

Position paper



E-Privacy Regulation impacts on DSOs

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I. Introduction: The relevance of e-Privacy Regulation for DSOs.

E.DSO is the key interface between Europe’s Distribution System Operators (DSOs) and the European institutions. E.DSO gathers 41 leading electricity DSOs in 24 countries, including 2 national associations, cooperating to ensure the reliability of Europe’s electricity supply for consumers and enabling their active participation in our energy system. E.DSO members are at the core of the digital transformation of the energy systems through innovation and continuous engagement with customers.

Digitalisation is paramount to the success of the energy transition. Greater use of data and digital technologies are bringing important changes to the energy system. They ensure security of supply as a major responsibility of DSOs, and at the same time provide the opportunity for increased productivity, new products and services that impact energy systems, and digital marketplaces that bring new participants and transform the way the sector does business.

As part of DSOs missions and obligations as essential service providers, consumer smart energy data are crucial to enable DSOs to manage their networks more efficiently (considering the increasing difficulty of new energy sources connected to the grid and consumption habits). Power systems require a better knowledge of the customers’ habits and more efficient capabilities to predict their energy needs.

Electricity DSOs are not information society services and they do not provide electronic communication services. The regulation of electronic communications is a complex matter that must find a balance between protecting data and fostering digitalisation in the energy sector. Unfortunately, recent developments on the new e-Privacy Regulation proposal do not include positive progress in this regard and can heavily undermine digitalisation of the electricity distribution sector.

2. Main DSOs’ services at stake

Smart grids and smart meters are the backbone of the future energy systems and they **play an important role for the proper functioning of the electricity distribution network and hence for the whole energy system**. Data collected by DSOs from smart meters are a key component for the energy transition, security of supply and customers empowerment. They support DSOs to provide essential services based on the respect and compliance with European and national legal obligations for data. Tasks for operating DSO systems include maintaining proper levels of distribution grids’ observability, striving for network efficiency, and leveraging the deployment of energy services, such as demand-side flexibility.

Observability and operation of power systems, as a critical tool to allow DSOs to ensure system security, might be at risk if appropriate measures and levels of data cannot be acquired from smart meters. Smart meters provide valuable information for DSOs to guarantee the security and stability of the system and to operate it efficiently. The detail and the minimum of information essential needed, should be sufficient to avoid congestion problems and faults among others, helping to provide better reliability and security of supply.

Grid optimisation. Aggregated data from consumption and distributed generation can provide information for optimizing system operation and planning processes which are necessary to ensure that best planning and development decisions are made. This not only can reduce maintenance costs but also allows the current system to maximise electrification and RES integration, minimising overall system costs.

Customer engagement through the provision of energy services: The use and management of energy data from smart meters allow customers to participate in the energy system through different possibilities: demand response, aggregation, self-generation, peer-to-peer sharing, electro-mobility, and other innovative services. Smart meters measure the electricity demand and other parameters for each customer and make the data readily available, providing the customers the ability to choose their energy

consumption (production) patterns, in coherence with the aim of the Clean Energy Package (Electricity Directive¹).

3. DSOs commitment to data protection

DSOs already protect data they collect and manage. They continuously put in place specific processes to ensure that the use of data does not infringe customer’ rights and facilitate communication between customers and stakeholders. For example, tools are developed to facilitate the control of consent from customers, as they can easily give or withdraw their consent themselves. **Distribution activity and the role of smart meters are already subject to several legislative documents.** The General Data Protection Regulation (GDPR)² applies to all personal data, which is defined as any information relating to an identified or identifiable natural person, in a direct or indirect way. Thus, data collected through smart meters installed at the home of a natural person, notably consumption data, are covered by the scope of GDPR and protected by DSOs. This protection is reinforced by the related provisions of the adopted Electricity Directive, applying specifically to smart meters data collected by DSOs (Article 23).

E.DSO welcomes the ongoing effort of the EU to modernise data protection and privacy laws and is highly dedicated to secure and lawful processing of customer data. E.DSO deems important the provisions aiming to improve ever-growing risks stemming from extensive use of social media and smart phones, computers, or other highly personalised devices. Nonetheless, this leads to shortcomings for the energy sector, which need to be considered. While the e-Privacy Regulation is an important document towards securing privacy in online services, such as social platforms or advertising, it may affect in parallel the proper functioning of the energy sector.

The e-Privacy Regulation could hinder the use of smart meters significantly by hampering collection, storage, and processing of smart meter data, which is fundamental for the meters’ functioning. The non-availability of smart metering would impede innovation and the transformation of the energy system into a decarbonised and decentralised future.

4. Face down emerging challenges for DSOs services

The e-Privacy Regulation proposal deals with electronic communication and aims to increasingly protect both personal and non-personal data. E.DSO agrees that greater level of information security is just as important as the use of data within communication. However, regarding its broad scope, this proposal covers many different types of services in various areas. Specificities of the energy sector – notably the distribution of electricity – and data uses should be considered.

Scope: The scope of the current draft includes not only personal data, but also technical and business data. E-Privacy Regulation requirements apply to all electronic communications services as well as to terminal equipment of end-users. Therefore, smart meter systems processing energy consumption data seem to be included in its scope in those both aspects.

Coexistence with existing legal framework: The legal basis to collect, store and process data from customers, including electricity smart meters is regulated by the GDPR. Data is collected on the grounds of a service contract with a customer or a legal obligation to perform a service in a certain manner. As GDPR protects natural persons’ personal data, the e-Privacy proposal should be aligned with its provisions. Regarding legal entities’ data, the e-Privacy Regulation will establish a new framework. Nevertheless, it is needed to emphasise that several Member States also provide legal frameworks applying to legal entities’ data. Consequently, these data and their exchange may be subject to other legal

¹ <http://data.europa.eu/eli/dir/2019/944/oj>

² <http://data.europa.eu/eli/reg/2016/679/oj>

or contractual restrictions, which may arise due to confidentiality obligations, intellectual property rights (including trade secrets), anti-cartel law or other regulatory provisions.

Articulation and coordination with the GDPR, that foresees lawfulness of processes upon consent, to perform a contract, fulfil a legal obligation, protect vital interests, or carry out a public interest or a legitimate interest: Smart meters imply to collect data from terminal equipment through means of electronic communications for billing matters and to ensure stability and security of the network. For this reason, as they have to comply with legal obligations, they should be covered by an exception regime for both electronic communications and terminal equipment. While the compliance with legal obligations is foreseen as an exception for electric communication in the Council compromise (Article 6) this exception is missing for end-users' terminal equipment (Article 8).

Considering a smart meter is made of a terminal equipment using electronic communications, the provisions applying to these two components should be consistent. Articles 6 and 8 should encompass compliance with legal obligations to fully allow DSOs to fulfil their missions.

Consent: In addition to GDPR requirement, the proposed e-Privacy Regulation requires consent for processing smart meter data beyond personal data (notably business' data). This could have significant consequences for the energy sector, its customers and ultimately the energy transition. It is especially true if the exception related to the legal obligation is not recognised in Articles 6 and 8. In that case, if customer consent is not given or is withdrawn, it could endanger the security of the system and supply, which are legal obligations for DSOs. These are the reasons why we consider the type of consent required goes beyond that of the GDPR and can be viewed as "consent+" regime.

E.DSO strongly believes that consent should be reserved for the activities of commercial actors or for activities that could be devolved to DSOs, outside the strict framework of public service missions. In other words: as soon as the smart data is used to manage, maintain and operate the network (such as its stability) and perform public service obligations, **those services must not depend on customers' consent**. Moreover, making access to certain services (e.g. renewable energy communities) conditional on "e-privacy" consent to the collection of fine-grained consumption data could have the effect of making this consent unfree and therefore inoperative.

The nature of energy services: energy services are fundamentally different from online services using cookies. In the case of electricity supply, demand response, aggregation, electro-mobility, prosumers' solution and related topics, electronic communication via smart meters constitutes a supportive role, instead of it being the main objective of the service.

The privacy of personal data is an integral part of products and services (new and existing) that process personal data, throughout its life cycle, beginning with the design of such products and services (privacy by design). Therefore, the exception related to smart meters, recognised in recital 21 of the compromise proposal, should be reflected in the provisions. It recognises that the consent should not be requested when use or access to data from smart meters is necessary for the provision of the service.

DPIA: In the ambit of Article 35 of the GDPR, smart meter systems' operators are required to perform a data protection impact assessment (DPIA), intended to safeguard privacy beyond a mere GDPR compliance. Such DPIAs should analyse the nature, scope, context, and purposes of the processing, as well as the likelihood and severity of the risk to the rights and freedoms of the data subject, and establish the measures to mitigate them, where necessary. For this reason, DSOs already carry out their own DPIAs for all those processing activities with a high level of risk, as well as for all those activities required by the legislation or local regulators.

Conclusion

The e-Privacy Regulation proposal is a key instrument to protect online private life of citizens. Nevertheless, its scope is much broader than its target and could endanger DSOs' missions. In that perspective, E.DSO highlights three main points:

- **Energy services are different from other services targeted by the Regulation:** they use digital tools and telecom networks to provide essential services to electricity customers, based on legal obligations.
- **Smart meters should be recognised as a specific tool to provide these energy services.** This should be endorsed in the provisions of the proposal.
- **DSOs' missions and responsibilities should not be hindered,** which would be the case if the e-Privacy Regulation does not consider the specificity of smart meters and their role in the energy services.

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