

## ENERGY MARKET INVESTIGATION

### **CMA response to the Information Commissioner's Office's response to the formal consultation on the Energy Market Investigation (Database) Order 2016**

#### **Introduction**

1. On 18 October 2016, the Competition and Markets Authority (CMA) consulted on a draft order (the Order), including the associated draft Licence Conditions (the Licence Conditions) and a draft explanatory note (the Explanatory Note) for the implementation of the database remedy set out in the energy market investigation final report (the Database Remedy).<sup>1</sup> The consultation closed on 18 November 2016.
2. The Information Commissioner (the Commissioner) submitted [a response to our consultation](#) on 18 November 2016. This paper sets out the CMA's views concerning the matters raised in the Commissioner's submission and the main changes which have been made to the Order and the Licence Conditions as a result of it.<sup>2</sup>
3. The CMA welcomes the Commissioner's submission, in particular, the Commissioner's recognition of 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.
4. The Commissioner has recognised that the Database Remedy will proceed on the basis of the Order, which will require licensed energy suppliers to identify certain 'Disengaged Customers', to send such customers a 'First Contact Communication',<sup>3</sup> and to disclose to the Gas and Electricity Markets Authority

---

<sup>1</sup> [Energy Market Investigation: Final Report](#).

<sup>2</sup> The CMA also received 15 submissions from third parties. The main changes which have been made to the Order as result of such third parties' submissions are discussed in a separate paper (see the summary of responses to the consultation on the draft database order on the [case page](#)).

<sup>3</sup> The First Contact Communication will inform each Disengaged Customer of (i) the proposed disclosure to Ofgem of certain personal data including their name, address, current energy tariff and annual energy consumption, (ii) the proposed use of the data by Ofgem and rival suppliers, and (iii) the reasons for this disclosure. The First Contact Communication will also include an opportunity for each Disengaged Customer (at any point) to opt-out of the proposed disclosure or the inclusion of their personal data in the Database Remedy. Further details of the minimum contents of the First Contact Communication are set out in the final Order and

(GEMA) certain personal data concerning any Disengaged Customers that have not opted-out of the process. The timing of these requirements (which come into force from 31 July 2017 onwards), is set out in the Order but is ultimately expected to be determined by GEMA given the central role it will play in establishing and maintaining strict safeguards concerning the retention, use and any disclosure of the personal data, and holding the personal data in a secure database.

5. The CMA has built a certain degree of flexibility into the Database Remedy. This flexibility is necessary so as to allow GEMA time to conduct 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. In this regard, there are a number of areas – including the important issues highlighted in the Commissioner's submission (see below) – where further work is ongoing, and is expected to be progressed by GEMA after the date of publication of the CMA's Order, in consultation with the Commissioner's Office, the industry, consumer bodies, and the CMA. The overall aim of such testing and further consultation is to address and/or mitigate any risks that adverse outcomes for the customer might arise from the Database Remedy, despite its lawfulness as regards current and forthcoming data protection legislation.<sup>4</sup>
6. The Commissioner's submission focuses on three key issues in the context of the Database Remedy proceeding, all of which the CMA recognises are important concerns. In the CMA's view, through careful design of the next phases of the remedy, these concerns are capable of being addressed and/or otherwise accommodated or mitigated before the Database Remedy becomes fully operational. The CMA is aware that GEMA is giving careful further consideration to the issues raised by the Commissioner, which the CMA has summarised as follows:
  - (a) the Commissioner's submission identified a number of factors that were considered to favour GEMA adopting a 'trusted voice' model when operating the Database Remedy, rather than rival suppliers being able to access the Database and send their best offer to any Disengaged Customer that had not opted-out;

---

Explanatory Note (see the summary of responses to the consultation on the draft database order on the [case page](#)).

<sup>4</sup> The DPA; the EU Directive 95/46/EC; and the new EU General Data Protection Regulation (Regulation (EU) 2016/679 of 27 April 2016).

- (b) the First Contact Communication needs to be neutral and informative and not promote any particular service or raise any particular party's profile, and a Disengaged Customer's right to prevent the processing of personal data for the purposes of direct marketing (enshrined in section 11 of the Data Protection Act 1998 (DPA)) must be respected; and
  - (c) the processing of sensitive personal data, which will be necessary in order for the Database Remedy to be effective as regards certain Disengaged Customers (such as those who are visually impaired) and would therefore require such customers to opt-in expressly to their sensitive personal data being processed in the manner contemplated by the Database Remedy.
7. Set out below is the CMA's initial view on each of these issues, as well as an explanation of how the Order and/or Explanatory Note have been amended in light of the Commissioner's submission, and the next steps being taken by GEMA (in consultation with the Commissioner's Office, industry and the CMA), with a view to accommodating them or mitigating the risk of them arising.
8. The Commissioner's submission also noted a number of practicalities that need to be considered, and the CMA's view on these is set out at the end of this paper.

### **The 'trusted voice' model**

9. The Commissioner's submission identified a number of factors that were considered to favour GEMA adopting a 'trusted voice' model when operating the Database Remedy, rather than rival suppliers being able to access the database and send their best offer to any Disengaged Customer that had not opted-out.<sup>5</sup>
10. The Commissioner's submission particularly noted that if GEMA was to adopt a 'trusted voice' model, this would have the following benefits: (i) the minimisation of information risk; (ii) the ability for GEMA to police and control access to customers; (iii) the ability for GEMA to control the acquiring of best offers and restrict the information which needs to be provided to rival suppliers in order to obtain best quotes; (iv) ease of managing customers' opt-out

---

<sup>5</sup> One of the main areas of flexibility currently built into the Database Remedy allows Ofgem to determine whether (i) to provide access to the Database to licensed energy suppliers, subject to sufficient safeguards being in place (see further below), or (ii) to take action itself, for the purposes of prompting customers to engage. As noted in the Commissioner's submission, both models are currently being trialled on a small scale and the results of these trials will be taken into consideration by Ofgem when deciding how best to prompt the Disengaged Customers. These different options have been more clearly identified in the final Explanatory Note. See, for instance, paragraph 64 of the Explanatory Note.

request once their data has passed into the database; and (v) ensuring GEMA have the data needed to establish how effective the scheme is.

11. While the CMA recognises that the ‘trusted voice’ model would give GEMA absolute control over the data and any marketing communications (which would be likely to come from GEMA as a single source rather than from multiple suppliers), the CMA considers that the main potential concern underlying this aspect of the Commissioner’s submission – namely arising from wider sharing of the personal data with rival suppliers and such rival suppliers directly contacting Disengaged Customers that have not opted out (and any associated consumer mistrust of such model) – is capable of being addressed entirely (or sufficiently mitigated) and controlled through the role that GEMA would play before granting any supplier access to the database.
12. As indicated above, access to the database would only be provided where sufficient safeguards are in place to protect the legitimate interests of Disengaged Customers. In this context, in addition to building a secure cloud database<sup>6</sup> in which to hold the data, GEMA is preparing data sharing agreements governing the access terms and, in particular, stringent use restrictions that will apply to suppliers seeking access to the database. Such data sharing agreements, once in place, should minimise the risk of proliferation and duplication of customer data, and control the total number, medium and frequency of the marketing communications which will minimise the risk of adverse outcomes for the Disengaged Customers, such as noted in the Commissioner’s submission through ‘individuals receiving a bombardment of marketing’. The CMA understands that GEMA is in the process of consulting the Commissioner’s Office concerning such agreements.
13. As regards the management of Disengaged Customers’ opt-out requests, the CMA notes that the database would be updated on a monthly basis, or more frequently where GEMA identifies there are good operational reasons to do so, such as to address any unintended adverse consequences from the database containing out-of-date information and where the costs of doing so are outweighed by the benefits. The CMA therefore considers that any risk of the information in the database not being up-to-date is the same, irrespective of whether GEMA acts as the sole ‘trusted voice’ or whether rival suppliers are provided access. In any event, the data sharing agreements that will be in place should identify a specific window within which any marketing correspondence is sent after the database has been updated.

---

<sup>6</sup> Paragraph 83 of the Explanatory Note.

14. Finally, the CMA notes that, irrespective of whether or not rival suppliers are allowed to access the database, GEMA will receive monthly updated data concerning the Disengaged Customers, which will enable GEMA to identify whether a particular customer no longer falls within the definition of a Disengaged Customer (e.g. because they have switched supplier or are no longer on a default tariff), or has opted out. Accordingly, GEMA will have the information needed to assess the impact and effectiveness of the Database Remedy. GEMA will also have the power to seek any further information from suppliers.

#### **Right to prevent processing for the purposes of direct marketing – section 11 of the DPA**

15. The CMA acknowledges the importance that the First Contact Communication must not amount to 'direct marketing' within the meaning of section 11 of the DPA.
16. In this regard, the Commissioner's submission provides guidance that the First Contact Communication needs to be neutral and informative and not promote any particular service or raise any particular party's profile in order to avoid constituting direct marketing.
17. The Order sets out certain minimum content requirements for the First Contact Communication (involving an explanation of the legal requirement on the supplier to supply the relevant information to GEMA, how that data will be stored and updated, a summary of the safeguards in place to protect the customer's interests, and details of how to opt-out or opt-in, as applicable). The CMA considers that the First Contact Communication is therefore capable of satisfying the guidance set out in the Commissioner's submission. Whilst responsibility for developing and refining the First Contact Communication will fall to GEMA, the CMA's expectation is that the final version can be drafted so that it does not involve direct marketing.
18. The Commissioner's submission also notes that a Disengaged Customer's right to prevent the processing of personal data for the purposes of direct marketing must be respected. The CMA acknowledges this concern, and understands that GEMA is giving this careful consideration in conjunction with determining the appropriate model that will be adopted for all customer correspondence associated with the Database Remedy, including the First Contact Communication. For example, GEMA may decide that the First Contact Communication sent to Disengaged Customers that have made a section 11 request should include an opt-in consent.

19. The CMA also notes that the Licence Conditions allow GEMA to specify additional fields of information to be provided by suppliers concerning each Disengaged Customer. This could, for instance, include asking suppliers to identify any Disengaged Customers that have made a section 11 request. As noted above, the Database Remedy allows for flexibility for GEMA to determine how customers are to be prompted, which would include the ability for GEMA, having balanced the risks in question, to decide whether to allow rival suppliers access to certain Disengaged Customers' data. The CMA is aware that certain trials are already underway that will inform GEMA's view.

### **Sensitive personal data**

20. The Commissioner's submission notes the possibility that, in order to be effective for certain Disengaged Customers, the Database Remedy will require the processing of sensitive personal data as defined in section 2 of the DPA. The CMA acknowledges this concern may arise in relation to those Disengaged Customers with particular accessibility or contact requirements stemming from a customer's physical or mental health or condition (such as those who are visually impaired), which would clearly impact the format of any correspondence sent pursuant to the Database Remedy.<sup>7</sup> Such accessibility or contact requirements would need to be disclosed by the supplier to, at least, GEMA, in addition to the Relevant Customer Data specified in the Order.
21. The Commissioner's submission notes that the sharing of sensitive personal data would need to satisfy one of the conditions in Schedule 3 of the DPA. In practice, this would require the customer specifically to opt-in to their sensitive personal data being processed in the manner contemplated by the Database Remedy.
22. In order to address the Commissioner's submission on this issue, the CMA has amended the Order, Licence Conditions and Explanatory Note to provide for the First Contact Communication to include an opt-in consent in respect of any sensitive personal data as defined in section 2 of the DPA.<sup>8</sup> The CMA would also expect GEMA to take into consideration the need to comply with Schedule 3 of the DPA in the context of any onward sharing of sensitive personal data to rival suppliers.<sup>9</sup>

---

<sup>7</sup> The CMA consider that other forms of sensitive personal data (as defined in the DPA) would be significantly less likely to be relevant to the Database Remedy.

<sup>8</sup> See Article 4.4(d) of the Order.

<sup>9</sup> See paragraph 86 of the Explanatory Note.

## Practicalities

23. As regards the practicalities identified in the Commissioner's submission, the CMA notes the following:

- **Security of the database** – the Database Remedy envisages that the relevant data will be stored in a secure database maintained and operated by GEMA. The CMA expects that the relevant data will be stored in a secure password protected cloud-based database with robust access controls and appropriate security measures.<sup>10</sup>
- **Onward usage provisions** – as noted above, the Database Remedy envisages GEMA applying access terms and stringent use restrictions before any rival supplier is provided access to the database.<sup>11</sup> In this context, GEMA is preparing data sharing agreements governing the access terms and use restrictions that will apply to suppliers seeking access to the database.
- **Access revocation provisions** – the data sharing agreement noted above should also allow GEMA to terminate the agreements immediately and, therefore, to revoke access to the database for any reason, including where there has been a breach of the agreement by a supplier.
- **Preventing duplication and proliferation of personal data** – the Order allows flexibility for GEMA to determine the format in which the data concerning the Disengaged Customers will be provided by suppliers.<sup>12</sup> The CMA expects GEMA to consider whether to issue guidance to ensure consistency across the data submitted by suppliers.<sup>13</sup> In addition, the requirement on suppliers to update the database at regular intervals (with, at least, monthly frequency) will help ensure the accuracy of the information contained in the database.<sup>14</sup>
- **Ensuring customers actually receive the First Contact Communication** – suppliers will be subject to a legal obligation to send the First Contact Communication<sup>15</sup>. The CMA and GEMA will monitor compliance with this obligation through their ordinary monitoring tools (eg requirement on suppliers to send annual compliance statements to the

---

<sup>10</sup> Paragraph 20 of the Explanatory Note.

<sup>11</sup> Paragraph 83 of the Explanatory Note.

<sup>12</sup> Paragraph 52 of the Explanatory Note.

<sup>13</sup> Paragraph 48 of the Explanatory Note.

<sup>14</sup> Paragraph 57 of the Explanatory Note.

<sup>15</sup> Articles 4.1 and 4.3 to the Order and paragraphs 5 and 6 of the Licence Conditions.

CMA, and GEMA's powers to request information from suppliers concerning compliance with this obligation).

- **How opt-outs from the database would be managed** – as indicated above, the database would be regularly updated such as to address any unintended adverse consequences from the database containing out-of-date information and where the costs of doing so are outweighed by the benefits. The opt-out requests will, in principle, be sent directly by the disengaged customers to the existing suppliers. The Database Remedy requires suppliers to keep a record of any opt-out requests from disengaged customers (including the means by which the disengaged customer has opted out).<sup>16</sup> The CMA expects GEMA to direct opt-out requests to the relevant supplier when such requests have been sent directly to GEMA by the disengaged customers or a third party.<sup>17</sup> The Database Remedy also requires suppliers to provide (upon GEMA's request) evidence of opt-out requests received from disengaged customers to facilitate monitoring compliance with the remedy.
- **How to make clear what the opt-outs relate to** – the First Contact Communication will contain clear details of the mechanism for the Disengaged Customer to object to their data being stored on the Secure Database.<sup>18</sup> For the avoidance of any doubt, if a customer opts out in response to the initial First Contact Communication, their data will not be shared with the database at all. If an opt-out request is sent subsequent to a customer's data being shared with GEMA and included in the database, such customer's data will be removed from the database, as part of the update process, and such customer will not receive further marketing communications following such update.

---

<sup>16</sup> Paragraph 10 of the Licence Conditions.

<sup>17</sup> Paragraph 92 of the Explanatory Note.

<sup>18</sup> Article 4.4 of the Order and paragraph 7 of the Licence Conditions.