

## ENERGY MARKET INVESTIGATION

### Explanatory Note

#### The Energy Market Investigation (Database) Order 2016

*This note is not a part of the Order*

#### Introduction

1. The Competition and Markets Authority (CMA) published its findings in a report under section 136 of the Enterprise Act 2002 (the Act) entitled *Energy market investigation: Final Report* on 24 June 2016 (the Report).
2. The Report set out the CMA's findings that there are features of the markets for the domestic and SME retail supply of gas and electricity in Great Britain which, alone or in combination give rise to adverse effects on competition (AECs).
3. The CMA decided on a package of remedies to be implemented by it in order to remedy, mitigate or prevent the AECs (and associated detriment) that it found.
4. The Energy Market Investigation (Database) Order 2016 dated 14 December 2016 (the Order) gives effect to one of these remedies, ie the Database Remedy. The Database Remedy involves (a) a requirement on suppliers to disclose to the Gas and Electricity Markets Authority (GEMA)<sup>1</sup> certain details of their domestic and microbusiness consumers who have been on their standard variable, or any other default, tariff for three or more years (stage 1); and (b) a recommendation that GEMA (i) retain the relevant data, (ii) test the operation of the database, (iii) use and, subject to sufficient safeguards being in place, disclose the relevant data (via a secure database) to rival suppliers for the purposes of prompting such customers to engage in the retail energy markets, and (iv) monitor the impact of the database with a view to maximising its effectiveness (stages 2 and 3). The CMA considers that in

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<sup>1</sup> GEMA is the legal entity that has the statutory functions, duties and powers to regulate the gas and electricity markets and it is also the board that provides corporate governance for Ofgem, as its executive arm.

acting upon this recommendation and facilitating customer engagement, GEMA would be assisting the CMA to fulfil its duty to address the AEC pursuant to its functions in section 34 of the Gas Act 1986 and section 47 of the Electricity Act 1989.

5. Section 15 of the Electricity Act 1989 and section 27 of the Gas Act 1986 provide that where the CMA makes an order under section 161 of the Act, such order may also provide for the modification<sup>2</sup> of the conditions of a particular licence, or the standard conditions of licences of any type (including supply licences for gas and electricity) to such extent as may appear to the CMA to be requisite or expedient for the purpose of giving effect to, or taking account of, any provision made by the order.
6. The Order introduces a new Electricity Supply Licence Condition 56, and a new Gas Supply Licence Condition 50 (the Electricity Licence Condition and the Gas Licence Condition, together the Licence Conditions). This Explanatory Note applies to the Order and the Licence Conditions.
7. Nothing in this Explanatory Note is legally binding.
8. Terms defined in the Order, the Electricity Supply Licence or the Gas Supply Licence (including in the Licence Conditions) have the same meaning in the Explanatory Note. In the event of a conflict between this Explanatory Note and any provision of the Order or the Licence Conditions, the Order and Licence Conditions shall prevail.
9. To the extent the Database Remedy involves the processing of personal data, it was designed so as to be compliant with the relevant UK and EU data protection legislation, ie (i) the Data Protection Act 1998 (DPA); (ii) the EU Directive 95/46/EC;<sup>3</sup> the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR); and (iv) the new EU General Data Protection Regulation<sup>4</sup> (collectively, the 'Data Protection Regime') (see paragraphs 95 to 100 below).

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<sup>2</sup> The term 'modification' includes additions, alterations and omissions.

<sup>3</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23/11/1995.

<sup>4</sup> Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

## **Possible consequences for non-compliance**

10. Section 167 of the Act places a duty on any person to whom the Order applies to comply with it. Any person who suffers loss or damage due to a breach of this duty may bring an action.
11. The CMA has power under the Order to give directions, including directions to a person in their capacity as an office holder, for the purpose of carrying out, or ensuring compliance with, the Order.
12. Section 167 of the Act also provides that the CMA can seek to enforce the Order by bringing civil proceedings for an injunction or for any other appropriate relief or remedy.
13. The obligations set out in Parts 2 and 3 of the Order have been introduced into the Electricity Supply Licence and the Gas Supply Licence, respectively. To the extent that the obligations set out in the Order have been introduced into the Gas Supply Licence and the Electricity Supply Licence, GEMA has a duty to monitor compliance and, where appropriate, to use its powers under sections 28 to 30 of the Gas Act 1986 and 25 to 28 of the Electricity Act 1989, including where appropriate by imposing on the licensee a penalty of such amount as is reasonable in all the circumstances of the case. The CMA intends to collaborate with GEMA so as to put in place processes to monitor and ensure compliance with the obligations set out in the Order and associated conditions of the Licence Conditions, where appropriate through enforcement measures.

## **Review of the Order**

14. The CMA has a duty under section 162 of the Act to monitor the operation of the Order. This includes a duty to consider, from time to time, whether the Order should be varied or revoked in the light of a change of circumstances. Suppliers may apply for a variation or cancellation of all or part of the Order on the basis of a change of circumstances, or recommend that the CMA reviews the need for the Order or part of it.
15. GEMA has a general duty, under section 34 of the Gas Act 1986 and section 47 of the Electricity Act 1989, to monitor activities connected with regulated energy activities (including supply) in a manner which it considers will best further its principal objective to protect the interests of existing and future consumers. It similarly has a duty to provide advice, information and assistance to the CMA (on GEMA's own initiative or where expressly requested).

16. In view of these duties, the CMA expects that GEMA considers, from time to time, the need for the Order (and associated obligations set out in the Licence Conditions), and informs the CMA of any change of circumstance which in its view might require the termination or variation of the Order (and any consequential changes to the Licence Conditions).

### **Structure of the Order**

17. The Order is divided into four Parts and has three Schedules:
- (a) Part 1 contains general provisions, which include specifying when the Order comes into force, the scope of the Order and the definitions that are used throughout the Order (and which are also used in this Explanatory Note).
  - (b) Part 2 contains an obligation on suppliers to supply certain customer information to GEMA, and provides details of the manner and timeframe for complying with this obligation.
  - (c) Part 3 contains an obligation on gas and electricity suppliers to send a communication to certain customers, and provides that the contents, format and structure will be determined by GEMA, subject to having the minimum content requirements specified in the Order.
  - (d) Part 4 contains provisions for monitoring compliance, including provisions allowing the CMA to give directions as to compliance with the Order and to require the supply of information for the purposes of monitoring compliance with the Order and reviewing its operation.
  - (e) Schedule 1 contains new Electricity Supply Licence Condition 56.
  - (f) Schedule 2 contains new Gas Supply Licence Condition 50.
  - (g) Schedule 3 contains a Template Database Remedy Compliance Statement.

### ***Part 1 – General and interpretation***

18. Article 1 provides that the Order applies to suppliers, defined as any person authorised to supply gas by virtue of a Gas Supply Licence and any person authorised to supply electricity by virtue of an Electricity Supply Licence. The CMA expects that the Order will, in practice, apply to active suppliers. Article 1 also provides that the Order shall come into force on 15 December 2016. The Order will not be subject to a sunset clause as the CMA considers that the

need for GEMA and/or rival suppliers to identify the Disengaged Customers, and alert such customers to better deals is an ongoing need.

19. Article 2 includes definitions of various terms used in the Order, and in a number of instances cross-refers to terms defined in the Licence Conditions or defined elsewhere in the Electricity Supply Licence or Gas Supply Licence. To the extent possible, the terms used in the Order have been defined to have the same meaning as in the Electricity Supply Licence and the Gas Supply Licence (as applicable). For the avoidance of doubt, when a word or expression has been expressly defined in the Order, the definition set out in the Order shall prevail over other definitions.

## ***Part 2 – Disclosure of Relevant Customer Data to GEMA***

20. The aim of Article 3 of the Order is to impose a legal obligation on suppliers (subject to having complied with the requirements of Part 4 concerning the First Contact Communication) to supply the Relevant Customer Data (as defined below) to GEMA, which GEMA will retain in a secure database.<sup>5</sup> GEMA will use the Relevant Customer Data, and, subject to sufficient safeguards being in place, may also disclose the Relevant Customer Data to rival suppliers for the purposes of prompting customers to engage in the retail energy markets. The CMA has also recommended that GEMA (i) test the operation of the database; and (ii) monitor its impact with a view to maximising its effectiveness. See paragraphs 95 to 100 below concerning compliance of this obligation with the Data Protection Regime.

### *Disengaged Customers*

21. The Relevant Customer Data includes certain items of information (see below) concerning Disengaged Customers.
22. 'Disengaged Customer' has been defined in the Order to mean, for each supplier, a Domestic Customer or Micro Business Consumer (on any meter type) who has been supplied by that supplier on one or more Default Tariffs offered by that supplier, including its standard variable tariff, for three or more years as at the time of complying with Articles 4.1 or 4.2 (as applicable).

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<sup>5</sup> The CMA expects that the Relevant Customer Data will be stored in a secure password protected cloud-based database with robust access controls and appropriate security measures. In particular, the CMA expects that the database will (i) be accessed via secure data links between suppliers and Ofgem, (ii) have relevant security protocols in place, (iii) not to be used to disclose or transfer any data outside the EEA without GEMA's consent, and (iv) provide for a mechanism to 'clean' the Relevant Customer Data (eg the uploaded data is checked for viruses, formatted and validated). Audits may take place to ensure data quality and security.

23. Default Tariffs are essentially (a) non-fixed term tariffs or (b) those that are automatically applied to a Domestic Customer or a Micro Business Consumer in the event that the customer does not make a choice (eg a roll-over situation). In respect of Domestic Customers, the definition will capture any type or part of a domestic supply contract (including an evergreen supply contract<sup>6</sup> or deemed contract<sup>7</sup>) in circumstances where no part of the tariff which currently applies to a Domestic Customer is for a fixed term period. In the case of Micro Business Consumers, the definition will capture tariffs offered in fixed term contracts (eg out-of-contract contracts, auto-rollover contracts and evergreen contracts), as well as non-fixed term contracts (eg evergreen and deemed contracts).<sup>8</sup>
24. For the avoidance of doubt, a customer will be a Disengaged Customer if they have been subject to one or more types of Default Tariff offered by the same supplier over a period of at least three consecutive years. By way of illustration, the following will be considered as Disengaged Customers:
- (a) a customer who has been on a deemed tariff for one year, a standard variable tariff for another year, and any other evergreen tariff for another year with the same supplier; and
  - (b) a dual fuel customer who is engaged in one fuel but has become subject to one or more Default Tariffs on the other fuel offered by the same supplier over a period of at least three consecutive years.<sup>9</sup>
25. Pursuant to the Order, a customer will be a Disengaged Customer even where the domestic customer has actively chosen an evergreen tariff (for instance, due to its specific features). The CMA notes that some suppliers do not offer fixed-term tariffs and, therefore, in theory each of their domestic customers could fall within the definition of Disengaged Customer if they have received gas or electricity (or both) pursuant to such non-fixed-term contracts for three or more years.
26. The database will not include information of customers who are Disengaged Customers at the time of receipt of the First Contact Communication but

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<sup>6</sup> Evergreen tariffs include the standard variable tariff.

<sup>7</sup> Suppliers are currently prohibited by SLC 22C from rolling Domestic Customers onto any type of fixed-term contract. However, if this prohibition were amended by GEMA following the Order, fixed-term tariffs will equally be caught by the definition of Default Tariff where a Domestic Customer has not made a choice to be rolled onto such tariffs.

<sup>8</sup> For the avoidance of doubt, this definition captures all types of evergreen and any automatic rollover contracts which are for a fixed-term period following the first fixed-term period.

<sup>9</sup> As further explained below, in these instances the supplier supplying the 'disengaged' fuel will be required to provide Ofgem with the Relevant Data in relation to that meter associated with the disengaged fuel.

become engaged<sup>10</sup> before suppliers are required to send the Relevant Customer Data to GEMA.

27. For completeness, the CMA notes that the Order uses the same definition for Micro Business Consumer as is defined in the supply licences. To the extent that a supplier faces practical difficulties in identifying whether a particular customer falls within this definition (eg as regards the turnover and number of employees), the CMA would expect suppliers to include such customers within the definition of Disengaged Customer.
28. In this regard, if the name of a Micro Business Consumer changes, but the identity of the bill-payer otherwise remains the same (eg a change of company name, but no change to the company registration number; or a change of trading name), such a Micro Business Consumer should be treated as the same Micro Business Consumer for the purposes of determining whether they are a Disengaged Customer.

#### *The Relevant Customer Data*

29. Article 3.1 contains an obligation on suppliers to supply the Relevant Customer Data to GEMA, subject to Article 4.1 which contains an obligation on suppliers to send the First Contact Communication to each Disengaged Customer (as defined below).
30. The Relevant Customer Data comprises two components: the Domestic Customer Data and the Micro Business Consumer Data for each Disengaged Customer who has not opted-out or who has opted-in (as applicable) as at the time the supplier provides the Relevant Customer Data to GEMA. These terms are further explained below.
31. The Domestic Customer Data and the Micro Business Consumer Data contain the same core component customer information that will form the basis of the data supplied to GEMA, namely: for each meter, the customer's full name; billing address; consumption address;<sup>11</sup> current supplier; name and details of their current tariff (including tariff rates and payment method); Annual Consumption Details; and MPAN/MPRN and the Standard Settlement Configuration code (which will specify the electricity meter type).

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<sup>10</sup> To 'become engaged' a Domestic Customer or Micro Business Consumer must either switch to a tariff that is not a default tariff or switch energy supplier. A change in payment method or other payment terms would not result in a Disengaged Customer being regarded as 'becoming engaged'.

<sup>11</sup> Where the consumption address is different to the billing address. For Micro Business Consumers, the requirement to submit the registered address will only apply when the registered address has direct relevance to the energy supply.

32. The Order and Licence Conditions allow GEMA to specify additional fields of information regarding Domestic Customers or Micro Business Consumers (that are Disengaged Customers) to be provided by suppliers in circumstances where such additional information is necessary to address a change in market conditions or to maximise the impact and effectiveness of the database.
33. GEMA will have the ability to consult suppliers on the feasibility and timings of providing any additional fields of information, where appropriate.
34. The Licence Conditions prohibit suppliers from providing data which is not Relevant Customer Data to Ofgem, eg data of otherwise eligible customers who have opted-out or who have not opted-in, as applicable.
35. For the avoidance of doubt, the Relevant Customer Data will be provided by suppliers on a meter by meter basis. If one customer has more than one meter supplied by different suppliers, suppliers will be required to provide GEMA with the information concerning the meters they supply.
36. The CMA acknowledges that requiring suppliers to provide information on a meter-by-meter basis will result in multiple entries for customers with more than one meter (for example, customers with restricted meters). To address this, suppliers should, where possible, report entries relating to the same customer and address in adjacent line entries. As an alternative, GEMA could add a unique customer identifier to the list of required information to better ensure that data is grouped not only for multiple meters but also for gas and electricity supply points. GEMA and/or rival suppliers should contact customers at a customer level to avoid contacting the same customer more than once.
37. In the Report,<sup>12</sup> the CMA identified that suppliers should provide the name of each Disengaged Customer's current tariff. The intention behind this requirement was for GEMA and/or rival suppliers to be able to identify, through being informed of a Disengaged Customer's current tariff, the tariff rates (standing charges and unit rates) and payment method applying to that tariff. This has been clarified in the definition of Domestic Customer Data and Micro Business Consumer Data. The overarching purpose behind providing GEMA and/or rival suppliers with such information is to enable them to include in their correspondence with customers a more accurate estimate of the savings they can make if they were to switch tariffs and/or supplier.

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<sup>12</sup> Paragraphs 13.132 and 17.233(a).

38. For the avoidance of doubt, 'current' tariff means the tariff applied to the Disengaged Customer at the time the customer is identified by their supplier as being a Disengaged Customer, ie the tariff applied at the time of complying with the obligation to send the First Contact Communication (see below). Thereafter, for any Domestic Customer or Micro Business Consumer who continues to be a Disengaged Customer, when their supplier provides updated information, the 'current' tariff means the tariff applied at the time of complying with the requirement to provide updated information.
39. Annual Consumption Details has the meaning set out in the Electricity Supply Licence and Gas Supply Licence, and means actual (or estimated) energy consumption of a Domestic Customer or Micro Business Consumer during the previous 12-month period.
40. In the Report,<sup>13</sup> the CMA said that for Domestic Customers on restricted meters,<sup>14</sup> a requirement on suppliers to provide more granular information was essential to achieving the aims of the remedy. In particular, suppliers should be required to provide (a) more granular information about the Domestic Customers' consumption during different consumption windows, (b) details of the standing charges and unit rates that apply to these consumption windows, and (c) further details on the length of time and the hours within which time is recorded for these consumption windows.
41. In the Report, the CMA left open whether, for the same reasons, suppliers should be required to provide additional information, where relevant, in other instances (eg for Domestic Customers with smart meters and Domestic Customers on multi-tier default tariffs). In addition, in the Report,<sup>15</sup> the CMA left open whether suppliers should be required to provide any additional information for Micro Business Consumers.
42. The CMA acknowledges that, in certain circumstances, it may be necessary to provide GEMA with more granular data in order for GEMA and/or rival suppliers to be able to alert both Domestic Customers and Micro Business Consumers to a better deal and to provide these customers with personalised and reliable quotes. Accordingly, these requirements have been clarified in the definition of Domestic Customer Data and Micro Business Consumer Data.

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<sup>13</sup> Paragraph 13.144.

<sup>14</sup> Ie, Domestic Customers with (a) one electricity meter whereby electricity consumption in two or more consumption windows is separately recorded on two or more registers; or (b) two or more electricity meters (each with one or more registers) installed in the same premises whereby electricity consumption for distinct purposes is separately recorded on such electricity meters.

<sup>15</sup> Paragraph 17.233(a).

43. In particular, for both Domestic Customers and Micro Business Consumers, suppliers will need to provide GEMA with (a) the consumption volumes to which different unit rates applied; (b) a breakdown of the annual consumption details by each consumption window for which data is available; (c) the length of time and the hours within which time was recorded for each consumption window; and (d) details of the standing charges and unit rates that apply to each consumption window.
44. Ofgem will decide whether more granular data is required in relation to restricted meter customers or in the instances identified above.
45. Each Domestic Customer's and Micro Business Consumer's electricity meter has a Meter Point Administration Number (also known as MPAN, Supply Number or S-Number). This is a 21-digit reference used in Great Britain to uniquely identify electricity supply points (such as individual domestic residences). The gas equivalent is the Meter Point Reference Number. A rival supplier needs this information for customers who want to switch to them.
46. A basic table illustration (showing column headings but leaving the main body blank) showing the fields that a supplier must populate when supplying information for Domestic Customers and Micro Business Consumers is attached at Annex 1. Each row of data corresponds to one electricity or gas meter.
47. The CMA expects GEMA to consider whether to issue guidance on the criteria that suppliers should apply when supplying the data required to populate this table to ensure consistency in approach across all suppliers. As indicated above, GEMA may consider adding new fields of information. GEMA could also issue some guidance to ensure consistency across the data submitted by suppliers, and address any data quality issues which may make it difficult for suppliers to use the secure database.
48. Suppliers will be responsible for validating the quality and accuracy of the data being passed to GEMA as they are best placed to know their customers' information.

*The manner and timeframe with which the Relevant Customer Data must be supplied to GEMA*

49. Article 3.2 provides that the manner and timeframe for supplying the Relevant Customer Data to GEMA is set out in the Licence Conditions.
50. The Licence Conditions require suppliers to provide the first tranche of the Relevant Customer Data to GEMA (in such a manner and containing such

additional information as GEMA may direct) by 1 October 2017, or at such later date as may be specified in a direction issued by GEMA.

51. The manner in which suppliers must provide the first tranche of the Relevant Customer Data will be specified in a direction issued by GEMA. As indicated in paragraph 32 above, GEMA may also direct suppliers to provide additional information in circumstances where such additional information is necessary to address a change in market conditions or to maximise the impact and effectiveness of the database.
52. The CMA expects that the roll out of the database will be a staged process, and that the database will go live by 30 April 2018.<sup>16</sup> The Licence Conditions give GEMA flexibility to specify a date later than October 2017 for receiving the Relevant Customer Data from suppliers. The rationale behind this flexibility is to avoid certain risks such as having to update the database several times before the data is used by GEMA and/or rival suppliers.
53. The CMA expects that GEMA will provide suppliers with a schedule of when test data would need to be supplied and in what format to ensure file transfers can be tested thoroughly with each supplier ahead of the date when suppliers will be required to submit the Relevant Customer Data to GEMA.
54. Following compliance with Article 3.1, suppliers must comply with the obligation contained in Article 3.3 to provide GEMA with the Relevant Customer Data (in such a manner as GEMA may direct) on a monthly basis, except where there are good operational reasons for supplying the Relevant Customer Data more frequently than monthly, where such alternative frequency may be specified in a direction issued by GEMA (following consultation where appropriate). This obligation is subject to Article 4.3 which contains an obligation on suppliers to send the First Contact Communication to these customers prior to supplying the Relevant Customer Data to GEMA (see further below).
55. The aim of Article 3.3 is to enable GEMA to update the information contained in the database so that this information is (to the extent possible) up to date. In practice, the requirement to provide updated information to GEMA will require a supplier to (i) submit data for new Disengaged Customers who have not opted-out (subject to suppliers giving Disengaged Customers a reasonable timeframe to opt-out, having received the First Contact Communication, as explained below) or who have opted-in (as applicable); (ii) exclude any Disengaged Customer that has opted-out or no longer falls within

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<sup>16</sup> [Ofgem's response to the CMA's final report](#).

the definition of Disengaged Customer; and (iii) re-submit updated data for those customers who continue to be Disengaged Customers. In relation to (iii), the technical infrastructure of the database will determine whether the supplier will be required only to submit the data items that have changed since the last update, or whether the supplier will be required to submit a full set of data for the customers who continue to be Disengaged Customers.

56. The requirement to update the database will help ensure the accuracy of the information contained in the database, that the database is targeted and effective, and minimise any risk that a Disengaged Customer, that has opted-out or is no longer on a Default Tariff with their incumbent supplier, is contacted by GEMA or a rival supplier having accessed the database (see also paragraph 59 below). In addition, whilst most of the Relevant Customer Data items are relatively static (ie do not vary over short periods of time), if GEMA and/or rival suppliers are to use the consumption data for the purpose of providing accurate comparative quotes, the consumption data will need to be reasonably current.
57. The manner in which suppliers must provide the updated information to GEMA, and any additional information that suppliers must provide to GEMA, will be specified in a direction issued by GEMA. GEMA will specify the approach for updating the Secure Database and, in particular, whether each update is a total refresh of the database (ie GEMA deletes the current database and replaces it with the new submissions from suppliers) or whether each update is limited to the specific fields of information concerning the Relevant Customer Data (eg consumption data) that have changed since the latest update.
58. The Order provides for suppliers to provide GEMA with the updated information on a monthly basis, except where there are good operational reasons for supplying the Relevant Customer Data more frequently than monthly where such alternative frequency has been specified by GEMA (following consultation where appropriate). The circumstances when, for operational reasons, GEMA could require more frequent updates from suppliers include (i) where GEMA has put in place a technical infrastructure that facilitates the more frequent updates of the database (eg the database infrastructure can be easily linked to the data storage systems of suppliers); (ii) where more frequent updates would not be disproportionately more costly or burdensome for suppliers than monthly updates; and (iii) where more frequent updates are necessary to address any potential unintended consequences arising from the database containing out-of-date information.
59. One of the factors that GEMA will need to weigh before requiring suppliers to provide data more frequently than monthly is the costs associated with more

frequent updates to suppliers and to third parties. The CMA understands that added technical functionality may be required in order for suppliers to be able to update the information more frequently than monthly, and that such added technical functionality may involve additional costs for suppliers.<sup>17</sup> In this context, the CMA expects GEMA to conduct a cost/benefit analysis before determining that, for operational reasons, suppliers should be required to provide data more frequently than monthly. GEMA will also take into account the legitimate interest of consumers that Relevant Customer Data is accurate and up to date so that they do not receive unwanted communications or inaccurate offers.

60. The CMA has received submissions raising concerns that if the database was updated on a monthly basis, there would be a potential risk of one or more customers, who have opted-out or no longer fall within the definition of Disengaged Customers (eg because they have switched energy supplier or tariff), nonetheless being inundated with marketing correspondence from rival suppliers using out-of-date information from the database. However, the CMA expects that such concerns will be addressed by GEMA, through its ability to put restrictions in place in the data sharing agreements with rival suppliers concerning access to the database, for instance, regarding the timing and frequency of such correspondence (eg so that any marketing correspondence is sent within a specified window after the database has been updated). For instance, if a supplier has been given access to the database on 1 January, and the next update takes place on 1 February, such supplier could be restricted to send marketing correspondence to the Disengaged Customers only during the first two weeks after the date when it was given access to the database, ie in the period 1 to 15 January.
61. The CMA expects that GEMA will work with suppliers to find the right balance between their operational needs and the need to maintain an up-to-date database. All suppliers will need to meet the same standard of interaction of providing updated information at the same maximum frequency.
62. Any alternative frequency will be specified in a direction issued by GEMA.

#### *Access to the Relevant Customer Data*

63. While the Report recommended GEMA to provide access to the Relevant Customer Data to rival suppliers,<sup>18</sup> GEMA may wish to consider alternatives to the rival supplier model. For instance, GEMA may decide to use the Relevant Customer Data itself to send communications to the Disengaged Customers

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<sup>17</sup> However, the CMA has not received evidence of the likely quantification of such costs.

<sup>18</sup> Paragraph 13.146(b)(v).

that have not opted-out or have opted-in (as applicable), or to give other parties (eg other government or consumer bodies) access to the Relevant Customer Data, subject to adequate safeguards being in place and compliance with relevant legislation (including the Data Protection Regime). In this context, it is possible that GEMA may work in partnership with the Information Commissioner's Office, the Behavioural Insights Team and/or Citizens Advice to monitor the impact of the database and, to facilitate this, such government or consumer bodies may, subject to complying with the Data Protection Regime, also be given restricted access to certain aspects of the database.

### ***Part 3 – First Contact Communication***

64. The aim of Article 4 is to place a legal obligation on suppliers to send a First Contact Communication, subject to certain minimum content requirements (see below), to each Disengaged Customer, to give such customers an opportunity to opt-out (or opt-in, as applicable) of having their customer data supplied to GEMA by their current supplier pursuant to Article 3.
65. By sending a First Contact Communication, the data transfer and processing requirement will be more transparent and fair to Domestic Customers and Micro Business Consumers, in accordance with the Data Protection Regime (see paragraphs 95 to 100) which requires data subjects to be informed of the proposed disclosure and use of the data, and the reasons for this. The First Contact Communication is also one of the safeguards to protect customers' interests in the context of the Database Remedy as a whole (see compliance with the Data Protection Regime below). In addition, the First Contact Communication provides a mechanism which may lead to the exclusion of customers who do not want to be included in the database. In this way, the First Contact Communication also helps to ensure that the Database Remedy is targeted and effective.
66. Article 4.1 contains an obligation on suppliers to send an initial First Contact Communication. Suppliers must send the initial First Contact Communication in such a manner (eg by post or email) as GEMA may specify by publishing a notice or issuing a direction to suppliers. The CMA acknowledges that allowing suppliers to send the First Contact Communication by email will enable suppliers to track 'bounce-backs', opened/unopened mails and reduce some of the costs that suppliers would face when writing to large numbers of customers in a short period. However, before specifying email as the means (or one of the means) for sending the First Contact Communication, the CMA expects that GEMA will take into account issues such as customers' access to the internet or emails. For dual fuel customers, GEMA may give suppliers the

option to send a single combined letter. GEMA may wish to run an awareness campaign prior to suppliers sending the First Contact Communication to raise awareness.

67. Suppliers must send the initial First Contact Communication to their Disengaged Customers by 31 July 2017, or at such later date as may be specified in a direction issued by GEMA. As indicated above, the CMA expects that the roll out of the database will be a staged process, and that the full database will go live by 30 April 2018. While suppliers must be ready to send the First Contact Communication to the Disengaged Customers from 31 July 2017, the Licence Conditions give GEMA flexibility to postpone this deadline. The rationale behind this flexibility is to avoid certain risks such as customers experiencing delay between the First Contact Communication and the first contact by GEMA and/or rival suppliers.
68. Article 4.3 contains an obligation on suppliers to send subsequent First Contact Communications to any additional Domestic Customer or Micro Business Consumer who has become a Disengaged Customer since complying with Article 4.1. Suppliers must send the subsequent First Contact Communications in such a manner as GEMA may specify by publishing a notice in writing or by issuing a direction to suppliers (the same principles set out in paragraph 66 above concerning the initial First Contact Communication would apply to the subsequent First Contact Communications). Suppliers must send the subsequent First Contact Communications at least one calendar month prior to complying with the obligation to submit the Relevant Customer Data to GEMA, or within such other timeframe specified in a direction issued by GEMA.
69. The timeframe of at least one month for sending the First Contact Communication determines, in part, the initial timeframe given to each Domestic Customer and Micro Business Consumer to opt-out or opt-in (as applicable) before their data is supplied to GEMA, and the timeframe given to suppliers to process opt-out and opt-in applications. The reasoning behind the timeframe of at least one month is to ensure that Domestic Customers and Micro Business Consumers are given a reasonable amount of time to opt-out or opt-in (as applicable), and suppliers are given a reasonable amount of time to process the opt-out and opt-in applications before sending the Relevant Customer Data to GEMA. However, for the avoidance of doubt, Domestic Customers and Micro Business Consumers will be allowed to opt-out of the database at any time (see paragraph 78(d) below).
70. The CMA expects that any alternative timeframe specified by GEMA will give Domestic Customers and Micro Business Consumers a reasonable amount of

time to opt-out or opt-in (as applicable), and will give suppliers reasonable time to process the opt-out and opt-in applications.

71. The CMA also expects that GEMA will specify a schedule to inform suppliers of the relevant timeframes for identifying the Disengaged Customers, sending the First Contact Communication and supplying the Relevant Customer Data to GEMA, and the equivalent timeframes for updating the database.
72. The decision to opt-out or opt-in should be, at all times, instigated by the Disengaged Customer. Suppliers must not prompt any Disengaged Customer to opt-out or not to opt-in (eg by telephoning or emailing them directly). As indicated above, the rationale behind the First Contact Communication is to give customers an opportunity to understand the disclosure process, to freely assess the advantages and disadvantages of being in the database and to make a decision on a voluntary basis. Any pressure from suppliers on Domestic Customers or Micro Business Consumers during the opt-out or opt-in process would negatively affect the effectiveness of the database. The CMA would expect GEMA to monitor any such conduct, and take appropriate action such as the potential withdrawal of access to any such supplier from access to the database and/or regulatory enforcement proceedings.<sup>19</sup>
73. The Licence Conditions prohibit suppliers from initiating any communication with a Disengaged Customer about the database (including the process for opting-out and opting-in) following the First Contact Communication. This generally includes having a section on their website with an explanation of issues such as the background to the database, what data is being provided, how customers are selected, the nature of the service and how customers can opt-out (or, if applicable, opt-in). Suppliers will also not be allowed to include any message in their communications with customers (eg bills and annual statements) about the database or the opt-out or opt-in processes (eg reminding them of the First Contact Communication) except where in accordance with paragraph 74.
74. However, suppliers will, for instance, be permitted to provide customers with the same text used on Ofgem's website, include hyperlinks on their websites, or otherwise direct their customers, to areas on Ofgem's website, where such information is provided. GEMA will consider whether guidance is needed to deal with customer communications. Customers will also be able to contact consumer bodies to obtain any information or clarification.

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<sup>19</sup> Ofgem has powers to impose financial penalties under section 30A of the Gas Act 1986 and section 27A of the Electricity Act 1989.

75. In circumstances where a Disengaged Customer instigates contact with a supplier via telephone, email, post, face-to-face, web chat or otherwise, specifically to seek further clarification of the purpose of the database or the customer's right to opt-out or opt-in, suppliers may explain the nature and purpose of the database as outlined in the First Contact Communication and that there is a process to opt-out or opt-in, as applicable. However, staff and representatives will not be allowed to advise customers to opt-out (or not to opt-in) or describe the database in a manner intended to elicit an opt-out or ignore an opt-in. The CMA expects that suppliers will ensure that training materials and policies are drafted accordingly. GEMA may monitor compliance, for example, by requesting sample transcripts, training materials and policies or by carrying out mystery shopping exercises.
76. The prohibition contained in the Licence Conditions does not prevent suppliers from making brief references to the Secure Database in communications with customers where there is a compelling reason to do so (eg in instances where a supplier suffers a data protection breach and needs to explain to its customers what has happened to reassure customers who might otherwise be worried that their data had been compromised).
77. The database will not include information of Disengaged Customers who have opted-out or have not opted-in (as applicable) between the date of receipt of the First Contact Communication and the date when suppliers are required to comply with the obligation to send the Relevant Customer Data to GEMA.

*Requirements concerning the First Contact Communication*

78. Article 4.4 contains certain requirements concerning the First Contact Communication. The First Contact Communication must have such contents, format and structure as may be specified from time to time by GEMA, subject to having the following minimum contents:
  - (a) a clear explanation of the legal requirement established by the Order requiring the relevant supplier to supply the Relevant Customer Data to GEMA;
  - (b) a clear explanation of how the Relevant Customer Data will be stored on the Secure Database that will be updated from time to time by GEMA;
  - (c) a clear summary of the safeguards in place to protect Disengaged Customers' interests concerning the Relevant Customer Data, which should include details of (i) who will be allowed access to the database; (ii) the limited use to which the suppliers and/or GEMA would be able to put the Relevant Customer Data, including limitations on the means for

contacting the Disengaged Customers (ie direct marketing by postal correspondence or by any other means specified by GEMA subject to compliance with data protection and privacy legislation), and limitations on the total number and frequency of such correspondence; (iii) the amount of time the suppliers and/or GEMA may retain the Relevant Customer Data; and (iv) the consequences of misuse or mis-selling as a consequence of having access to the database; and

(d) clear details of the mechanism for the Disengaged Customer to object at any point in time to their Domestic Customer Data or Micro Business Consumer Data, as applicable, being stored on the secure Database (including by post, email or telephone); or clear details of the opt-in mechanism for any Disengaged Customer falling within a group of Disengaged Customers that have been specified by GEMA, including customers for whom it would be necessary for the supplier to supply any sensitive personal data.<sup>20</sup>

79. For the avoidance of doubt, suppliers may, subject to direction by GEMA, have very limited flexibility to design the First Contact Communication. Suppliers will be constrained by the direction issued by GEMA which will stipulate the precise contents, format and structure of the First Contact Communication, and will satisfy the minimum content requirements. GEMA will be able to specify (a) the format of the envelope (including any mandatory labelling) for the First Contact Communication, where relevant, and (b) the areas in the First Contact Communication allowing for some design input from suppliers (eg spaces for company logos). GEMA will also be able to vary the First Contact Communication to reflect customer circumstances (eg information about restricted meters could be omitted from letters to non-restricted meter customers).
80. The minimum content requirements will help to make the data transfer and processing more transparent and fair in accordance with data protection principles which require data subjects to be informed of the proposed disclosure and use of the customer's data and the reasons for this (see above).
81. The requirement to include a clear summary or explanation of the items identified above does not mean that the First Contact Communication must include a high degree of detail on such items. The First Contact

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<sup>20</sup> Within the meaning of section 2 of the DPA and/or Article 9 of the GDPR. The circumstances in which the CMA expects it would be necessary for a supplier to supply sensitive personal data to GEMA are rare and would include, for instance, where a Disengaged Customer has particular accessibility or contact requirements that derive from a customer's physical or mental health condition (such as visual impairment).

Communication must contain sufficient information to give Domestic Customers and Micro Business Consumers fair notice of the disclosure process (including the restrictions on the use of the Relevant Data by GEMA and suppliers), and their right to opt-out or opt-in (as applicable).

82. As set out in paragraph 78(c) above, the First Contact Communication will contain a clear summary of the safeguards that GEMA will put in place to protect the interests of the Disengaged Customers. As explained below, these safeguards are necessary to ensure the compliance of the operation of the database with data protection and privacy legislation. Before providing access to the database for any suppliers, the CMA expects GEMA to require suppliers to enter into data sharing agreements containing access and use restrictions as a condition of accessing the database. Subject to these agreements, the CMA envisages suppliers would be able to access and to use the Relevant Customer Data to prompt the Domestic Customers and Micro Business Consumers of rival suppliers.
83. The CMA expects that any direct marketing by GEMA and/or suppliers will be conducted through postal communications, or by any other means determined by GEMA (eg email) subject to compliance with data protection and privacy legislation. For instance, this could require opt-in consent for electronic marketing.
84. As set out in paragraph 78(d) above, the First Contact Communication must give the Disengaged Customers the opportunity to opt-out at any time, and through a wide range of means (eg telephone, email or through third party agents). This means that the Disengaged Customers will be able to opt-out even when their information has already been supplied to GEMA by suppliers. In this case, the information of these customers will be removed from the database in the next database update (ie the Relevant Customer Data for that customer would no longer be disclosed to GEMA on a monthly basis).
85. The First Contact Communication must also give the opportunity to opt-in to Disengaged Customers falling within a group of Disengaged Customers that has been specified by the Authority, including customers for whom it would be necessary for the Retail Energy Supplier to supply any sensitive personal data.<sup>21</sup>
86. The first version of the First Contact Communication (and the format of any mandatory labelling of the envelope) is expected to be confirmed to suppliers

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<sup>21</sup> As noted above, the circumstances in which the CMA expects it would be necessary for a supplier to supply sensitive personal data to GEMA are rare and would include, for instance, where a Disengaged Customer has particular accessibility or contact requirements that derive from a customer's physical or mental health or condition (such as visual impairment).

by GEMA at least two months in advance of the deadline for sending the First Contact Communication. GEMA may create a different version of the First Contact Communication that suppliers are required to send by means other than post (eg email) to certain Disengaged Customers.

#### ***Part 4 – Monitoring and compliance***

87. Article 5 of the Order and paragraphs 8 to 10 of the Licence Conditions set out the detailed compliance reporting requirements in relation to Parts 2 and 3 of the Order and the Licence Conditions, respectively.
88. Articles 5.1 to 5.4 require suppliers to submit compliance statements to the CMA in the format specified in Schedule 3 to the Order. The first compliance statement must be submitted to the CMA by 31 October 2018. Each subsequent compliance statement must be submitted to the CMA by 31 October in each year.
89. These compliance statements and reports are required to assist the CMA in complying with its statutory duty to monitor compliance with the Order and Licence Conditions, respectively.
90. Paragraph 9 of the Licence Conditions requires suppliers to provide any information that GEMA reasonably requests concerning compliance with the Licence Conditions. This would include providing evidence of (oral and written) opt-out and opt-in requests (as applicable) received from Disengaged Customers. In order to facilitate compliance with this requirement, paragraph 8 of the Licence Conditions also require suppliers to keep a record of any opt-out and opt-in requests from Disengaged Customers (including the means by which the Disengaged Customer has opted-out).
91. The CMA does not expect GEMA to be the usual recipient of opt-out or opt-in requests. Where opt-out or opt-in requests are sent directly to GEMA by the Disengaged Customers or a third party, the CMA expects GEMA to redirect such requests to the suppliers.
92. The CMA believes that monitoring the impact and effectiveness of the database will also be very important going forward. Accordingly, paragraph 10 of the Licence Conditions also gives GEMA the power to request any information that GEMA reasonably requests to monitor the impact and effectiveness of the database. The CMA expects that GEMA will put in place a programme for monitoring the impact and effectiveness of the database, including evaluation criteria. GEMA will, therefore, determine the evaluation criteria and methodology. The information requested by GEMA will facilitate the assessment of the impact of the database against these criteria.

93. Article 6 provides that the CMA may give directions as to compliance with the Order.
94. Article 7 provides for any person to whom this Order applies to provide information required by the CMA to allow it to monitor and review compliance with and operation of the Order.

### **Compliance with the Data Protection Regime**

95. To the extent the Database Remedy involves the processing of personal data within the meaning of the DPA, it was designed so as to be compliant with the Data Protection Regime, as set out in paragraphs 13.161 to 13.171 of the Report.<sup>22</sup>
96. The key principles under the Data Protection Regime include that personal data should be (a) processed fairly and lawfully; and (b) obtained only for specified and lawful purposes, and should not be further processed in any manner incompatible with that purpose or those purposes. In assessing the compliance of the Database Remedy with these principles, the CMA considered each of the stages of data processing involved in this remedy, and the condition(s) required for lawful processing of personal data as set out in Schedule 2 to the DPA.
97. The Order and the Licence Conditions impose a legal obligation on suppliers to send the First Contact Communication and provide the Relevant Customer Data to GEMA. The legal obligation to provide the Relevant Customer Data to GEMA arising from the Order is the relevant basis for the processing of personal data to be carried out by current suppliers at stage 1. In addition, the First Contact Communication, which should not amount to 'direct marketing' under the DPA, will notify customers of the further proposed processing before their data is passed on to GEMA or rival suppliers. Therefore, stage 1 of the Database Remedy will satisfy the data protection principles.
98. The CMA cannot control whether the processing of personal data to be carried out at stages 2 and 3 of the Database Remedy (ie processing by GEMA and/or by suppliers) is compliant, in practice, with the data protection principles because it is ultimately the responsibility of those who control and process personal data (ie GEMA and the suppliers) to ensure that such processing is compatible with the Data Protection Regime. However, the Order will help ensure compliance of these stages with the Data Protection

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<sup>22</sup> The design of the Database Remedy takes account of discussions between the CMA and the Information Commissioner's Office (ICO), and external legal advice received by the CMA. The relevant published documents reflecting the CMA's engagement with the ICO can be accessed at the following links: (i) [The Information Commissioner's response](#) and (ii) [ICO statement in relation to Competition and Markets Authority report](#).

Regime. The CMA also intends to provide assistance in the context of further developments of the First Contact Communication, data sharing agreements, and other safeguards that are expected to be put in place by GEMA (following consultation with the ICO, industry and consumer groups) to protect customers' legitimate interests.

99. The Order and certain limbs of the recommendation to GEMA incorporate safeguards to strike a fair and proportionate balance between the various interests at stake, and to avoid undue prejudice to the rights and interests of the data subjects. Such safeguards include:
- (a) the requirement (imposed by the Order) on suppliers to allow consumers to opt-out of processing of their data on an ongoing basis, or to provide opt-in consent, including where the processing involves sensitive personal data;
  - (b) the recommendation that the database offers appropriate assurances of security and protection to ensure that the Relevant Customer Data is held and processed securely;
  - (c) the requirement (imposed by the Order) on suppliers to keep the relevant data up to date to limit the risk of customers who have engaged from being contacted repeatedly by suppliers;
  - (d) the recommendation that GEMA enters into binding agreements with suppliers seeking access to the relevant data concerning how the data may be accessed and used, which may include (i) limits to the number of postal communications that a supplier may send to any individual customer, (ii) the frequency with which any communication can be sent to any individual customer, (iii) the amount of time a supplier may retain the relevant data before it must be deleted or destroyed, (iv) the use to which the relevant data can be put, and (v) whether such use should be restricted to particular forms of direct marketing; and
  - (e) a recommendation to GEMA to put in place enforcement mechanisms to ensure that suppliers comply with the rules relating to access to the database and use of the relevant data.
100. In light of the above, the CMA's expectation is that the Database Remedy will be implemented in a manner consistent with the Data Protection Regime.

## **Annex 1: Domestic Customer and Micro Business Consumer information**

See the illustrative excel table published separately.