

# MIDLANDS ELECTRICITY PLC

-and-

## THE DATA PROTECTION REGISTRAR

Before the Chairman (J A C Spokes QC); Ms Diana Hanks and Mr Michael Jones

### APPEAL DECISION

By a Notice of Appeal dated the 15th January 1999, Midlands Electricity PLC (throughout the hearing called “MEB”) appealed against an Enforcement Notice issued by the Registrar on the 1st December 1998, pursuant to Section 10 of the Data Protection Act, 1984.

The Appeal is concerned with that part of the first data protection principle, which provides that “personal data shall be processed fairly”. The appeal raises the issue of the circumstances in which, without infringing the provisions of the Data Protection Act, a licensed supplier of mains electricity is able to process personal data that has derived from the relationship arising between supplier and domestic customer.

Miss J Reid, counsel instructed by the Data Protection Legal Officer, appeared for the Registrar. The Registrar gave evidence and in addition an expert witness, Professor Dawson, was called on her behalf. Mr N J Gardner, of Messrs Herbert Smith, solicitors, appeared for the appellant and called Mr Philip Kear, the Marketing Director in the Energy Services division of MEB and in addition put in evidence the written statement of Mr Charles Pimble. Witness statements had been exchanged between the parties and provided to the Tribunal in advance of the hearing. Copies of documentation had been provided to the Tribunal before the hearing and additional documentation was produced at the hearing.

The Enforcement Notice dated the 1st December 1998, stated (inter alia) that:

“The Registrar is satisfied that the data user has contravened and is contravening Principle 1 of the Data Protection Act 1984 by unfairly processing data relating to individual customers (held by the data user for the purpose of supplying electricity) for a purpose which, because of the nature of the arrangements for the supply of electricity and the relationship between the data user and the customers and the statutory rights and duties applying thereto are such as to render the processing unfair save where the data user has obtained the prior consent of its customers to the processing.

5. The Registrar is so satisfied that the data user has contravened and is contravening the First Data Protection Principle ... for the following reasons:
  - (a) the data user has processed and continues to process personal data held about individual customers for the supply of electricity for the purpose of marketing goods and services both from the data user and others;”

The Enforcement Notice contained a statement pursuant to Section 10(7) of the Act that because of special circumstances, as a matter of urgency, the steps required to be taken in the notice should not be postponed until after the determination of any appeal. The appellant appealed against such a statement in accordance with Section 13(3) of the Act. On the 21st January 1999, by consent and pursuant to Section 14(4) of the Act, the Tribunal directed that such a statement should not have effect. The requirements of the Enforcement Notice are in consequence not currently in force.

The decision hereafter set out relates only to the substantive appeal heard on the 21st, 22nd and 23rd April 1999. At the outset of the hearing, the appellant abandoned Paragraphs 20 and 27 of the Notice of Appeal. It was thus accepted that in assessing the fairness of processing it was relevant to take into account the purpose of the processing.

In reaching our decision and the findings of fact and conclusions set out herein we have borne in mind that it is for the Registrar to establish that her decision should be upheld.

MEB is registered as a data user under the Data Protection Act 1984. The data protection principles accordingly apply to personal data held by MEB. We find, and it was admitted, that MEB processed personal data that it held relating to domestic customers to whom it supplied mains electricity. MEB did so in order to send quarterly accounts in an envelope together with a publication known as the Homebright magazine. In particular, we find that such processing occurred both in the billing period July to September 1998 and in the billing period October to December 1998. As a result of such processing individual quarterly accounts, together with a copy of the Homebright magazine were sent to MEB’s domestic customers prior to the issue of the Enforcement Notice.

We turn now to more detailed findings. MEB has some 2.2 million customers, domestic, commercial and industrial. The majority are domestic customers. There are some 330,000 changes of customer address each year; some will relate to new customers and others to existing customers of MEB. Among the domestic customers will be those to whom the supply of mains electricity was first provided to them when MEB held the monopoly of such supply to the particular address and where the supply was pursuant, not to contract, but to tariff arrangements. Competition was progressively introduced within the MEB area from October 1998 and is now fully established. MEB is now in competition with some fifteen other licensees to supply mains electricity to consumers.

We find that personal data processed by MEB was held on their billing (or supply) database. The database is used to prepare quarterly accounts for all customers. The database is continually updated and contains the names of customers together with the address of supply and the billing address. The database contains consumer references, together with information on the customer tariff, payment history, meter reading and the meter reading cycle. Customers are identified as domestic, commercial or industrial by the customer reference. A special marker is automatically placed against the accounts for all domestic customers. Where there is such a marker every envelope into which a domestic customer's account is automatically inserted for despatch by post will also contain a copy of the current edition of MEB's Homebright magazine. In a similar manner accounts for commercial customers will be automatically prepared for posting and the envelopes will contain a current edition of MEB's Powertalk magazine. A small proportion of the quarterly accounts are separated out for checking for a number of reasons before despatch to customers and after checking they may be despatched manually from local offices or returned to MEB's central accounting unit for despatch. If the manually checked account relates to a domestic customer a copy of the Homebright magazine will be included in the envelope despatched to the customer. Where duplicate accounts are despatched no further copy of the Homebright magazine will be included. The processing of the customer data and the arrangements for despatch are under the control of MEB and its staff. In the course of his evidence, Mr Kear told us that there is currently no suppression system available for customer data and that the inquiries he had made within MEB suggested that the provision of such a system, such as a special flag to mark an individual consumer as one to whom no magazine would be sent, could not readily be put in place.

Copies of Homebright magazines were in evidence. The July to September 1998 edition of the magazine was of a size to fit conveniently into the billing envelope and was some twenty pages in length. The magazine contained news, an article on a racing driver and advice. The advice included that on safety and the efficient use of electricity. There was information relating to a museum, a charity, football, Midlands Gas, mobile telephones, a holiday prize draw, mains and battery operated electrical appliances and home improvements. The October to December 1998 edition was broadly similar. It had sections for news, energy efficiency and advice. It provided information on MEB's performance, on the Woodland Trust, on leisure centres, home security and personal carelines. It contained a prize draw for a Tunisian holiday. It offered a discount scheme for electricity and information on Midlands Gas. It would we consider not be obvious to readers that Midlands Gas was in fact supplied by a third party, not a subsidiary of MEB. The magazine offered a £15 Boots voucher for each reader's letter that was published. Copies of readers' letters were before us, the majority in response to the invitation in the magazine. Some of the letters made suggestions or made criticisms. The majority were complimentary. None of those writing asked not to receive future copies of the Homebright magazine. MEB prepared the January to March 1999 edition of the Homebright magazine, but it was not issued in its original form following the service of the Enforcement Notice. It had contained information about Powerhouse stores, where home appliances might be purchased. Powerhouse stores are not owned by MEB, but within some of them MEB had concessionary areas where inquiry could be made of MEB staff and in particular

about arrangements for MEB's "Save Your Energy" scheme. We find the following facts in relation to this scheme. By joining the scheme, launched in 1998, members of the public could enter into arrangements for one or more supplies of piped gas, mains electricity and telephone services. In addition home improvement products and services could be purchased. The scheme provided discounts and through a points system vouchers could be obtained to exchange in a number of retail outlets not owned by MEB and offering a variety of goods and services. Mr Kear told us in the course of his evidence that new MEB customers were told of this scheme and invited to participate in it when they sought to obtain a supply of mains electricity under a contract with MEB. When agreeing to enter into this scheme customers would be offered the opportunity either to opt-in to their personal data being processed for other purposes or to opt-out from their personal data being processed for other purposes. However Mr Kear when describing this scheme was unable to tell us whether it was an opt-in or an opt-out option that was offered. Mr Kear was unable to tell us and we have no evidence as to how many who participate in the "Save Your Energy" scheme and are customers who take a supply of mains electricity from MEB have opted-in or opted out from having their personal data processed to send them marketing material for third party goods and services. Mr Kear told us and we accept that if a customer at the time when he joined the scheme and contracted to take a supply of mains electricity had indicated that he did not wish his personal data to be used for other purposes, such customer would nonetheless currently receive a copy of the Homebright magazine with the quarterly account sent to him by MEB.

On the 28th February 1997, a MEB customer wrote to the Data Protection Registrar concerning the content of an edition of the Homebright magazine complaining that when he gave details of himself to MEB he had not expected them to be used to market other goods and services and that he had been given no opt-out option by MEB from that type of advertising. The individual who had written the letter of complaint wrote a further letter to the Registrar on the 12 September 1997. It was accepted by the parties to the appeal that this letter formed part of the background to the case, although it did not relate to the two Homebright magazines issued in the second half of 1998, upon which the parties had agreed the issue of unfair processing would be decided. Again as part of the background material there was a 1992 edition of the Homebright magazine and a leaflet issued by MEB in the Summer of 1997, including information on a range of goods and services which were available from third parties and which did not relate to the supply of electricity or electrical products. None of these MEB publications gave readers the option of informing MEB that they did not wish to receive such publications. We find there was no evidence of further written complaints to the Registrar initiated by domestic customers concerning the use of personal data to circulate the Homebright magazine. There was no evidence that any such complaint had been made to MEB. The Data Protection Act does not refer to complaints. We accept that, while a particular matter may be drawn to the Registrar's attention by a complaint, she nonetheless exercises her own judgment as to whether to issue an Enforcement Notice and did so in this case. We take into account in reaching our decision the fact that the Homebright magazine has led to no more than an isolated complaint.

We find from the evidence of Professor Dawson that direct or database marketing has increased substantially in recent years. The magazines are a form of such marketing by means of promotional material addressed individually to prospective customers. The magazines are designed to build brand allegiance to retain existing customers and contain a mixture of advertising for products and services available from MEB and other organisations. We accept Professor Dawson's evidence that the potential for nuisance and annoyance is increased following greater direct marketing activity. While some consumers are content to receive sales approaches, there is substantial evidence that many consumers find them intrusive and a nuisance. Professor Dawson's evaluation derives, not from investigations relating directly to the Homebright magazine, but from general research. While, therefore, a significant proportion of customers may be irritated by direct database marketing, the evidence also indicates that consumers are more tolerant of such direct marketing when it is seen as relevant to them. There is accordingly no direct evidence that anyone was irritated at receiving either of the editions of the Homebright magazine issued in the second half of 1998. Indeed, the research documentation to which we were referred suggests that at least a minority like to receive such mailings. Apart from the correspondence referred to above, research conducted for MEB contained in a document dated February 1999, was before us. This included a section on "Impressions of Homebright magazine". In summary, 22 per cent of the sample questioned found the magazine interesting or informative, 25 per cent had not read or looked at it and 13 per cent "threw it in the bin". We accept Mr Kear's evidence that the purpose of the magazine was to promote the brand image of MEB and that in the interests of maintaining goodwill the content of the magazine and the offers made in it were very carefully selected. The publication of the magazine was funded by MEB without contribution from third parties. We find the magazine can properly be regarded as of value for customer goodwill, although general survey evidence indicates that a significant proportion of those who receive the magazine are likely to discard it unread. Equally, we conclude that there are many who will read the magazine with widely differing degrees of interest. We find that there is no direct evidence that the magazine has caused annoyance to MEB customers, nor have any requests been made to MEB by customers that the magazine should not be sent. None of the magazines contain information, nor is information otherwise provided, to customers that upon request MEB would cease to despatch the Homebright magazine to a customer. MEB currently make use of no suppression system available when processing personal data so as to omit enclosing a Homebright magazine when despatching quarterly accounts to individual domestic mains electricity consumers. The magazine has been published regularly since the early 1990's. We consider a fair assessment of the evidence is that while a new customer might not expect to receive a copy of the Homebright magazine, its receipt would be unlikely to cause surprise.

A part of the Direct Marketing Association's current Code of Practice was placed before us, namely that which relates to the Mailing Preference Service "DMA Members are required to use their databases so as not to send direct mail or telephone individuals, *other than customers*, who have registered their wish not to have unsolicited approaches with the Mailing Preference Service. We do not find that the current requirement of the Code would impose on its members a duty to refrain from

sending marketing materials to persons who were their existing customers even if those customers were registered with the Mailing Preference Service. Accordingly, the fact that MEB may have customers who are registered with the Mailing Preference Service does not assist us one way or the other as to the question whether MEB unfairly processed personal data in the circumstances with which we are concerned.

The Registrar has for some years had under consideration the circumstances in which and the purposes for which public utilities supplying energy to premises in the United Kingdom could make use of information obtained from persons to whom they supplied energy without the unlawful and unfair processing of personal data. In considering the background we have well in mind that this appeal is concerned with issues relating to unfair processing and not with unlawful processing. In June 1996, the Registrar issued a guidance note *The Requirements of Fairness and the Use and Disclosure of Customer Information by Utility Companies*. In November 1998, the Registrar issued a revised guidance note *Uses and Disclosures of Customer Information by Utility Companies*. Copies of both guidance notes were in evidence. On the 30th September 1997, the Registrar issued a preliminary notice on MEB in accordance with her usual practice. The purpose was to take account of representations and to endeavour to reach agreement with a data user served with a preliminary notice before the Registrar made a final decision as to whether to issue an Enforcement Notice. The only matter raised in the preliminary notice with which we are now concerned is that relating to the insertion of unsolicited marketing material with the bills sent to customers. By letter dated the 23rd October 1997, MEB asserted that they complied with all the requirements of the Act and in their marketing offers "... which afford no financial benefit to the company, may relate to non-electricity products but the sole purpose is to project and support our electricity supply business ... it does not give rise to any additional processing of customer data." On the 14th January 1998, the Registrar met representatives of MEB. In the course of that meeting the Registrar was informed by representatives of MEB that they currently had no means of suppression when preparing quarterly accounts to be sent to domestic customers together with the Homebright magazine. Where a suppression facility is available it would enable the personal data of an individual who had informed MEB that he did not wish to receive future Homebright magazines to be processed in such a manner that the individual would not receive a magazine with his quarterly account. The Registrar informed the representatives of MEB at this meeting of the requirements of the Data Protection Act 1998 and her view that it would require such a system to be available when that Act came in to force. On the 14th February 1998, the Registrar informed MEB that a decision on Enforcement proceedings against MEB would not be made until the Data Protection Tribunal gave its decision in a pending appeal to the Tribunal by *British Gas Trading Limited*. Thereafter, after that decision was pronounced, a letter was sent from the Registrars office to MEB on the 24th July 1998. There was no reply to this letter. A reminder was written on the 15th October 1998, which was acknowledged by MEB. MEB were still considering their reply when the Enforcement Notice was issued. We accept the evidence of Mr Pimble, a legal officer with MEB, that the letter of the 24th July 1998, was mis-filed and that following the reminder of the 15th October, MEB still had a detailed response under consideration when the Enforcement Notice was served. The fact is, however, that the absence of a response

was, we consider, a feature that the Registrar was entitled to take into account in deciding whether to exercise her discretion to issue the Enforcement Notice.

The appellant submitted that in assessing whether the Registrar had proved that the processing was unfair it was important to take account of the fact that it was not asserted by the Registrar that sending the Homebright magazine with the customers quarterly account was of itself unfair. It was merely said that the content of the magazine rendered the processing unfair. Furthermore, there was no disclosure of customers' personal data to third parties and no processing selected or "targeted" a particular group among domestic customers. The magazine went to all domestic customers, whatever method of payment was used and whatever the amount of the quarterly account. The processing was carried out by MEB employees. There had been no complaints by customers in relation to the two issues of the Homebright magazine relied on to establish unfair processing. It was submitted that the absence of the ability to suppress data to prevent individual despatch to those who did not wish to receive the magazine was irrelevant, as no one had made such a request. While the point of principle underlying the appeal decision in the *British Gas Trading Limited* concerning the purpose for the processing was accepted, the decision was not concerned with the sending of a magazine with the quarterly bill for the purpose of strengthening the brand name and in order to retain customers. The magazine had been regularly supplied to domestic customers since the early 1990's. The magazine should be considered as a whole, not on an item by item basis, since the underlying purpose was to market the electricity supplied by MEB. It was said that when so approached the processing that led to the sending of the magazine to the domestic customers was not unfair or at worst the Registrar had exercised her discretion wrongly in deciding to issue the Enforcement Notice. We have considered all these submissions.

In order to decide whether the processing was unfair, we take into account our above findings and we have well in mind that on this issue, as others, it is for the Registrar to establish that the decision now under appeal should be upheld. We find that utilities, such as licensed suppliers of mains electricity, differ from other commercial organisations in that they supply an essential service under a framework of supervision and control imposed by statute. As the Registrar stated in her evidence, which we accept, such utilities have to this extent characteristics akin in nature to public bodies and accordingly have a special character both in the services they supply and their relationship with their customers. Among those domestic consumers whose personal data MEB processes will be those who in order to obtain a supply of mains electricity had no choice but to turn to a supplier who held a monopoly. Since the ending of monopoly supply, such consumers requiring what is in reality an essential supply of mains electricity, continue to have no choice but to turn to a supplier licensed pursuant to statute and in order to do so have to provide names and addresses. The differences between the parties on this aspect are clear. MEB contend that there is no unfairness in using the personal data to support and enhance customer goodwill, to improve the knowledge of the brand image of MEB and to retain customers. This is done by sending the Homebright magazine to all domestic customers with their quarterly accounts and it is said by MEB that there is no unfairness in advancing those purposes

by making offers of third party goods and services of a type unconnected with the supply of goods or services of an electrical nature. The Registrar is of opinion that it is unfair to process this personal data for promoting goods or services, of a type that would not have been obvious to customers when they arranged to take a supply of electricity, either from a monopoly or more recently from a licensed utility providing an essential supply. It is said it will be unfair unless it can be shown that the customer has agreed to such additional processing. The non-obvious purposes at issue for which there was no consent are non-electrical goods and services, including holiday offers.

We consider an underlying purpose of the data protection principles is to protect privacy with respect to processing of personal data. We do not overlook the fact that the ability to process personal data, including that for purposes of trade and commerce, has substantial benefits for the general public. In approaching the question of fairness undefined in the Act, we consider it requires that we should weigh up the interests both of data subjects and data users. In part they may not coincide, but in part they may, for instance, carefully selected marketing of new products and services may benefit both MEB who provide the information by improving goodwill and may benefit the customers who have particular products and services, or items of regional interest, perhaps accompanied by advantageous terms or other incentives, drawn to their attention. The content of the magazines are we consider unlikely to cause offence and it can be said that a data subject who receives unwanted marketing material can ignore it or discard it. In the case of a magazine enclosed with a statement of account it is however probable that the envelope will be opened and to this extent the customers are a "captive" market. What we consider to be important, however, is that personal data provided by customers for energy supply purposes are being used for other purposes. This is in order that MEB can achieve the purpose of supplying a magazine marketing goods and services not directly related to those the subject of a tariff arrangement or contract for electricity. It was suggested that as the Homebright magazine had been published for a number of years some new customers might know of its content. However, it was not contended that any data subject was told of the intention to use their data for a non-electrical marketing purpose, nor asked for their consent, nor asked if they had any objection to such use. The contention throughout was that the underlying purpose was to promote the supply of their electricity. In our judgment it is no answer to say that the processing would have been the same whether or not a Homebright magazine had been enclosed with the quarterly account. The fact is a purpose of the processing of personal data was in order to send out a Homebright magazine and following such processing domestic customers received marketing material of a type not directly related to the arrangement for the supply of mains electricity into which they had entered and pursuant to which they had supplied their names and addresses. Furthermore, it is we consider apparent that the processing of personal data and the customer reference number caused the separation of domestic customers' accounts from others and the placing of marking on their accounts so as to send them third party and non-electrical goods and services marketing promotions contained in the magazines. Each Homebright magazine, looked at as a whole, we consider contains a significant proportion of such marketing material.



In relation to long-established customers for the supply of electricity we consider that the supplier could have made use of personal information fairly processing the personal data derived from it for marketing electricity related products and services being purposes that customers would have expected, including the promotion of energy conservation. We conclude that there is a distinction to be made between what can generally be described as electricity-related marketing and wider uses. We conclude that customers would not have expected the processing of their personal data to be used to promote items as far removed from electricity as holidays, mobile telephones or exercise facilities. In one sense the relationship is constantly changing, but we consider that where the relationship has begun many years ago the fact that it began as a public tariff supply between monopoly utility and customer and remains as an essential utility continues as a feature of the relationship. Expectations as to the scope of goods and services to be marketed by a particular supplier may also change from time to time. Likewise, public expectations may change to an expectation that when providing personal details at the outset of a new relationship with a commercial undertaking an opportunity will be given to restrict the processing of their personal data except for the disclosed purposes or those directly connected with the purpose of the relationship. These are factors to take into account when examining whether processing was unfair in the light of the facts and circumstances existing at the time when the Enforcement Notice was served.

We take account of the competition existing in the supply of domestic energy both gas and electricity. We do not consider that MEB would be unfairly processing personal data were it to do so for the purpose of offering a gas supply as a part of a scheme or incentive to a customer to remain as an electricity customer and did so in a Homebright magazine forwarded to a domestic customer with a quarterly statement of account.

We take account of the public advantage in promoting the conservation of energy. The Registrar referred to correspondence in 1997, with the Office for Electricity Regulation and drew attention to the fact that MEB and other public electricity suppliers were required by the terms of their supply licences to offer advice on energy efficiency. We were of the view that electricity suppliers had in the past offered goods and services relating to energy conservation and the fact that their licences only required them to offer advice on energy efficiency does not we consider answer the question whether it would be unfair to process personal data of individuals to whom mains electricity was supplied for the purpose of promoting energy conservation including the promotion of goods and services intended to achieve such conservation. Because of the history of promotion of energy conservation by electricity suppliers and because we consider the conservation of energy is in the public interest we do not consider that it would be unfair for MEB to process personal data of domestic customers so as to use it for such a purpose without consent. No question of disclosure of such data by MEB to third parties arises for consideration in this case. We consider our approach follows that adopted by the Tribunal in 1998 in the appeal decision in *British Gas Trading Limited*.

In assessing whether it has been proved that MEB processed personal data unfairly, we take account of our above findings in relation to the promotion of electricity and goods and services associated with electricity. We have similarly taken into account our above findings in relation to gas supply and energy conservation. However, having considered the circumstances set out above in which personal data was processed for a purpose other than electrical supply and without consent, we have concluded that the personal data admittedly processed to send out the two Homebright magazines was processed unfairly. Thus we consider that the Registrar rightly reached the conclusion that MEB had processed personal data unfairly. We have also considered whether the Registrar has established that she correctly exercised her discretion in deciding to issue an Enforcement Notice on the 1st December 1998. We find the Registrar considered whether damage or distress had been caused pursuant to Section 10(2) of the Act, before issuing the notice and concluded, as we do, that none was established. The issue relating to utilities and the use they could fairly make of personal data of their customers had been under review for a substantial period of time. A preliminary notice had been issued in September 1997. MEB had then asserted that their processing was fair. A further decision was deferred until after the decision was made by the Tribunal in *British Gas Trading Limited*. The Registrar had then written to MEB in July 1998, but no substantive response had been received prior to the 1st December 1998. Further delay could adversely affect treating one utility equitably with another. Against that background and the apparent unlikelihood of resolving matters without an Enforcement Notice we conclude that it is established that the Registrar exercised her discretion correctly in deciding to issue an Enforcement Notice. Indeed it appears to us that it was the only effective way of resolving the issues in dispute, despite the efforts made between the parties to resolve the matter by the negotiations and discussion to which we have referred.

We turn now to the question of consent, against the background of the particular relationship between energy supplier and customer to which we have referred. As the Enforcement Notice provides, if MEB wish to process personal data in a manner that thereby promotes, markets or advertises third party goods and services beyond those of the type otherwise permitted by the Enforcement Notice, then no unfairness will arise in the promotion, marketing or advertising provided the customer has consented to the use of personal data for such wider purposes of which he has been notified. With new customers we consider that at the time of the agreement for the supply of mains electricity there is little difficulty in informing customers of the type of marketing intended to be carried out by processing their personal data and asking them and there if they object. It appears from the evidence of Mr Kear that all new domestic customers are now offered a "Save Your Energy" scheme and that currently some form of opt-out or opt-in is offered. If no objection is then made either orally, or in an electronic or other communication from the customer or in a document returned by the customer to confirm the arrangements for the supply of electricity, such as either an opt-in box ticked, or an opt-out box left blank, processing of personal data for the purposes made clear, would we consider not be unfair. Therefore, we consider MEB could seek to obtain consent for processing personal data for purposes beyond those we have indicated above by doing so at the time the agreement for supply is entered into, whether by writing, by telephone, or by other means. We heard in the course of

evidence that in the course of a year that would be some 330,000 changes of the customer supplied at a particular address; some of these will never have been supplied by MEB previously, but some are likely to be customers previously, or moving from one address to another and continuing to be supplied by MEB with their mains electricity.

With existing customers, as with new customers, for the reasons that we have indicated, namely the special position of domestic utilities, particularly where the relationship began in monopoly conditions, we do not consider that it is sufficient merely to send to the customer a leaflet providing them with an opportunity to object to their personal data being processed for purposes beyond those electricity related purposes or other purposes, such as energy conservation, which we have identified as being available for processing without consent and without unfairness to which we have referred. It would we consider be sufficient to prevent processing for other purposes being unfair, if individual customers are informed that MEB wishes to continue to send them Homebright magazines containing third party offers selected by them or such other type of marketing or promotions that MEB would wish to carry out, provided that they are given the choice to agree or not and either consent then and there, or do no object, to their personal data being processed so as to enable such a use to take place. Alternatively thereafter, and before such processing takes place, the customer returns a document to MEB or by other means of communication received by MEB indicates consent to, or by not filling in an opt-out box, or other means, indicates no objection to, processing for such type or types of marketing or promotion. One such returned document could be, for example, a direct debit mandate form; others could be a part of a bill, or purpose designed leaflet, or a portion of the Homebright magazine that could be returned. We have taken into account, what we assess to be the difficulty inherent in expecting people to notice, read, understand and respond to requests in leaflets. For this reason and because there have been no complaints from those receiving the two magazines in the second half of 1998, we consider that it is reasonable to provide MEB with an extended period in which to seek to obtain such consents, or alternatively to modify the content of the magazine to exclude that of a type not permitted by the Enforcement Notice without customer consent. An extended period would also enable MEB to modify or improve their ability to suppress, on the billing database, those who do not wish to have their data processed to provide third party marketing; although we adjudge on the evidence before us that the existing facility automatically to set aside certain domestic accounts from being inserted into envelopes with a Homebright magazine is at least initially capable of being used for such a purpose. In view of the evidence that we heard, therefore, we consider the Registrar should to this extent have exercised her discretion differently. Otherwise we uphold the provisions for consent as provided in the Enforcement Notice. Accordingly, we extend the period before the Enforcement Notice comes into effect until the 1st January 2001. This extension is on the basis that MEB will not process personal data prohibited by the Enforcement Notice without customer consent other than for the purpose of circulating the Homebright magazine.

Any enforcement notice must show in clear terms what constraint is placed upon the data user. In the course of the appeal it became apparent that both parties would wish

to consider the precise terms of the Enforcement Notice to remove any possible ambiguities in its terms. At the conclusion of the hearing we indicated that we would give both parties the opportunity to consider the terms of the Enforcement Notice, if the appeal was dismissed. We also indicated that we would then consider hearing any submission that MEB might wish to make as to the general principles of the enforceability of the Notice in its current form, which they had hitherto elected not to make to us. We, therefore, give the parties an opportunity to agree the terms of an amended enforcement order in the light of our decisions as set out above. If the parties are unable to reach agreement expeditiously, or the Tribunal is unwilling to approve terms put before them in writing, the Tribunal will sit again. The Tribunal intends, if such a further hearing is necessary, that it will take place within six weeks of the date of this decision. This would afford the parties an opportunity within that time to make submissions on the form of the amended Enforcement Notice and for the Tribunal to decide on the final terms of the Enforcement Notice.

No grounds for making an order for costs arise. Accordingly, there will be no order as to costs.

John Spokes  
Chairman

7th May 1999