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By email to: Michael.Wilson@communities.gsi.gov.uk

Dear Mr Wilson,

### **Making Energy Performance Certificate data publicly available**

Consumer Focus welcomes this opportunity to comment on the proposal to make Energy Performance Certificate (EPC) data publicly available. However, we feel that this issue should have been opened up to a full public consultation. Stakeholders' understanding of the marketplace in which this data will be used has changed significantly since the last consultation, due to the development of the Green Deal and the smart meter rollout.

In relation to the smart meter rollout, we note that Government has committed that customers should have a choice about how their smart metering data is used and by whom, except where it is required to fulfil regulated duties. It is now seeking to define what these duties include. We would urge a similarly consumer-centric approach in relation to EPCs.

The consultation<sup>1</sup> under the previous Government stated that 'data may not be used for commercial or profitable gain' so this would have been consistent with this stated aim. We believe that consumers can benefit from sharing their EPC data with providers of their choice, but do not feel that Government has made the case for the lack of choice given to consumers regarding the sharing and use of EPC data. We seek further clarification on the rationale for moving to provide bulk data at address level to energy efficiency providers.

As outlined to DCLG last year, Consumer Focus does not believe that the impact assessment adequately addresses consumers' needs. The impact assessment<sup>2</sup> states benefits (2.1), with a view to these outweighing the risks (4.1) – but the benefits are very much in favour of Government and commercial interests while the risks of pressure selling, irrelevant marketing and invaded privacy are carried by consumers.

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<sup>1</sup> DCLG (2010) Making better use of Energy Performance Certificates and data <http://bit.ly/yk4pcv>

<sup>2</sup> DCLG (2011) Making energy performance certificate and related data publicly available: Privacy impact assessment, <http://bit.ly/y9GuJW>

Consumer Focus responded to DCLG's consultation in 2010 on *Making better use of EPCs and data*<sup>3</sup>. Our response drew on learning from our work with Demos *Private lives: a people's inquiry into personal information*<sup>4</sup>. This found that consumers have varying degrees of tolerance towards data sharing depending on the area in question. However, even when consumers are relatively tolerant they absolutely want to know and understand what is going on, so transparency is essential. They want to exercise control over whether or not their data is shared or collected or not, and to be able to change their minds according to circumstances. Young people in particular are increasingly aware that their data has a commercial value and want something in exchange for it, rather than companies having default access.

We concluded in our 2010 response that consumers have little trust in the private sector's use of personal information and want the ability to opt in rather than have to opt out of targeted marketing. From this inquiry, Consumer Focus drew three conclusions on the acceptable use of energy performance ratings at address level without the customer's prior consent:

- **Legitimacy:** access should remain tied to stated, legitimate uses – we believe these to be the assistance of those in or at risk of fuel poverty and the development and delivery area-based energy efficiency programmes, where the use of data is controlled by the local authority or somebody working on their behalf<sup>5</sup>
- **Control:** consumers must be able to control the use of their personal information, with the ability to opt in to targeted marketing both at the point of data collection and via the EPC online tool. If opt out is adopted it must also be easy and clear how the customer can achieve this
- **Regulation:** there is a lack of trust of the private sector when it comes to handling information, requiring greater control and transparency. Consumers want those mishandling data to be named and shamed and compensation for consumers harmed by the misuse or illicit sale of information

In addition to the direct impact on consumers, we are also concerned about the reputational impact of DCLG's approach. Opening up data and placing consumers at the risk of pressure selling, irrelevant marketing and invaded privacy has a knock-on risk for confidence in the EPC and, by association, the Green Deal.

DCLG notes in its invitation to comment on the proposals that it will put in place a four safeguards. The sections below set out why we think these are insufficient.

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<sup>3</sup> Consumer Focus (2010) <http://bit.ly/Atu2Lk>

<sup>4</sup> Demos research in 2010, supported by Consumer Focus and the ICO examined, through ground-breaking deliberative research methodology over several weeks, people's attitudes to information privacy linked to communication data, targeted advertising and health records. Participants learned first about the issues in depth from experts (including industry), and then discussed, came to conclusions and made recommendations

<sup>5</sup> In our 2010 response we limited this to local authorities, but now understand that local authorities will be delivering Green Deal programmes in competition with commercial bodies. Consideration would need to be given to barriers to competition, but we do not feel the answer is to make data available to all accredited providers.

## **1. Making it a condition of accessing the data that the user complies with the Data Protection Act 1998 and other statutory regimes**

After considering the quality of Data Protection Act enforcement, we consider this safeguard by looking at each principle in the Act in turn.

### **Data protection legislation**

#### Low levels of compliance

There is an 'abysmally low' level of compliance with data protection law by 'data controllers' and 'data processors'. For instance, the transparency rules – ie the legal obligations to inform consumers and citizens (data subjects) about the collection and processing of personal data – do not work.

Many privacy policies, particularly those of online service providers, do not abide by the compulsory transparency rules; and many do not have privacy policies at all<sup>6</sup>.

#### Inadequate redress procedures

The rights of consumers (data subjects) are increasingly abused and it is very difficult for ordinary people to identify and correct errors, which may only become apparent when something goes seriously wrong. There is also very little that consumers can do if their data is disclosed deliberately, hacked into or lost through negligence. When these rights are breached, consumers do not receive redress. The remedies provided on complaint to the ICO are very limited, while litigation is not practical and very expensive for the majority of people, so in reality civil actions are rare or non-existent<sup>7</sup>.

Privacy guidelines for use of EPC data will need to include advice, misselling and redress issues – specifically who is to be charged with these responsibilities. This should have been spelt out in the request for comments on the proposal to make the data public.

#### No legal responsibilities for third parties

There are no legal responsibilities for third parties, with the result that many companies collecting personal data pass it on to third parties that often process this data for different purposes from those initially notified by the data controller. The regulatory framework neglects altogether the area of liability for third party data loss and negligence<sup>8</sup>. This is particularly important given the day to day involvement of third party agencies in the energy industry such data management companies, meter installers, network operators, etc. It is crucial that any third parties are appropriately accredited before they can access, store and use personal energy performance data.

#### Very poor enforcement of the legislation

Government needs to ensure that effective mechanisms are in place to properly monitor activity and that enforcement is effective and provides a suitable deterrent and sanction against bad practice.

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<sup>6</sup> See inter alia: New Challenges to Data Protection, Final Report, European Commission – DG JFS, January 2010, page 45, also Annex 6, United Kingdom Country Study, <http://bit.ly/bkJsSx>. Also Data sharing and data protection – National Consumer Council's response to Data Sharing Directive 2008, <http://bit.ly/as9VK4> and more generally evidence provided in the Consumer Focus response to ICO consultation on a Code of Practice for personal information online, March 2009, <http://bit.ly/auMbTY>

<sup>7</sup> *Ibid.* Regarding applicable law, see also BEUC answer to the consultation on the EU Data Protection Framework, December 2009, p.7 <http://bit.ly/aQoL0Q>

<sup>8</sup> For example, about 350,000 third party applications are offered through Facebook, which by default have access to user information.

### Consumer understanding of their privacy rights is poor

The vast majority of consumers do not read privacy notices, because they are long, over-complicated, incomprehensible and obscure on vital issues, such as with what third parties data is shared with, and who these third parties are or what they intend to do with the data<sup>9</sup>. Consumer Focus's survey (March 2010) found that only 26 per cent of people have read in full their energy terms and conditions<sup>10</sup>. This is a reminder of the importance of consumer opt-in mechanisms as a meaningful way for giving consent.

DCLG must set out its proposed approach for consumers to opt-out in more detail, including expectations of consumer awareness of the right to opt-out and the benefit to consumers of this proposal.

### First principle: fair and lawful processing of personal data

The Government intends to make information available to consumers through a statement on the EPC issued after changes made subsequent to the relevant legislation (from April 2012). For households with older EPCs it intends to publish information on the DCLG website and have an open parliamentary debate 'to increase awareness, explain and justify plans to open up access to the data'. The Government states that the public will have the ability to opt out.

The response to the opening up of this data to address level, and allowing commercial gain from it, is likely to be negative. We are concerned about this reputational risk to energy efficiency services, but more importantly we are concerned that inaccurate data will be shared at address level.

We think fair and lawful sharing of data would be better undertaken as anonymised data for super output areas, allowing providers to:

- understand property types in different geographic areas
- target relevant marketing to properties that could benefit from their offers
- avoid being misled by inaccurate EPCs

It will also limit pressure-selling as door-to-door salespeople will not be able to tell residents information specific to their property.

Providers should have the right to the full RdSAP data with the household's consent.

### Second principle: data only to be processed for specified and lawful processes

Once address level data is provided in bulk, the Government will lose control of how it is used. The Government must be clearer about the risks to consumers. In the Impact Assessment, the Government stated that it would 'set out in legislation the uses to which the data from the EPC register may be put by the organisations receiving data in bulk' (para 7.2.3)<sup>11</sup>. This is not set out in the Energy Act 2011<sup>12</sup>.

If the data is to be shared, in bulk at address level or anonymised at super output area level as we prefer, then the purpose must not be limited to the reduction of carbon emissions.

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<sup>9</sup> Research from other market sectors. For example: Research report: Fair Processing Notification, current effectiveness and opportunities for improvement, IC, 2007 <http://bit.ly/9A0siR>.

<sup>10</sup> This stretches from 20 per cent for 18-24s to 35 per cent of 55-64s. Those in social groups DE said they were most likely to read the Terms and Conditions 30 per cent versus C1 23 percent and AB 25 per cent.

<sup>11</sup> DCLG (2011) *Making energy performance certificate and related data publicly available: Privacy impact assessment*, <http://bit.ly/y9GuJW>

<sup>12</sup> Energy Act 2011, Clause 74, <http://bit.ly/zQkTAQ>

Energy ratings can also help identify households at risk of fuel poverty and EPCs could help providers deliver the Affordable Warmth scheme, particularly if the Government also permitted data-matching<sup>13</sup> with benefits data.

The impact assessment states how consumers will be informed of how their data will be used, but does not cover instances where consumers want to use their data, or share it with an energy service provider of their choice. Consumers and their energy advisers should be able to download the full RdSAP (or SAP) dataset in csv or excel format and not be tied into using DCLG software. Consumer access must not be restricted to those who have contracted with Green Deal providers.

### Third principle: data shall be adequate, relevant and not excessive

In our response to the 2010 consultation, Consumer Focus noted its support for area-based programmes and supported the provision of address level data to local authorities and their agents. As the Green Deal has now been developed to provide a commercial framework for energy efficiency programmes, we recognise that it may not be appropriate to limit access to local authorities alone. However, we are concerned about the provision of address level data to any delivery body as it raises the risk of pressure selling, irrelevant marketing and invaded privacy.

Consumer Focus finds that the provision of data at address level is excessive as a) the accuracy of data is questionable (see validity principle) and b) consumers can provide the data if they interested in the generic offer. Green Deal providers and others need to make energy efficiency desirable; data alone will not 'sell' the need to install new measures.

### Fourth principle: data is accurate and, where necessary, kept up to date

At present EPCs are valid for 10 years and so data will not be accurate. In our review of the content and format of the EPC, *Easy as EPC*, Consumer Focus called for a change to this validity period because this means that consumers could be given inaccurate information on:

- current energy performance, as assessment methods improve
- recommended measures, as innovative products reach the market and costs change
- the presence of a Green Deal and the amount payable, where previous owners have paid off the charge early
- the value of measures as fuel prices and financial incentives change

Prospective buyers and tenants must be given accurate information. We therefore welcome the intention that the EPC will be updated on completion of Green Deal measures but, given uncertainty about the accuracy of EPCs completed to date, recommend that EPCs should also be updated for every sale and rental or, at a minimum, the validity period should be shortened.

There is also uncertainty about the lodging of EPCs that form part of Green Deal Advice Reports (GDARs). Government must develop a reliable evidence base of the quality of the housing stock, and this is one of the reasons that we have long advocated the use of EPCs as part of the Green Deal methodology. We think there is a risk that Green Deal providers will not lodge EPCs undertaken for the purposes of GDARs if Green Deal providers know that as soon as they are lodged, the data can be picked up by competitors for free.

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<sup>13</sup> At present, it is very difficult for companies to find the households they should be supporting. Consumer Focus and other organisations including Save the Children, Age UK and NEA would like to see the Government take powers in primary legislation to allow data matching for priority groups.

It is yet to be seen what business models form around Green Deal advice, but while advice may be provided for free upfront by some providers we suspect consumers may have to pay to take ownership of the data and shop around. Our preference is that the framework allows for a range of business models, but that Advisers and Providers must not share the data without the consumers' consent (particularly if they share the data for commercial gain), and consumers have full control of their data once it is paid for. We have raised this issue with DCLG through the Green Deal Advice Standards Steering Group, and recommend that the rules for lodging EPCs are defined with consideration for DCLG's plans for making data publicly available.

Our final concern about accuracy is the RdSAP method itself. Consumer Focus has today published a report that sets out a fault in the way RdSAP makes recommendations. We have identified that up to 2.3 million homes with clear and unfilled cavities would not have cavity wall insulation recommended to them through the EPC process. We want assurance that this issue will be resolved prior to the launch of the Green Deal framework and before data is shared with any third party.

#### **Fifth principle: data shall not be kept longer than necessary**

Consumer Focus agrees with the limits to be placed on the storage and use of data, but wants further information on how these limits will be monitored and enforced.

#### **Sixth principle: data shall be processed in accordance with the rights of data subjects**

Consumer Focus wants consumers who have opted out of direct mail, using the Mail Preference Service, to be able to opt out of Green Deal direct marketing at the same point. We are concerned that the opt-out will only be made available on the DCLG or DirectGov websites, which may not be intuitive to consumers.

#### **Seventh principle: measures against unauthorised or unlawful processing of data and against accidental loss or destruction of, or damage to, data**

Consumer Focus cannot assess how the Government will design a system to prevent data mining when it plans to provide address level data in bulk to commercial organisations. It is in the interest of those organisations to fully utilise the value of the data, and we cannot see how Government can limit this.

#### **Eighth principle: measures against unauthorised or unlawful processing of data and against accidental loss or destruction of, or damage to, data**

Energy suppliers/distributors are global companies, and may wish for economic and other efficiency reasons to store data in another out-of-EU jurisdiction (eg if they have out-of-EU server facilities) or to use a third party to process and store data in a different location. If the harm is done when information is stored or transferred overseas, there are questions of applicable law as well as other practical barriers. There would be no possibility for group action, which would help larger groups of consumers whose personal information has been disclosed illegally for example.

Export of UK consumer personal information to third countries (outside EU) with weaker data protection legislation, and legal uncertainty regarding applicable law and the competent jurisdiction raise serious concerns. This issue is increasingly acute with the advent of 'cloud computing', as well as extensive use of call centres outside the EU.

It is also compounded by the EU's slow process in confirming which countries have adequate data protection legislation (the adequacy test) and by the very poor implementation of the US-EU Safe Harbor agreements, whereby US companies who want to do business with the EU self-certify that they adhere to the EU data protection principles.

### **Introducing safeguards to prevent data mining**

Your letter does not set out the risks of data-mining, or how you define that process, and therefore it is not clear what safeguards are necessary or whether they will work.

Nor do you state which organisations have a legitimate need to store and process the full data set.

### **Use of data by policy-makers**

We cannot foresee a time where a third parties' policy development needs could not be met as well by data anonymised at super output area level or above.

### **Use of data by delivery bodies**

We support the use of bulk address level data by trusted parties where it supports assistance to fuel poor households, but address-level data should not be provided for commercial gain.

In 2010 we stated that address level data is likely to be of interest to delivery programmes, such as Warm Front and Warm Zones, as the data would allow such schemes to target homes most in need. Since then, we have seen the development of the Green Deal and ECO, and the central role of the EPC in these policies. This means that EPCs are now of significant value to commercial bodies, who in some areas will operate in competition with local authorities.

In the short-term, access to information by delivery programmes should be limited to:

- anonymised data at super output area
- address level data for properties whose owners have opted in to targeted marketing

The Government should consider access for organisations delivering socially-beneficial programmes such as ECO, and publicly funded programmes in Wales and Scotland, as part of a wider data-matching process that should also include relevant benefits data. Such a decision needs to be made in the context of the proposed ECO brokering scheme.

## **2. Advising consumers how their data will be used and giving them the opportunity to opt-out**

As above, we believe that consumers should be able to opt-in to share their full data. They face more risks than benefits from having address-level information shared.

## **3. Placing conditions on the use to which the data can be put by organisations that have been given the facility to access the data in bulk**

We cannot comment on this safeguard without seeing what those conditions are, and how they will be monitored and enforced.

In summary, we feel that this invitation to comment lacks the information and evidence we need to comment in full and look forward to a full, public consultation and parliamentary debate.

In particular, we want to understand why the Government wants to share address-level data in bulk when anonymised super output area could address many of the related needs.

Finally, we continue to support the public availability of data that sets out A-G ratings (from the time of sale or rental) alongside sold prices on the Land Registry. This information is insufficient to offer commercial gain to energy efficiency providers, as it does not specify what measures are recommended for that property, but we think it is a useful indicator to the public and property profession of what energy performance is being achieved in a neighbourhood. It also demonstrates that Government expects a link to be made between energy performance and property value.

Yours sincerely,

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