The Information Commissioner's response to the Competition and Market Authority's "Energy market investigation: notice of possible remedies" paper.

The Information Commissioner's role

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 ("DPA"), the Freedom of Information Act 2000 ("FOIA"), the Environmental Information Regulations ("EIR") and the Privacy and Electronic Communications Regulations 2003 ("PECR").

He is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

The Information Commissioner welcomes the opportunity to respond to the Competition & Market Authority's (CMA) paper: *"Energy market investigation: notice of possible remedies"*. The paper addresses a number of issues, not all of which fall within the remit of the Information Commissioner. This response focuses on those questions covering areas that may have an impact on information rights and privacy.

DPA and PECR: overview

The DPA is concerned with the processing of "personal data". Personal data is data which relates to a living individual who can be identified from that data either itself, or in combination with other information. The DPA sets out a number of principles that organisations processing personal data must comply with, and a copy of these is attached for reference[1]

PECR sets out detailed rules relating to electronic direct marketing by email, phone and text message. Our Guidance on Direct Marketing[2] explains that direct marketing is not limited to advertising goods or services for sale; it also includes promoting an organisation's aims and ideals. Messages which include some element of marketing are still subject to the same rules, even if marketing is not the message's primary, or only, purpose.

[1] See Annex 1
[2] https://ico.org.uk/media/for-organisations/documents/1555/direct-marketing-guidance.pdf

When a domestic customer or sole trader enters into a contract for the supply of energy, this will inevitably involve the processing of their personal data. Customers will also receive communications from their supplier and other organisations about their energy supply. Some of these communications will simply be service messages. However, any communication that promotes a product, service, aim or ideal (such as additional services, different tariffs or even simply the idea of switching to a cheaper tariff) is likely to be considered direct marketing and therefore subject to the controls on such activities contained within the DPA and PECR.

The Commissioner is also interested in the ongoing roll out of smart meters[3] and the use of information generated by smart meters. The Article 29 working party has recognised that smart meters *"…allow the network operator (…), energy supplier and other parties to compile detailed information about energy consumption and patterns of use as well as make decisions about individual consumers based on usage profiles. Whilst it is acknowledged such decisions can often be to the benefit of consumers in terms of energy savings, it is also emerging that there is potential for intrusion into the private lives of citizens through the use of devices which are installed in homes. It also marks a shift in our fundamental relationship with energy suppliers in that consumers have traditionally simply paid suppliers for electricity and gas that has been supplied. With the advent of smart meters, the process is more complex in that the data subject will provide suppliers with insights into personal routines[4].*

We are therefore keen to ensure that any remedies implemented by the CMA that will involve the use of smart meter consumption data are not only compliant with the DPA and PECR, but also take into account the requirements of the smart meter Data Access and Privacy Framework[5].

The Commissioner is generally supportive of any remedies implemented by the CMA to increase competition in the energy market for the benefit of consumers, as long as those steps do not conflict with the obligations placed upon organisations by the DPA and PECR, and properly take into account the rights that these laws give to individuals. The Commissioner is happy to work with the CMA to ensure that this is the case. To this end, we have responded to the suggested remedies that have the potential to interact with the requirements of the DPA and PECR.

[3] https://www.ofgem.gov.uk/gas/retail-market/metering/transition-smart-meters
[4] http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp183_en.pdf
[5] https://www.gov.uk/government/consultations/smart-meter-data-access-and-privacy

Remedy 4a – Measures to address barriers to switching by domestic customers

Paragraph 59

(c) Should Price Comparison Websites (PCWs) be given access to the ECOES database (meter point reference numbers) in order to allow them to facilitate the switching process for customers?

(ii) are there any data protection issues we should consider in this respect?

It is our understanding that the Electricity Central Online Enquiry Service (ECOES) database contains all Meter Point Administration Numbers ("MPANs") in the UK. An MPAN uniquely identifies an electricity supply point, which is often a particular property. Where data is linked to the MPAN of a domestic property (or a commercial property where the business owner is a sole trader), it is likely to be personal data, even if the name of the individual (or individuals) who live there is not known. This is because an organisation is still able to single out a particular property and make decisions or take actions which will have a direct effect on the resident of that property. This issue was considered by the Article 29 Working Party of data protection authorities in Europe.

Any access to ECOES by PCWs would therefore need to be compliant with the DPA. This includes having a legitimate justification for accessing the information held on the ECOES database, and ensuring that individuals are made aware of what information is being accessed and why. As the reason for a PCW accessing ECOES would be to facilitate switching between energy suppliers, it would appear that a PCW would only be justified in accessing the ECOES database if it was as the result of a direct request from an individual for the PCW to facilitate switching to another supplier.

Paragraph 60

(a) Does the 'Midata' programme, as currently envisaged, provide sufficient access to customer data by PCWs to facilitate ongoing engagement in the market? Should PCWs – with customer permission – be able to access consumer data at a later date to provide an updated view on the potential savings available?

We cannot comment on whether the midata programme, as currently envisaged, provides sufficient access.
However, the first principle of the DPA requires that personal data is processed fairly and lawfully. In practice, this means that a data controller must:

- have legitimate grounds for collecting and using personal data;
- not use the data in ways that have unjustified adverse effects on the individuals concerned;
- be transparent about how it intends to use the data, and give individuals appropriate privacy notices when collecting their personal data;
- handle people's personal data only in ways they would reasonably expect; and
- make sure it does not do anything unlawful with the data[6].

In order to comply with the first principle, a PCW must clearly inform a customer if it wishes to access personal data that the customer has provided (via Midata or any other method) at a later date to provide an updated view. The PCW must also be able to satisfy a condition for processing under schedule 2 of the DPA[7].It should also be noted that the smart meter Data Access and Privacy Framework currently requires that third parties wishing to access smart meter consumption data have the customer's consent to do so. This would include PCWs. PCW's would therefore need to have the customers consent (i.e. "opt-in") to access any smart meter consumption data at a later date.

[6] https://ico.org.uk/for-organisations/guide-to-data-protection/principle-1-fair-and-lawful/
[7] See Annex 2

Furthermore, any message sent to an individual for the purpose of encouraging them to switch tariff is likely to be direct marketing and therefore subject to the requirement of the PECR. One of these requirements is that when an organisation sends a direct marketing communication by means of an "electronic message" (e.g. a text message or email), it has the recipient's consent to receive such messages.

Remedy 8 – Introduction of a new requirement into the license of retail energy suppliers that prohibits the inclusion of terms that permit auto-rollover of microbusiness customers on to new contracts with a narrow window for switching supplier and/or tariff

It is common practice in some industries for firms to automatically renew a contract unless the individual contacts the organisation and states that they do not wish this to happen (for example, insurance policies).
In order to ensure that the processing of personal data for the purpose of such a contract is fair, customers must be made aware that the contract will automatically renew at the end of its term and what action they need to take if they do not want this to happen. The customer should also be sent a reminder towards the end of the contract term, reminding them that the renewal date is approaching and what steps the individual should take if they do not want the contract to automatically renew.

As microbusinesses will include sole traders, the above requirements would apply to microbusiness customers.

Paragraph 83

(c) What is the minimum or maximum notice period that customers should be required/allowed to give in order to exit a contract that they have been rolled onto?

We are not in a position to say what the minimum or maximum notice for cancelling a contract should be. However, as explained above, the notice period should be clearly communicated to the account holder at the time they enter into the agreement and in the reminder letter that should be sent to them before the auto-renewal date.

(d) Should energy suppliers be required to inform customers that they are nearing the end of their contract and prompt them to switch?

As explained above, a reminder should be sent to the customer at an appropriate time before the contract automatically renews.

The inclusion of information which prompts the individual to switch to a different tariff is likely to make the communication a direct marketing communication. It would therefore need to be compliant with the direct marketing requirements of the DPA and, if sent electronically, PECR. Our Guidance on Direct Marketing explains these requirements in detail, and we would be happy to provide further advice in this regard.

Remedy 9 – Measures to provide either domestic and/or microbusiness customers with different or additional information to reduce the actual or perceived barriers to accessing and assessing information

Paragraph 84

(b) When customers seek to switch tariffs, are they given enough/too much information on the terms and conditions of their new contract?

As explained above, one of aspect of processing information "fairly" is to explain to an individual how their personal data will be processed. However, overwhelming an individual with too much information can make it difficult for them to identify the information that is important.

Our recommended approach would therefore be to explain the important points in a clear, easy to understand way, and then direct an individual to the full terms and conditions of the contract, for example by providing a link should they require more information in a layered approach.

The Commissioner produces guidance for organisations on how to explain their data processing activities in a clear, easy to understand manner[8].

[8] https://ico.org.uk/media/for-organisations/documents/1610/privacy_notices_cop.pdf

Remedy 10 – Measures to prompt customers on default tariffs to engage in the market

Paragraph 90

(a) What information should be included in the prompts to customers on default tariffs in order to maximise the chances that they are acted upon?

(i) Should customers who have failed to engage be informed that they are 'no longer under contract for energy', that they have been 'rolled onto a safeguard tariff', or an alternative message, for example, emphasising how many customers in their area have switched in the last year?

As the running of a customer's account will involve processing that customer's personal data, customers should be informed of any changes to their tariff to ensure compliance with the fair processing requirements of the DPA.

As explained above, material encouraging an individual to switch tariff, whether sent on its own or included in another communication, is likely to be considered direct marketing and would therefore need to comply with the requirements of the DPA and PECR.

(b) How should prompts be communicated to customers? For example, there is some evidence from the financial sector that text prompts are particularly effective at raising awareness in terms of overdrafts etc.

A communication prompting an individual to switch tariff is likely to be considered direct marketing subject to the requirements of the DPA and, where the communication is sent electronically, PECR.

Direct marketing text messages are governed by regulation 22 of PECR, which states that an organisation cannot send direct marketing by text without the consent of the individual (although there is a limited exception to this rule in situations where the organisation has a particular form of existing relationship with the customer, which is referred to as 'soft opt-in'). For more information, please see our guidance on regulation 22 of PECR[9].

[9] https://ico.org.uk/for-organisations/guide-to-pecr/electronic-and-telephone-marketing/electronic-mail-marketing/

Whatever method of communication is used to prompt individuals into switching tariffs, such messages are likely to be direct marketing. As mentioned above, the CMA should ensure any requirements placed upon organisations do not conflict with their obligations under the DPA or PECR.

(d) Who should provide the prompts: customers' energy suppliers, Ofgem or another third party?

As most customers' direct relationship will be with their energy supplier, we would consider the supplier to be the most appropriate organisation to send any message prompting an individual to consider switching tariff.

It seems unlikely that customers, particularly those who have failed to engage with the market, would expect to receive contact from third parties in relation to their tariff. Indeed, many customers may be confused by such a message and concerned that details of their tariff have been shared with another organisation.

It would also be more difficult for a third party to comply with the requirements of PECR where prompts are sent by electronic means. If sending the prompt by text or email the third party would not be able to rely on the soft opt-in under regulation 22 of PECR. The third party would therefore require the customer's prior consent to send the message in question. A customer who has failed to engage with the market may be unlikely to have provided such consent to be contacted by third parties about their tariff.

(f) Is there benefit in others in the markets, such as rival energy providers or TPIs, being made aware of which customers remain on default tariffs (or have been rolled on to the safeguard tariff)? In this respect, data protection issues would need to be carefully considered. The ability of other market participants to identify inactive customers, however, has the benefit of potentially encouraging the customer to switch tariffs once out of contract.

Direct marketing is one of the major concerns the public contact the ICO about. Research conducted by the Department of Energy and Climate Change (DECC) into consumer attitudes towards smart meters found that *"the overwhelming concern was the possibility that data collected via a smart meter might lead to more unwanted marketing communication"*[10]

[10] https://www.gov.uk/government/consultations/smart-meter-data-access-and-privacy

The ICO is keen to ensure that data protection does not present an unnecessary burden to appropriate data sharing, but our initial thought is that the sharing of details of customers on a default tariff with other suppliers, or other third parties, is problematic. Any list of customers that remain on default tariffs would effectively become a marketing list, and the sharing of this list would be likely to result in those customers receiving a large amount of direct marketing communication encouraging them to switch suppliers.

In the event that rival energy suppliers or TPIs were to contact individuals by means of text message or email, they would also need the customer's prior consent to do so. It seems unlikely that customers who are not engaged with the market would provide this consent, and it is therefore difficult to see how any third party supplier or TPI could contact a customer in this manner in a way that complies with PECR.

Remedy 13 – Requirement that domestic and SME electricity suppliers and relevant network firms agree a binding plan for the introduction of a cost-effective option to use half-hourly consumption data in the settlement of domestic electricity meters

Paragraph 103

(c) What are the principal barriers to the introduction of a cost-effective option to use half-hourly consumption data in electricity settlement for profile classes 1-4? How could these be reduced?

and

(d) Should the use of half-hourly consumption data in settlement for these profile classes (or certain of them) be optional for energy suppliers, or should it be mandatory? What are the advantages/disadvantages of each approach?

As discussed in the Article 29 working party opinion on smart meters, there is potential for intrusion into the private lives of individuals when organisations process consumption data derived from smart meters, due to the insights this information can give into an individual's private activities.

The more granular consumption data is, the more can be inferred about the activities of individuals from that information and therefore the greater the risk of possible intrusion into their private lives. As half-hourly

data are the most granular consumption data that smart meters can produce, the detail with which an individual's activities can be profiled is higher and the risk of intrusion therefore greater...

In recognition of this, the smart meter Data Access and Privacy Framework currently:

- Allows suppliers to access monthly (or less granular) energy consumption data, without customer consent, for the purposes of billing and fulfilling any statutory requirement or licence obligation;

- Allows suppliers to access daily (or less granular) energy consumption data for any purpose except marketing, with a clear opportunity for the customer to opt-out; and

- Requires that suppliers must receive explicit (opt-in) consent from the customer in order to access half-hourly energy consumption data, or to use energy consumption data for marketing purposes.

It would therefore not be possible to make the use of consumption data that was more granular than monthly a mandatory requirement. Suppliers could use daily (or less granular) data as long as the customer had been given the opportunity to opt-out, but they could not use half-hourly data unless the customer had explicitly opted-in to this.

We would also mention that DECC's research into consumer attitudes found that: *"with an increase in granularity of energy consumption data collected (i.e. from monthly to daily, to half-hourly etc.), consumers started to feel more sensitive"*[11]. In view of this and the potential conflict with the smart meter data access and privacy framework, we would be concerned about any moves to make the collection of half-hourly data by suppliers mandatory.

As set out at the start of this response, the Commissioner is generally supportive of action that will benefit consumers. To this end, the Commissioner would be happy to work with the CMA to ensure that remedies benefitting consumers can be implemented in a way that does not conflict with organisations' obligations under the DPA and PECR, and takes into account individuals' rights under information rights law.

[11] https://www.gov.uk/government/consultations/smart-meter-data-access-and-privacy

Annex 1 – The Data Protection Principles (Schedule 1, Part 1 of the DPA)

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

    (a) at least one of the conditions in Schedule 2 is met, and

    (b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4. Personal data shall be accurate and, where necessary, kept up to date.

5. Personal data processed for any purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6. Personal data shall be processed in accordance with the rights of data subjects under this Act.

7. Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Annex 2 – The conditions for processing (Schedule 2 of the DPA)

1. The data subject has given his consent to the processing

2. The processing is necessary –

    (a) for the performance of a contract to which the data subject is a party, or

    (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary –

    (a) for the administration of justice,

    (aa) for the exercise of any functions of either House of Parliament,

    (b) for the exercise of any functions conferred on any person by or under any enactment,

    (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

    (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied