

21 November 2016

David Fowles
Project Manager
CCMG
Competition and Markets Authority
Victoria House
Southampton Row
London WC1B 4AD

By email only

Dear David,

Re: EMI Consultation: The Energy Market Investigation (Database) Order 2016

Thank you for the draft of The Energy Market Investigation (Database) Order 2016 (the Order) and draft Supply Licence Conditions (SLCs). This letter forms Utilita Energy Ltd's (Utilita) response.

Utilita has serious concerns about the implementation of the Database remedy. These relate both to our understanding of the proposals and the current drafting of the Order, and are set out below.

1) Definition of Default Tariffs

The definition of Default Tariff as currently drafted may produce unintended consequences. The explanatory note sets out that the database will include information on a customer who has been on a deemed tariff for one year, an SVT for two years and any other evergreen tariff for another year. The note goes on to state that this will capture all evergreen tariffs, including those that have been actively chosen by a customer because of certain features of the tariff.

In our case, we operate two tariffs for each meter type (single rate and E7) – Premium Energy (our standard tariff) and Smart Energy. Both are variable tariffs with no end date and no termination fee. We do not have acquisition tariffs or fixed contracts for domestic customers. We have deemed contract terms, but the applicable rates are the same as our normal tariffs for domestic customers.

We believe that the approach of capturing all non-fixed tariffs is flawed. Disengaged customers should be considered to be those who have never moved or who are on poor value default tariffs due to no action. Where a customer has made a choice – for example to select our Smart Energy Tariff which is our cheapest tariff and provides the customer with a smart meter free of charge, we believe it is clear the customer is engaged, not disengaged.

The approach in the Order should be adapted so that the supplier's cheapest tariff should be excluded from the definition of Default Tariff. Where the tariff that the customer is on is the supplier's cheapest

tariff, the tariff would be excluded and they would be treated as engaged not disengaged. This approach would be completely consistent with the AEC the CMA is trying to remedy, which is to ensure that disengaged customers are not left on outdated SVTs which are poor value relative to better tariffs the supplier offers e.g. acquisition or fixed tariffs.

The current drafting in the Order has the effect of penalising independent suppliers who offer simple tariff structures and the best value pricing that they can to all their customers.

2) Initial Contact Communication

We note that the initial disclosure is deemed to be compliant with the data protection regime. However, we are aware of concern in the industry that the GDPR may require explicit opt in rather than opt out for compliance. If CMA implements this Order, it must be clear that by complying with this Order Licensees will not be deemed to be in breach of the GDPR. Licensees must not be placed in a position where compliance with the Order renders them liable to prosecution. CMA and Ofgem should obtain and publish a definitive legal ruling on this point before the Order is implemented.

We also believe that some customers could find the communication intrusive, especially if they have previously instructed their supplier they wish to opt out. The Order should provide for separate recording of any complaints received by suppliers relating to the communication. As the letter issue will be a result of the Order, if customers do complain, these complaints must be excluded from normal complaints statistics (and any ombudsman referral data). The Citizens Advice comparison tool will use issues such as complaints data to assess supplier performance, and complaints on the Database remedy should not form part of the assessment of supplier performance given suppliers are required to comply.

In addition, the draft letter in the explanatory note risks being misleading. If the CMA adopted the approach of applying the Order to only those customers who had remained on the default SVT of a big six supplier or who had never moved supplier, the suggestion of £300 plus savings may be a fair illustration. Given the approach set out is also intended to capture customers of independent suppliers which should be deemed engaged (as they had chosen to move supplier for a better offer), such figures are risk misleading those customers as to the level of savings which may be available to them.

3) Data maintenance

The Order indicates that suppliers must issue the First Contact Communication to all customers on Default Tariffs and provide the information to GEMA. If the customer later elects to opt out, that information must be retained for evidence and the updated information provided to GEMA. The proposal also provides for monthly updates for GEMA of all data or updated data depending on the final Order. Where a customer falls into a notifiable category after the data issue to GEMA, then a First Contact Communication must be subsequently issued.

A further concern arises with the potential variability of data and quantity of data where consumption by period is required. The more data is shared, the more complex it will be to maintain. The effective route would be to use the database as a route to engage directly with the customer, as below.

The burden that this exercise (and monthly updates) will place on Licensees must not be underestimated. We believe that planned updates at wider intervals would be more manageable and cost effective, balancing cost and efficiency. Half yearly updates would be preferable. This would be consistent with the updating of the data on the PPM cap.

We are extremely concerned at the revised drafting, which not only stipulates monthly updates, but also makes provision for more frequent updates if GEMA considers this appropriate. The explanatory note records this may impose higher costs on suppliers and that this should be tested. The licence drafting however offers no such protection. We suggest the licence drafting be revised to reduce the update frequency and ensure that GEMA may not increase frequency without having conducted a consultation and cost benefit analysis, for example, making it clear that this provision would only apply 'following consultation'.

4) Use of data

A further issue with the database is the prescribed use of the resulting data and ensuring that disengaged customers gain the intended benefit. Our experience has shown (as we previously set out) that many of our customers, including those using prepayment meters who may also be vulnerable, are hard to reach and engage by traditional marketing means. Our success at engaging these customers has been based on face to face selling and telesales. Our customers frequently do not engage with written or email communications. For these customers to really benefit from these proposals supplier must be able to actively reach out to them.

We believe that face to face selling and telesales can be conducted compliantly. The sales process must be high quality, robust and well monitored. Agents must be well trained and subject to compliance checking. This requires effort and commitment throughout the organisation, but is achievable and brings real benefit to the customer.

It is essential that to reach these disengaged customers, suppliers should be able to engage through all sales channels, using the channel which will be most effective for the customer. Applying restrictions such as post only, will not help disengaged customers, when talking to them would offer them a better chance to engage and have their questions answered in the initial contact. Relying on post leaves the onus with the customer and may remove much of the benefit which active engagement by suppliers using a robust and compliant sales process may bring.

We hope that these points have been useful. If you would like to discuss any points in more detail, we would be happy to help, otherwise we hope our comments will be taken into account prior to the formal consultation.

Kind regards,

Yours sincerely,

By email

Alison Russell
Head of Regulatory Affairs