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Draft legal text – Alternative Solution

Below are the draft legal text changes for the SECMP0045 Alternative Solution.

The difference between this alternative version and the proposed version is that this version recommends introducing new Section I1.6A (as recommended by SECAS and Gowling), whereas the proposed version recommends adding an additional sentence into Section I1.6, as recommended by the Proposer.

Add the following new definitions to Section A

<u>Data Controller</u>	<u>has the meaning given to 'controller' in the Data Protection Legislation.</u>
<u>Data Processor</u>	<u>has the meaning given to 'processor' in the Data Protection Legislation.</u>
<u>Data Subject</u>	<u>has the meaning given to that expression in the Data Protection Legislation.</u>
<u>Data Subject Rights</u>	<u>means the rights of Data Subjects under the Data Protection Legislation.</u>
<u>General Data Protection Regulation</u>	<u>means EU Regulation 2016/679 of the European Parliament and of the Council 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.</u>

<u>Personal Data Security Incident</u>	<u>means any accidental or unlawful destruction, accidental loss, alteration, unauthorised disclosure or access to the Personal Data or any other breach of security in respect of the Personal Data.</u>
<u>Sub-Processor</u>	<u>means, in respect of a Party which Processes Personal Data obtained pursuant to this Code as a Data Processor, any person which Processes such Personal Data on behalf of such Party.</u>

Amend the following definitions in Section A

Data Protection Act<u>Legislation</u>	<u>means theGeneral Data Protection Act 1998Regulation and any national legislation implementing the same and related statutory instruments.</u>
Information Commissioner	<u>means the Commissioner, as defined inUK regulator for the Data Protection Act<u>Legislation</u>.</u>
Personal Data	<u>means personal data, as definedhas the meaning given to that expression in the Data Protection Act<u>Legislation</u>.</u>
Process<u>ing</u>	<u>means, in respect of any Personal Data,has the meaning given to ‘process’—that Personal Data,—as definedexpression in the Data Protection Act<u>Legislation</u> (and “<u>Process</u>” and</u>

	"Processes" ^{"Processing"} shall be interpreted accordingly).
Relevant Instruments	means: (a) the Electricity Act and the Gas Act; (b) the Data Protection Act ^{Legislation} ; (c) the Energy Licences; and (d) the Energy Codes.

Amend Section 11 as follows

I1 DATA PROTECTION AND ACCESS TO DATA

Without Prejudice

I1.1 The obligations of the DCC and each User under this Section I1 are without prejudice to any other obligations they each may have under the Data Protection ~~Act~~^{Legislation} and other Relevant Instruments, including any such obligations they each may have concerning Processing of Personal Data.

User Obligations Consumption Data

I1.2 Each User undertakes that it will not request, in respect of a Smart Metering System, a Communication Service or Local Command Service that will result in it obtaining Consumption Data, unless:

- (a) the User has the Appropriate Permission in respect of that Smart Metering System; and

- (b) (where that User is not the Import Supplier, Export Supplier, Gas Supplier, Electricity Distributor or Gas Transporter for that Smart Metering System) the User has, at the point of obtaining Appropriate Permission and at such intervals as are reasonably determined appropriate by the User for the purposes of ensuring that the Energy Consumer is regularly updated of such matters, notified the Energy Consumer in writing of:
- (i) the time periods (by reference to length) in respect of which the User obtains or may obtain Consumption Data;
 - (ii) the purposes for which that Consumption Data is, or may be, used by the User; and
 - (iii) the Energy Consumer's right to object or withdraw consent (as the case may be) to the User obtaining or using that Consumption Data, and the process by which the Energy Consumer may object or withdraw consent.

Service Requests

- 11.3 Each User undertakes that it will not send either a 'Join Service' or 'Unjoin Service' Service Request (respectively to join a Type 2 Device to, or unjoin it from, any Smart Meter or Device Associated with a Smart Meter) unless:
- (a) the User is the Responsible Supplier for the Smart Meter or Associated Device to which the Service Request is sent, and sends that Service Request for the purpose of complying with an obligation under its Energy Supply Licence; or
 - (b) the Energy Consumer at the premises at which the Smart Meter is located has given the User Unambiguous Consent, which has not been withdrawn, to (as the case may be):

- (i) join that Type 2 Device to the Smart Meter or Associated Device, and the User has clearly informed the Energy Consumer before obtaining such Unambiguous Consent that a consequence of joining the Type 2 Device may be that Data relating to the Energy Consumer will be shared with third parties; or
- (ii) unjoin it from the Smart Meter or Associated Device, save that the Responsible Supplier for a Smart Metering System at the premises need not obtain such Unambiguous Consent where it has reasonable grounds to believe that the Type 2 Device has Compromised or is likely to Compromise any Device forming part of that Smart Metering System (and the Responsible Supplier shall, where it unjoins a Type 2 Device in such circumstances, take all reasonable steps to inform the Energy Consumer that it has done so).

Access to Records

I1.4 Each User undertakes that it will not access (pursuant to Section H8.16) or request (pursuant to Section H8.17) the information described in Section H8.16(c), unless:

- (a) the Energy Consumer at the premises at which the relevant Smart Meter is located has given the User Unambiguous Consent to do so and such consent has not been withdrawn; and
- (b) the information is accessed solely for the purpose of its provision to that Energy Consumer.

Good Industry Practice

- I1.5 Each User shall put in place and maintain arrangements designed in accordance with Good Industry Practice to ensure that each person from whom it has obtained consent pursuant to Section I1.2 to I1.4 is the Energy Consumer.

Processing of Personal Data by the DCC

- I1.6 It is acknowledged that in providing the Services to a User, the DCC may act in the capacity of ~~‘dData Pprocessor’ (as defined in the Data Protection Act)~~ on behalf of that User in respect of the Personal Data for which that User is the ~~‘dData eController’ (as defined in the Data Protection Act)~~.

I1.6A The Personal Data which the DCC will Process as a Data Processor on behalf of Users will relate to Energy Consumers, and will include Personal Data which is included within messages sent and received by the DCC via the DCC User Interface or the Self-Service Interface, and/or which is included within messages sent or received by the DCC to or from Communications Hubs. The nature of such Personal Data will be that which is required or permitted to be included in such messages as described in this Code. The full description of the subject matter, the nature and purpose of the processing, and the type of personal data is as described by this Code as a whole.

- I1.7 The DCC undertakes for the benefit of each User in respect of the Personal Data for which that User is the ~~‘Deata Ceontroller’ (as defined in the Data Protection Act)~~ to:

- (a) only Process that Personal Data for the purposes permitted by the DCC Licence and this Code (subject to paragraph (d) below);
- (b) only Process that Personal Data for so long as it is required to do so by the DCC Licence and this Code;
- ~~(b)~~(c) undertake the Processing of that Personal Data in accordance with the DCC Licence and this Code, (to the extent consistent with the DCC Licence and this

Code) on the documented instructions of the User, and (subject to the foregoing requirements of this Section 11.7(~~bc~~)) not in a manner that the DCC knows (or should reasonably know) is likely to cause the User to breach its obligations under the Data Protection ~~Act~~Legislation (subject to paragraph (d) below);

(d) if the DCC is aware that, or is of the opinion that, any requirement of paragraph (a) (b) or (c) above breaches the Data Protection Legislation, the DCC shall immediately inform the User of this giving details of the breach or potential breach (unless the DCC is prohibited from doing so by any of its other obligations under Laws and Directives);

(e) ensure that the DCC's personnel who are authorised to Process Personal Data are under enforceable obligations of confidentiality and are required only to Process that Personal Data in accordance with the DCC's obligations under the DCC Licence and this Code;

~~(e)~~(f) having regard to the state of the art, the costs of implementation and the nature, scope, context and purposes of Processing as well as the risk of varying likelihood and severity for the rights and freedoms of Data Subjects, implement appropriate technical and organisational measures to protect that Personal Data against ~~unauthorised~~accidental or unlawful ~~Processing and against accidental~~ loss, destruction, damage, alteration or disclosure (such measures to at least be in accordance with Good Industry Practice and the requirements of Section G (Security));

~~(d)~~(g) not transfer or Process that Personal Data outside the European Economic Area;

(h) ~~provide reasonable assistance to~~taking into account the nature of the Processing, ~~assist~~ the User ~~in complying with any subject access request with which the User is obliged~~its obligations to comply with Data Subjects' requests and Data

Subjects' rights under the Data Protection Act and which relates to the Processing Legislation in respect of that Personal Data pursuant to this Code through, insofar as is possible, the use of appropriate technical and organisational measures;

(i) taking into account the nature of the Processing and the information available to the DCC, assist the User in ensuring compliance with the User's obligations in Articles 32-36 of the General Data Protection Regulation (or its national equivalent), including:

(i) notifying the User without undue delay if the DCC becomes aware of a breach of the Data Protection Legislation in relation to the Personal Data (including in the event of unauthorised access to such Personal Data); and

(ii) providing full details of the relevant breach where caused by the DCC or any Sub-Processor without undue delay or, where necessary, in phases but always without further undue delay;

~~(e)(j)~~ provide reasonable assistance to the User in complying with any enquiry made, or investigation or assessment initiated, by the Information Commissioner or any other Competent Authority in respect of the Processing of that Personal Data pursuant to this Code;

~~(f)(k)~~ promptly notify the User in the event that the DCC Processes any of that Personal Data otherwise than in accordance with this Code (including in the event of unauthorised access to such Personal Data);

~~notify the User of any complaint or subject access request or other request received by the DCC with respect to the Processing of that Personal Data~~

~~pursuant to this Code, and to do so within 5 Working Days following receipt of the relevant complaint or request; and~~

~~(g)(1)~~ notify the User of any a complaint ~~or request~~ relating to the DCC's obligations ~~(if any)~~ under the Data Protection ~~Act~~ Legislation in respect of the Processing of that Personal Data pursuant to this Code;

~~(m)~~ after the end of the provision of the Services to which the Processing of that Personal Data relates, at the written election of the User, either securely destroy the Personal Data or return it to the User together with all copies (save to the extent that the DCC is required by Laws and Directives to retain a copy of the Personal Data); and

~~(n)~~ permit the Independent Privacy Auditor (on the instruction of SECCo on behalf of Users collectively), on giving reasonable prior notice of its intention to audit, to audit the DCC's compliance with this Section I1.7 during normal business hours, and shall make available to the Independent Privacy Auditor all information, systems and staff reasonably necessary for the Independent Privacy Auditor to conduct such audit. The number of audits shall be limited to no more than once in every twelve (12) calendar month period unless more frequent audits are required under the Data Protection Legislation or the Panel has grounds to suspect there has or is likely to be a breach of the Data Protection Legislation. Where practicable, DCC shall be provided with an opportunity to comment upon the scope of an audit in advance and any audit shall be carried out in such a way that interruption to DCC's operations is minimised as far as is reasonably possible.

DCC's Sub-Processors

I1.8 The DCC shall ensure that its Sub-Processors are subject to written contractual obligations in respect of the Processing of Personal Data which are at least equivalent to the obligations imposed on the DCC under the DCC Licence and this Code, including obligations which provide sufficient guarantees from the Sub-Processor that the Processing meets the requirements stated at any time in the Data Protection Legislation.

I1.9 Each User hereby gives its general authorisation to the DCC to engage Sub-Processors who are appointed in accordance with the DCC Licence and does not object to the engagement by the DCC of any Sub-Processor provided that in engaging the Sub-Processor the DCC complies with the DCC Licence and this Code and publishes on its Website the identity of the Sub-Processors from time to time. Each User hereby consents to Processing by each such Sub-Processor who is appointed in accordance with the DCC Licence and this Code.

Records

~~I1.8~~10 The DCC and each User will each maintain in accordance with Good Industry Practice all such records and other information as is necessary to enable the DCC and each such User to demonstrate that it is complying with its respective obligations under Sections I1.2 to I1.5 and ~~I1.7~~9.

I1.11 The DCC shall make available to each User all information reasonably necessary to demonstrate compliance by the DCC with Sections I1.6 to I1.9, but only insofar as such information relates to the Personal Data for which that User is the Data Controller.

General Compliance with Data Protection Legislation

I1.12 Each of the DCC, SECCo, and each User undertakes to comply with its obligations under the Data Protection Legislation in respect of Personal Data they processes as a Data Controller pursuant to this Code.

Amend Section M8.1(c) (Events of Default) as follows:

- (c) the Defaulting Party has failed in a material respect to comply with an enforcement notice served by the Information Commissioner pursuant to ~~section 40 of~~ the Data Protection ~~Act~~Legislation, whether such failure has been notified to the Panel by the Information Commissioner or the Panel has otherwise become aware of such failure;

Amend Appendix AG (Incident Management Policy), clause 2.4.4 (Categorisation Matrix), row 1 as follows:

Replace "Data Protection Act" with "Data Protection Legislation".