

Executive summary of potential legal issues related to ePrivacy Regulation

1. Applicability of ePrivacy Regulation in electricity sector may lead to uncertainties.

Data in the electricity sector¹ is regulated under art. 23 and 24 of the **Electricity Directive**, in conjunction with the **GDPR** and the national law complementing the GDPR. Additionally, another layer of harmonisation will be added by the **implementing act on data access** and interoperability. Smart metering operators are also subject to Art. 35 of the **GDPR on impact assessments**.

Smart grid functionalities and smart metering data are used by a number of electricity undertakings, including those that **do not collect them directly**, e.g. data collected by a grid operator is needed for the provision of services by suppliers and aggregators. **Clarity** is needed to determine which of the undertakings are **responsible for lawful collection** of data and how it can be shared.

2. Should electricity services be classified as electronic communication services?

Even though smart grids and smart metering systems may be classified as **electronic communication networks**, it is not clear whether electricity services fulfil the criteria of the definition of **electronic communication services**.

In the view of **Electronic Communications Code**, electricity services **are not** internet access services, interpersonal communication services or services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services or for broadcasting. Neither they are **functionally equivalent** to those services. Does Art. 8 only apply to electronic communication services?

3. Processing based on consent: Art. 6a par.1 (a)²; Art. 8 par. 1 (b); Art. 8 par. 2 (b)

The **serious risks** from consent-based processing of smart metering data are: (I) obtaining the consent from end-users especially by grid operators (which are normally not visible to end-users) and (II) that a **withdrawal of a consent** would effectively mean an **early termination of a contract**. Under the GDPR a **consent has to be freely given** and not be a condition for obtaining the service. While almost immediate supplier switching is allowed under Art. 12 of Electricity Directive, other electricity services' contract or asset management contracts may foresee **notice periods**, in particular in business-to-business contracts. An abrupt contract termination would mean a **risk to electricity system stability and security**.

4. Processing based on request for a service: (Art. 6a par.1 (a)³; Art. 8 par 1 (c), Art. 8 par. 2 (b)

If processing is based on the **request for a service**, three different scenarios might occur:

- A customer **explicitly requests** the use of smart metering system;
- A customer is subject to a **national roll-out programme for smart meters**;
- Energy undertaking uses smart grid solutions and smart metering data for ensuring security and stability.

In the first scenario **Art. 8 applies** and possibly Art. 6a **applies** if a consent is granted. In the two latter cases there is **no explicit request for service**, how could these cases be classified under the ePrivacy Regulation.

¹ Under the Electricity Directive data means data originating from smart meters and other metering data, electricity consumption data, data required for changing suppliers, demand response, aggregation, consumer generation, in particular from solar panels (prosumers), energy communities, storage and electric vehicles

² In case in Art. 6a consent must be granted together with request for service

³ In case of Art. 6a request must be accompanied by a consent