ENERGY
RETAIL
Association

Response to DECC's Smart Metering Implementation Programme "a consultation on a draft Statutory Instrument *the Electricity and Gas (Prohibition of Communications Activities) Order 2012* "

23rd March 2012

Overview

The ERA welcomes the opportunity to respond to DECC's latest consultation on the draft Statutory Instrument "The Electricity and Gas (Prohibition of Communications Activities) Order 2012. The establishment of the monopoly Data Communications Company (the DCC) is a key component of the arrangements required to support the roll-out of smart metering in Great Britain, and it is essential that a robust and fit for purpose legal and regulatory framework is put in place to support it.

Energy suppliers are already installing smart meters ahead of the Government's mandated roll-out, all supported by individual and bespoke communications arrangements to deliver connectivity between suppliers and their installed smart meters. Many of these arrangements are likely to remain in place up to, and in some case, beyond the point at which the DCC licence award is granted and fully operational. It is essential that the Prohibition Order is structured in a manner that does not inadvertently or unintentionally capture the communications services being provided to support these early smart meter installations.

The ERA recognises that there are still a number of key policy decisions for Government to make in relation to the services and activities associated with the DCC, but also support the need to put in place the appropriate legal and regulatory framework to support the forthcoming smart meter roll-out and enduring industry arrangements in order to provide appropriate certainty for parties. As such, there will be some decisions associated with the setting of the Prohibition Order that may have to be made based on some well-grounded assumptions. Whilst this is inevitable, industry and Government must work together to ensure that the Order is set based on as many firm decisions and requirements as possible in order to deliver the certainty required.

Question 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.

ERA Response: There is some concern that some other parties could potentially be captured. The first is the potential for existing prepayment meters to be captured under the proposed definition of 'smart meter' as described in our response to Question 2. Secondly, there is a view that existing communications service providers could be unintentionally captured as described in our response to Question 3.

Some of these concerns may well be dealt with under any proposed exemption arrangements. The ERA and its members believe that a proportionate exemption regime should be implemented co incident with the Prohibition Order coming into force. The ERA's members all agree that any such

arrangements will need to be robust in order to provide certainty to all affected market participants that their current services are able to continue for as long as necessary without being inadvertently captured by the Prohibition Order. If exemptions are not defined and specific enough at the outset, there is a concern that the process for making additional exemptions at a later stage will take unnecessary and unavoidable time to resolve.

Question 2: Do you have any views on the definition of a smart meter as set out in the draft Order?

ERA Response: We recognise that Government is keen to ensure the Prohibition Order only captures the intended category of meters and agree it's important there is only one consistent definition for everyone to refer to. Any agreed definition must be able to be changed or updated in the future as technology (and potentially requirements of stakeholders) evolves over time. It may therefore be appropriate for any definition within the Prohibition Order to be a higher-level definition, and then making reference to a lower level as defined in the Smart Energy Code (the SEC). This would obviate risk of subsequent inconsistencies opening-up between definitions. An alternative approach could be to use the same definition as will be used as part of the forthcoming EU notification process.

The ERA and its members do recognise that it is very difficult to satisfy the views and opinions of every party on what the definition of a smart meter should be. So getting the right level of definition agreed for the Prohibition Order is important.

In terms of the current definition, many of the ERA's members share the view that under the current proposed draft definition, there is a danger that existing prepayment key meters in electricity, and Quantum prepayment meters in gas could be captured. Both of these types of meter currently enable information to be communicated to or from it using an external communications network.

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

ERA Response: There are a number of areas where the ERA's members remain concerned with the structuring of the licensable activity as proposed.

Some of the ERA's members are concerned that there is still uncertainty that the prohibition as drafted may capture some existing communications service providers unintentionally. It is likely to be difficult for those parties to gain sufficient comfort that they will not be captured by the

prohibition order without sight or details of what is likely to be included in any general transitional exemption.

There is some concern with the conclusions relating to narrowing the scope of communications to and from the smart meter. One of the key decisions made by Government in the very early stages of the SMIP, was that all communications to and from smart meters must be through the DCC – that suppliers' or other parties would not communicate with smart meters directly. One of the key reasons for this decision was to help keep the end-to-end infrastructure secure. In seeking to narrow down the scope of licensable activity, the consultation appears to suggest that the DCC might not be the sole provider of the communication to and from smart meters – in direct contradiction of previous Government decisions.

We do not believe this is Government's intention. All industry discussions to date have concluded that only the DCC will communicate to and from smart meters, taking instruction from authorised DCC users who are signatories to the Smart Energy Code. One category of DCC users could be those users providing non-energy related services that could utilise the communications solution for smart meters – these are outside of the core and elective 'regulated' services that the DCC must provide. It is the 'non-energy related services' that are outside of the DCC's regulated activity. The ERA would like Government to clarify this point at the earliest opportunity.

Finally, the ERA's members all agree that it is important that the Prohibition Order is clear that the DCC need only contract with Active licensed suppliers. There are a number of supply licensees who are not active, and are unlikely to either want or need to interact or contract with the DCC if they have no intention of operating in the competitive market, and it would appear wholly sensible not to place unnecessary administrative burdens on either party to put in place contractual arrangements that will never be used. In terms of determining whether or not a licensed supplier is active, there are existing arrangements in place (used by Ofgem, and in other industry codes and agreements such as the BSC) and consideration will need to be given as to whether they can be applied or utilised as part of the Prohibition arrangements.

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

ERA Response: No, all of the activities listed appear to be relevant.

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

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ERA Response: No, the ERA is comfortable with the conclusions as set out. We also agree with Government's view that amendments to the Consumers, Estate Agents and Redress Act (2007) (CEAR) to extend arrangements to the DCC are not appropriate.

The DCC's customers are suppliers, network operators and other 3rd party SEC signatories, and any redress will be dealt with contractually. The DCC is, and is likely to remain invisible to consumers, and is effectively just another agent operating under contract to suppliers. As such, any complaints that relate to any aspect of service provided by the DCC must be directed to the supplier for the supplier to resolve with its customer. When adding the expectation that the DCC is not, and is unlikely to have any direct customer contact (save any unforeseen arrangements yet to be decided via Government policy), the DCC will not have the relevant resources to deal with customer complaints.

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

ERA Response: No, the ERA has no comments to make.

Question 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?**

ERA Response: No. We agree with Government's view that the DCC is not a consumer facing organisation and energy consumers will have no direct interaction or relationship with the DCC. The ERA therefore does not believe the DCC should be included in the standards of performance framework.

Any standards of performance should be included within the Smart Energy Code, along with any appropriate compensation regime.

Question 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.

ERA Response: The possibility that the DCC will be a 'statutory undertaker' is, perhaps, an unintended consequence of the reference to its licensable activity in 6(1) of the Electricity Act 1989. However, ERA members are not at all persuaded that it will ever be necessary for the DCC to perform such a role. Rather, we would suggest that where similar provisions exist in the Communications Act, these might be more likely to apply to any relevant matters contemplated in the DCC's licence and to the activities of the DCC's Communications Service Providers.

However, if it is the Government's view that the DCC will need to exercise rights and obligations under Schedule 16 of the Electricity Act 1989, then we would be concerned to ensure that similar provisions are made with regard to the Gas Act 1986, or it may give rise to concerns that the rights do not apply to Gas only

installations. Early clarification on this issue would be beneficial.

For the avoidance of doubt, if it is determined that the DCC or its appointed service providers do require, or may benefit from statutory undertaker powers, then the ERA's members are clear that this should not be construed as conferring a right on the DCC or its service providers to directly contact consumers. As discussed elsewhere in this response, the DCC is not expected to be a customer facing organisation, and is likely to be all but invisible to end users. It could be highly confusing should consumers start to receive direct contact from the DCC, one of its service providers, or any agent acting on behalf of either, and any such contact should be from suppliers.

Of course, there may be extreme exceptions to this where, for example, Government Policy decisions dictate that the DCC needs to procure specialist communications services for certain property types and one of its service providers' employees needs to speak to occupiers of the building as part of an installation or maintenance visit. However, we would expect such circumstances to represent rare and exceptional events.