

Memorandum

To Hollie Nicholls on behalf of DCUSA Limited

From Rocio De la Cruz

Date 9 February 2018

Subject GDPR impact assessment in respect of the DCUSA

1 YOUR INSTRUCTIONS

- 1.1 You have instructed us to conduct an impact assessment in respect of the Distribution Connection and Use of System Agreement (version 9.5 released 2 November 2017) (the "**Agreement**") for the purposes of ascertaining the extent of any changes that may be required in order to ensure compliance with EU Regulation 2016/679, commonly known as the General Data Protection Regulation (the "**GDPR**").
- 1.2 This note summarises the findings of our impact assessment and explains the suggested amendments to the Agreement included in Annex 1 to this Memo, so as to achieve full GDPR compliance. Any terms used but not defined in this note have the meaning given to them in the Agreement.

2 BACKGROUND TO THE AGREEMENT

- 2.1 The Agreement is a multi-party contract between licensed electricity distributors, suppliers and generators in Great Britain concerned with the use of the electricity distribution system.
- 2.2 Since its creation, the DCUSA has expanded to encompass Distributor to Distributor/OTSO relationships, and also relationships with Gas Suppliers who wish to work at the customer's electricity connection point to fit communications associated with SMART gas meters.
- 2.3 The Agreement contains sections in relation to its governance and change control (Section 1) and general provisions (Section 3). The operative provisions are split into 4 sections as follows:
- (a) Distributor to Supplier/Generator Relationships (Section 2A);
 - (b) Distributor to Distributor/OTSO Relationships (Section 2B);
 - (c) Distributor to Gas Supplier Relationships (Section 2C);
 - (d) Electricity Supplier to Gas Supplier Relationships (Section 2D).
- 2.4 The Agreement's Schedules contain various industry processes and rules, such as:
- (a) the National Terms of Connection;

- (b) the Theft Risk Assessment Service (TRAS) arrangements;
- (c) the Distribution UoS Charging Methodologies;
- (d) the Common Connection Charging Methodology; and
- (e) the Revenue Protection Code of Practice.

3 ASSUMPTIONS AND LIMITATIONS

- 3.1 The scope of our impact assessment is limited to the compliance of the provisions of the Agreement with the GDPR.
- 3.2 It does not include the wider GDPR compliance of any of the signatories to the Agreement in their activities outside the Agreement, nor does it include the sharing of any personal data with third parties that are not parties to the Agreement.
- 3.3 The GDPR compliance of DCUSA Limited generally (save to the extent that provisions need to be included in the Agreement) is also outside the agreed scope of our impact assessment.
- 3.4 If you would like us to advise you in respect of any of these wider issues, please let us know, and we can discuss your instructions and provide a fee estimate for this separate work.

4 RISK PROFILE

- 4.1 Non-compliance of the Agreement with the GDPR will present a high level of risk for the parties to the Agreement. The GDPR gives the Information Commissioner's Office, being the UK's national data protection authority, the power to levy much more significant fines on data controllers and data processors for failing to comply with the GDPR than under the current data protection regime.
- 4.2 Failure to comply with the GDPR may also result in damaging adverse publicity, especially where consumer data is involved, which could cause significant damage to the reputation of the business concerned.

5 DATA CONTROLLER VS DATA PROCESSOR

- 5.1 The GDPR makes a distinction between the obligations of a data controller and those of a data processor (the definitions of which expressions are broadly the same as the current definitions under the Data Protection Act 1998).
- 5.2 The data controller typically decides:
 - (a) to collect the personal data;
 - (b) what data to collect;
 - (c) the purpose of the data processing; and
 - (d) the general manner in which the data is to be processed.

5.3 A data processor typically (on behalf of the controller):

- (a) obtains, records or holds the personal data; and
- (b) processes personal data in a manner consistent with the controllers instructions (and without significant decision making discretion).

5.4 The key distinction is which person (jointly or alone) determines the 'purpose' of the processing, and secondly the 'means' of processing. This person is the data controller (or a joint data controller if acting jointly with another person).

5.5 It is worth noting that, as per guidance from the European Commission and the Information Commissioner's Office, more weight is generally given to the 'purpose' of the processing than the 'means' of processing; so:

- (a) if an entity determines the 'purpose' but does not have significant control over the 'means' of processing, there is a fair chance that they would still be considered a data controller for the purpose of the processing; and
- (b) if an entity has significant control over the 'means' but not the 'purpose' of processing, there is a good chance that they would only be considered a data processor and not a data controller.¹

5.6 This is because it is recognised that, particularly for complex services, controllers are often reliant on the expertise, knowhow and methodology of their service providers. Essentially, the service provider may have considerable control over the 'means' of processing – this will not, however, necessarily make them a data controller.

6 Guidance issued by the Information Commissioner's Office on the difference between a data controller and data processor identifies the difficulty of drawing the line between controllers and processors². It gives a number of examples. One of the key themes stressed in this guidance is that a sub-contractor is not necessarily a data processor and can often be a data controller in its own right.

7 IMPACT ASSESSMENT

7.1 *GDPR Status of Parties to the Agreement*

- (a) Based on our analysis of the information available, we advise that the Parties to the Agreement act as data controllers in respect of the data processing they undertake pursuant to the Agreement.
- (b) This is because each Party generally determines for itself the purpose and means of the processing of personal data within their organisations.

¹ http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_en.pdf - pgs. 14-16

² <https://ico.org.uk/media/for-organisations/documents/1546/data-controllers-and-data-processors-dp-guidance.pdf>

- (c) So, for example, each Party will collect and hold personal data concerning its customers/connectees. The Parties may exchange this data with one another under the Agreement. However, this exchange of data does not make one Party the other Party's data processor. Each Party is determining the purpose and means of how that data will be processed within its organisation. It is not the case that the receiving Party is processing that personal data in accordance with the instructions of the Party.
- (d) There are though some occasions where two or more Parties to the Agreement jointly determine the purpose and means of the processing of personal data that they are undertaking pursuant to the Agreement. This arises where the Agreement itself describes the purpose and means of an aspect of processing. In these cases, the Parties are acting as joint data controllers, because they have jointly taken a decision on how to process personal data, which decision is set out in the Agreement.
- (e) Thus, when customer data is shared between parties to the Agreement and the procedures in each particular case are stated in the Agreement, and agreed by each of them in becoming a signatory to the Agreement, the parties are acting as joint data controllers. Some examples include the sharing of personal data between:

Supplier Parties and DNO/IDNO Parties for the purposes of the DNO/IDNO Party undertaking de-energisation or energisation works (Clause 25);

- (i) Supplier Parties and IDNO/DNO Parties in relation to Revenue Protection Services (Schedule 23);
 - (ii) Supplier Parties and IDNO/DNO Parties in relation to Resolving Unregistered Consumers (Schedule 27); and
 - (iii) Parties for the purposes of the TRAS Service (see further below).
- (f) We have not been able to identify any instances in which a Party acts as a data processor under the Agreement for the reasons described above, hence we consider those instances to be examples of situations in which Parties are jointly agreeing the purpose and means of certain aspects of processing; rather than one Party processing on the instructions of another.
 - (g) We have also considered whether DCUSA Ltd could be viewed as a data processor. DCUSA Ltd processes certain personal data pursuant to the Agreement. Most notably, DCUSA Ltd processes the names, job descriptions and contact details of individuals who represent Parties or serve on the Panel or Working Groups. The other Parties do exert some control over the purposes and means of this processing via the provisions of the Agreement. However, we do not consider that the extent of this control is sufficient to make DCUSA Ltd a data processor. In our view DCUSA Ltd is the data controller of this personal data for the purposes of the Agreement.
 - (h) Notwithstanding (f) and (g) above, as part of the change proposal process, we recommend inviting Parties to comment on whether they are aware of any instances in which a Party processes personal data under the Agreement as a data processor. There is no need for them to identify processing which is governed by a different contract. For example, there is no need to identify instances in which a Meter Operator Agent processes data on behalf of a Supplier Party (which would be governed by the metering contract), or the exchange

of personal data via the Data Transfer Network (which is governed by the Data Transfer Services Agreement).

- (i) It is worth noting that the Agreement does not currently contain any provisions which impose obligations on Parties as data processors, which is consistent with our analysis that no Party is acting as another's data processor under the Agreement.

7.2 Status of TRAS Service Provider

- (a) The TRAS Service Provider is engaged by DCUSA Limited under a contract which is separate to the Agreement.
- (b) However, part of the contractual arrangements is documented in Schedule 25 (Theft Risk Assessment Service).
- (c) We advise that the TRAS Service Provider processes personal data as a data controller because it has enough discretion on deciding the manner in which the personal data will be processed, and because it is providing an expert service comparable to that of a professional services organisation. Although the Suppliers have determined the overall purpose of the processing, the TRAS Service Provider has control over the methodology.
- (d) However, there might be some instances where the TRAS Service Provider might act as a data processor for some basic tasks which it has agreed to undertake as instructed.
- (e) In any event, these are matters for DCUSA Ltd's contract with the TRAS Service Provider, and we understand that discussions are ongoing with the TRAS Service Provider. However, we mention them here only to note that the TRAS Schedule will need to be looked at again when the TRAS Service Provider contract is reviewed, to ensure that the Schedule remains consistent with the contract.

7.3 Status of ETTOS Services Provider

- (a) Schedule 26 (Energy Theft Tip-Off Service) provides for DCUSA Limited to contract with an ETTOS Service Provider.
- (b) In our view, the ETTOS Service Provider processes data as a data controller, and the Parties to the Agreement also act as data controllers in respect of the personal data they receive from the ETTOS Service Provider.
- (c) The ETTOS Service Provider contract may not therefore require amendment, but is (in any event) outside the scope of this note.

8 AMENDMENTS TO THE MAIN BODY OF THE AGREEMENT

- (a) In order to achieve full compliance with the GDPR, we have suggested the following amendments are made to the main body of the Agreement:
 - (i) Definitions – we suggest that the definition of "Data Protection Act" (and all references to it) is replaced with a new definition of "Data Protection Legislation" included in Annex 1 below, so that this definition is wide enough to include all possible forthcoming data protection legislation, including the GDPR.

- (ii) The current references to 'Data Protection Act' throughout the Agreement will need to be updated to refer to 'Data Protection Legislation'. We have noted that there are references to the Data Protection Act in different parts of the DCUSA including Clauses 1 and 57.3, Schedule 25 and Schedule 26. We will also need to delete clauses 34.3, 35.5, 50.3, 51.5, 52E.3, 52F.5, 52K.5, and 52L.5.
- (iii) We recommend incorporating a general Data Protection Clause in Section 3. This would be a new clause 60.15 "Data Protection". The wording of the clause addresses the requirements under Article 26 GDPR in respect of joint data controllers and clarifies that the Parties to the Agreement are either joint data controllers or independent data controllers.

Please don't hesitate to contact me should you have any queries in respect of the contents of this note.

Rocio De la Cruz

Gowling WLG (UK) LLP

9 February 2018

ANNEX 1- AMENDMENTS SUGGESTED FOR DCUSA

GDPR PROVISIONS

Amend the following defined terms in Section 1A, clause 1 as follows:

"Data Protection Legislation" [DN – It will replace the definition of "Data Protection Act"]	means the Data Protection Act 1998; the EU Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which is known as the General Data Protection Regulation, and any other applicable legislation governing the processing of personal data as adopted by the UK Government;
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Replace any reference to "Data Protection Act" by "Data Protection Legislation".

INCORPORATE A CLAUSE 60.15 IN SECTION 3 as follows:

Data Protection

60.15 The words and expressions used in this Clause 60.15 and not defined elsewhere in this Agreement shall be interpreted in accordance with any meaning given to them in the Data Protection Legislation.

- (a) From time to time, personal data may be shared between the Parties in accordance with the provisions of this Agreement.
- (b) It is acknowledged that each Party is likely to process such personal data as a data controller, and when jointly agreeing on the manner in which, and the purposes for which, such data is processed, as joint data controllers.
- (c) Each Party warrants that it has effected, and undertakes that it shall (while it remains a Party to this Agreement) effect and maintain, all such notifications and registrations as it is required to effect and maintain under the Data Protection Legislation to enable it lawfully to perform the obligations imposed on it by this Agreement, and exercise the rights granted to it by this Agreement.
- (d) Each Party undertakes to comply with the Data Protection Legislation in the performance of this Agreement, including ensuring that it has a lawful basis for sharing personal data with another Party and that it complies with the Data Protection Legislation in relation to such sharing of personal data.
- (e) Each Supplier Party shall provide to its Customers, and each DNO/IDNO Party shall provide to its Connectees the information (if any) required by the Data Protection Legislation to be provided by them in respect of the processing to be undertaken under this Agreement. If a data subject is dealing with two or more Parties at the same time,

then both those Parties shall be separately responsible for complying with their obligations under the Data Protection Legislation regarding the processing of the data subject's personal data.

- (f) Each Party shall comply with the Data Protection Legislation as regards the exercise of rights by data subjects for which the Party is the data controller. In particular, each Party shall designate its own contact point responsible for dealing with data protection queries raised by data subjects for which the Party is the data controller. Unless otherwise agreed bilaterally in writing at the relevant time, and to the extent any Parties are joint controllers:
 - i. each Party shall independently comply with the Data Protection Legislation, regarding the rights of data subjects under the Data Protection Legislation; and
 - ii. each Party shall independently inform the data subjects about its processing activities and shall refer to the other joint controller in such notices.
- (g) The Parties do not anticipate that they will act as data processors in relation to any personal data shared pursuant to this Agreement. If a Party becomes aware of instances in which personal data may be processed under this Agreement by a Party as a data processor it shall notify the Panel so that consideration can be given to whether a Change Proposal should be raised to describe such personal data and the purpose, nature and duration of such processing, and to set out the clauses required by the Data Protection Legislation to be included in contracts between data controllers and data processors.