

Summary of Responses to SDEP Access Agreement Consultation

1. Introduction

In November 2019, MRASCo consulted on the draft Access Agreement for the Secure Data Exchange Portal (SDEP) that details the commercial terms between users of the service and MRASCo. A total of 7 responses were received from a combination of Energy Suppliers and Distribution Businesses. These responses were reviewed and discussed by the MRASCo Board and an updated version of the SDEP Access Agreement has been agreed.

This paper provides an overview of the responses received to the consultation, and the views from the MRASCo Board, which includes whether a change has been made to the Access Agreement.

2. Summary of responses

Definitions

One respondent proposed an alternative definition to “Data Protection Legislation”. This definition has been updated to reflect the agreed definition in the Master Registration Agreement.

MRASCo Obligations

Respondents suggested that the term ‘reasonable endeavours’ in Clause 4.1.4 should be strengthened, given the potential repercussions of SDEP User Data not being held securely. MRASCo Board discussed this and concluded that there is a precedent for the use of reasonable endeavours, and this places an appropriate obligation to keep SDEP User Data in its possession secure.

Exclusion of Liability

Respondents were uncomfortable with excluding MRASCo from liability for omissions or inaccuracies in SDEP Data as a result of MRASCo’s negligence. As the intent of this clause is to recognise that SDEP Data will be provided by SDEP Users, and not by MRASCo (therefore MRASCo cannot be deemed liable for the accuracy of this data). MRASCo Board agreed this clause could be re-phrased to reflect this. A suggestion was provided by one respondent which has been adopted.

SDEP User Obligations

One respondent suggested that MRASCo should have a mutual obligation to the requirement in Clause 5.1.7 needing SDEP Users to take reasonable steps to ensure the security of the SDEP and to prevent viruses or other malicious code entering the SDEP. As MRASCo has wider obligations to ensure the security of the service MRASCo Board did not believe this clause is required in the Access Agreement.

One respondent also suggested that the requirement in Clause 5.1.9 for SDEP Users to provide information which MRASCo may require to satisfy the pre-requisites for access and to confirm continued compliance should be amended to ‘reasonably required’, which has been amended accordingly.

SDEP User Warranties

One respondent highlighted that Clause 5.2.1 should consider that data received through the SDEP may be pertinent to a user's commercial activities and therefore could be subject to monetary reward. MRASCo Board noted that it was not the intention for the SDEP to restrict valid uses of data where the user has a legal basis for processing, therefore an exclusion has been added where a user 'otherwise had a legal basis for obtaining and processing this data for this purpose notwithstanding this agreement'.

One respondent also suggested that there should be a reciprocal clause to Clause 5.2.3 for MRASCo to comply with all obligations as a Data Processor. This has been added to the agreement as Clause 4.1.6.

Misuse

One respondent queried whether Clauses 6.4 and 6.5 should be reciprocal to MRASCo. As MRASCo are not an SDEP User, there is no requirement for protection against their potential misuse of the system.

One respondent suggested whether 'reasonable costs' should be clarified to ensure this doesn't result in a SDEP User being subject to unrecoverable costs. As costs would only occur in the event of misuse, it is not possible to anticipate what costs would be incurred as a result. Therefore, MRASCo Board propose to leave this as 'reasonable costs', which would only apply to costs incurred directly as a result of that SDEP Users misuse of the system.

Audits

Several respondents questioned when MRASCo would exercise their right to audit, and if this would be similar to the annual security audits in place for ECOES and GDCC. MRASCo Board noted that there is no intention for a regular/cyclical audit for SDEP Users and this is only intended in the event of suspected misuse of the system. The Access Agreement has been updated to clarify that this right exists 'where there is a reasonable suspicion of misuse'.

One respondent questioned whether the notice to the SDEP User for an audit could be extended from 5 Working Days to 10 Working Days. MRASCo Board noted that an audit would only be requested in the event of misuse and this could potentially be as a result of a major incident, and therefore proposed to keep this as a minimum of 5 Working Days. If there is less urgency associated with audit, MRASCo may choose to provide an extended notice period.

Data Protection

One respondent proposed alternative wording to Clause 7.1.1 to clarify that the SDEP User is a Controller in relation to Personal Data Processed 'by that SDEP User'. MRASCo Board have adopted most of the proposal except for amending 'that it is' to 'that it will be' which has not been amended.

One respondent proposed alternative wording for Clause 7.2 and 7.4 which has been adopted.

One respondent proposed that the phrase 'at the cost of the SDEP User' should be removed from Clause 7.5.5 which has been amended accordingly.

Charges

One respondent questioned why Clause 8.2 was required if Clause 6.7 already holds a SDEP User liable for the costs of an audit. MRASCo Board noted that this clause specifically references Clause 6.7 and only refers to the ability to charge these costs to the SDEP User under the agreement. Costs will otherwise be recovered through the funding mechanism in the MRA.

Billing and Payment

Several respondents requested that the payment Due Date for invoices and adjusted payments in Clause 9.2 and 9.6 were amended from 20 Working Days to 30 Working Days. These clauses have been amended accordingly.

One respondent suggested that the limit of 12 months following an invoice for raising a dispute should be removed. MRASCo Board noted that as these invoices would only apply in the event of confirmed misuse, following an investigation or audit, which the SDEP User would be aware of, MRASCo Board expected that 12 months is sufficient for any dispute regarding the invoice to be raised and this limit was not removed.

SDEP Licence Suspension

One respondent requested that SDEP Users are provided with longer than 5 Working Days to remedy a material breach of its obligations on notice from MRASCo, prior to MRASCo having the right to suspend their licence. MRASCo Board noted that as it is possible for the nature of this breach to have implications on the security of the system or other users, it would not be appropriate to extend this beyond 5 Working Days. MRASCo Board further noted that if this event were to occur, the SDEP User would be encouraged to engage with MRASCo to provide plans for rectifying this fault, and MRASCo could choose to delay suspending a SDEP Users licence if this were appropriate.

Variation to the Agreement

Several respondents raised concerns with the ability for MRASCo to unilaterally vary the terms of the agreement without a period for consultation or comment. Clause 11.2 has been amended to extend the minimum notice period to SDEP Users to 30 Working Days and include a minimum of 10 Working Days to allow SDEP Users to respond with representations on the proposed variation. This is a minimum requirement, which means where a longer consultation and/or notice period is required, this can be accommodated.

One respondent suggested that where a variation would result in a material change to a SDEP User systems, a minimum of 60 Working Days' notice should apply. MRASCo Board noted that they did not anticipate a change to the Access Agreement which has a consequential change to a SDEP Users systems, as these changes should be managed through the MRA Issues and Change Process and by changing the requirements or functionality of the SDEP. In the event that a change to the Access Agreement would result in an impact to user systems, MRASCo Board noted they would endeavour to ensure an appropriate notice period would apply to any variation.

Once respondent questioned whether the wording in Clause 11.6 meant that a SDEP User proposing a variation would be required to pay for the full costs of the change if this was to benefit MRASCo or all SDEP Users.

The nature of the proposed variation will depend on whether costs will be incurred and whether it would be appropriate for those costs to be paid by the SDEP User or MRASCo. The clause has been updated to reflect that these costs can be paid by MRASCo and recovered in accordance with the MRA. Clause 11.7 has also been amended to extend the response period from 5 Working Days to 10 Working Days.

Liability

Several respondents raised concerns regarding MRASCo's proposed cap on liability of £10,000, and this would not be sufficient to answer the financial detriment that could be experienced by parties in the event of a substantial data breach or failure by MRASCo. Some respondents provided examples of similar industry procured services with higher levels of liability. This has been investigated and MRASCo has agreed to extend the limit on liability in Clause 12.2 to £1,000,000.

Respondents also questioned the guarantees that could be made around system performance and availability. MRASCo Board noted that the requirement for the system to be available 24/7/365, subject to planned or unplanned downtime, and the requirements for managing unplanned downtime are detailed in the MRA. Issues surrounding this process will need to be addressed through the MRA Issues and Change Process.

Termination

One respondent requested that the period for termination in 14.1(a) is extended from 7 days to 20 Working Days. As MRASCo would still have the right to suspend the SDEP Users licence in this period, MRASCo Board did not identify any concerns with this proposal and the clause has been amended accordingly.

One party questioned whether data could still be accessed after termination of the agreement, or if it could be extracted and made available to them. These are design considerations that will need to be addressed as part of the solution delivery. For the purposes of the Access Agreement the SDEP User would lose their licence upon termination and would lose the right to access the system.

It was also identified that while a SDEP User has the right to terminate the agreement, this may have a material impact on their ability to comply with their obligations under the MRA and/or SPAA. A new Clause 14.8 has been agreed for MRASCo to notify the MRA Executive Committee (MEC) and/or SPAA Executive Committee (SPAA EC) where a SDEP User has terminated the agreement.

Confidentiality

One respondent proposed that a clause should be included to agree that damages are not an adequate remedy and either party can seek injunctive relief in the event of a breach or suspected breach of Clause 16. Given the nature of the agreement, MRASCo Board do not believe a clause of this nature is required.

There was also a request that parties destroy all confidential information following termination of the agreement unless required by law. As the agreement already requires both parties to comply with their obligations as a Data Controller or Data Processor, MRASCo Board would expect this to be covered within an appropriate data retention policy and shouldn't require further prescription.

Publicity

Two parties were concerned about the publication of their details on the MRASCo website without prior written consent. This is intended to provide information to other SDEP Users on who they are able to communicate with using the SDEP. MRASCo Board believe this to be a reasonable requirement and accession to the agreement would be considered consent to publish these details and further noted that there does not seem to be any commercially sensitive information included in this publication.

Rights of Third Parties

One party suggested that third party rights should not be extended to MRA and SPAA parties. As the solution requires interaction between MRA and SPAA parties, and SDEP Data will be provided directly between SDEP Users with no intervention from MRASCo. MRASCo Board felt that this was appropriate to retain this clause.

3. Next steps

MRA and SPAA parties are invited to provide any additional comments they have on the revised SDEP Access Agreement to Support.SDEP@gemserv.com by 17:00 on 22nd January 2020.

The update SDEP Access Agreement will be presented to MRASCo Board for approval on 28th January 2020. Any material comments received will be presented to MRASCo Board at this meeting for discussion prior to final approval of the document.

If you have any questions in general regarding the SDEP, you can contact us on Support.SDEP@gemserv.com or 020 7090 1029.