

The Information Commissioner's response to the public consultation from the Department for Business, Energy and Industrial Strategy (BEIS) entitled *Domestic energy retail consultation: opt-in switching and testing opt-out switching*

About the ICO

1. The Information Commissioner's Office (ICO) welcomes the opportunity to respond to the BEIS consultation *Domestic energy retail consultation: opt-in switching and testing opt-out switching*.
2. The ICO has responsibility for promoting and enforcing data protection and information rights. This includes responsibilities under the UK General Data Protection Regulation (UK GDPR), the Data Protection Act 2018 (DPA), the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR) and the Privacy and Electronic Communications Regulations 2003 (PECR). The ICO is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The ICO provides guidance and support to individuals and organisations, aimed at helping organisations to comply, and it takes appropriate action when needed

Summary

3. BEIS proposes new primary legislation which will require energy suppliers to share consumers' personal data and other information with a delivery body and potential new suppliers for the purposes of creating personalised offers of alternative energy tariffs for consumers. These proposals aim to boost competition in the energy market by helping consumers to switch to more competitive deals. The main part of the scheme gives consumers the ability to 'opt-in' to switching once they have received details of a better tariff. BEIS also intends to test switching in some situations that will take place unless the consumer actively exercises their right to 'opt-out'.
4. Public trust is vital to the effective use of personal data. Responsible, safe and trusted data sharing and data use can deliver economic and wider public benefits. Data protection legislation and PECR provide important checks and balances while also supporting business success and the delivery of services to consumers. In principle, the ICO welcomes the responsible use of personal data to support an active, competitive energy market and to help consumers benefit from cheaper energy costs.
5. BEIS will need to be satisfied of the necessity and proportionality of the processing of consumers' personal data. These proposals will therefore need to be kept under review, particularly given the rapidly changing nature of the energy providers and market.

6. BEIS is seeking views on a range of potential options, and we have therefore not sought to provide exhaustive comment, instead highlighting some general principles engaged by these proposals including the potential impact on individuals who have rights to data protection under UK GDPR, whom we refer to as consumers in this response. BEIS has already engaged with the ICO and we welcome continuing engagement as the policy develops, both in relation to any primary or secondary legislation that might be proposed, and in any implementation phase.

'Opt-in' switching

7. A data protection impact assessment (DPIA) is a helpful tool in adopting a privacy by design and default approach as required under Article 25 UK GDPR. Data controllers must undertake a DPIA where the processing of personal data is likely to result in a high risk to individuals.¹ More generally, the process of preparing a DPIA assists controllers in identifying and minimising risk and in formulating suitable mitigating steps. A thoroughly considered DPIA is likely to address many of the issues we refer to in this response.
8. We understand from our current engagement with BEIS that work is ongoing on a DPIA and we look forward to understanding BEIS' settled view of the risks arising and the mitigations it proposes. As part of its DPIA and in consultation with its data protection officer, BEIS will need to give detailed consideration to the personal data in scope. It will be essential to map out the anticipated data flows to clarify how the data will be processed and when data sharing takes place (and who with), as well as clarifying matters such as the controllership of personal data throughout its journey, and assessing the potential impact on the individual. The ICO's guidance on data protection² and our detailed data sharing code of practice³ that now has statutory force, will be of assistance in this respect.
9. The personal data to be processed needs to be adequate for the purpose but limited to what is necessary. Overall, the processing should be necessary and proportionate, and it must also be fair. In this respect, BEIS will need to take account of consumer expectations, and be sure that it has considered and documented in its DPIA the range of options it has considered to ensure that its policy objectives are ultimately achieved in the most privacy-friendly way.
10. In particular, although the consultation refers to 'opt-in' switching and the testing of 'opt-out' switching, the data sharing proposed works on an 'opt-out' basis in both cases. This presents challenges in implementation for both parts of the scheme to ensure that there is adequate transparency and the

¹ See Data protection impact assessments | ICO

² Guide to the UK General Data Protection Regulation (UK GDPR) | ICO

³ Data sharing information hub | ICO

avoidance of miscommunication. We welcome further clarity about how BEIS proposes to address this.

11. In considering BEIS' approach to less privacy-intrusive options, we would also welcome understanding whether suitable alternative tariffs can be generated from non-personal information, perhaps including energy usage and details of an existing tariff. If this is feasible, it may mean that there is no need to process personal data until a consumer elects to opt-in to switching, or it might reduce the amount of personal data required. This would be particularly relevant in a scenario where there is no better tariff available and such consumers are not stated to be a priority for switching.
12. BEIS has yet to decide who will send the prompt to switch. It has highlighted possible problems in incumbent suppliers doing so, including their potential difficulty in calculating the cheapest market offering. We await BEIS' conclusions on this point, but would underline that if incumbent suppliers issue the prompt, consumers' personal data need not be shared until and unless they engage with the switching process. This would be less intrusive and would give them greater control over their own personal data.
13. We also look forward to hearing more about the personal data that will be required to identify the individual cohorts of consumers for 'opt-in' switching. Use of objective criteria, such as the length of time that a consumer has been on a default tariff, is likely to be more privacy-friendly, ensuring that excessive personal data is not required for this purpose. If suppliers select consumers for switching, then careful attention will be needed to restrict the data sharing to what is actually required, under the data protection principle of minimisation. The requirements and safeguards of UK GDPR will still apply to personal data that has been processed using personal identifiers or other pseudonymisation methods, but using such methods might help to mitigate some of the risks in processing.
14. Care will also be needed to identify circumstances where there may be profiling or automated decision-making and the steps that will be taken to ensure the appropriate safeguards are in place under Article 22 UK GDPR, including ensuring that this information is brought to the attention of consumers. These matters will need to be included in the DPIA.

Lawful basis

15. BEIS should consider all available lawful bases for processing in their DPIA. To date, BEIS has suggested that suppliers might rely on legal obligation as the lawful basis for processing under Article 6(1)(c) UK GDPR, relying on new statutory provisions requiring them to share personal data with a delivery body. Under UK GDPR, consumers would then have no right to object to the processing, no right of erasure of their personal data, and no right to data

portability. BEIS will therefore need to consider the potential risks this will create and the impact on individuals.

16. BEIS will also need to consider in more detail how the lawful basis for processing will link in with the suggested 'opt-out' from data sharing. Given the nature of the scheme, we assume that any new legislation will allow individuals to opt-out at any time and that it will be easy to do this, free of charge. This would require mechanisms to deal with situations where consumers 'opt-out' after the deadline and after their data has been shared with the delivery body. There should be a clear process to facilitate this, including processes for the deletion of any data shared. However, consumers also need to understand whether they can be included in proposals for future data sharing and switching, and the process to facilitate that. The rationale for BEIS' conclusions on these matters will need to be set out in its DPIA.

Special category data and vulnerable individuals

17. Processing the personal data of consumers with communication needs is likely to involve special category data and will require an additional condition for processing under Article 9 UK GDPR, as referred to in the consultation. The consultation refers to existing processes between third party intermediaries and suppliers to identify consumers who are eligible for the Priority Services Register (PSR), which could also include special category data. It will be important to ensure that all special category data is identified and processed in accordance with data protection legislation and is addressed in a DPIA.
18. The consultation suggests that identifying consumers for the PSR might be included as part of the role of the delivery body. If this is the case, consideration needs to be given to the sources of this information and the nature of any additional data sharing that might arise as a result. In the same way, BEIS will need to clarify the nature of the data sharing required to ensure that those who already receive Warm Homes Discount continue to do so.
19. The consultation does not discuss how suppliers and the delivery body will satisfy themselves of the identity of the consumer. Processes will also be required to address situations where individuals act on behalf of others, especially in the situations of carers or others who manage an individual's bills, but without any formal authorisation in place. Furthermore, some people may become unwell during the switching process. Mechanisms will need to be developed to address such issues.

Transparency and communications with the consumer

20. Transparency and fairness are vital aspects of UK GDPR, which engender public trust, and support initiatives that can help consumers, so these proposals need to ensure that individuals clearly understand their options about the sharing of their personal data, in addition to their choices for switching. This is particularly important as the term 'opt-in' in this consultation refers only to the

switching and not to the sharing of personal data, which operates on an 'opt-out' basis in relation to both parts of the proposal. Individuals will therefore need a meaningful opportunity to 'opt-out' of the data sharing, with a proportionate timeframe for a response that takes into account the lengthy period that they have disengaged. These messages need to be clear about who has sent them and the reasons for the communication, and consumers will need to know if they can change their mind.

21. The consultation suggests that consumers might receive several prompts to engage, but this needs to be carefully balanced. Clear parameters should be set about the amount of contact the consumer can expect, including safeguards to ensure that communications do not become excessive or a nuisance, either at the time of data sharing or switching, or later on.
22. BEIS will need to consider fairness when considering how individuals can exercise their ability to 'opt-out', for example by providing a freepost address or freephone number, to ensure that the 'opt-out' from data sharing is available to everyone, including those who are digitally excluded.
23. When considering the nature of communications with consumers, BEIS will particularly need to take account of the requirements of the Privacy and Electronic Communications Regulations (PECR). These regulations mean that organisations often need an individual's specific consent to send them unsolicited direct marketing on the telephone or by electronic means. Under Article 21 UK GDPR, an individual also has a right to object to the processing of their personal data for direct marketing purposes. These provisions would apply, even if a delivery body were to send marketing information to consumers about other suppliers or the services of third parties.
24. Terminology and tone, in communications to individuals, and particularly ensuring factual and neutral language, will therefore need to be carefully considered, especially when explaining the nature of potential options for switching. For example, any words or phrases that might suggest that an individual is being offered an exclusive deal, or is under pressure to respond, are likely to amount to marketing which will restrict the circumstances in which it might be lawfully sent to them, or mean that that they can object to receiving it.
25. We therefore welcome further engagement on the detail of these proposals, so we can understand how BEIS will meet the principles of transparency and fairness, especially in the planned communications with consumers.

Delivery body

26. The data protection implications arising from processing will depend on the delivery body selected, and the personal data that it will process. Safeguards will be needed to ensure that the delivery body only processes personal data

for the purposes of the switching scheme, as explained to the individual, and data sharing agreements will need to set out the arrangements data sharing participants, as recommended in the ICO's data sharing code.

27. Sharing personal data across a range of delivery bodies, rather than a single entity, is likely to increase the risks of processing, and the necessity and proportionality of such an approach will need particular consideration, if adopted. In particular, additional mitigating measures, especially to ensure that the data protection principles of data minimisation and data security are adhered to, are likely to be required.
28. Clarity is also needed about what will happen to consumers' personal data once it has been shared with the delivery body. This will include the possibility of any follow up engagement after the initial prompt and/or switch, including situations where an individual might be invited to switch again or when a new tariff runs out. We would expect that individuals would have a further opt-out so that they could choose not to receive notifications in future. Data shared initially is likely to be insufficient or potentially inaccurate for such purposes which raises important questions about the retention and deletion of the personal data that will need to be fleshed out in a DPIA.

Testing of opt-out switching

29. In principle, one of the aims of data protection legislation is to put people in more control of their own personal data. At present, there are limited circumstances where a supplier can switch a consumer to another energy provider without their consent.
30. While BEIS does not want to interfere with the ability of energy companies to select their own pricing structures, the proposed interventions, especially in the 'opt-out' testing could impact on consumers' autonomy and data rights, as well as their contractual commitments and personal finances.
31. Many consumers are likely to welcome lower bills, but some of those identified for switching in either part of this scheme could be worried or suspicious about the prompts to switch that they might receive. In the 'opt-out' testing, appropriate attention to transparency and fairness will therefore be even more crucial to ensure that the opportunity to 'opt-out' is meaningful, and that consumers understand how their data will be used, as well as understanding the switching process. This is especially the case as the data sharing and the switching will otherwise take place without consumers' consent.
32. In this respect, the consultation acknowledges that price is not the only driver for apparent disengagement, and this might apply to consumers for 'opt-in' scheme or those in scope for 'opt-out' testing. We particularly welcome understanding more about the safeguards that BEIS intends to implement around the process of the 'opt-out', and particularly the risk that a consumer

who is content to switch in principle, may nonetheless have objections to specific energy suppliers on the basis of factors other than price, for example, because of previous poor service or their approach to environmental issues.

33. Switching under this part of the scheme will mean the termination of consumers' existing energy contracts and the creation of new ones, which will affect the payments they have to make and to whom. Appropriate transparency measures need to ensure that consumers fully understand the process, and will recognise new demands for payments, thus avoiding the risk of falling into debt or increased debt through disengagement.
34. The finalised form of these proposals will need to clarify the extent of any additional data sharing with organisations such as banks and financial institutions. In all cases, strong safeguards will be needed to ensure that consumers' personal data is kept securely and is not used for unauthorised purposes. BEIS will also need to consider whether any specific details of the proposals might give rise to additional risk, for example, the potential for fraud which might arise if new, pre-populated direct debit documentation were to be intercepted.
35. Assessment of the potential risks arising from the processing will need to include additional incidental adverse impacts on consumers arising from the data sharing and subsequent switching, including for those already in debt or with credit balances. For example, any credit checks that might be required as part of the switching under the 'opt-out' proposal could have important consequences for individuals, affecting their credit score.
36. We note the plans for 'reverse switching' to allow consumers to revert to their previous supplier, if they object after the switching has already taken place. However, viewed in the round, BEIS needs to consider the necessity and proportionality of sharing consumers' personal data so widely without the active participation of the consumer in the first place. We therefore welcome further engagement with BEIS so that we might understand more about their approach and the safeguards that they intend to implement.

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