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Joint declaration on the E-privacy Regulation

EHPA, ESMIG and Eurelectric would like to share some concerns about the Council's progress on the e-Privacy Regulation proposal. We have closely monitored the developments on the e-Privacy Regulation over the past years and acknowledge that the regulation for electronic communications is a complex matter, as it must strike a balance between protecting the users' data on the one hand and boosting digitalisation in the EU on the other hand.

Despite the energy sector's commitment to protect our customers' privacy and data integrity, we are sorry to conclude that the Council's efforts to date did not result in a proposal that could provide further protection of the energy services' customers' data without heavily undermining digitalisation of the energy sector. Draft proposals of consecutive Presidencies have not included positive developments within the Council over the past years, and could have had a major negative impact on the green and digital transitions often invoked by all the EU institutions. We welcome the current Portuguese Presidency's declaration on setting a balance between the high-level protection of the fundamental rights to private life and fostering development of new technologies and innovation.

Based on the draft proposals of consecutive Presidencies, we would like to share with you the results of our observations on the matter:

1. Grounds for applicability of the e-Privacy Regulation to the energy sector

Electricity supply and other energy services are neither information society services nor electronic communication services. In other words, energy services are fundamentally different from online services using cookies. In the case of smart meters for electricity, gas and heat¹, the electronic communication constitutes a supportive role, instead of it being the main purpose or a carrier of a service. Since smart metering data may not be classified as electronic communication content (text, videos, images, sounds) core provisions of the e-Privacy Regulation will not find applicability to the energy sector.

Despite the above, smart meters fall under the category of so-called 'terminal equipment' in the e-Privacy Regulation terminology, since they are connected to the Internet or other public electronic communication networks. Consequently, collecting smart metering data falls under draft

¹ The name 'smart meter' is commonly used in reference to electronic devices that record information on consumption of energy and capable of transmitting data. For the purpose of this letter, a smart meter should be understood, not only as a smart meter fulfilling minimum requirements from the Electricity Directive 2019/944, but also any kind of meter that is connected to the Internet or other public communication network, and thus, fulfilling the conditions to be classified as 'terminal equipment' and subject to Art. 8 of the draft e-Privacy Regulation.



Art. 8 of the e-Privacy Regulation proposal². These provisions, however, should not be applicable to the energy sector, given that:

- (i) other provisions of the e-Privacy Regulation proposal, notably draft Art. 6 on permitted processing of electronic communications data do not find application in the energy sector, therefore rules on collecting and accessing smart metering data would be the only applicable provisions of the e-Privacy Regulation, not providing any further solutions for smart metering data processing;
- (ii) provisions of the draft Art. 8 of the e-Privacy Regulation would overlap with the relevant provisions of the GDPR and the sectorial rules on data access set out in the Electricity Directive 2019/944 as explained in point 2 of this letter;
- (iii) provisions of the draft Art. 8, if inadequately drafted, would cause serious obstacles to the use of smart meters in the sectors of electricity, gas and heat, impose financial and operational burden on innovative companies and hinder the uptake of new services due to consumers' lack of information, as explained in point 3 of this letter;
- (iv) the e-Privacy Regulation may create an uneven level playing field for traditional suppliers on the one hand, new (atypical) market actors, e.g. energy communities, peer-to-peer platforms or closed distribution networks that use private (non-publicly available) communication network, on the other hand. Smart meters used in such networks could then be exempted from the 'terminal equipment' definition under the e-Privacy Regulation.

2. Energy sector under the GDPR framework

The EU has already successfully leveraged the importance of personal data within the GDPR framework. The GDPR has been established as an effective instrument for the protection of personal data and has been implemented by companies with a great effort in terms of human and financial resources. The importance of the GDPR has also been recognised in sectorial regulation: Art. 23 of the Electricity Directive 2019/944. The Commission is currently working on implementing acts on data to be adopted under Art. 23 that, by law, need to be in-line with the GDPR.

In addition, Art. 35 of the GDPR gives data protection supervisory authorities an opportunity to classify certain types of processing as 'likely to result in high risks to the rights and freedoms of natural persons' and to require data controllers to perform data protection impact assessments as an additional compliance and data privacy safeguard. Should processing of smart metering be deemed as risky, the national authorities have then an appropriate instrument to further advance data protection, going far beyond draft Art. 8 of the e-Privacy Regulation, which is limited to regulating data collection. In fact, numerous energy companies in the EU perform data protection impact

² *Even though smart metering data is very different from terminal equipment data that the e-Privacy Regulation intends to protect: details of an individual's emotional, political, social complexities, including pictures and contact lists (See Recital 20 of the draft e-Privacy Regulation).*



assessments (either under national rules or voluntarily) in order to secure data protection and privacy of consumers beyond mere GDPR compliance.

3. Potential consequences of the e-Privacy Regulation to the energy sector

3.1. Joint applicability of the GDPR and e-Privacy Regulation

Co-existence of the e-Privacy Regulation and the GDPR would bring legal uncertainty when and to what extent the e-Privacy or the GDPR will be applicable. It should be underlined that data collected from a single consumer within a single service, e.g. electricity supply, consists of mixed datasets: data collected from smart meters, but also data collected through other sources e.g. a paper contract.

The e-Privacy Regulation should follow the established grounds for data processing foreseen by the GDPR as a *lex generalis* for the personal data processing and not to build up a separate regime for terminal equipment information, in particular smart metering data, which is not the only dataset used by the energy companies.

3.2. Discrepancies in the e-Privacy Regulation and the GDPR grounds for data processing

Draft Art. 8 of the e-Privacy Regulation, in principle, should forbid the collection of data from terminal equipment apart from the cases foreseen therein. The catalogue of cases keeps changing from one Council draft to another and deviates to a higher or lower extent from the legal grounds for data processing under the GDPR. In the Croatian Presidency draft, the catalogue has been relatively similar to the GDPR: consent, legitimate interest (subject to additional conditions, though) as well as a request for service ('twin' provision to performance of a contract under the GDPR). The Portuguese Presidency draft, in turn, eliminates legitimate interest as well as narrows down the 'contractual' basis for processing to 'services specifically requested by the customers'.

It should be underlined that the category of the 'request' for service is very problematic for the energy sector. Given the complexity and increased decentralisation of the energy systems as well as unbundling rules, a successful provision of a requested service (e.g. electricity supply) requires complementary activities (e.g. related to grid stability and security) performed by multiple actors that are not visible to the end consumers, hence not actively requested by them, but fundamental for the security of supply and the system operation, subject to a strict regulatory framework.

As a consequence, a customer would have to explicitly request a number of additional services, the list of which would have to be frequently updated, considering future developments of electricity grids. A non-exhaustive list of such requests would include: grid optimisation, quality improvements, access to each new service and effective stability in the entire DSO grid. If the grid operator is not in a position to receive such requests, it will be obliged to install redundant devices that, in the end, will increase consumer's bill.

If Art. 8 of the e-Privacy Regulation is to be unavoidably applicable to smart metering data, the 'legitimate interest' ground for collecting the data should be re-introduced, while the concept of the



'request for service' should include complementary services enabling to provide the principal service in a secure and lawful manner.

3.3. Software updates

Consecutive presidencies' proposals have not been consistent with regard to legal grounds for permissible software updates under Art. 8 (e.g. legitimate interest under Croatian proposal, consent under German proposal, possibility to postpone or turn-off an update under the new Portuguese draft). Especially in case of critical infrastructure, such updates must be ensured at any time for security reasons. In this light, the end user should not have the possibility to postpone any relevant update for the system. Updating software especially when it comes to security updates is an action pursuant to the requirements of Art. 32 of the GDPR, thus, there is already an applicable legal ground for this kind of action and such an action cannot be dependent on the consent of the user. Any delay could lead to a security gap, have a serious impact on the stability of the infrastructure or reliability of the entire energy system.

4. Impact on e-Privacy Regulation on the use of non-personal data

The e-Privacy Regulation also includes non-personal data in its scope but does not differentiate enough between the treatment of personal and non-personal data, which limits the collection of non-personal data in a disproportionate way. Non-personal data has a strong commercial value as the President of the Commission, President Ursula von der Leyen recognised in the vision for the development of digital policy in the EU. The key points of the European Data Strategy also address a higher need for using and sharing data, including energy data. The e-Privacy Regulation proposal contradicts these developments as it limits the collection of information in a strict way without differentiating between the type of information or the degree of sensitivity or confidentiality.

Finally, the approach to processing of the non-personal data shall be compliant with the existing Regulation on a framework for the free flow of non-personal data in the EU (2018/1807) and, the Open Data Directive concerning critical infrastructure information protection (2018/0111).



About the signatories

The **European Heat Pump Association (EHPA)** represents the majority of the European heat pump industry. Its members comprise of heat pump and component manufacturers, research institutes, universities, testing labs and energy agencies. Its key goal is to promote awareness and proper deployment of heat pump technology in the European market for residential, commercial and industrial applications. EHPA aims to provide technical and economic input to European, national and local authorities in legislative, regulatory and energy efficiency matters. All activities are aimed at overcoming market barriers and dissemination of information in order to speed up market development of heat pumps for heating, cooling and hot water production.

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ESMIG represents European companies which provide products, information technology and services for multi-commodity metering, display and management of energy consumption and production at consumer premises.

These products and services enable:

- better outage detection
- customized tariffs and accurate bills
- a precise overview of consumption and manageable demand.

Therefore, they help in making energy cleaner, more affordable and more reliable.

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Eurelectric is the federation for the European electricity industry. We represent the power sector in over 32 European countries, speaking for more than 3,500 companies in power generation, distribution and supply. We contribute to the competitiveness of our industry, provide effective representation in public affairs and promote the role electricity in addressing the challenges of sustainable development. We draw on more than 1000 industry experts to ensure that our policy positions and opinions reflect the most recent developments in the sector. This structure of expertise ensures that Eurelectric's publications are based on high-quality input with up-to-date information. We currently have over 34 full members, representing the electricity industry in 32 European countries.

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