To the kind attention of **Norbert Hofer**
Minister for Transport, Innovation and Technology
Cc: Commissioner for Digital Economy and Society, Mariya Gabriel
Commissioner for Climate Action and Energy, Miguel Arias Cañete

Brussels, 24 October 2018

RE: Open coalition letter on the future of the ePrivacy Regulation

Dear Minister for Transport, Innovation and Technology,

The undersigned Associations - smartEn, EER, ESMIG, Eurelectric, EHPA, and SolarPower Europe - welcome the European efforts to clarify important data protection rules with the ePrivacy Regulation that is currently being deliberated in Council. While we strongly support the regulation's core objective to protect electronic communication and user's electronic data, we are concerned about the current texts being discussed within the Council. Despite the fact that the public discourse has so far been centred around cookies and data for online advertising, the proposals would also have far-reaching consequences for all energy companies involved in the decarbonisation and digitalisation of the energy system.

Almost all innovative business models in the energy sector are based on the processing of consumption, condition, and measurement data, collected by a wide variety of measuring devices, not limited to smart meters installed on the customers' premises. These include services for intelligent energy management, the management and control of generation and consumer plants, services for electric mobility and numerous smart home applications. Such business models would be inconceivable without data collected through terminal equipment and devices.

However, according to Article 8 of the current draft of the ePrivacy Regulation, information from the end user's terminal equipment may only be collected and processed under the strictest conditions. Importantly, these restrictions are not only limited to personal data, but even extend to factual and business data. In its current broad version, Article 8 covers almost all innovative developments in the energy industry, without sufficient exceptions for sector-specific circumstances. For example, unlike in the General Data Protection Regulation, there are no justifications for data processing on the grounds that it is necessary for the performance of a contract concluded with the end user, the

fulfilment of a legal obligation, or due to overriding interests. This makes data processing for innovative energy services practically impossible (even where only business data is involved).

Another important concern is the question of consent to process data from terminal equipment. In the current draft, consent can be revoked without any advance notice. Since this leads to an inability to perform contractual services, this has the effect of terminating the contract without notice. It is also impractical if new consents have to be constantly obtained for innovations and adaptations in data processing. In addition, particularly in the case of complex energy services, the question arises as to whose consent must be obtained and to what extent.

In summary, while we recognise the importance of e-privacy, this should not hamper innovative solutions that are crucial to the energy transition, particularly where it concerns business data as opposed to personal data. Where it does concern personal data, certain exemptions are needed for third parties to fulfil their contractual obligations to their customers.

We have provided several proposed solution in the annex of this letter. We hope that you will be able to take our recommendations into consideration and remain at your disposal for any clarification and further discussions.

Yours sincerely,

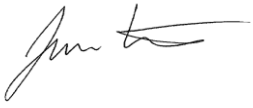
Frauke Thies
Executive Director
smartEn

Michele Governatori
President
European Energy Retailers

John Harris
President
ESMIG

Kristian Ruby
Secretary General
Eurelectric

Thomas Nowak
Secretary General
European Heat Pump Association



James Watson
CEO
SolarPower Europe

Annex: Solution proposals

Scope of the ePrivacy Regulation

The scope of Article 8 of the ePrivacy Regulation should be limited and only related to cookies. Not all information from all terminal equipment and devices should be regulated in the same way. For complex special cases such as the energy sector, specific regulations are required and there should be no general prohibitions such as in Article 8. We therefore recommend the following changes.

Art. 8 shall be limited to personal data.

- The exemptions in Art. 8 shall be extended: in particular, the justification under Article 8 paragraph 1 c) must not be limited to information society services. Instead, it should read - as in the GDPR:

  c) it is necessary for the performance of a contract to which the end user is party or in order to take steps at the request of the end user prior to entering into a contract

Member States may introduce more detailed derogations

In addition, a provision such as Article 6 (1) sentence 1 c), (2) and (3) GDPR should be inserted and the opening clause in Article 11 extended. It should be made clear in the recitals that exceptions to the rules of the ePrivacy Regulation may also be introduced in particular for the purposes of environmental protection, climate protection and security of energy supply.