GEMA.
11. npower acknowledges the CMA's recommendation that GEMA consider issuing guidance on the criteria suppliers should apply when supplying data. npower believes that any guidelines/rules for suppliers to adhere to should: ensure consistency across the data submitted; address any data quality issues which may make it difficult for suppliers to utilise data within the database and; reduce the potential for customer complaints. For example:

⁴ CMA's Final Report page 1039 paragraph 14.408

- 11.1 Will there be plausibility thresholds for suppliers to apply to consumption information where any records containing spurious usage levels can be excluded from the data submitted until the figures have been investigated?
- 11.2 Will there be a suppression list to exclude for example vulnerable customers or some meters i.e. where the accounts are held in the name of 'Executors', or Housing Associations?
- 11.3 Will customers who have registered with Mailing Preference Service also be excluded from the database?
12. npower is concerned that the inclusion of consumption details means that suppliers can effectively cherry-pick (target or avoid specific types of customers) prospects. Cherry-picking may not lead to a good outcome for customers. Customers of 'low' value will not benefit from this remedy if suppliers do not compete to supply them by marketing to them.
13. npower agrees that it is appropriate for suppliers to provide data on a meter by meter basis however believes that suppliers using the central database should contact customers at a customer not meter level to avoid contacting the same customer more than once.
14. Where customers are on non-E7 Restricted Hours tariffs the database should contain an indicator to denote whether that RH tariff is preserved or not. This information will be necessary if potential suppliers are to give affected customers the opportunity to make a fully informed decision about the switching/tariff choices they face (notably that if they elect to relinquish a preserved RH tariff in order to take up a single-rate offer they will not be able to revert to that RH tariff in the future).

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

15. npower acknowledges that the roll out of the database is expected to be a staged process, and that the database will go live by 30 April 2018. In giving GEMA the flexibility within the licence conditions to specify a date later than October 2017 for receiving the relevant customer data it will avoid having to update the database several times before the data is used by rival suppliers. npower believes this should help to ensure the process complies with ICO guidance that assumed consent for indirect marketing contact is only valid for six months after it has been obtained.
16. For consistency across suppliers GEMA should specify a schedule for suppliers to adhere to so that the data provided is based on the same snapshot view of all disengaged customers. For example, suppliers could be required to send the first

contact communication by the 31 July based on a snapshot of disengaged customers as at 30 June. Suppliers would then be required to run a further update (to remove all the customers who have opted out or are no longer on the default tariff or who have changed supplier) on the same date to ensure that the central database correctly reflects disengaged customers as at the specified date. Any customer who becomes eligible for inclusion or exclusion from the database after this date would be captured within the next data update that would be performed according to a published schedule.

17. npower would suggest that each monthly update is a total refresh of the database, i.e. GEMA deletes the current database each month and replaces it with the new submissions from suppliers to ensure it accurately reflects the disengaged customer universe at a snapshot point in time and removes the risk of duplicate records.

Access to the Relevant Customer Data

18. In npower's response to the PDR⁵ we stated we believe customer data should only be shared where the customer has given explicit consent to their supplier to do so. The CMA's approach to adopt an opt-out model risks not only undermining trust in the industry through large amounts of unsolicited and unwelcome marketing activity but is also at odds with the new GDPR requirements which come into force in the same year as the proposed database. npower is awaiting details of GEMA's proposed safeguarding for use of their customer data by rival suppliers and assumes as a minimum it will contain the details as specified in the order. npower believes all suppliers wishing to have access to the database should be required to adhere to an agreed level of Information Security, plus be prepared to be audited by GEMA on an annual basis. Results of the audit should be shared and failure to comply should remove right of access to the database.

Part 3 – First Contact Communication

Requirements concerning the First Contact Communication

19. npower welcomes the CMA's recommendation to expand the communication channels for the First Contact Communication to include email (subject to the appropriate customer consent). npower considers it is important to communicate with customers via their preferred communication channel of choice, however npower acknowledges that some disengaged customers may not have access to the internet or emails and would suggest that an Ofgem led PR/awareness campaign could be run prior to suppliers sending letters/emails to raise awareness.

⁵ npower response to the PDR page 65 paragraph 53.5

20. npower welcomes the opportunity to comment on the initial draft of the First Contact Communication and assumes GEMA will involve communication experts within the consultation process who can ensure the communication is consistent with the tone and brand styles of individual suppliers. npower considers the first page (letter) should include sub-headings to signpost the various sections making it easier for customers to understand. Possible sub-headings could be: 'Are you paying too much for your energy?'; 'What does this mean for you'; 'What information do we need to provide to Ofgem?'; 'Will this information be protected' and; 'What to do next'.
21. npower considers that the communication should also promote customer engagement more broadly and include details on switching tariffs with their existing supplier more prominently on the first page to maximise customer engagement.
22. npower believes the 'opt-out' slip should also feature more prominently, preferable on the first page so that customers are aware that, by not completing and returning it, their data will be passed to Ofgem.
23. As discussed above, npower considers the effectiveness of this communication to increase engagement would be enhanced if supported by an Ofgem led PR/awareness campaign prior to the letters/emails being sent out by suppliers.

Part 4 - Monitoring and compliance

24. Within paragraph 11 of the draft licence amendment it states that '*The licensee must give the Authority any Information that it reasonably requests to assess the impact and effectiveness of the Secure Database.*' npower is unclear on the information to be provided and awaits clarification from GEMA on how the impact and effectiveness of the database will be evaluated.
25. npower considers that in using assumed consent from the 'opt-out' approach within the first contact communication there is a risk that customer complaints will increase as a result of customers receiving unsolicited and unwelcome marketing activity, particularly where they have opted out of receiving their own suppliers marketing material or subscribed to the Mailing Preference Service and may therefore take issue that their data has been shared. npower would ask that complaints of this nature are ring-fenced and not included when customers' complaints with suppliers are recorded and published.

Compliance with data protection law

26. npower awaits information from GEMA regarding the safeguarding approach and supplier usage agreements. Additionally, we would welcome confirmation from the Information Commissioner's Office (ICO) that the CMA's proposals are consistent with the current Data Protection Act and that they will meet any

additional requirements of the new EUGDPR the outcome of the review of the E-Privacy Directive (implemented as the PECR) and the potential placing of the ICO's Direct Marketing Guidance on a statutory footing under the UK's proposed Digital Economy Bill.

ANNEX 1: Domestic Customer and Micro Business Consumer Information

27. With regard to the specified domestic customer information, npower believes the list should be expanded to include a Warm Home Discount field to ensure that customers can make a more informed choice when considering tariffs, services and savings that suppliers can provide.
28. As customers will only appear on the database where suppliers have assumed consent, npower suggests that a field detailing the date of the most recent 'First Communication Contact' was sent is included to ensure data is only used by rival suppliers within six months of assumed consent being obtained. This would align with the ICO guidance for indirect consent to ensure consumers are contacted within a reasonable time (the ICO rule of thumb being no more than six months)⁶ after receiving the initial communication telling the customer what is going to happen (i.e. that their data will be shared for other organisations to contact them to see if they can offer a better deal).

Draft Order

29. The Order defines a 'Microbusiness Consumer' as having '*the meaning given to it in the Electricity Supply Licence or the Gas Supply Licence (as applicable)*'. This covers a heterogeneous group of customers and consists of sole traders, partnerships and limited companies. Data Protection legislation is not consistent across these groups and the CMA has made clear its aim to target the vulnerable customers with their remedies. npower has suggested⁷ that only sole traders and partnerships be captured by this remedy and would ask that the CMA consider providing a more defined segment of microbusiness customers for example, in the same way as proposed within the "Microbusiness Order".
30. The Order defines 'Relevant Customer Data' as '*the Domestic Customer Data and the Micro Business Consumer Data concerning each Disengaged Customer who has not Opted-out and who has **not** been supplied by the licensee on one or more Default Tariffs for a continuous period of three years or more...*' This definition seems at odds with the definition of a 'Disengaged Customer' where the customer must have been supplied by the same supplier '*on one or more Default Tariffs for three years or more*'. npower would ask the CMA to clarify the

⁶ "As a general rule of thumb, if an organisation is making contact by phone, text or email for the first time, we would advise it not to rely on any indirect consent given more than six months ago – even if the consent did clearly cover that organisation."

⁷ RWE's response to Provisional Remedies page 76 paragraph 59.2

definition of 'Relevant Customer Data' to ensure it aligns with the 'Disengaged Customer' definition.