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SSE: Response to The Energy Market Investigation (Database) Order 2016 - Draft Order – Consultation

Introduction

This document provides the response (the Response) of SSE plc (SSE) to the consultation on the proposed Database Order (the Order) issued on 18 October by the Competition and Markets Authority (CMA).

SSE's previous submissions to the CMA over the course of the Energy Market Investigation (EMI) discussed SSE's serious concerns with the database remedy. In particular, the response to the Provisional Decision on Remedies (PDR) explained why SSE does not believe that the customer database will be effective in achieving the CMA's stated objective of increasing customer engagement.

This Response is therefore focused on the practicalities of implementation of the Order. At this stage it is important to set the remedy in the most effective and practical manner.

The issues detailed in this Response are discussed in order to assist the CMA in ensuring that the remedy is implemented in the most efficient and practicable manner possible, whilst retaining the clarity of purpose of the CMA's original policy intention.

Lawfulness of processing data

SSE has previously raised concerns in relation to the CMA's interpretation of suppliers' obligations under the Data Protection Act as it relates to customers who have denied marketing consent. SSE would question the CMA's proposal can be said to be compatible with both current and future data protection law (specifically the GDPR).

The legal basis on which personal data of a customer can be disclosed to and processed by a number of third parties, unknown to the customer, who may in turn use such data to contact these customers at regular intervals for a sustained period of time. In this regard, the CMA's proposed Order and Explanatory Notes do not provide a clear answer.

Notably, although the CMA is ordering suppliers to disclose personal data to GEMA, it has not provided any assurance that the receipt of the data by GEMA, or any other subsequent activities, is lawful for the purposes of data protection law. Rather the CMA states in the Draft Explanatory Note accompanying the Order that it is "ultimately the responsibility of those who control and process data to ensure that such processing is compatible with the Data Protection Regime". In addition, SSE is concerned as to whether GEMA will procure a third party to host the proposed customer database. GEMA must satisfy itself that it is complying with the following provisions under Schedule 1 (The Seventh Principle) of Data Protection Act:

11. Where processing of personal data is carried out by a data processor on behalf of a data controller, the data controller must in order to comply with the seventh principle—

choose a data processor providing sufficient guarantees in respect of the technical and organisational security measures governing the processing to be carried out, and

(b) take reasonable steps to ensure compliance with those measures.

Without sight of the proposed Database or Ofgem's terms of access, it is impossible for energy suppliers to reach a definitive conclusion on the suitability of the Order and the lawfulness processing it may give rise to. This ultimately limits SSE's ability to make meaningful representations to improve the drafting of the Order in the best interests of its customers and their privacy.

To this end, we would like to recommend a joint meeting with the Information Commissioner's Office (ICO), CMA, Ofgem, consumer groups and Suppliers to better understand in more detail the expectations and requirements of the ICO in relation to the operation of the database so that Suppliers are better placed to make appropriate and relevant representations to safeguard the data protection rights of their customers.

However, having already received multiple complaints related to this remedy, SSE considers that it is inevitable that some customers will complain directly to the ICO in relation to this point. It is also clear that regardless of the legal correctness of the Order as it is ultimately implemented, customers will complain to their supplier if they perceive that their rights or preferences have not been respected.

Ofgem recording opt-out

Ofgem also has a clear obligation to record and action customers' opt-out requests where these are sent directly to Ofgem or provided to Ofgem by a third party (including parties

other than that customer's current supplier). SSE raised this issue in response to the previous Draft Order however these concerns are not reflected or addressed within the latest Order or Draft Explanatory Note.

SSE agrees that all suppliers should facilitate a simple process to allow customers to opt-out of the customer database, and such opt-outs will remove customers from the monthly data file. SSE also notes that data protection rules require suppliers to maintain a suppression list, including details of any individuals (regardless of whether or not they are current customers) who have notified that supplier that they do not wish to receive direct marketing. Such suppression lists must be maintained on an enduring basis and processes must be in place to ensure that such individuals are not included in contacts details that are procured at some future date.

The ICO's expectation that such processes are adhered to suggest that a similar obligation must also apply to Ofgem in controlling and maintaining the customer database; it would not be sufficient for Ofgem to rely on suppliers to maintain opt-out records as situations will arise where the relevant supplier has received no such opt-out request but Ofgem has.

Similarly, SSE considers that it would not be acceptable to require that customers follow only the procedure specified by their own supplier in order to register their wish to opt-out of the database (however flexible that procedure may be in practice). Such an approach would be anomalous given that in all other situations private individuals have a wide range of means to opt-out of direct marketing in order to protect their privacy.

Implementation

SSE's previous submissions have emphasised how challenging it will be to implement this remedy in a manner that does not result in a great deal of customer distress and confusion with a high probability of a significant increase in customer complaints. One possible route to mitigate this risk would be to provide suppliers with as much scope as possible to ensure that customers fully understand the purpose of the database and their right to opt-out.

As per our previous submissions, SSE continues to believe that suppliers should be free to design the specific First Contact Communication to be sent to their customers. This approach increases the chances that customers read and understand the letter they receive, and are prompted to take action if the wish to opt-out of the database. The material provided in Annex 2 to the EN demonstrate this challenge well; both the initial draft letter and the attached 'Background Note' are functional documents which provide all of the relevant information, yet the content is particularly unengaging and it is questionable whether the majority of customers would make it as far as the opt-out slip on page 2.

SSE also continues to disagree with an approach whereby letters must be 'approved' by the CMA and Ofgem. This requirement would be completely out of keeping with Ofgem's established approach to compliance with supply licence obligations. The onus has always been on suppliers to satisfy themselves that their processes are compliant with relevant obligations. This approach would allow for innovation and development of communications

and products in response to customer feedback, whilst also making it clear that suppliers must be in a position to explain and defend their approach if required to do so by Ofgem.

We also note that the draft Order and supply licence amendments have different definitions of Domestic Customer Data. The supply licence amendments include: “(c) any additional items of information specified by the Authority that are necessary for the purposes contemplated by the CMA Order.” We suggest that the definition in the Order is amended to match the supply licence definitions. Ofgem’s ability to specify additional items of information (which could have cost, operational or consumer privacy impacts) should be subject to consultation where appropriate. We therefore suggest that the relevant text is amended as follows: “and (c) any additional items of information specified by the Authority (after consultation where appropriate) that are necessary for the purposes contemplated by the CMA Order.

Definition of ‘Relevant Customer Data’

The Order proposes the following definition of ‘Relevant Customer Data’:

Relevant Customer Data	means 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 same Retail Energy Supplier on one or more Default Tariffs for a continuous period of three years or more as at the time of complying with Articles 3.1 or 3.2 (as applicable).
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However, Paragraph 30 of Explanatory Note refers to Relevant Customer Data as the following:

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.

The sections highlighted in bold within the proposed definition and Explanatory Note would appear to contradict each other. SSE would welcome further clarification on the stated intent and for this to be reflected within the Order.