

Smart Metering Implementation
Programme
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Your ref: URN 11D/957
Direct Dial:
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Dear Colleague,

Response to the consultation on a draft Statutory Instrument the Electricity and Gas (Prohibition of Communications Activities) Order 2012

We welcome the opportunity to respond to DECC's consultation on the draft statutory instrument *The Electricity and Gas (Prohibition of Communications Activities) Order 2012*. We see this instrument as an important first step in building the new regulatory framework governing the activity of the Data and Communications Company (DCC). The definition of the DCC licensable activity will have important implications for the future development of energy markets and related communications markets that provide services to the energy industry. The associated consequential legislative changes are also important in ensuring that the appropriate foundations are laid to establish and regulate DCC.

As the gas and electricity market regulator we have an important role in ensuring the interests of consumers remain protected both during the transition to smart metering and in the enduring framework. We will also play a key role in monitoring and, where appropriate, enforcing compliance with the new DCC licence conditions and associated regulatory framework. The Secretary of State is required to consult on the contents of the Prohibition Order with the Authority and other appropriate persons before making the Order. We welcome continued informal engagement with DECC as the Prohibition Order is refined in preparation for laying it for approval before both Houses of Parliament in the summer.

We set out below our main observations on DECC's proposals in relation to the DCC licensable activity and consequential legal changes, which are the subject of this consultation. Where we have specific comments in relation to the consultation questions, we have set them out in Annex 1 to this letter.

DCC Licensable activity

We see significant benefits from the perspective of regulatory certainty, and the practicalities of regulation, in ensuring that the licensable activity is tightly defined to mitigate the risk of capturing parties that are not intended to be licensed. This is particularly important given that it would be a criminal offence to perform the licensable activity without a licence or a licence exemption. It is also important for licence enforcement purposes, to ensure that the licensable activity is consistent with the activity DCC will be required to perform under its licence.

The proposed definition of the DCC licensable activity is not tightly drafted and consequently is likely to capture current market participants and future market entrants other than DCC, at least on a transitional basis. We recognise that this is partly because

smart metering policy is still evolving and partly because it is difficult to identify a sub-set of DCC's activities that will be unique to it. It is the combination of the activities undertaken by DCC, the scale of these activities and the market it operates within that makes it unique, which is proving difficult to capture. Nonetheless, the approach proposed by DECC would need to place heavy reliance on an exemption regime to sit alongside the Prohibition Order. Clarity on the exemption regime must, in our view, be provided alongside the Prohibition Order. Otherwise there is a high risk of introducing uncertainty for market participants on the rules. This could create unnecessary regulatory barriers which stifle innovation and competition in smart metering related activities and potentially restrict future market development. Furthermore, creating regulation that unnecessarily impedes market growth would clearly not be in keeping with the Government's Better Regulation agenda.

If the licensable activity cannot be crafted more tightly than a general exemption as part of the Prohibition Order to exempt all parties until DCC is operational and providing services would be preferable to case by case treatment. In the lead up to DCC licence grant, the exemption order should be refined to include the necessary specificity to deliver the policy objectives. This will of course be contingent on wider policy considerations that are yet to be concluded such as the level of foundation stage communications contracts that DCC is required to adopt and DCC's obligations in respect of the enrolment of non-compliant meters.

Consequential changes

We note that some of the proposed changes touch on some important policy areas that need to be resolved in challenging timescales, given that the Prohibition Order is a key milestone on the critical path to mass rollout. Generally, where policy is still evolving or under development, it is important not to unduly limit policy options by omitting consequential changes from the Prohibition Order which may provide a future policy solution. Further policy work is needed to specify DCC's role in the current standards of performance regime and in respect of existing redress schemes. As such, we advise DECC to include enabling powers that could be used to integrate DCC into the existing framework if that is what the policy debate eventually concludes. We would be concerned that not including these enabling powers in the Prohibition Order would prematurely close the door to that option.

We recognise and appreciate your constructive engagement with us and other stakeholders thus far on the crafting of the Prohibition Order. We look forward to further discussions in the coming months as the Prohibition Order is refined to be laid before Parliament. If you have any questions about this response in the meantime, please contact .

Yours sincerely,

Annex 1 – Detailed response to consultation questions.

1. Do you think any party other than DCC would be captured by the Prohibition Order as set out? If you consider other parties would be captured please identify them and indicate whether you consider this a short term or long term issue.

Yes, we think that there is a high risk of capturing other parties besides DCC with the draft licensable activity in the Prohibition Order. This is primarily because the definition of smart meter relied upon is very broad. The consultation acknowledges the risk of unintentionally capturing service providers that are engaged in the early deployment of domestic meters with smart capability. We agree that an exemption will be needed at least on a transitional basis. We recently consulted on *"Commercial interoperability: proposals in respect of managing domestic customer switching where meters with advanced functionality are installed"*¹. This consultation included a range of proposals designed to facilitate switching where a domestic customer has a meter with advanced functionality. Included in those proposals is an obligation on large installing suppliers to provide services to a new supplier when domestic customers change suppliers. In our consultation document we said that this service could be provided by third parties. As the smart meter definition is wide enough to include domestic meters with smart capability, it is conceivable that suppliers may choose to make arrangements with the same company to provide communications services to these meters in order to achieve commercial interoperability. In the event that such arrangements materialise, it is likely that an exemption order will be required.

In addition to the scenarios DECC identified in its consultation document, we consider that there are other situations where there is a risk of unintentionally capturing third parties:

- Traditional pre-payment meters have a functional capability of communicating with the meter by using an external electronic communications network. Under the Master Registration Agreement, suppliers assign an agent to provide infrastructure services, which shall include processing customer transactions, in respect of that metering Point (a "Pre-Payment Meter Infrastructure Provider"). It is therefore conceivable that agents providing the infrastructure that supports the communication of information - where prepayment meters are topped up and the information is communicated over a communications network ultimately to suppliers - could be deemed to be carrying out the licensable activity. If that is the case, where suppliers are using the same agent (which is not unlikely) there is a risk that those agents could be deemed to be carrying out the licensable activity during the transition to DCC go live and potentially throughout the rollout period until traditional pre-payment meters are replaced with smart meters.
- We have further identified instances where parties carrying out smart meter related activities may be caught by the licensable activity and therefore could require an exemption. For example, equipment manufacturers, meter installers and meter operators may all need to have two-way communication with the meter during the installation and commissioning process. Although undertaking this activity in itself would not breach the Prohibition Order, where a provider is contracting with all domestic suppliers to provide their respective services, arguably a small element of their service (not the entirety of it) would be the licensable activity of *"Making arrangements with each domestic supplier to provide a service, for such suppliers, of communicating relevant information to and from smart meters installed in domestic premises."* To avoid inadvertently capturing these parties, we would suggest considering whether the *"provide a service"* part of the licensable activity could be crafted in such a way as to clearly exempt market participants

¹<http://www.ofgem.gov.uk/Markets/sm/metering/sm/Documents1/Commercial%20Interoperability%20Consultation%20Letter.pdf>

involved in the manufacture, installation, commissioning and operation of smart metering equipment.

2. *Do you have any views on the definition of a smart meter set out in the draft Order?*

We note that the definition of smart meter includes a very limited set of functionality and therefore has the potential to capture any meters with advanced functionality and traditional meters operating in pre-payment mode. Generally, we would support a tighter definition of smart meter that includes more detailed functionality to mitigate the risk of capturing parties providing services to other types of meters. We suggest that DECC considers including other functional requirements in the definition with a view to avoiding the capture of other meter types and achieving consistency with the vires set out in section 88 of the Energy Act 2008. We also support the use of a consistent definition of smart meter throughout the regulatory framework, where possible, to ensure continuity and clarity of obligations on licensees and industry participants.

3. *Do you have any further comments on the approach being adopted to structuring the licensable activity?*

We recognise that crafting the licensable activity for DCC is a difficult task given that much of the related policy is still developing and may evolve over time. Also, the DCC activity of contract management and procurement is a generic function, not something unique to DCC, which itself imposes some constraints on the definition. Given this uncertainty, the approach adopted runs a high risk of capturing parties that are not intended to be licensed. Nonetheless, it is vitally important to provide certainty to market participants on the rules, to avoid stifling competition and innovation in existing and emerging markets and imposing unnecessary regulatory barriers. The approach adopted places heavy reliance on the exemptions regime to achieve this. Therefore, it follows that the exemption regime must be as clear and transparent as the Prohibition Order itself. Our preference would be for a Class Exemption Order on an enduring basis with case by case treatment providing a safety net if needed. A Class Exemption Order would provide certainty, consistent treatment and administrative efficiency.

4. *Do you have any comments on the draft licensable activity as set out in article 4 of the draft Order (Annex 2)?*

We have no specific comments on the legal drafting.

5. *Do you have any comments on the conclusions set out in respect of the proposed consequential amendments or on those assessed as unnecessary?*

We note that these changes touch on some important policy areas that need to be resolved in challenging timescales given that the Prohibition Order is a key deliverable on the critical path to mass rollout. Where policy is still evolving we advise against disregarding consequential amendments that could deliver future policy solutions. In some cases the consequential amendments provide enabling powers which do not necessarily have to be used from the outset. However they provide a framework to treat DCC in the same way as existing licensees, should there be a policy reason to do so. We would caution against closing the door on amendments unless policy is fully concluded in those areas. Where policy is still developing it would be sensible to include the enabling power so that future policy options are not unduly limited.

6. *Do you have any comments on the consequential amendments as set out in the draft Order?*

We have no specific comments on the legal drafting.

7. *Do you think that the DCC should be included in the standards of performance framework? Do you have any general views on the regulation of DCC's relationship with consumers?*

Although DCC will not be a consumer facing organisation, it could have the technical capability to disconnect customers, either on instruction or as a result of the actions of its service providers. Therefore it is important that there are appropriate safeguards in place to ensure appropriate customer protection in this area. Currently, customers are entitled to receive penalty payments from their DNO or GDN under particular circumstances where they have suffered an interruption. There are also protections for consumers in relation to complaint handling and consumers are entitled to seek redress from the Ombudsman under particular circumstances. It is important that introducing DCC into the regulatory framework, does not remove or dilute these existing consumer protections.

We are not proposing that DCC should have a consumer facing role under the existing consumer protection arrangements. However, in order to maintain the current levels of protection afforded to customers under this framework, it may be necessary for DCC to have some sort of role. Further analysis is needed to determine exactly what DCC's role should be. This may be merely to cooperate with other licensees that are subject to the arrangements or it may be that in order to maintain current levels of protection, DCC should be liable for penalty payments that could be passed on to customers via their supplier. We would caution against DCC being subject to a separate set of arrangements under the SEC, as is discussed in the consultation document. We think it would be difficult to maintain a coherent set of consumer protection arrangements if DCC is governed by a different instrument to the rest of the industry.

Our view is that there needs to be further policy work to specify exactly what DCC's role will be within the existing consumer protection framework. However, in the meantime we strongly advise that the enabling powers to make guaranteed standards of performance in respect of DCC should be included in the Prohibition Order to avoid closing the door on the possibility of including DCC within the existing framework. As such, we strongly support the inclusion of enabling powers under the Electricity Act (similar to sections 39 and 39A) and under the Gas Act (similar to sections 33A and 33AA) to allow the Authority, with the consent of the Secretary of State, to make regulations prescribing standards of performance for DCC. We also suggest that DECC considers including an enabling power to make a redress scheme in respect of DCC so that detailed policy consideration can be given to this aspect too.

8. *Do you consider it necessary for the DCC (or its service providers) to be considered a "statutory undertaker"? Please explain the reason for your answer.*

We share the Government's initial view that the nature of DCC itself is such that these additional protections should not need to be extended to it.