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Stage 04: Modification Report Consultation Responses

SECMP0045 'Incorporation of the requirements of the General Data Protection Regulations'

What stage is this document in the process?

01	Initial Assessment
02	Refinement Process
03	Modification Report
▶ 04	Decision

About this document

This document contains the collated responses to the SECMP0045 Modification Report Consultation (MRC). The Change Board will consider these responses when making its determination on this modification.

If you would like any further information, or to discuss any questions you may have, please do not hesitate to contact Talia Addy on 020 7090 1010 or email

SEC.Change@gemserv.com.

SECMP0045

Modification Report
Consultation
Response Form

13th March 2018

Version 1.0

Page 1 of 23

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Content

Summary of Responses	3
Question 1	4
Question 2	6
Question 3	8
Question 4	12
Question 5	16
Question 6	18
Question 7	19
Additional response from Western Power Distribution	22

About this Document

This document contains the collated responses to the Modification Report Consultation (MRC) for SECMP0045.

The Change Board will consider these responses at its meeting on 21st March 2018, where it will determine whether SECMP0045 should be approved or rejected by the Authority.

SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

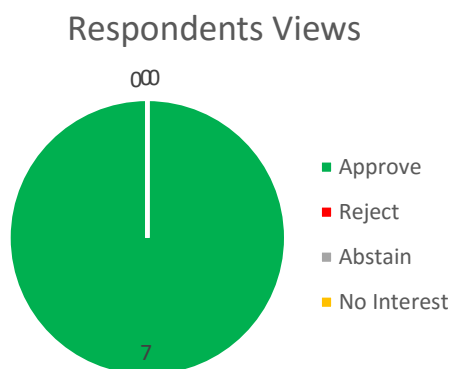
Page 2 of 23

This document is
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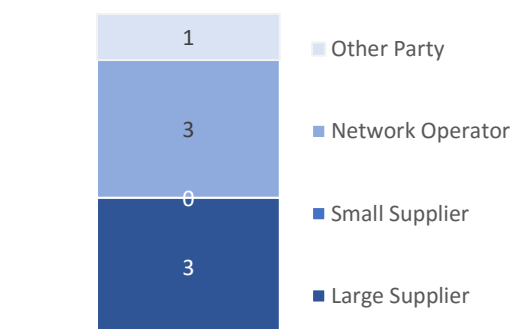
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Summary of Responses

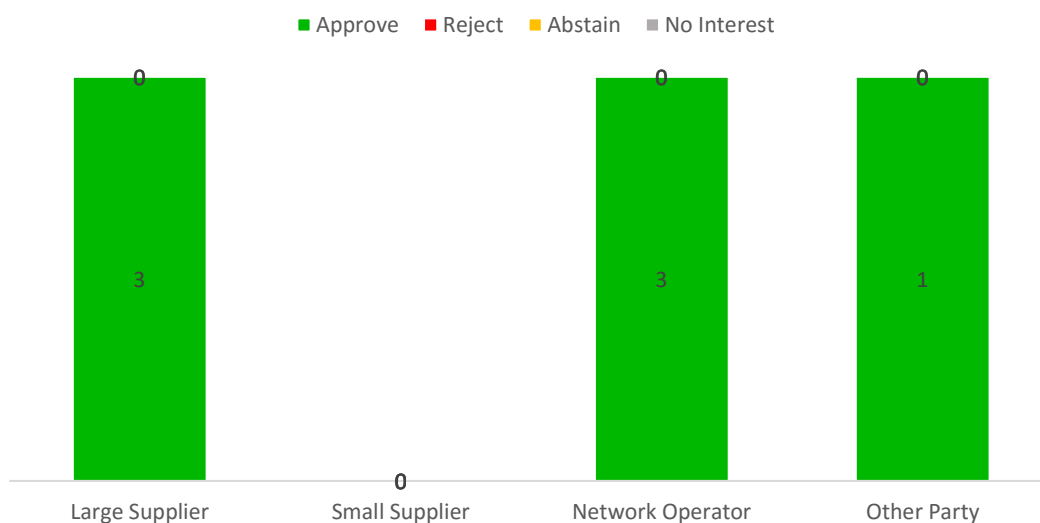
This section summarises the responses received to the SECMP0045 MRC.



Number of Respondents (by Party Type)



Views by Party Type



SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 3 of 23

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Question 1

Q1: Do you agree that the proposed solution better facilitates the SEC Objectives?

Party Name	Party Category	Yes/No/Neutral	Comments
E.ON Energy Solutions	Large Supplier	Yes	We believe that this Modification better facilitates both objective (b) and (f), and for the reasons noted in the Modification Report.
Electricity North West Limited	Network Operator	Yes	In particular, objective (F) as the GDPR is intended to protect Personal Data and incorporating its requirements into the SEC will contribute to the overall protection of Data under the Code.
Northern Gas Networks	Network Operator	Yes	NGN agrees that the proposal furthers both SEC Objectives (b) and (f) regarding the effective discharge of obligations, and the protection of data, as per the DCC Licence.
Scottish and Southern Electricity Networks	Network Operator	Yes	SSEN agrees with the Proposer and believes that this Modification Proposal better facilitates General SEC Objectives (b) and (f).
SSE	Large Supplier	Yes	The proposed solution should better facilitate SEC Objectives B and F.
Smart DCC Ltd	Other Party	Yes	DCC considers that the proposed solution better facilitates the following SEC objectives: (b) the second General SEC Objective is to enable the DCC to comply at all times with the General Objectives of the DCC (as

SECMPO045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 4 of 23

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SEC
Smart Energy Code

			<p>defined in the DCC Licence), and to efficiently discharge the other obligations imposed upon it by the DCC Licence.</p> <p>The incorporation of the requirements of the GDPR into the SEC will support the efficient discharge of the obligations imposed upon DCC by Condition 10 of the DCC Licence (Protection of Confidential Information).</p> <p>(f) the sixth General SEC Objective is to ensure the protection of Data and the security of Data and Systems in the operation of this Code.</p> <p>The GDPR is intended to protect Personal Data. Incorporating its requirements into the SEC will contribute to the overall protection of Data under the Code.</p>
EDF Energy	Large Supplier	Yes	<p>We agree with the Proposer that this Modification better facilitates General SEC Objectives (b) and (f) as it aligns the SEC to changes in the referenced privacy legislation moving from DPA to GDPR.</p>

SECMPO045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 5 of 23

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Question 2

Q2: Having considered the potential impacts and costs to your organisation, as well as the cost to deliver the modification, do you agree that SECMP0045 should be approved?

Party Name	Party Category	Yes/No	Comments
E.ON Energy Solutions	Large Supplier	Yes	-
Electricity North West Limited	Network Operator	Yes (with alternative legal text)	We agree that SECMP0045 for the alternative draft legal text should be approved. For more detail see our response to question 3 & 4.
Northern Gas Networks	Network Operator	-	NGN has not identified any potential costs or negative impacts from this modification as it only seeks permission to insert the new GDPR requirements into code.
Scottish and Southern Electricity Networks	Network Operator	Yes	SSEN believes that being an EU Regulation, DCC as well as DCC Users have no option but to comply.
SSE	Large Supplier	Yes	This change will not result in an impact or cost to SSE, and as we are keen to see codes ensuring compliance with GDPR we support the approval of SECMP0045.
Smart DCC Ltd	Other Party	Yes	DCC considers that the proposed changes align the SEC with important requirements of Article 28 of the GDPR in terms of contractual obligations between controllers and processors and should be approved.

SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 6 of 23

This document is
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EDF Energy	Large Supplier	Yes	As a DCC user operating in a Supplier role and therefore a Data Controller, this SEC modifications aims at ensuring that the SEC obligations applying to the DCC reflect their responsibilities as Data Processor. However we do believe that some changes are required to the current legal text before it is approved.
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SECMPO045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 7 of 23

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Question 3

Q3: Do you agree that the proposed draft legal text changes deliver the intention of the modification?

Party Name	Party Category	Yes/No	Comments
E.ON Energy Solutions	Large Supplier	No	We do not believe the text proposed is sufficiently robust enough to meet all of the obligations the Data Controller has under GDPR.
Electricity North West Limited	Network Operator	No	The proposed text is not clear enough to comply with GDPR Regulation 28(2). Referencing back to the Code and the DCC Licence is not particularly helpful.
Northern Gas Networks	Network Operator	Yes	Yes, NGN agrees that the proposed draft legal text reflects the intent of the solution proposed.
Scottish and Southern Electricity Networks	Network Operator	No	See response to Q4.
SSE	Large Supplier	Yes	-
Smart DCC Ltd	Other Party	Yes	The applicable requirements of Article 28 of the GDPR have been incorporated into the proposed draft legal text in a manner which accurately reflects the intent of the modification. A possible exception to this relates to Article 28(3) of the GDPR, which has resulted in the two different sets of draft legal text which accompany the modification. Article 28(3) requires that data processing is governed by a contract (or

SECMPO045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 8 of 23

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			<p>other legal act) that sets out the subject -matter , nature and purpose of the processing, along with the type of personal data and categories of data subjects.</p> <p>Both this draft legal text, and the alternative draft legal text seek to reflect these requirements in the SEC, but in different ways. This draft legal text cross -refers to the content of the SEC (I1.6) . Whereas the alternative text seeks to contain a more targeted description (I1.6A) .</p> <p>There are limitations to what DCC as a data processor can achieve in isolation. Identifying and capturing all of the personal data within DCC Systems to the satisfaction of each data controller would require a consensus across all SEC Parties which are data controllers.</p> <p>In the absence of industry-wide agreement on this matter, DCC considers that the best approach to drafting this requirement is to refer to the data and processes contained in SEC as defining the subject -matter and nature of the processing and the types of personal data without attempting to describe or list what these are. Any description or list which has not been agreed across all SEC Parties risks being incomplete, and therefore inaccurate. It also risks ambiguity around how the requirement should be read against other provisions in the SEC.</p>
EDF Energy	Large Supplier	No	<p>No, not fully.</p> <p>The “proposed” version includes less detail on the personal data and what this consists of. We think the more detailed version in the Alternative Solution is preferred as GDPR states that the subject matter and nature of the processing needs to be set out in the contract with data processors.</p> <p>Also (and this is also valid for the “alternative draft legal text changes”):</p>

SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 9 of 23

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			<ul style="list-style-type: none"> We request that the definition of 'personal Data Security Incident' be amended to: <ul style="list-style-type: none"> 'Personal Data Security Incident' means any accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed' This is taken from the GDPR itself and is more comprehensive than the current proposed definitions. I1.9: Data Controllers need to have knowledge of who the sub-processors are so that they are able to notify the data subjects when requested, and ensure their privacy notices are kept updated. We would request that 'from time to time' be amended to something more regular such as 'as soon as reasonably possible after the sub-processor is appointed' I1.9: There is no indemnity provided by the DCC for appointment of sub-processors. What would happen in cases of breaches of the GDPR by the sub-processor? This could probably do with some clarification, the contractual relationship that Data Controllers (including indemnities and liabilities) is with the DCC and it is not clear whether sub-processors would be covered by these. Section M of the SEC covers liabilities and indemnities and refers to 'DCC Service Providers' who are referred to in other parts of the SEC – we suggest this requires clarification. Sub-processors could potentially be defined as a type of DCC Service Provider to align with other parts of the SEC. 11.2 needs to be amended to state: <ul style="list-style-type: none"> 'each of the DCC, SECCo and each User undertakes to comply with its obligations under the Data Protection Legislation in respect of personal
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SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 10 of 23

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SEC
Smart Energy Code

			Data they process as a Data Controller <i>or Data Processor</i> pursuant to this Code.
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SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 11 of 23

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Question 4

Q4: Do you agree that the alternative draft legal text changes deliver the intention of the modification?

Party Name	Party Category	Yes/No	Comments
E.ON Energy Solutions	Large Supplier	No	<p>Whilst I1.6A is our preferred means of addressing Article 28 (3), we would note that we do not believe I1.9 as proposed in either text is sufficiently robust enough to meet the requirements of Article 28 (2).</p> <p>It would be our preference to have this passage (I1.9) written to the effect of: "Where the DCC intends to engage Sub-Processors in accordance with the DCC Licence, it will consult with all Data Controller(s) such that it acquires and records the written authorisation of each Data Controller with regard to the appointment of and the identity of the Sub-Processor to be appointed. Where no response is made to such a consultation the authorisation of the non-responsive Data Controller will be deemed here to have been given as a general authorisation. No Data Controller will unreasonably 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-Processor(s) in a timely manner."</p>
Electricity North West Limited	Network Operator	Yes	The alternative solution with enhanced wording at clause I1.6a in our view is more compliant with the requirements of GDPR Regulation 28(2) and should be approved.
Northern Gas Networks	Network Operator	Yes	Yes, NGN agrees that the alternative draft legal text reflects the intent of the solution proposed

SECMPO045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 12 of 23

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Smart Energy Code

Scottish and Southern Electricity Networks	Network Operator	Yes	SSEN believes that the alternative draft legal text changes deliver the intent of the modification as this better reflect the intent of Article 28 (3) and the Obligations imposed on the Users.
SSE	Large Supplier	Yes	-
Smart DCC Ltd	Other Party	No	<p>The alternative draft legal text changes aim to describe the subject -matter and nature of the processing and the types of personal data. However, this description is not exhaustive and may be inaccurate as a result. Producing an exhaustive and accurate description which does not risk inconsistency with the remainder of the SEC is a significant undertaking that would require industry -wide agreement .</p> <p>DCC's view is that in the absence of such industry-wide agreement , the optimal method of ensuring that the requirement under Article 28(3) is reflected in the SEC is to refer to the whole of the SEC as defining subject -matter and nature of the processing and the types of personal data without attempting to describe what these are.</p>
EDF Energy	Large Supplier	No	<p>No, not fully.</p> <p>We consider the purpose of I1.6A to be useful compared to the “proposed draft legal text” however the definition provided is not fully accurate as the DCC will process other types of personal data. For example, as part of the SMKI registration process, the DCC collects personal information related to the staff of DCC Users. For example: Nominating Officers, Senior Responsible Officers, Authorised Responsible Officers.</p> <p>Also (and this is also valid for the “proposed draft legal text changes”):</p>

SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 13 of 23

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			<ul style="list-style-type: none"> We request that the definition of 'personal Data Security Incident' be amended to: <ul style="list-style-type: none"> 'Personal Data Security Incident' means any accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed' This is taken from the GDPR itself and is more comprehensive than the current proposed definitions. I1.9: Data Controllers need to have knowledge of who the sub-processors are so that they are able to notify the data subjects when requested, and ensure their privacy notices are kept updated. We would request that 'from time to time' be amended to something more regular such as 'as soon as reasonably possible after the sub-processor is appointed' I1.9: There is no indemnity provided by the DCC for appointment of sub-processors. What would happen in cases of breaches of the GDPR by the sub-processor? This could probably do with some clarification, the contractual relationship that Data Controllers (including indemnities and liabilities) is with the DCC and it is not clear whether sub-processors would be covered by these. Section M of the SEC covers liabilities and indemnities and refers to 'DCC Service Providers' who are referred to in other parts of the SEC – we suggest this requires clarification. Sub-processors could potentially be defined as a type of DCC Service Provider to align with other parts of the SEC. 11.2 needs to be amended to state: 'each of the DCC, SECCo and each User undertakes to comply with its obligations under the Data Protection Legislation in
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SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 14 of 23

This document is
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SEC
Smart Energy Code

			respect of personal Data they process as a Data Controller <i>or Data Processor</i> pursuant to this Code.
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SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 15 of 23

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Question 5

Q5: Considering your obligations as a User, which version of the legal text do you believe should be incorporated to cover off the requirements of GDPR Article 28(3)?

Party Name	Party Category	Proposed/Alternative	Comments
E.ON Energy Solutions	Large Supplier	Alternative	We believe the drafting proposed in the alternative legal text better meets the requirements of Article 28 (3).
Electricity North West Limited	Network Operator	Alternative	See our response to questions 2, 3 and 4.
Northern Gas Networks	Network Operator	Proposed	NGN prefers the proposed draft legal text as it summarises the obligation to protect Data in a simplified manner, and so is less likely to have missing information when compared to the highly detailed alternative draft legal text.
Scottish and Southern Electricity Networks	Network Operator	Alternative	SSEN believes that the alternative draft legal text changes deliver the intent of the modification as this better reflect the intent of Article 28 (3) and the Obligations imposed on the Users.
SSE	Large Supplier	Alternative	We support both versions of draft legal text and recognise the benefits of both, however as the alternative version was produced on the advice of SECAS' legal guidance we would favour this version.
Smart DCC Ltd	Other Party	Neutral	DCC is not a User.

SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 16 of 23

This document is
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EDF Energy	Large Supplier	Alternative	We think the Alternative Solution is preferred as GDPR states that the subject matter and nature of the processing needs to be set out in the contract with data processors.
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SECMPO045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 17 of 23

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Question 6

Q6: Do you agree with the recommended implementation date?

Party Name	Party Category	Yes/No	Comments
E.ON Energy Solutions	Large Supplier	Yes	-
Electricity North West Limited	Network Operator	Yes	We agree an implementation date of 25th May 2018, if a decision to approve is made on or before 24th May 2018; or 1 Working Day following approval if a decision to approve is made after 24th May 2018.
Northern Gas Networks	Network Operator	Yes	Yes, NGN agrees with an implementation date of 25 May as this is when the new GDPR rules come into effect.
Scottish and Southern Electricity Networks	Network Operator	Yes	This will comply with the date when the Regulation becomes mandatory.
SSE	Large Supplier	Yes	-
Smart DCC Ltd	Other Party	Yes	Implementing the proposed changes on the recommended implementation date will ensure that the incorporation of the required changes into the SEC will align with the date that the GDPR will be enacted into British law.
EDF Energy	Large Supplier	Yes	Yes as in line with GDPR coming into effect in the UK.

SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 18 of 23

This document is
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Question 7

Q7: Do you have any further comments on SECMP0045?

Party Name	Party Category	Yes/No	Comments
E.ON Energy Solutions	Large Supplier	Yes	<p>For the legal text proposed under the alternative Modification we would note that 'Energy Consumers' is not a defined term, and would therefore suggest that this is written 'Energy Consumer(s)' to demonstrate that this is intended to be understood as the defined term 'Energy Consumer' in the relevant context.</p> <p>For the legal text proposed under both Modifications we note the below:</p> <p>1.7 c) it is not clear within the drafting what 'documented instruction' refers to; we believe any obligation being placed on Data Controllers here needs to be explicit within the legal drafting;</p> <p>1.7 l) we believe 'any a complaint' ought to be written 'any complaint';</p> <p>1.7 n) we believe that scope needs to be added here such that the DCC must notify Users where a disruption to Services is known or reasonably expected during this activity. We do not believe that Unplanned Maintenance is sufficient and would therefore request that this scope is notified in accordance with Planned Maintenance, and that any consequential impact for the DCC is considered;</p> <p>1.11 we believe that consideration ought to be given to the inclusion of something to the effect of 'as at the date the information is provided to the User', so as to avoid accidental</p>

SECMP0045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 19 of 23

This document is
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			<p>breach resulting from Change of Supply activities which are beyond the reasonable control of the DCC;</p> <p>1.12 we believe that 'processes' here should be written 'Processes', and</p> <p>References are made throughout the drafting (e.g. 11.8) to 'Sub Processors', we believe this ought to be written as 'Sub Processor(s)' to demonstrate that this is intended to be understood as the defined term 'Sub Processor' in the relevant context.</p>
Electricity North West Limited	Network Operator	No	-
Northern Gas Networks	Network Operator	No	-
Scottish and Southern Electricity Networks	Network Operator	No	-
SSE	Large Supplier	Yes	<p>Section 3 of the modification report states: "For the avoidance of doubt, this Modification assumes that the current model of implicit consent provided by Users and Registration Data Providers for DCC to act as data processor on their behalf remains valid under the GDPR". It is our view that under GDPR consent must be explicit, so we can no longer rely on implicit consent. While this does not affect our support for the intentions of this modification, we would be keen to see if other SEC Parties have any views on this assumption.</p>
Smart DCC Ltd	Other Party		<p>The proposed draft legal text changes will ensure that the SEC is in a satisfactory state at the point at which the GDPR take effect . However, DCC considers that further work is needed</p>

SECMPO045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 20 of 23

This document is
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			<p>across the energy industry in order to reach a consensus amongst data controllers as to what constitutes personal data under the SEC.</p> <p>SEC Parties would also benefit from an industry wide consensus on how other aspects of the GDPR should be implemented, particularly where DCC will be required to undertake actions at the request of data controllers. An example of this would be agreement around how the operational and technical procedures required to exercise the rights of data subjects will operate within the Smart Metering eco-system. Such rights include:</p> <ul style="list-style-type: none"> • The right to be Forgotten • The right to Restrictive Processing • The right to Notification • The right to Data Portability • The right to Object • The right to Appropriate Decision Making
EDF Energy	Large Supplier	Yes	<p>We believe that it should have been possible for this Modification Proposal to have been raised earlier, which would have given SEC Parties additional opportunities to review and comment on and review this legal drafting before this Final Modification Report.</p> <p>As noted in our responses to the questions on the legal drafting we believe a number of changes need to be made – we are concerned that as a result of these being raised late in the day these may not be able to be incorporated into the final legal text that goes to the Change Board to be voted on. This may then impact the approval of this Modification, and the timelines for getting these necessary changes in place</p>

SECMPO045

Modification Report
Consultation
Responses

13th March 2018

Version 1.0

Page 21 of 23

This document is
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Additional response from Western Power Distribution

I have been in contact with our legal department and at the moment we feel we are unable to respond to the consultation as it stands as we require further clarification.

This is something which needs a bit of thought. Amending the smart energy code (the "Code") is significant undertaking as it will affect everyone who wishes to use smart meter data across the country (including all suppliers and DNOs). So it's important the DCC gets its analysis right.

Before amending the Code, we think we need to take a step back and consider whether the DCC is a data processor or whether it's actually a data controller. This will have an important impact on how the data privacy provisions in the Code will need to be updated to ensure compliance with the GDPR. As drafted, both the un-amended and the amended versions of the Code, assume that the relationship is one of data controller and data processor (whereby the DCC is a data processor which processes personal data on behalf the Users, who are data controllers). The correct analysis is possibly more likely to be that the DCC is a data controller rather than a data processor, and that the relationship between the DCC and its Users is that they are joint data controllers.

Under the GDPR a party will be a data controller if it determines the purpose and means of processing of the relevant personal data. The ICO has previously published (non-binding, but persuasive) guidance on identifying when a party will be a data controller and when it will be a data processor (<https://ico.org.uk/media/for-organisations/documents/1546/data-controllers-and-data-processors-dp-guidance.pdf>). The guidance states the following (on page 6):

"To determine whether you are a data controller you need to ascertain which organisation decides:

- 1) to collect the personal data in the first place and the legal basis for doing so;
- 2) which items of personal data to collect, i.e. the content of the data;
- 3) the purpose or purposes the data are to be used for;
- 4) which individuals to collect data about;
- 5) whether to disclose the data, and if so, who to;
- 6) whether subject access and other individuals' rights apply i.e. the application of exemptions; and
- 7) how long to retain the data or whether to make non-routine amendments to the data."

In each case, it's the DCC that makes these decisions. The Article 29 Working Party (the independent organisation made up of representatives from each supervisory authority, which advises the European Commission on data privacy matters) states the following in its Opinion 1/2010:

"The capacity to "determine the purposes and the means" may stem from different legal and/or factual circumstances: an explicit legal competence, when the law appoints the controller or confers a task or duty to collect and process certain data..."

SECMPO045

Modification Report
Consultation
Response Form

13th March 2018

Version 1.0

Page 22 of 23

This document is
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Although this doesn't exactly describe the situation we have here, we think it's still relevant. The DCC operates under licence granted by BEIS. As we understand it, the licence has its basis in statute, under sections 7AB(2) and (4) of the Gas Act 1986 and sections 6(1A) and (1C) of the Electricity Act 1989. The BEIS licence conditions set out the requirements which apply to the DCC to provide the services to the Users, and effectively set out what the DCC's services should look like. Rather than the DCC being accountable to Users as a service provider, in many respects, the reverse is true: Users have to go through a significant licensing process to gain access to smart meter data, as part of which (as we understand it) the DCC assesses their suitability and whether they have appropriate IT infrastructure, etc. This is clearly not a conventional controller-processor relationship.

All this makes it more likely that the DCC is a data controller. In practice, Users have very little control over the purpose and means of processing carried out by the DCC. However they will have control over the purpose and means of processing of consumption data once it comes into their possession. And in this respect they will be a data controller in their own right.

Next steps

- 1) The parties need to be clear about what their relationship is, and whether the DCC is a data controller.
- 2) If the DCC is a data controller then the Code will need re-drafting.
- 3) Once this clarification is received, WPD can provide comments on the consultation (it seems premature to provide further comment at this stage).

SECMP0045

Working Group
Consultation
Responses

13th March 2018

Version 1.0

Page 23 of 23

This document is
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