

ENERGY MARKET INVESTIGATION

Summary of responses to the consultations on the Draft Energy Market Investigation (Database) Order 2016, associated Draft Licence Conditions and Draft Explanatory Note

Introduction

1. On 18 October 2016, the Competition and Markets Authority (CMA) consulted on a draft order (the Draft Order), including the associated draft licence conditions (the Draft Licence Conditions) and a draft explanatory note (the Draft Explanatory Note) for the implementation of the remedies set out in the energy market investigation final report (the Report).¹
2. In the course of this consultation, the CMA received 16 submissions relating to the Draft Order, Draft Licence Conditions, and the Draft Explanatory Note. Non-confidential versions of the responses received are available on the CMA's webpages.² This paper sets out the main changes which have been made to the Draft Order as a result of those submissions and also gives reasons why certain suggested changes were not made. Minor changes (such as the correction of typographical and spelling errors, minor clarifications included to the Draft Explanatory Note, and other consequential changes) are not discussed in this paper. References to specific Articles in this paper refer to the final version of the order published on the same date as this paper (the Order), rather than to any earlier drafts. Capitalised terms in this paper have the same meaning as defined in the Order, unless otherwise specified below.
3. Responses to the consultation can be categorised into two broad categories:
 - (a) comments relating to the compliance of the Database Remedy with data protection legislation; and
 - (b) comments relating to the drafting of the Draft Order and Licence Conditions.

¹ [Energy market investigation: Final report.](#)

² [Energy market investigation case page.](#)

Comments relating to the compliance of the Database Remedy with data protection legislation

4. A number of respondents raised issues concerning the compliance of the Database Remedy with data protection legislation and, in particular, (i) the Data Protection Act 1998 (DPA); (ii) the EU Directive 95/46/EC³; (iii) the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR); and (iv) the new EU General Data Protection Regulation (GDPR)⁴ (the 'Data Protection Regime').
5. The comments received from respondents on this issue can be categorised under the following five topics:
 - (a) The legality of the opt-out mechanism.
 - (b) The safeguards to protect the relevant data.
 - (c) The application of section 11 of the DPA.
 - (d) Seeking assurances from the Information Commissioner's Office (ICO).
 - (e) The medium for the First Contact Communication.

Comments on the legality of the opt-out mechanism

6. A few respondents questioned whether seeking consent from customers, through an opt-out mechanism, for inclusion of their data in the database would be compatible with the Data Protection Regime.
7. Paragraphs 95 to 100 of the Explanatory Note set out how the Database Remedy, as regards each of the stages involving the processing of personal data,⁵ is expected to comply with all aspects of the Data Protection Regime. Paragraph 97 of the Explanatory Note sets out how the Draft 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 Ofgem arising from the Order is the relevant basis for the processing of personal data to be

³ 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.

⁴ 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).

⁵ Stage 1 involves the processing of personal data by suppliers to GEMA; Stage 2 involves the processing of personal data by GEMA; and Stage 3 involves the processing of personal data by rival suppliers.

carried out by current suppliers at stage 1. Accordingly, the remedy does not depend on customer consent to make the data transfer to Ofgem lawful.

Comments on the application of section 11 of the DPA

8. A few respondents raised concerns in relation to the compatibility of the remedy with the right to prevent processing for the purposes of direct marketing (enshrined in section 11 of the DPA). Similar concerns were also raised by the ICO in its response to the formal consultation. The CMA has addressed these concerns in its separate response to the ICO's submission.⁶

Comments seeking assurances from the ICO

9. Some respondents sought assurances or confirmation from the ICO that all aspects of the processing of personal data involved in this remedy (including the receipt of the data by Ofgem and any other subsequent activities involving Ofgem and/or rival suppliers' access to such data) complies with the Data Protection Regime.
10. In this context, the CMA welcomes the Information Commissioner's response to the formal consultation concerning the Draft Order, Draft Licence Conditions and Draft Explanatory Note. In particular, the Information Commissioner has recognised the value of improved competition within the energy sector, and the overriding purpose of the Database remedy to stimulate disengaged customers to change tariff and/or supplier to get a better energy deal.
11. The Information Commissioner also recognises that a certain degree of flexibility is built into the Database remedy more generally. This flexibility is necessary so as to allow GEMA to conduct initial testing and trials of the Database remedy both before it is fully implemented, and whilst the remedy is ongoing, so as to ensure that Disengaged Customers' legitimate interests, in particular, concerning the proposed treatment of certain personal data, are and continue to be appropriately safeguarded.
12. The CMA have amended the Draft Order and Draft Explanatory Note to provide GEMA with more flexibility to test and design the database service, so that it can use customer data to the greatest effect to improve consumer engagement and address the Domestic and Microbusiness Weak Customer

⁶ See the CMA's response to the ICO's submission on the [case page](#).

Response AECs.⁷ Accordingly, there is scope for GEMA to develop alternative uses for the database to achieve this outcome.

13. In this regard, there are a number of areas where further work is ongoing (eg preparation of data sharing agreements), and is expected to be progressed by GEMA after the date of publication of the CMA's Order, in consultation with the ICO and the industry. The aim of this is to address and mitigate identifiable risks that adverse outcomes for the customer might arise from the Database remedy despite its lawfulness as regards the Data Protection Regime.⁸

Comments on the First Contact Communication

14. One respondent submitted that the Draft Order does not stipulate whether the First Contact Communication can or must be made by post or by email. In its view, if email were used, the Draft Order would appear to be in breach of the PECR which requires opt-in consent.
15. The CMA acknowledges that the Draft Order does not specify the precise manner in which the First Contact Communication will be sent by suppliers. However, paragraph 66 of the Explanatory Note makes it clear that 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.

Comments on the safeguards to protect the relevant data

16. One respondent said that the specific safeguards to protect customers should be mentioned in the Order.
17. The CMA notes that paragraph 7(c) of the Licence Conditions contains a minimum list of access and use restrictions that should be included in the data sharing agreements that will govern access to the database. Ofgem is currently preparing these data sharing agreements in consultation with the ICO. Until such agreements are finalised, it will not be possible to know the details of the relevant safeguards. In addition, the CMA considers that it is important that Ofgem has flexibility to put in place additional safeguards, where appropriate, during the life of the remedy, and specifying the safeguards in the Order would prevent this. Accordingly, the CMA has not

⁷ In this context, the CMA notes that the recommendations to GEMA include a recommendation to: (i) test the operation of the database; and (ii) monitor its impact with a view to maximising its effectiveness.

⁸ See CMA's response to the ICO's submission on the [case page](#) (page 2).

amended the Draft Order, Draft Licence Conditions or the Draft Explanatory Note to reflect the proposed change.

18. Notwithstanding the above, the CMA recognises the need for suppliers to understand the safeguard measures that will be put in place by Ofgem, for example, through the data sharing agreements.

Comments relating to the drafting of the Draft Order and Draft Licence Conditions

19. Some respondents suggested amendments to the Draft Order and Draft Licence Conditions. The main comments received can be grouped under the following four topics:
 - (a) certain definitions;
 - (b) the First Contact Communication;
 - (c) customer communications following the First Contact Communication; and
 - (d) the frequency of updates to the database.

Comments on certain definitions

20. A number of respondents suggested amendments to the definition of Default Tariff contained in the Draft Order and Draft Licence Conditions. In the case of Domestic Customers, Default Tariff has been defined in the Draft Order and Draft Licence Condition as 'any type or part of a Domestic Supply Contract (including an Evergreen Supply Contract) or Deemed Contract in circumstances where no part of the Tariff which currently applies to a Domestic Customer is for a fixed term period, or where a Domestic Customer has automatically become subject to one or more Domestic Supply Contracts or Deemed Contracts in the event that they do not make a choice'.
21. These respondents questioned the approach of capturing all non-fixed-term tariffs since there may be instances where engaged customers actively choose a non-fixed term tariff. In particular, they argued that (a) the definition will capture evergreen tariffs that suppliers may choose to offer that ought not to be regarded as default tariffs (including innovative tariffs that the removal of the RMR simpler choices rules aim to promote); (b) evergreen tariffs, other than standard variable tariffs, 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; (c) the definition will capture all customers of smaller suppliers that do not offer fixed-term tariffs or have built business models around using standard variable tariffs as an acquisition product; and (d)

suppliers' cheapest tariff should be excluded from the definition of Default Tariff.

22. The Report noted that if customers are on default tariffs with the same supplier after three years they are unlikely to have actively chosen to be on such tariffs, especially where such tariffs are at a substantial premium to fixed-term tariffs. The CMA therefore considered that that the Database Remedy should apply to all customers who have been on a standard variable tariff (or any other default tariff) within the same supplier for a total of three or more years.⁹ The CMA recognises that the definition of Default Tariff contained in the Draft Order may capture customers who have actively chosen a non-fixed term tariff, and all customers of certain smaller suppliers that do not offer fixed-term tariffs. However, the CMA considers that excluding non-fixed term tariffs that consumers have actively chosen from the definition of Default Tariff would raise two main concerns: (a) demonstrating that a customer has actually made an 'active' choice; and (b) the potential for gaming opportunities. In addition, customers that actively choose non-fixed term tariffs would not be automatically captured by the definition as they would need to be on a non-fixed term tariff with the same supplier for three or more years. This is unlikely to arise in relation to 'active' customers (and in any event any such customer could still choose to opt out of being included in the database following receipt of the First Contact Communication).
23. In light of the above, and having taken into account respondents' submissions on this issue, the CMA has decided not to make any changes to the definition of 'Default Tariff' contained in the Draft Order and Draft Licence Conditions.
24. Some respondents suggested amendments to the definition of Micro Business Consumer contained in the Draft Order and Draft Licence Conditions. The Draft Order defines a Micro Business Consumer as 'having the meaning given to it in the Electricity Supply Licence or the Gas Supply Licence (as appropriate)'. One respondent argued that this definition covers a heterogeneous group of customers and consists of sole traders, partnerships and limited companies. This respondent asked the CMA to consider providing a more defined segment of microbusiness customers, for instance, in the same way as proposed within the Draft Microbusinesses Order.¹⁰ Another respondent argued that it may be difficult for suppliers to identify the microbusiness customers falling within the definition and the number of customers for which this may be uncertain will be very large and lead to inconsistencies of approach between suppliers. It also suggested the CMA

⁹ Paragraph 13.130.

¹⁰ The Energy Market Investigation (Microbusinesses) Order 2016.

should use the definition of Relevant Micro Business Consumer included in the Draft Microbusinesses Order.

25. The CMA notes that the design of Database Remedy for microbusiness customers specified in the Report was determined as applying to all microbusiness customers,¹¹ and it was only considered necessary to narrow the scope of the microbusiness customer group for the price transparency remedy¹² (the Ofgem-led testing programme remedy and the auto-rollover remedy also apply to all microbusiness customers).
26. The reason for using a narrower definition in the context of the price transparency obligation contained in the Draft Microbusinesses Order is because the microbusiness consumers falling within the definition of Relevant Micro Business Customers are the most affected by the lack of price transparency in the microbusiness segment. The aim of the Database Remedy is to prompt engagement of as many disengaged microbusiness consumers as possible. The CMA has received no evidence from the respondents to the formal consultation that would justify a departure from the Report. Therefore, the CMA has decided to keep the definition of Micro Business Consumer in the Order.
27. Notwithstanding the above, the CMA recognises that, in some instances, suppliers may face practical difficulties in identifying whether a particular customer falls within this definition (eg as regards the turnover and number of employees). In such instances, the Explanatory Note makes it clear at paragraphs 27 that suppliers must include such customers within the definition of Micro Business Consumer.
28. Some respondents commented on the definition of Domestic Customer Data contained in the Draft Order and the Draft Licence Conditions. A few respondents asked that the definition contained in the Draft Order includes Ofgem's power to request additional items of information from suppliers to ensure consistency between the definition of Domestic Customer Data contained in the Draft Order and the Licence Conditions. The CMA has amended the definition of Domestic Customer Data contained in the Draft Order to address these comments. A few respondents said that 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. The CMA notes, in this regard, that Ofgem will have the ability to consult before it specifies additional items of information, but does not consider it necessary to fetter Ofgem's discretion on when to do so. One

¹¹ Paragraph 17.219.

¹² Paragraph 17.32 of the Report.

respondent said that only information on actual standing charges and unit rates should be provided, rather than multiple sets of prices if there has been a price change during the relevant year. The CMA agrees that the assessment of the savings available to domestic and microbusiness customers for switching, it is necessary to know their actual tariff rates. Therefore, the CMA has amended the definitions of Domestic Customer Data and Micro Business Consumer Data to address this point.

Comments on the First Contact Communication

29. Pursuant to Article 4.4 of the Draft Order, 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 minimum contents specified in subparagraphs (a) to (d) of Article 4.4. This requirement was included in the Draft Licence Conditions.
30. A number of respondents said that the Draft Order should be amended to give suppliers flexibility to design the First Contact Communication to be sent to their customers as they have experience in effective communication with their customers. One respondent questioned the need for the CMA and Ofgem to approve the First Contact Communications. The CMA considers that the First Contact Communication will play a key role in ensuring the effectiveness of the remedy and compliance with the Data Protection Regime. Therefore, the CMA is of the view that the content, format and structure of the First Contact Communication should be specified by Ofgem, subject to the specified minimum contents set out in Article 4.4 of the Order. As indicated in paragraph 79 of the Explanatory Note, suppliers may, subject to direction by Ofgem, have very limited flexibility to amend the template First Contact Communication. In the direction, GEMA may specify the areas in the First Contact Communication allowing for some design input from suppliers (eg spaces for company logos).
31. One respondent questioned the requirement contained in the Draft Order that the First Contact Communication must be 'approved' by the CMA and Ofgem. They submitted that this requirement would conflict with Ofgem's established approach to compliance with supply licence obligations since the onus has always been on suppliers to satisfy themselves that their processes are compliant with relevant obligations. The CMA agrees that suppliers will be required to comply with the obligations contained in the Order and Licence Conditions and, therefore, the requirement to obtain approval from Ofgem and the CMA is unnecessary. Therefore, the CMA has amended the Draft Order and Draft Licence Conditions to address this point.

Comments on customer communications following the First Contact Communication

32. Paragraph 8 of the Licence Conditions prohibits suppliers, following the First Contact Communication, from initiating any communication with a Disengaged Customer about the database, including the process for opting out. The Explanatory Note clarifies the scope of this prohibition at paragraphs 73 to 76 by giving examples of actions that would/would not fall under this prohibition.
33. Some respondents argued that this prohibition is too stringent on suppliers. In particular, they argued that (a) the ban on suppliers to provide customers with information on how they can opt-out after the First Contact Communication goes too far, and (b) it would be prudent to give Ofgem flexibility to permit additional communications as appropriate (eg in light of its trials or operational experience).
34. The CMA is of the view that safeguards should be put in place to ensure that suppliers do not prompt any Disengaged Customer to opt out (eg by telephoning or emailing them directly), as this would undermine the effectiveness of the remedy. However, the CMA recognises that an appropriate balance needs to be struck between not overly restricting suppliers' ability to provide information to customers and ensuring the Database Remedy is effective as possible. Guidance from Ofgem to deal with customer communications may be helpful in this context. The CMA addressed this point at paragraph 74 of the Explanatory Note.

Comments on the frequency of the updates

35. Article 3.3 of the Order requires suppliers to submit updated information to Ofgem on a monthly basis, except where there are good operational reasons for supplying the Relevant Customer Data with greater frequency than monthly, in which case such alternative frequency may be specified in a direction issued by GEMA.
36. One respondent supported updates at wider intervals (ie half yearly updates) as these less frequent updates would be more manageable and cost effective for suppliers. In the Report, the CMA suggested that the database be updated on a monthly basis unless there are good operational reasons for doing otherwise (as this would limit the risk of customer who have engaged from being contacted again).¹³ As explained in paragraph 56 of the Explanatory Note, the requirement to update the database will help ensure the accuracy of

¹³ Paragraph 13.138.

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 Ofgem or a rival supplier having accessed the database. 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.

37. In light of the above, the CMA has decided not to make any changes to the Draft Order and Draft Licence Conditions to reflect this submission.