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Case No: CO/53/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2019

Before :

THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

THE QUEEN ON THE APPLICATION OF UTILITA ENERGY LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Defendant**

- -
- -

Victoria Wakefield Q.C., Malcolm Birdling and Zahra Al-Rikabi (instructed by **Blake Morgan LLP**) for the **Claimant**
Anneli Howard, Anneliese Blackwood and Imogen Proud (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 23, 24 and 25 July 2019

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Approved Judgment

The Honourable Mr Justice Lewis:

INTRODUCTION

1. This is a claim for judicial review of three decisions taken by the defendant in connection with the government's programme for ensuring the provision of smart electricity and gas meters to domestic homes and smaller non-domestic premises in Great Britain. Smart meters enable communication between the meter at the property where it is installed and the energy supplier. There are two types of meters involved and they are referred to in this judgment as SMETS1 and SMETS2 meters.

2. There are three decisions under challenge. The first is a decision of 4 October 2018 to amend the standard conditions of relevant licences so as to require energy suppliers to take all reasonable steps to enrol eligible SMETS1 meters with the Data Corporation Company ("DCC") within twelve months of them becoming eligible for enrolment and to impose an obligation on suppliers to replace any unenrolled SMETS1 meters with a SMETS2 meter by 31 December 2020 ("the First Decision").

3. The second is a decision also taken on 4 October 2018 that SMETS1 meters installed after 15 March 2019 will not be taken into account when considering whether an energy supplier has complied with its duty to make arrangements for the installation of smart meters ("the Second Decision"). The third is a decision of 23 May 2019 requiring the DCC to provide services to the type of SMETS1 meters used by the claimant, Utilita Energy Ltd, (Utilita") to enable those meters to be enrolled with the DCC ("the Third Decision").

4. Permission was granted by Walker J. to challenge the First and Second decisions. The claimant has also applied to re-amend the grounds to seek permission to challenge the Third Decision.

5. In relation to the First Decision, there are five grounds of challenge. In brief, these are as follows. The claimant contends that the First Decision was irrational and failed to treat the claimant in a consistent way with other companies. It contends that the decision was taken without proper consultation as it was unclear whether the obligation would apply to all unenrolled meters including the SMETS1 meters used by the claimant. It claims that the defendant failed to assess the environmental impact of imposing an obligation to remove existing, unenrolled meters by the end of 2020. It contends that the requirement that it replace all its enrolled SMETSI 1 meters on 31 December 2020 involved a breach of its rights under Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1") and what it describes as its common law property rights. Finally, it contends that the defendant failed to comply with its duty under section 149 of the Equality Act 2010 ("the 2010 Act") to have due regard to certain equality matters and to the duties to have regard to other specified considerations as set out in section 4AA of the Gas Act 1986 and section 3A of the Electricity Act 1989.

6. In relation to the Third Decision, it is said that the defendant made what are described as material errors of assessment or took into account irrelevant considerations, or failed to take account of relevant ones, and the consultation which preceded the decision was predetermined.

7. In relation to both the Second and Third Decisions, the claimant contends that the defendant failed to comply with its duty under section 149 of the 2010 Act to have due regard to certain equality matters or to have regard to other relevant statutory considerations set out in section 4AA of the Gas Act 1986 and section 3A of the Electricity Act 1989.

THE FACTS

Background

8. Smart meters are gas and electricity meters which provide two-way communication between the premises where the meter is installed and the energy supplier. They are believed to offer significant benefits to customers and to the wider environment.

9. There are two generations of smart meters. The first generation of smart meters are meters known as SMETS1 meters. There are six brands, or "cohorts", of SMETS1 meters. They are operated through, and messages are communicated via, a particular operating system referred to as an SMSO. Energy suppliers may have access to one or more SMSOs. At present, however, if a customer with a SMETS1 meter wishes to change energy supplier, that may render the customer's exsiting SMETS1 meter incapable of two-way communication as the new energy supplier may not have access to the SMSO used by the meter currently serving the customer's property. The new energy supplier would, therefore, have to install a new smart meter, that is a new SMETS1 meter, able to communicate information using its system.

10. The second generation of smart meters are known as SMETS2 meters. They operate, and communicate, via a single operating system, operated by the DCC. Thus, if a customer switches energy supplier, there is no need to change the smart meter as the new energy supplier is able to communicate with the SMETS2 meter using the DCC system.

11. Furthermore, if a SMETS1 meter is connected or "enrolled" with, and communicates via, the DCC system, a new energy supplier will also be able to use that existing SMETS1 meter to communicate and receive messages. In those circumstances, if a customer whose SMETS1 meter is enrolled on the DCC changes supplier, the new supplier will be able to operate via the DCC and without any need for the customer to change the smart meter. In the jargon used in the industry, this will ensure interoperability whereby any energy supplier who is a DCC user will be able to use any enrolled SMETS1 or a SMETS2 smart meter for the purpose of two-way communication between the energy supplier and the customer's smart meter.

The Claimant

12. Utilita is an energy supplier. 93% of its customers are pre-payment customers, that is, they pay for their energy before they use it, usually by adding credit to their meters. A higher proportion of the claimant's customers are pre-payment customers as compared with other energy suppliers although there are energy suppliers which have a higher absolute number of pre-payment customers. Prepayment customers are significantly more likely than other customers to be elderly, on lower incomes, or to be disabled.

13. The claimant uses a brand, or type, of SMETS1 meters manufactured by Secure. Utilita entered into a contract with the supplier which gave Utilita the contractual right to use each Secure SMETS1 meter it acquired for a period of 10 years. It has, over time, acquired the right to use in excess of 1 million of these smart meters. It has installed these meters in customers' homes. These Secure SMETS1 meters operate and communicate with the claimant via Secure's SMSO.

The Government's Policy

14. Since 2011, government policy has been to ensure that every home in Great Britain is offered a smart meter by the end of 2020. The policy is set out in the Smart Metering Implementation Programme. That programme sets out some of the anticipated benefits for consumers, including having up-to-date (described as "near real-time") information to assist them to understand and manage their energy use more efficiently and to save money and to obtain better tariffs, advice on energy efficiency and better customer service. Meters could be read remotely without a meter reader needing to visit a customer's home. They would provide flexibility on means of payment and enable customers to switch energy suppliers more easily.

15. As part of the programme, energy suppliers are subject to a duty (referred to as the roll-out duty) imposed by their standard gas or electricity licence conditions, in the following terms (using the electricity standard licence as an example):

> "The roll-out duty
>
> 39.1 The licensee must take all reasonable steps to ensure that a Smart Metering System is installed on or before 31 December 2020 at each Domestic premises or Designated Premises in respect of which it is the relevant Electricity Supplier. "

16. It appears that there are targets for each energy supplier for the number of smart meters to be installed. The regulator, Ofgem, can take enforcement action against energy suppliers who do not fulfil their targets. The precise details of the mechanism by which targets are set and enforced do not appear from the evidence. The 2011 implementation programme document also envisaged the creation of the DCC to provide a single data and communications system. Government policy also anticipated that there would be a transition from SMETS1 to SMETS2 meters. In July 2013, the government confirmed that its intention was that it would introduce a date after which the installation of a SMETS1 meter would no longer count towards meeting a supplier's roll out duty.

The April 2018 Consultations

17. In April 2018, the defendant issued two separate consultation papers. One involved consulting on maximising interoperability for SMETS1 meters. That consulted on two options. The preferred option, Option 1, was an option whereby energy suppliers would be required to take all reasonable steps to enrol their eligible SMETS1 meters with the DCC or replace them with SMETS2 meters within 6 months of the point at which SMETS1 meters could be enrolled. Further, as what was described as "a backstop", energy suppliers would be required to replace any SMETS1 meter which was not enrolled in the DCC with a SMETS2 meter by 31 December 2020.

18. The consultation document set out a number of anticipated benefits for the consumer and the energy market. It set out a detailed consideration of the options being consulted upon. At paragraph 34, the consultation document noted that the proposal:

> "that any SMETS1 meters that are not enrolled in the DCC must be replaced with SMETS2 meters by the end of 2020 is intended to ensure that all consumers with smart meters retain a smart service when they switch energy supplier."

19. The document noted that the proposal was considered to be proportionate as it would ensure an interoperable smart meter service for all consumers by the end of the roll-out of smart meters. It was said that it would enable all consumers to benefit from third-party services (which were to be provided via the DCC) and would avoid a two-tier market developing if some SMETS1 meters were still operating without being enrolled in the DCC. The document noted that the proposal "may have implications for existing contractual arrangements between energy suppliers and other industry parties". However, the document said that those implications had been weighed against what were seen as the wider public policy benefits of delivering an interoperable smart metering service for all consumers and the latter outweighed the former. The consultation document asked specific questions, numbers 1 and 5 of which were:

> "Question 1: Do you agree with the proposal that suppliers should be required to take all reasonable steps to enrol SMETS1 meters in the DCC, or replace with SMETS2 meters within a specified time frame?"
>
> and
>
> "Question 5: Do you agree with the proposal that any unenrolled SMETS1 meters should be replaced with SMETS2 meters by the end of 2020?"

20. The second consultation involved consultation on whether the DCC should offer services to four brands, or cohorts, of SMETSI smart meters, namely Aclara, Honeywell Elster, Itron and Landis+Gyr. If that were done, that would enable suppliers of meters in those four cohorts to enrol their SMETS1 meters within the DCC. That would mean that they would not have to replace those meters with SMETSI 2 meters by 31 December 2020. By contrast, the consultation did not include consideration of whether the DCC should provide services to two other cohorts or brands of SMETS1 smart meters, namely Secure (used by Utilita) or EDMI. The consultation paper explained that the government did not have access to sufficient information to consult on the provision of services via the DCC to Secure or EDMI smart meters. It noted that, in order to reach a decision on those two cohorts, there would need to be further commercial and technical discussion between the DCC and the relevant service providers. The consultation paper noted that the government intended to consult on the provision of a DCC service to these two cohorts once sufficient information was available.

The October Decisions

21. The defendant published its decision on the consultation of maximising interoperability on 4 October 2018. In essence, the defendant decided that he would amend the standard licence conditions for gas and electricity suppliers to provide that energy suppliers take all reasonable steps to enrol eligible SMETS1 meters within 12

months (rather than the original 6 months proposed) and to provide that suppliers should replace any unenrolled SMETS1 meters with a SMETS2 by the end of 2020.

22. The government set out its responses to the concerns raised in the consultation exercise, and the reasons for its final decision in its response to the consultation. It noted the background to the SMETS1 policy and the benefits anticipated. It summarised the key points made by respondents to the consultation including, in relation to question 1, that the obligation to replace any unenrolled meters with SMETS2 meters added material and potentially unjustified costs if meters could not be enrolled within the timeframe envisaged. It noted that respondents had said that the potential early replacement of SMETS1 meters could lead to a risk of "asset stranding" (that is, replacing SMETS1 meters with SMETS2 meters before the end of the life of the SMETS1 meter) reducing investor confidence and increasing supplier costs where they face premature replacement charges. The responses to question 5 included concerns that the replacement of unenrolled SMETS1 meters could increase programme costs, and that the proposal was not justified where the meter was operating in smart mode.

23. The government response noted that the government had decided not to require energy suppliers to choose whether to enrol a SMETS1 meter or replace it with a SMETS2 within a specified time frame (i.e. within 6 months of the date when those meters became eligible for enrolment). Rather, it proposed to place an obligation on energy suppliers to take all reasonable steps to enrol SMETS1 meters in the DCC within 12 months of their becoming eligible for enrolment. The government also intended to introduce an obligation, referred to as a backstop obligation, to replace any unenrolled SMETS1 meters with SMETS2 meters by the end of 2020. This was intended "to ensure that by the end of 2020 all consumers with smart meters retain smart services when they switch energy supplier".

24. The government response explained in its conclusion section that its overall aim was to ensure interoperability for SMETS1 meters so that consumers with those meters would retain smart services when they switched energy supplier. It considered that the proposed decisions were a proportionate means of achieving that objective. It noted that the decisions were intended to ensure that an interoperable smart meter service was available to all consumers by the end of the roll-out period thereby achieving the consumer and industry benefits of operating smart meters via the DCC. The government response noted that the potential implications for existing contractual arrangements between energy suppliers had been taken into account, along with other factors. It noted the government preference for all significant populations of SMETS1 meters to be enrolled in the DCC and noted the broad support for the proposition that energy suppliers would generally consider enrolment of SMETS1 meters to be preferable to replacing them with SMETS2 meters. It noted that, alongside this consultation response, the government was publishing a consultation response confirming that, in the light of positive net societal benefit, security and technical considerations, the DCC would be required to provide services for four cohorts of smart meters. It noted that the intention was to consult on the enrolment of the two remaining cohorts – Secure meters, used by the claimant, and EDMI meters – once sufficient information was available.

25. Following that response, draft modifications to the standard licence conditions pursuant to section 88 of the Energy Act 2008 ("the 2008 Act") were laid before

Parliament on 9 October 2018 and were made on the 3 December 2018. They came into force on 22 January 2019.

26. The decision to modify the standard licence conditions to require suppliers to take all reasonable steps to enrol a SMETS1 meter in the DCC within 12 months of it becoming eligible for enrolment and to replace any unenrolled SMETS1 meter with a SMETS2 meter by the end of 2020 is the First Decision and its validity is challenged in these proceedings.

27. As indicated, the government also published a consultation response on 4 October 2018, concluding that it would require the DCC to provide a SMETS1 service for the four meter cohorts that were the subject of that consultation, namely Aclara, Honeywell Elster, Itron and Landis+Gyr. The decision to give that direction to the DCC is not the subject of challenge in these proceedings.

28. The consequence of the two decisions was that smart meters from all six cohorts (including the Secure SMETS1 meters used by Utilita) would have to be enrolled in the DCC or, if not enrolled, would need to be replaced by the end of 2020. In the case of four cohorts (not including Secure), it was known that the DCC would be directed to enrol those SMETS1 meters and it would not, therefore, become necessary for those meters to be replaced with SMETS2 meters. The position was different in relation to Secure SMETS1 meters. The users of these meters would not know, until a consultation was carried out and a decision taken on whether the DCC ought to provide services to Secure SMETS1 meters, whether they would be able to continue using their Secure SMETS1 meters after 2020 or would have to replace them with SMETS2 meters by the end of 2020.

The Second Decision

29. Mr Walker, the official responsible for the government's smart metering programme, explains in his third witness statement that it had long been envisaged that there would be a transition from SMETS1 to SMETS2 meters. As part of that process, the government indicated, over a number of years, that a time would come when the installation of a SMETS1 meter would no longer be treated as counting towards an energy supplier's targets for meeting that supplier's duty to take reasonable steps to install smart meters (the roll-out duty). Over the years, the government had indicated the date by which it was minded that this would occur. Over time, that minded-to date was changed and moved back. This date became known as the SMETS1 end-date. On 18 January 2018, the government indicated that it was minded that this date would be 5 October 2018.

30. On 3 July 2018, the defendant began a consultation process in which views were sought on a revised date. The proposed date for credit meters would be 5 December 2018 and a later date was proposed for pre-payment smart meters of 15 March 2019. The consultation papers explained that the date had to be set carefully to balance early delivery of the benefits of SMETS2 meters with the risks of forcing a premature transition to SMETS2 meters. The risks of setting a date which was too early would be to create what was described as a hiatus in the smart meter roll-out, that is suppliers would be reluctant to install a SMETS1 meter after the end date as that meter would not count towards its target duty but they may not be in a position to install a SMETS2 meter at that stage. In the light of the available evidence, the

government proposed an end date for credit smart meters of 5 December 2018. The consultation however noted that the development of pre-payment meters (which involved additional, unique pre-payment commands) was less advanced and the consequences of operational problems could be greater for pre-payment customers. The government, therefore, proposed a different, later end date of 15 March 2019 for pre-payment SMETS1 meters. Paragraph 33 noted that:

> "…this approach introduces further regulatory complexity compared to a single end date for all meter replacements, but this would apply for a limited period. As noted above, our overall aim is to maximise consumer benefits and avoid market-wide risks and we consider that the proposed end dates would deliver this objective in a proportionate way, reflecting the status of the transition. Whilst we also continue to be mindful of the potential impact of the SMETS1 end date on prepayment customers, who are likely to be vulnerable, we remain of the view that an optimised transition to SMETS2 meters is as much to their benefit as it is to consumers generally."

31. A number of suppliers, including the claimant, responded. The government's response was published on 4 October 2018. It noted that the government's role was to protect the interests of consumers including those who were vulnerable. It confirmed that a date of 5 December 2018 was appropriate for credit meters. It recognised that most energy suppliers had made less progress towards transitioning to SMETS2 prepayment meters and that testing and deployment of SMETS2 prepayment meters would take longer. The decision was that the end date be 15 March 2019 for prepayment meters. It said at paragraphs 11 and 12:

> "11. For prepayment customers, who are more likely to be disabled or otherwise vulnerable, the consequences of immature services could more directly affect their customer experience than for credit customers. We have seen over the summer that energy suppliers have continued to prioritise their SMETS2 credit transition, and plan to build the additional prepayment requirements on top of this. This reinforces the importance of providing more time for the prepayment transition so as to help avoid the risk of hiatus. We will therefore lay before Parliament draft modifications to the Smart Energy Code that allow us to set a later SMETS1 prepayment end date of **15 March 2019.**
>
> "12. In summary, we assess that these decisions will deliver a smoother transition to SMETS2 meter deployments and best support the overall implementation of the Programme and the realisation of the additional benefits of SMETS2 to consumers, including vulnerable consumers."

32. Those changes were given effect to in the following way. Smart meter communications licences have been granted under section 7AB(2) of the 1986 Gas Act (in relation to gas) and sections 6(1A) and (1C) under the Electricity Act 1989 (in relation to electricity). Condition 22 of the smart meter communication licence provides that there will be a Smart Energy Code providing, amongst other things, for the technical, commercial, and operational arrangements relating to the installation of smart meters. The technical specifications in section A of the Smart Energy Code provide that a version of a technical specification for a meter will have an installation validity period, i.e. the period between the installation date and the installation end date. The end date was to be identified in the "TS Applicability Tables". These are incorporated into and form part of the Smart Energy Code.

33. The Secretary of State has power under section 88 of the 2008 Act to modify a licence and documents maintained in accordance with a licence. Modifications to the Smart Energy Code were laid before Parliament on 9 October 2018 and made on 3 December 2018 which enabled the fixing of different end dates for credit smart meters and prepayment smart meters. Those modifications came into effect on 4 December 2018.

34. Mr Walker gave a direction on 5 December 2018 which had the effect of providing for an installation end date of 15 March 2019 for pre-payment smart meters to be inserted in the TS Applicability Tables. (There had, in fact, been an error in the date specified in the modifications laid before Parliament and Mr Walker gave a direction which, in effect, amended the date in the TS Applicability Tables). The end result is that the installation of a prepayment SMETS1 meter will not count towards an energy supplier's targets for its roll-out duty if it is installed after 15 March 2019. This is the Second Decision which the claimant challenges. The grounds of challenge are that the defendant failed to comply with its public sector equality duty under section 149 of the 2010 Act, that is, the duty to have due regard to specified matters, and failed to have regard to certain mandatory considerations, i.e. those referred to in sections 4AA of the Gas Act 1986 and 3A of the Electricity Act 1989.

The Third Decision

35. The Third Decision concerns the question of whether the DCC should be directed to provide services to Secure smart meters. If so, and if Secure SMETS1 meters are enrolled with the DCC, they would not need to be replaced by the end of 2020.

36. By about March 2019, sufficient technical, cost and security information had been provided by Secure and the DCC to the defendant that he considered that he was in a position to consult on this issue. On 4 March 2019 the defendant published a consultation paper on a proposal to require the DCC to provide an interoperable smart meter service for the Secure SMETS1 meter set. The consultation paper set out the background to government policy. It said that, in order to judge whether the DCC should provide a SMETS1 service to Secure meters, three criteria had been applied:

> "Whether a net societal benefit exists
>
> Whether there is an acceptable level of security for the end to end smart metering system
>
> Whether the delivery of a potential solution in respect of the meter type in question is technically feasible."

37. The consultation paper explained that there was considered to be a positive net present value to Great Britain of £346 million. That assumed, amongst other things, that there would be savings as Secure SMETS1 meters would not need to be replaced by the end of 2020 but would be enrolled in the DCC. The figure also took account only of the additional costs of developing the DCC to accommodate a service for Secure meters: it did not include any part of the core costs of establishing the DCC (which had, in effect, been taken into account at the time when the decision to enrol the other four cohorts was taken and were seen as costs attributable to providing a service to those cohorts).

38. There were responses to the consultation paper. On 8 April 2019, the claimant responded. Its response set out the view that the outcome of the consultation had been predetermined by the way in which decisions had been taken or sequenced. Further, 70% of the benefit of enrolling Secure SMETS1 meters (£246 million) was said to be the cost of avoiding having to replace meters by the end of 2020. However, those costs and the saving were generated by the government's decision in October 2018 to impose a duty to replace unenrolled SMETS1 meters. Furthermore, the core costs of the DCC were omitted as these had been factored into the 4 October 2018 decision to require DCC to provide services to four other cohorts of smart meters. The response criticised other aspects of the proposals and the consultation paper.

39. The claimant's consultation response also set out its view that the proposal would have negative impacts on consumers. The claimant considers that the DCC will only provide certain core, or basic, services whereas the claimant considers that it has developed additional services for its customers which cannot be delivered if the Secure SMETS1 meters were enrolled in the DCC rather than using its own operating system. The primary concern was said to be the functionality of the meter in the absence of a Wide Area Network (or WAN) connection. It had a proportion of its prepayment customers in such areas. It had devised a means of providing a service to them but the DCC would not be able to provide that service. There were a number of additional services which the claimant's Secure meters provided but would not be provided via the DCC. One of these included what was called auxiliary load. This enabled customers, amongst other things, to have access to economy 7, a lower tariff for energy based on the fact that customers are able to programme devices (such as storage heaters) to operate at times when energy is cheaper. There were also problems over what is known as a loss of UTRN functionality. A UTRN is a unique transaction reference number. That enables customers where there is no or an intermittent network or WAN connection to enter codes manually into a keypad on the meter. The claimant contends that that would not be possible once a secure SMETSI meter was enrolled in the DCC.

40. A submission from departmental officials to the minister was made on 15 May 2019. That included an Annex which summarised certain statutory duties under the Electricity Act 1989 and Gas Act 1986 and the public sector equality duty. The Annex referred to the duty of the Secretary of State to have regard to the interests of individuals who are disabled or chronically sick, pensioners, persons on low income or residing in rural areas. The summary noted that enrolment of SMETS1 meters in the DCC would help protect smart meter services for all consumers with these meters including customers with these characteristics.

41. The Annex referred to the duty to have regard to the effect on the environment. The summary noted that smart meters were expected to have significant environment benefits, including allowing customers to avoid peak usage and to maximise use of renewable electricity, and that there would be carbon and air quality impacts. It noted that enrolment of Secure SMETS1 meters mitigated the risk that the meters would otherwise have to be prematurely replaced.

42. The Annex summarised the public sector equality duty imposed by the 2010 Act. It set out the relevant protected characteristics. It noted that enrolment of Secure SMETS1 meters in the DCC would allow customers, including those with protected characteristics, to retain (or regain) smart services on changing an energy supplier. It

noted that consideration had been given as to how the proposal affected prepayment customers in particular. It noted that pre-payment customers were considered more likely to be disabled or otherwise vulnerable. It noted steps that had been taken generally to take account of these customers' needs and examples were given. The submission noted that:

> "6. One consultation response (Utilita) claims that there are potential negative impacts of premature enrolment of SMETS1 meters in the DCC.
>
> -They provide services to prepayment customers over and above minimum SMETS1 requirements
>
> -They allow for customers to self-serve in areas where there is no intermittent Wide Area Network (WAN) coverage, by inputting a Unique Transaction Reference Number (UTRN) locally at the meter
>
> They claim that both of these may no longer be possible once the meter is enrolled.
>
> "7. For the reasons given in the table below we consider that these potential adverse effects can be avoided or mitigated by the supplier, and with that are significantly outweighed by the benefits to the prepayment customer of Secure SMETS1 enrolment.
>
> "8. Utilita also claimed that if issues arise when the meter is migrated to the DCC this could result in prepayment customers losing supply. In addition, Utilita have previously claimed that key prepayment commands (including topping up) will not be sufficiently prioritised once SMETS1 meters are enrolled in the DCC. We do not consider these adverse effects should arise for the reasons set out below".

43. There is then a table setting out the issues and the response to them. The Annex concluded with this paragraph:

> "We do not consider that enrolment of Secure SMETS1 meters in the DCC would necessarily result in any material downgrade in functionality for prepayment customers. By contrast, were energy suppliers permitted to continue to operate SMETS1 meters outside of the DCC it would mean that a consumer risks losing their smart service and/or requiring a meter replacement if they switch energy supplier which would result in a poor outcome for the consumer. Moreover, this negative outcome could be particularly pronounced for vulnerable consumers and those with protected characteristics."

44. On 23 May 2019, the government issued its response. In terms of the net positive benefit, the updated analysis showed a benefit of £331 million pounds. That included the savings generated by not having to replace Secure SMETS1 meters by the end of 2020. The response noted that, even if the decision were approached on the basis that the 2020 obligation to replace unenrolled meters were not in force, the net positive benefit would be £91 million. The response considered the impacts on consumers and pre-payment customers in particular. It noted that once the SMETS1 meters were enrolled in the DCC, customers could switch energy suppliers without having to replace their smart meter. The response stated that the government considered that the DCC's provision of core communication services provided the necessary capabilities required for pre-payment customers. It noted, amongst other things, that the DCC was considering what would be required to ensure that the existing Secure SMETS1

service for updating tariffs relating to passive auxiliary load control remained available after enrolment. It set out its views on the position where meters had intermittent or no access to WAN. The annex to the response set out further details of the updated cost-benefit analysis. The overall benefit was a positive net benefit of £331 million. It confirmed that, as the costs of developing the core or basic functions to support enrolment in the DCC were included as part of the decision for the first four cohort of meters, they were not included as costs in this cost-benefit analysis for Secure SMETS1 meters in line with HM Treasury advice on calculating costs which recommended focussing on the additional costs and benefits of each decision when appraising projects. No figures are given for this in the consultation response.

45. Mr Knowles, a witness for the claimant, says that on the assumption that 32% of the costs be attributed to Secure (an assumption he bases on government indications of the likely proportion), then the portion of the core costs capable of being attributable to Secure would be £69.4 million. Adding in costs of that amount and removing the savings from avoiding the need to replace meters by 2020 would have led, says Mr Knowles to a net positive benefit of roughly £21.56 million (not the £331 million in the government's cost-benefit analysis).

46. The conclusion of the government at paragraph 56 of its response was that:

> "For the reasons outlined above, the government has concluded that it will require DCC to provide SMETS1 services for Secure meters. These considerations take into account, in particular, a positive net societal benefit, security and technical factors and includes strategic considerations such as the wider public policy benefits of having interoperable smart meters for consumers with Secure SMETS1 meters. This follows support from almost all but one of the consultation respondents for this position".

47. That decision was to be implemented by a direction given to DCC. This forms the Third Decision that the claimant seeks permission to challenge.

The Proceedings

48. On 3 January 2019, the claimant issued a claim form seeking to challenge the decisions of 4 October 2018 (1) to impose an obligation to replace any unenrolled SMETS1 meter with a SMETS2 meter (the First Decision) and (2) to impose a pre-payment smart meter end date of 15 March 2019 (the Second Decision). It also sought to challenge what it described as the decision to predetermine the eligibility of Secure meters for enrolment with the DCC which, it was claimed, became apparent on 4 October 2018. Permission to amend the claim form and permission to challenge those decisions, on the amended grounds, was granted by Walker J. on 15 March 2019.

49. The claimant has also applied for permission to re-amend the claim form to challenge the decision of 23 May 2019 to require the DCC to provide services to Secure SMETS1 meters to enable them to be enrolled with the DCC (the Third Decision). By order dated 3 May 2019, Walker J. ordered that the application to re-amend the claim form be determined by the trial judge dealing with the substantive hearing of the judicial review of the First and Second Decisions. The application to re-amend was brought within the time limit for issuing a claim for judicial review of the Third Decision. The claimant, and defendant, had ensured that all relevant evidence and argument relevant to the challenge to the Third Decision were available at the

substantive hearing of the claim for judicial review of the First and Second Decisions. In those circumstances, it was sensible to consider the re-amended grounds seeking to challenge the Third Decision at the substantive hearing of the claim against the First and Second Decisions. At the hearing on 22 to 24 July it was decided to proceed on the basis that the challenge to the Third Decision be dealt with as a rolled-up hearing, that is that the application for permission to apply for judicial review of the Third Decision, and the issue of whether the Third Decision was unlawful if permission were granted, be dealt with at that hearing. In practice, all the arguments, and evidence, on which the parties wished to rely were considered in full at the hearing. I grant the claimant permission to re-amend the claim form in the terms of the re-amended claim form dated 7 June 2019. I set out below my conclusions on whether permission to challenge the Third Decision should be granted and, if so, whether that decision is unlawful.

THE ISSUES

50. Against that background, and having regard to the written and oral submissions of the parties, the following issues arise (set out in the order in which it is convenient to deal with them):

(1) In relation to the First Decision (and in particular, the obligation to replace all unenrolled SMETS1 meters by the end of 2020):

(a) Was the First Decision irrational and/or inconsistent in that, in particular, it treated Secure SMETS1 meters in the same way as the four cohorts of SMETS1 meters which were eligible for enrolment in the DCC?

(b) Was the First Decision taken without proper consultation because it was unclear that it would apply to Secure SMETS1 meters?

(c) Did the defendant fail to assess the environmental impact of the duty to replace any unenrolled meters by the end of 2020?

(2) In relation to all three decisions:

(a) Were the First and Second Decision unlawful, and is it arguable that the Third Decision is unlawful (and if so, was it unlawful) because of a failure to have regard to (i) the public sector equality duty imposed by section 149 of the 2010 Act or (ii) the duties imposed by sections 4AA of the Gas Act 1986 and 3A of the Electricity Act 1989?

(3) Is it arguable that the Third Decision was unlawful (and if so, was the decision unlawful) because:

(a) the defendant (i) made a material error of fact or took into account an irrelevant consideration by including as a benefit the fact that enrolment would avoid the costs of having to replace

Secure SMETS1 by the end of 2020 and/or (ii) failed to take account of a relevant consideration, namely a proportion of the core costs of the DCC?

(b) the outcome of consultation exercise was predetermined?

(4) Does the First Decision involve a breach of the claimant's rights under A1P1 or any common law property rights?

THE FIRST ISSUE – THE LAWFULNESS OF THE FIRST DECISION

Issue 1(a) - The Alleged Irrationality or Unlawfulness of the Approach Adopted

51. Ms Wakefield Q.C. for the claimant contends that there was a material difference between the claimant, which used Secure SMETS1 meters, and the four cohorts. Ms Wakefield submits that there is an inextricable link between the replacement duty imposed by the First Decision and eligibility for enrolment in the DCC. At the time of the First Decision, no decision had been taken on the eligibility of Secure SMETS1 meters for enrolment in the DCC. The claimant therefore was subject to an immediate liability (as from 22 January 2019 when the duty came into force) to replace its Secure SMETS1 meters by the end of 2020. Conversely, suppliers using meters in the four cohorts were in a materially different position as there had been a decision on 4 October 2018 that the DCC provide services to their SMETS1 meters. They would not, therefore, be in a position where they had to replace their SMETS1 meters by the end of 2020. For those four cohorts, the obligation would be a backstop obligation, as described in the documentation, as it would cover the remaining SMETS1 meters which had not, for some reason, been enrolled in the DCC. In the case of the claimant, it was not a backstop or residual obligation as all of its Secure SMETS1 meters would need to be replaced by the end of 2020 as they were not eligible for enrolment at the time that the replacement duty was imposed. To impose the obligation to replace Secure SMETS1 meters by the end of 2020, submitted Ms Wakefield, involved an irrational and unlawful approach. It was further said to be incompatible with the principle recognised by Lord Hoffman in *Matadeen v Pointu* [1999] 1 AC 98 at paragraph 9 that "treating like cases alike and unlike differently is a general axiom of rational behaviour." Although it was not necessary for the claimant to establish alternative solutions, Ms Wakefield submits that there were a number of ways in which the problem could have been addressed. The replacement duty need not have been imposed on Secure SMETS1 meters, for example, until a decision was taken on their eligibility for enrolment in the DCC or the defendant could have required the provision of the information necessary to conduct a consultation exercise and could have consulted on Secure SMETS1 meters at the same time that the defendant consulted on the other four cohorts.

52. Ms Howard for the defendant submitted that there was nothing irrational or unlawful about the way that the defendant approached the decision-making process. There was nothing irrational or discriminatory about consulting on eligibility for enrolment of four cohorts of SMETS1 meters but not Secure SMETS1 meters as the government did not have the necessary information to consult on the latter. There was nothing irrational about consulting on the replacement duty for all smart meters. The government considered that there was a case for moving to a mandatory approach to ensure that the DCC was used for all smart meters (whether enrolled SMETS1 meters

or, if these meters could not be enrolled, replacement SMETS2 meters). The defendant wished to encourage enrolment of SMETS1 meters in the DCC where possible and would consult when feasible to see if it were appropriate to require the DCC to enrol Secure SMETS1 meters. In truth, submitted Ms Howard, these were regulatory and policy choices made by government and were decision lawfully open to them.

Discussion

53. The government's preference was to ensure that consumers had access to smart meters which were interoperable. To that end, the government consulted upon, and decided that, SMETS1 meters should be enrolled within a specific time from when they became eligible for enrolment and also that all unenrolled SMETS1 meters be replaced with SMETS2 meters by the end of 2020. Alongside that consultation, they consulted upon whether the DCC should be required to provide services for four particular cohorts of SMETS1 meters so that those meters were eligible for enrolment with the DCC. They consulted on those four cohorts as they had the necessary information for consultation and decision-making. They did not have the information necessary to consult on Secure (or EDMI) smart meters. The government proposed to consult on those cohorts once they had been provided with the necessary information.

54. There is nothing irrational or illogical or otherwise unlawful in that approach. The approach ensured that all consumers would be able to benefit from smart meters which were interoperable by the end of 2020 at the latest (or earlier if a decision were taken that a particular type of SMETS1 meters could be enrolled in the DCC). It is not necessary to decide whether, and to what extent, any obligation of consistent treatment forms part of the principles of public law governing the exercise of statutory power. On the facts, Secure SMETS1 meters were not in the same factual position as the other four cohorts in 2018. The government had the information necessary to consult upon, and decide, whether the DCC should be required to provide services to those four cohorts of SMETS1 meters. The government did not have the information to consult upon Secure SMETS1 meters at that stage. Consultation, and decision, upon Secure SMETS1 meters would, therefore, be undertaken at a later stage (or, if that did not prove possible, suppliers would need to replace them with SMETS2 meters by the end of 2020).

55. There was, therefore, nothing irrational or discriminatory, or otherwise unlawful, about the government consulting on a duty to replace all unenrolled smart meters by a particular date. As Ms Howard submitted, the government considered that there was a case for moving to a mandatory approach to ensure that the DCC was used for all smart meters (whether enrolled SMETS1 meters or, if those meters could not be enrolled, their replacement SMETS2 meters). The defendant wished to encourage enrolment of SMETS1 meters in the DCC where possible and would consult when feasible to see if it were appropriate to require the DCC to enrol Secure SMETS1 meters. Those were, in truth, regulatory policy choices made by the government and the decisions reached were ones lawfully open to them.

56. The fact that the decisions on replacement and on enrolment of SMETS1 meters were linked did not mean that consultation on those decisions had, as a matter of law, to proceed together. It was open to the government to consult, and take decisions, on those matters separately and it was not irrational to do so. The fact that the decisions

could have been taken differently, or in a different order, does not mean that the decisions actually taken were irrational or unlawful. The first ground of challenge, therefore, fails.

Issue 1(b) – the Adequacy of the Consultation Exercise

57. Ms Wakefield submits that the First Decision was unlawful as there was inadequate, and unlawful, consultation. In particular, she submits that the consultation document on maximising interoperability did not make it clear that the replacement duty would apply to the two cohorts of smart meters (Secure and EDMI) which were not included in the consultation on whether to direct the DCC to provide services to the other four cohorts. Ms Wakefield further submits that the policy underlying the government's approach was so illogical that it would have to be highlighted expressly on the face of the consultation document. Ms Wakefield relied, in particular, upon the approach identified at paragraph 108 of the decision of the Court of Appeal in *R v North and East Devon Health Authority ex p. Coughlan* [2001] Q.B. 213, and paragraph 25 of the decision of the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947. Ms Howard submits that the consultation process was proper and it was clear that the proposed replacement duty applied to all cohorts of smart meters.

Discussion

58. Read fairly, as a whole, and in context, the consultation document on maximising interoperability did make it sufficiently clear that the options being consulted upon would apply to all smart meters (not simply to the four cohorts of smart meters subject to the other consultation exercise conducted alongside the consultation exercise on maximising interoperability). The text of the consultation document made it clear that the government was proposing that "any SMETS1 meters that were not enrolled in the DCC must be replaced with SMETS2 meters by the end of 2020" (see, for example, the text set out at paragraph 18 above and question 5 set out at paragraph 19 above). It is clear from the text that the government was proposing that "any" unenrolled SMETS1 meter be replaced not merely that meters eligible for enrolment but which, for some reason, had not been unenrolled, were to be replaced. Furthermore, that reading reflects the content and context of the proposed replacement duty. The aim was to ensure that all customers had access to interoperable smart meters by the end of 2020 (either by enrolment of a SMETS1 meter with the DCC if eligible for enrolment, or the installation of a SMETS2 meter by the end of 2020). This ground of challenge therefore fails.

Issue 1(c) – Assessment of Environmental Impacts

59. Ms Wakefield submits that the government was obliged to assess the environmental impact of the First Decision, and the imposition of a duty to replace any unenrolled SMETS1 meters by the end of 2020. This obligation, she submitted, was derived from sections 3A(5)(c) of the Electricity Act 1989 and 4AA(3) of the Gas Act 1986 and government guidance. Ms Wakefield referred to guidance on assessing environmental impact which, amongst other things, says that policymakers should have regard to the environmental impact of waste management and whether a proposal affects the volume, content or management of waste. An example given in the guidance is requiring the replacement of goods, equipment or plant before the planned end of their

life. Ms Wakefield relies on other guidance such as guidance entitled "Wider Environmental Impacts: Step by Step Guide" issued by the Department for Environment, Food and Rural Affairs, and guidance issued by HM Treasury on assessing all impacts, including environmental impacts. Ms Wakefield submits that the imposition of the replacement duty (which came into force on 22 January 2019) would require the replacement of the very large number, approximately 1.1 million, of Secure SMETS1 meters used by the claimant before the end of their operational life. She submits that the government failed to assess this environmental impact when taking the First Decision and imposing the replacement duty.

60. Ms Howard submits that the government did have regard to environmental impacts generally, including the possible effects of having to replace SMETS1 meters, and, in any event, this complaint had been rendered redundant by the Third Decision. If the claimant enrols its Secure SMETS1 meters, as it is now eligible to do, it will not need to replace them. The environmental impacts complained of will not therefore arise.

Discussion

61. First, I proceed on the basis that there was an obligation, in general terms, on the defendant on the facts of this case to have regard to the environmental impacts of the Third Decision. The defendant has not argued that no such duty exists. Section 3A(5)(c) of the Electricity Act 1998 provides that in carrying out certain functions, the Secretary of State shall "have regard to the effect on the environment of… the provision of a smart meter communication service". Similar provisions in relation to gas are contained in section 4AA(5)(c) of the Gas Act 1986. I assume, without deciding, that the defendant was obliged to have regard to the environmental impacts of waste management as it affects the volume of waste, content or management of waste, as required by the relevant government guidance unless there were reasons for departing from the guidance.

62. Secondly, in general terms, the defendant did have regard to environmental impacts generally when taking the First Decision. That decision is a reflection of its wider policy on smart metering. As Mr Walker explains in his third witness statement, the underlying policy is designed to reduce energy consumption by promoting the efficient use of energy. That, it is believed, will reduce greenhouse gas emissions and help realise reductions in carbon usage which will result in improvements in air quality. The consultation response sets out the government's First Decision imposing the requirement that eligible SMETS1 meters be enrolled with the DCC within 12 months, and the obligation to replace any unenrolled SMETS1 meters with SMETS2 meters by the end of 2020. Read fairly, and as a whole, it is clear that the government considered that the First Decision would contribute to meeting the underlying policy aims and the aim of ensuring more efficient use of energy through a system of smart meters which were interoperable. The government did, therefore, consider the wider environmental considerations at the time of the First Decision.

63. Furthermore, the consultation response, read as a whole, demonstrates that the government was aware of the possible consequences on the environment, and the interests of energy suppliers, if they were unable to enrol their SMETS1 meters in the DCC (with the consequence that they would need to be replaced by the end of 2020). One of the advantages of enrolment of SMETS1 meters with the DCC was the reduction in what was described as the stranding risk, that is the risk that energy

suppliers would have to replace their unenrolled SMETS1 meters before the end of their working lives. That appears, for example, at paragraph 10 of the consultation response where the government is dealing with the background to the policy and benefits of enrolment of SMETS1 meters with the DCC.

64. In its conclusion, the response noted that the overall aim was to ensure that SMETS1 meters were interoperable and that an interoperable service was available for all consumers by the end of the roll-out, i.e. by the end of 2020, and that the consumer and industry benefits of operating meters via the DCC were achieved. That approach, of course, involved the decision that eligible SMETS1 meters be enrolled with the DCC within 12 months of becoming eligible and that unenrolled SMETS1 be replaced by SMETS2 meters (which would operate via the DCC) by the end of 2020. The conclusion noted that the government's approach could have implications for existing contractual arrangements between energy suppliers and other industry parties (that could include those energy suppliers who were contracted to use SMETS1 meters but could not enrol them and so had to replace them). The conclusion noted that the government remained of the view that its approach would provide benefits for consumers and the energy system and those benefits had been balanced against the potential burden on individual industry parties. The conclusion noted that the policy objective remained to enrol all significant populations of SMETS1 meters in the DCC and that, alongside the First Decision, it had published its decision to require the DCC to four cohorts of SMETS1 meters, and intended to consult on enrolment of the remaining two cohorts (Secure and EDMI) once sufficient information was available.

65. It is clear, reading the document fairly, that the government was aware of the possibility that Secure (or EMDI) meters might not be enrolled (although it wished to consult on enrolment once sufficient information was available). It must, therefore, have been aware that those SMETS1 meters (if not enrolled) would have to be replaced. Nevertheless, the government considered that the benefits of smart meters operating via the DCC (through SMETS2 meters replacing unenrolled SMETS1 meters if necessary) was preferable in policy terms. The government did, therefore, take into account the possibility that the Third Decision would result in some SMETS1 smart meters (Secure, and EDMI, ones) having to be replaced before the end of their operational life. The government considered that the benefits outweighed that. There was no failure, therefore, to have regard to the possible environmental impacts of the First Decision. This ground of challenge fails.

66. Thirdly, and separately, in any event, even if there had been a failure to have regard in October 2018 to the environmental impacts of possible adverse environmental consequences from having to replace unenrolled SMETS1 meters, I would not have granted any remedy to quash the First Decision on this ground. Remedies in public law are discretionary. A remedy may not be granted if no injustice or prejudice has been suffered or the grant of a remedy would serve no purpose. Here, the defendant has taken the Third Decision which provides that the DCC will provide services to Secure SMETS1 meters. They can be enrolled before the end of 2020 and will not, if enrolled, have to be replaced. There would not, therefore, be adverse consequences arising from early replacement if that decision is valid. For the reasons set out in detail below, the Third Decision is valid and there is no arguable basis for challenging its validity. In those circumstances, I would have refused to grant any remedy to

quash the First Decision even if there had been any failure to have regard to potential adverse environmental consequences arising from the First Decision.

THE SECOND ISSUE - EQUALITY AND STATUTORY CONSIDERATIONS

67. Ms Wakefield contends that each of the three decisions under challenge was reached in breach of the obligation in section 149 of the 2010 Act to have due regard to certain specified equality matters in relation to those with protected characteristics, here disabled persons, women (as a higher proportion of prepayment customers are disabled, lone parents who are more likely to be women) and pensioners. She further contends that each decision was unlawful as each failed to have regard to the interests of individuals who are disabled, are pensioners, or are on low incomes as required by sections 4AA(3) of the Gas Act 1986 and 3A(3) of the Electricity Act 1989. Ms Howard submits that the defendant did comply with section 149 of the 2010 Act. She further submits that the obligations in the Gas Act 1986 and Electricity Act 1989 do not apply to the Second and Third Decisions as they were not decisions taken in the performance of duties under the relevant Act. The Second Decision involved an exercise of powers under section X5.5 of the Smart Energy Code and the Third Decision involved a direction to the DCC to exercise its functions under the terms of its licence. In any event, Ms Howard submits that the defendant did have regard to the relevant statutory considerations.

Discussion

68. Section 4AA(3) of the Gas Act 1986 provides that:

> "(3) In performing the duties under subsections (1B), (1C) and (2), the Secretary of State or the Authority shall have regard to the interests of –
>
> (a) individuals who are disabled or chronically sick;
>
> (b) individuals of pensionable age;
>
> (c) individuals with low incomes; and
>
> (d) individuals in rural areas
>
> But that is not to be taken as implying that regard may not be had to the interests of other descriptions of consumer."

69. The functions in the subsections referred to are broadly carrying out specific duties under Part 1 of the Gas Act 1986 in particular ways. Section 3A(3) of the Electricity Act 1989 is in materially similar terms.

70. The provisions of section 149 of the 2010 Act on which the claimant relies provide that:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> …..

> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> …..
>
> "(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
>
> …..
>
> " (7) The relevant protected characteristics are—
>
> age;
> disability;
> …
> sex;
>
> ….."

71. The general approach to whether the public sector equality duty has been complied with is now well-established. Relevant principles are set out in the decision of the Court of Appeal in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWC Civ 1345, especially at paragraph 26. There, the relevant government department decided to close a fund operated by an independent non-governmental body which, broadly, provided funding to assist disabled persons to lead independent lives. On the facts, the Court of Appeal concluded that the information provided to the relevant minister did not give her an adequate awareness that the proposals would place independent living in serious peril for a large number of people and the Court concluded, in that particular case, that the minister had not complied with the public sector equality duty and quashed the decision. As the Court of Appeal has subsequently observed, the decision has to be read in context and the application of the public sector equality duty will differ from case to case depending upon the function being exercised and the facts of the case. Furthermore, courts should be careful not to read the judgment in *Bracking* as though it were a statute: see *Powell v Dacorum Borough Council* [2019] EWCA Civ 23, [2019] HLR 21 at paragraph 51.

72. The Court of Appeal in *R (Baker) v Secretary of State for Communities and Local Government* [2008] 2 P. & C.R. 6 has also given valuable guidance on assessing whether there had been compliance with section 71 of the Race Relations Act 1996 ("the 1996 Act"). Similar principles apply to the equivalent duty in section 149 of the 2010 Act: see *Hotak v London Borough of Southwark* [2016] A.C. 811 at paragraphs 73 to 74. In broad terms, the duty is a duty to have due regard to the specified matters not a duty to achieve a specific result. The duty is one of substance, not form, and the real issue is whether the relevant public authority has, in substance, had regard to the relevant matters having regard to the substance of the decision and the authority's reasoning. The absence of a reference to the public sector equality duty will not, of

itself, necessarily mean that the decision-maker failed to have regard to the relevant matters although it is good practice to make reference to the duty, and evidentially useful in demonstrating discharge of the duty (see, e.g., *Baker* at paragraphs 36 to 37, and *Bracking* at paragraph 26). As Lord Neuberger observed at paragraph 74 of his judgment in *Hotak v London Borough of Southwark* [2016] A.C. 811 "the weight and extent of the duty are highly fact-sensitive and dependant on individual judgment".

73. It is frequently helpful to establish what particular impacts are said, potentially, to arise from the exercise of the function and to which due regard must be had by reason of the duty imposed by section 149 of the 2010 Act. In the present case, it is clear from submissions made in argument, that the claimant is submitting that the requirement to provide services via the DCC (whether by enrolment of SMETS1 meters with the DCC, or replacing them with SMETS2 meters which operate via the DCC) leads to services that the claimant considers are less good in a number of respects than the services it offers via its existing Secure SMETS1 meters using its own operating system. These include those referred in its consultation response and summarised at paragraph 38 above. As a greater proportion of the claimant's customers are prepayment customers who are disabled, are lone parents (who are more likely to be women), or pensioners, it is said that the potential impact of requiring the claimant to provide services via the DCC (either by enrolling its Secure SMETS1 meters with the DCC, or replacing them with SMETS2 meters) means that there are potential impacts to which the defendant is required to have due regard by reason of section 149 of the 2010 Act. Further, in relation to the Second Decision, whereby SMETS1 meters installed after 15 March 2019 do not count towards the claimant's roll-out duty, it is said that there is a risk that an energy supplier would be deterred from installing SMETS1 meters (as they would not count towards its target for meeting its roll-out duty) but they would not be in a position to provide SMETS2 meters. This is referred to in the documentation as the risk of hiatus. This, it is said gives rise to potential impact for its likely customers who are more likely to be disabled, lone parents, persons on low incomes or pensions. That again, it is said, gave rise to potential impacts to which the defendant was required to pay due regard.

74. It is convenient to start with the Third Decision. That was the decision to direct the DCC to provide services to Secure SMETS1 meters. Prior to taking the Third Decision, the minister concerned was provided with a ministerial submission. That referred to and summarised the relevant duties under the Gas Act 1986 and the Electricity Act 1989 and the public sector equality duty under section 149 of the 2010 Act. The submission analysed the issues that the claimant said would arise for its prepayment customers if they were required to provide services via the DCC. The ministerial submission set out an analysis of the issues and the alleged likely impacts of the proposal. The consultation response setting out the government's decision again referred to and analysed some of the specific problems said to result from the provision of services via the DCC under the heading consumer impacts. In all the circumstances, the claim that the defendant failed to have regard to its duties under section 149 of the 2010 Act, or the Gas Act 1986, or the Electricity Act 1989, when taking the Third Decision is unarguable. The contemporaneous documentation shows that the defendant did have regard to its statutory duties and did consider the substance of those duties when reaching a decision to require the DCC to provide services to Secure SMETS1 meters. This contention does not, therefore, provide any arguable ground for challenging the Third Decision.

75. In relation to the First Decision, the claimant submits that the same substantive problems arose as the First Decision was predicated on services being provided via the DCC. Either the SMETS1 meter would be eligible for enrolment with the DCC (and would need to be enrolled) or it would have to be replaced with a SMETS2 meter by the end of 2020 which, it was said, would lead to the provision of less good services to prepayment customers. It is submitted that at the time of the First Decision (October 2018) the defendant had not had regard to these matters.

76. I doubt very much that any failure to have regard to the possibility that the operation of smart meters via the DCC might lead to less good services in some respects for prepayment customers (who might have protected characteristics under the 2010 Act or otherwise be pensioners, or be disabled or on low incomes) would have the effect of breaching section 149 of the 2010 Act on the facts of this case. The function being exercised was the function of introducing amendments to the relevant standard licence conditions to ensure that interoperable smart meters would be in place at the latest by the end of 2020. Such smart meters, and interoperable meters, were thought to bring advantages to consumers generally (in terms of more efficient and cost-effective energy usage). They would offer other benefits (such as remote meter reading thereby avoiding the need to let meter readers enter one's home to read the meter). In general terms, the defendant did have regard to the impact of the proposals on customers generally, including those with protected characteristics, and considered that consumers would benefit from the proposals. In so far as the defendant did not have regard to alleged specific disadvantages said to accrue to prepayment customers with smart meters which used their own SMSOs, rather than the DCC, I do not regard that as evidencing a breach of the duty imposed by section 149 of the 2010 Act. For similar reasons, I do not regard the defendant as in breach of the material provisions of the Gas Act 1986 or the Electricity Act 1989 in this regard.

77. In any event, I would refuse to grant a remedy on this ground to quash the First Decision (or grant a declaration that there had been a breach of one of the material statutory duties). First, section 31(2A) of the Senior Courts Act 1981 provides that the High Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. The conduct complained of is, in substance, the failure to have regard to potential adverse impacts for certain groups arising from the provision of smart meter services to prepayment customers via the DCC. It is highly likely that the outcome for the claimant would have been the same even if that conduct had not occurred – that is, if at the time of the First Decision in October 2018, the defendant had had regard to those matters. The fact is that the defendant at a later stage (when coming to the Third Decision in May 2019) did specifically consider those matters and decided that the provision of services via the DCC was preferable. The overwhelming inference is that it is highly likely that he would have reached the same conclusion for the same reason on essentially the same issue as the reached seven months later. It is highly likely that the outcome for the claimant would not have been substantially different (i.e. the replacement duty would still have been imposed) even if the defendant had considered these matters in October 2018.

78. Secondly, remedies in public law are discretionary. A court may in its discretion refuse to grant a remedy if there has been no injustice or prejudice or the grant of a

remedy would serve no purpose. On this issue, the complaint is that the defendant should have taken, but did not take, into account alleged deficiencies in the provision of services to prepayment customers via smart meters using the DCC when reaching its First Decision. If that decision were quashed, the defendant would have to consider those matters when deciding whether to impose a duty to replace any unenrolled SMETS1 meters. The defendant has, however, considered that issue in the context of requiring the DCC to provide services to Secure SMETS1 meters. It has concluded that services should be provided via the DCC for Secure smart meters. The claimant has not suffered any prejudice and no purpose would be served in quashing the First Decision. There is no suggestion of any other prejudice to the claimant. It will have ample time to enrol its Secure SMETS1 meters before the end of 2020 and will not have to replace them. In those circumstances, no purpose would be served by granting a remedy in relation to the First Decision on these grounds. I would have refused to grant any remedy as a matter of discretion.

79. Similar considerations apply in relation to the Second Decision. That decision provided that any SMETS1 meters installed after 15 March 2019 would not count towards the claimant's roll-out duty. So far as it is alleged that the defendant failed to have regard to the risk energy suppliers may be deterred from installing SMETS1 meters after 15 March 2019 but not be in a position to install SMETS2 meters (referred to as the "risk of hiatus") the defendant did specifically consider that issue. It imposed a later date for prepayment meters (the 15 March 2019 rather than the 5 December 2018) because the development of SMETS2 prepayment meters were less advanced. It considered that 15 March 2019 was an appropriate date for prepayment meters. There was no failure to have due regard to this issue in so far as it related to any of the matters referred to in section 149 of the 2010 Act, or the material sections of the Gas Act 1986 or the Electricity Act 1989 are concerned. I doubt very much that any failure to have regard to the possibility that the operation of smart meters via the DCC might lead to less good services in some respects for prepayment customers (who might have protected characteristics under the 2010 Act or otherwise be pensioners, be disabled or be on low incomes) would have the effect of breaching section 149 of the 2010 Act (or the provisions of the Gas Act 1986 or the Electricity Act 1989) for the reasons given above in relation to the First Decision. In any event, I would not grant a remedy by reason of section 31(2A) of the Senior Courts Act 1981 for the reasons given in relation to that subjection 71 above.

80. In the circumstances it is not necessary to determine whether, as Ms Howard submits, sections 4AA(3) of the Gas Act 1986 and 3A(5)(c) of the Electricity Act 1989 are not applicable to the Second Decision as that was taken pursuant to powers conferred under the Smart Energy Code or the Third Decision as that was a direction given by the defendant to the DCC requiring it to perform functions pursuant to its licence and so neither was done by the Secretary of State in the exercise of his functions under the relevant Part of the Gas Act 1986 or the Electricity Act 1989. For completeness, I note the argument of the claimant that the Smart Energy Code, and the DCC licence, were themselves ultimately made or granted by the Secretary of State in the exercise of his functions under the relevant Part of the relevant statute and that things done under those instruments are themselves done in the exercise of functions under the relevant Part of the Act.

THE THIRD ISSUE – IS THE THIRD DECISION ARGUABLY UNLAWFUL?

Issue 3(a) - The Calculation in the Cost-Benefit Analysis

81. In its re-amended grounds of appeal, the claimant seeks to argue that the defendant acted unlawfully in that he made what are described as material errors of assessment and took into account irrelevant considerations in reaching his conclusion that there would be a positive net benefit resulting from the Third Decision. Ms Wakefield identified two such alleged errors.

82. First, it is said that the defendant took into account the benefits accruing from not having to replace Secure SMETS1 meters if they could be enrolled. This amounted to £240 million of the identified £331 million savings identified in the cost benefit analysis. Ms Wakefield submits that it was unlawful for the defendant to take that factor into account because they were, as it was put in the claimant's skeleton argument "artificially generated through the (unlawful) manner in which it has sequenced its decision making, rather than reflecting any real benefit". The second alleged error is in failing to take into account a proportion of the core costs of providing the DCC in assessing the costs generated by the Third Decision which directed the DCC to provide services to Secure SMETS1 meters. While those costs had already been included in the cost-benefit assessment carried out when the DCC were directed in October 2018 to provide services to four other cohorts, Ms Wakefield submits that a proportion, which the claimant's evidence estimates to amount to £69.4 million, should be attributed to the Third Decision and should be treated as costs resulting from that decision. Calculating the cost benefit analysis in that way, submits Ms Wakefield, would meant that the Third Decision would not result, as the defendant says, in a net positive benefit of £331 million but roughly one of £21.56 million if the £240 million savings from avoiding replacement of Secure SMETS1 meters are not included, and if core costs of £69.4 million in establishing the DCC are included.

83. Ms Howard submits that there was no error in the calculation of the cost benefit analysis and the way in which this was calculated reflects economic and policy choices open to the defendant.

Discussion

84. Dealing first with the savings resulting from not having to replace Secure SMETS1 meters, the claimant has not begun to establish that the defendant has made any arguable public law error in the way he approached the calculation. The fact is that when the defendant came, in May 2019, to calculate the cost benefit analysis of directing the DCC to provide services to Secure SMETS1 meters, the legal position was that those meters would have to be replaced by the end of 2020 if they were not enrolled in the DCC. That was the consequence of the First Decision taken in October 2018 and given effect to by the modifications to the standard conditions of the licence in January 2019. That decision was a lawful decision and there was nothing unlawful in the Defendant's approach to the sequencing of the decisions. The defendant was entitled, if he thought it appropriate to do so, to take into account the amount saved by providing for Secure SMETS1 meters to be enrolled in the DCC rather than having to be replaced. In truth, the claimant has not established any public law error on the part of the defendant in this regard.

85. Secondly, and separately, I would not have granted permission on this ground by reason of section 31(3D) of the Senior Courts Act 1981. That provides that leave to apply should be refused if it appears to the High Court that it would be highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred. Here, the conduct complained of is including the savings resulting from avoiding having to replace Secure SMETS1 meters. The decision that the defendant was considering was whether to direct the DCC to provide services for those meters. His preference was for those meters to be enrolled with the DCC if, following consultation, there were a net societal benefit (and other conditions relating to security and technical feasibility were met). Even without the £240 million attributable to avoiding replacing meters, there was (as the consultation response and the cost-benefit analysis itself recognises) a net positive benefit of £91 million . In the circumstances, it is highly likely that the outcome would have been substantially the same if those savings were not included as there would still be a net societal benefit of £91 million in economic terms. The defendant would have directed the DCC to provide services to and enrol Secure SMETS1 meters.

86. The second matter concerns the fact that the defendant did not include a proportion of the costs of establishing the DCC as those costs had been taken into account when deciding to direct the DCC to provide services to four other cohorts. The claimant says that was a failure to take into account a relevant consideration. Implicit in that argument, however, is the claim that the defendant was legally required to take that into account in calculating the cost benefit analysis of the proposal to direct the DCC to provide services to Secure SMETS1 meters. The claimant has, however, not identified any arguable legal basis upon which it could be said that the defendant was required to treat that proportion of the costs as a relevant consideration in relation to the Third Decision. Indeed, the evidence before this court is that the approach to calculation of costs adopted by HM Treasury was to focus on the additional costs of each decision when appraising projects. There is no basis for contending that the defendant erred, or failed to take account of some legally relevant consideration, when it decided not to include the core costs of establishing the DCC (already taken into account in the October 2018 decision relating to the four cohorts) in considering the cost benefit analysis of its Third Decision taken in May 2019.

87. In those circumstances, it is not strictly necessary to consider whether relief should be refused pursuant to section 31(3D) of the Senior Courts Act 1981. However, given that the Third Decision would still result in a net positive benefit of around £21 million pounds, and given the preference of the defendant to provide for the enrolment of SMETS1 meters (including Secure SMETS1 meters) with the DCC if there is a net societal benefit (and assuming the security and technical feasibility criteria are satisfied),it is highly likely in my opinion that the outcome for the claimant would not have been substantially different even if these costs were included in the cost benefit analysis (and the savings from avoiding replacing Secure SMETS1 meters were excluded). The defendant would have directed the DCC to provide services for and to enrol Secure SMETS1 meters. I would have refused permission to apply for judicial review on that ground for that additional, separate reason.

Issue 3(b) – Was the outcome of the consultation on the Third Decision predetermined?

88. Ms Wakefield submits that the manner in which the defendant structured his decision-making gave rise to, at least, the appearance of predetermination, relying on observations of Rix L.J. in *R (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 W.L.R. 83 at paragraphs 96 to 97. Ms Wakefield submits that the way in which the calculation of the cost benefit analysis, with the inclusion of savings from avoiding replacing Secure SMETS1 savings and excluding the core costs of establishing the DCC, reinforces the view that the outcome of the consultation was inevitable. Ms Howard submits that, whilst there was a general policy preference of enrolling SMETS1 meters with the DCC, where possible, that was subject to the particular meter cohort satisfying the necessary costs benefit analysis, security and technical considerations and that issue was not predetermined.

Discussion

89. Reviewing all the material in the present case, there is no arguable basis for contending that the fair-minded observer, knowing the facts, would conclude that there was an appearance of a real possibility of predetermination. On the facts, the defendant did approach the subject matter of this consultation – whether a direction should be given to the DCC requiring it to provide services to enrol Secure SMETS1 meters – without predetermining that issue.

90. From the material as a whole, it is clear that the defendant did not consider that he had sufficient material to consult upon that question in April 2018. By about March 2019, he considered that he did have sufficient information about cost, technical matters and security to consult. The consultation paper said that the question whether to direct the DCC to enrol Secure SMETS1 meters would depend on three criteria, namely whether a net societal benefit existed, whether there would be an acceptable level of security and whether the proposal was technically feasible. The defendant received, and considered, the representations on those issue. Those included the detailed submissions of the claimant. Those representations were considered as appears from the ministerial submission and the consultation response. The decision of the defendant was that the criteria were satisfied, and that the DCC should be directed to provide services to Secure SMETS1 meters. That material does not provide any arguable basis for concluding that there was any appearance of predetermination.

91. So far as the defendant's policy of preferring the provision of services via the DCC is concerned, a decision-maker is entitled to have a predisposition in favour of a particular policy provided that the decision-maker considers the issues fairly and on their merits when making the decision: see, e.g., *R (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83, per Rix L.J. at paragraphs 95 and 96, and per Pill L.J. at paragraphs 62 to 63.

92. So far as the structuring of the decision-making process is concerned, the defendant consulted in April 2018 on whether to require all eligible SMETS1 meters to be enrolled, and if not, replaced. He also consulted on whether the DCC should be directed to provide services to four particular cohorts of SMETS1 smart meters in April 2018. At that stage, he did not have sufficient material to enable him to consult upon whether the DCC should be directed to provide services to enrol Secure SMETS1 meters. By about March 2019, he did have sufficient information about costs, and technical and security issues to enable him to consult on directing the DCC to enrol Secure SMETS1 meters. The fact that he did not begin the consultation

earlier could not begin to suggest to the fair-minded observer that there was any appearance that the outcome of the consultation, when it took place, was predetermined.

93. Similarly, the fact that the defendant had consulted upon and decided that energy suppliers should take all reasonable steps to enrol SMETS1 meters eligible for enrolment within 12 months, and to replace any unenrolled SMETS1 meter by the end of 2020, could not begin to suggest to the fair-minded observer that there was an appearance that the outcome of the consultation on whether to direct the DCC to provide services to enrol Secure SMETS1 was predetermined. It is correct that if the defendant did not direct the DCC to enrol Secure SMETS1 meters then the claimant would be obliged to replace them by the end of 2020. But that does not begin to create the appearance that the question of whether there was a case, on cost, security and technical grounds, for enrolling Secure SMETS1 meters was predetermined. Rather, either there would be a direction that the DCC provide services to enrol Secure SMETS1 or, because of an earlier decision, they would need to be replaced by the end of 2020. But there is no arguable ground for considering that the fair-minded observer would consider that the possibility of that latter consequence occurring gave rise to any appearance that the decision on the enrolment issue was predetermined. In all the circumstances, therefore, this ground of challenge is unarguable.

THE FOURTH ISSUE – A1P1

94. The claim originally contended that the First Decision involved a violation of the claimant's under A1P1. That article provides that:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in accordance in the public interest and subject to the conditions provided by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

95. The basis of that claim was that the First Decision interfered with the contractual rights of the claimant in respect of the SMETS1 meters that it had installed. It had a contractual right to use each of the meters for 10 years. The claimant contended that a requirement that they be replaced by the end of 2020 would interfere with those contractual rights in respect of those meters, and also its marketable goodwill. It would amount either to a deprivation of rights or a control on the use of property, which was not justified. The claimant relied, in particular, upon the decision in *R (Mott) v Environment Agency* [2016] 1 WLR 4338. The claimant also contends, as part of this ground, that the First Decision involves a violation of what are said to be its common law property rights.

96. In the re-amended grounds of claim, the claimant says that it only pursues this ground if it succeeds in its challenge to the Third Decision. The claimant repeats that position in its written skeleton argument. In my judgment, that was a sensible concession on the part of the claimant. If the claimant enrols its SMETS1 meters, as it will be able to do if the Third Decision is lawful, it should not suffer any adverse consequences in terms of its continued ability to use its Secure SMETS1 meters (and would not have

to replace any enrolled SMETS1 meter by the end of 2020). Its contractual rights, and its marketable goodwill, ought to be unaffected. Given that I have found that the Third Decision is lawful, it is not necessary to consider this ground of appeal.

CONCLUSION

97. The claim for judicial review of the First and Second Decision is dismissed. There are no arguable grounds for challenging the validity of the Third Decision. Permission to apply for judicial review of the Third Decision, on the grounds set out in the re-amended claim form dated 7 June 2019, is, therefore, refused.