Baker McKenzie.

Baker & McKenzie LLP

10 May 2017

Data Protection Team

Dear Sirs

CALL FOR VIEWS ON GDPR DEROGATIONS

We are instructed by CACI Limited, a business operating in the direct marketing industry, to respond to the DCMS call for views on GDPR derogations. Our client has publicly welcomed the GDPR but is very concerned about the approach to implementation at least as demonstrated by the ICO's interpretation of the provisions in the GDPR on consent and profiling.

The key point on GDPR derogations which our client wishes to make is to ensure that disruption to existing businesses is minimised provided of course the GDPR requirements are addressed. In particular, our client would want guidance at least from the DCMS that existing obligations on public authorities to publish or otherwise make available data which could include personal data should be treated as national law obligations for the purposes of the GDPR and in particular for the purposes of Article 6(1)(c). This would catch for example the current obligation to make the electoral roll available as enshrined in para 110 of the Representation of the People (England and Wales) Regulations 2001 (as amended). We take the view that para 110 already satisfies Article 6(1)(c) but it would ensure certainty if that was confirmed by the DCMS.

Similarly under para 8(2) of the Land Registration Rules 2003, HM Land Registry has an obligation to record the price paid whenever practicable.

We note in this context that the ICO seems to be pursuing a restrictive interpretation of the GDPR at least in relation to consent and profiling. This seems directly contrary to what the UK pressed hard throughout negotiations to ensure namely that the GDPR

Baker McKenzie.

does not place unnecessary burdens on business. We attach copies of letters recently sent to the ICO in response to requests for input in relation to consent and profiling.

The ICO approach seems particularly inappropriate given the following important factors. First, the enforcement regime under the GDPR is significantly more onerous than currently with huge potential fines up to 4% of group annual worldwide turnover for failure to obtain consent. Even if the GDPR is properly interpreted to be neutral as to consent, it is highly likely that data controllers will put significantly more effort into compliance to avoid the higher enforcement risk under the GDPR. In other words, the GDPR will have important consequences for the direct marketing industry even if the GDPR does not make significant changes in relation to consent.

Second, the UK has now triggered the process to exit the European Union (**EU**) under Article 50 of the Treaty on EU. It is expected that the UK will leave the EU within the 2 year period set by Article 50 and the UK Government has said that the GDPR will be adopted as legislation in the UK at the point of departure from the EU. Given the short time frame between the GDPR becoming effective (May 2018) and the point at which the UK seems likely to leave the EU (March 2019), official judicial interpretation of the GDPR for the UK will likely be given by UK courts without any appeal to the Court of Justice of the EU.

These two key factors point clearly to the ICO not adopting an excessively strict interpretation of the GDPR in particular because such an approach might have a material impact on an entire industry from which it would not be easy to recover even if the interpretation was later found to be wrong. We attach in this context our client's response to the final question in the DCMS's call for views: "Additional question – cost impact.

In summary, we ask the DCMS to consider what influence it can bring to bear in relation to the ICO's approach on consent and profiling in light of the above points and attachments to this letter.

Finally, we would request that the current short timeframe to respond to the call for views does not mean that further requests are not possible for derogations or other national law measures in relation to the GDPR in particular as we become more familiar with the interpretation of the GDPR and impact on current business activities.

Yours faithfully

Baker & McKenzie LLP

Attachments:

- CACI Limited Response to Additional Question – Cost Impact
- Letter to ICO in Response to Consultation on Draft Guidance on Consent
- Letter to ICO in Response to Feedback Request on Profiling and Automated Decision-Making

Baker McKenzie.

CACI Limited Response to Additional Question – Cost Impact

In the context of the derogations above, what steps should the Government take to minimise the cost or burden to business of the GDPR?

As a Regulation, we understand that the GDPR only allows limited national flexibility and adaptation of certain derogations. That said, we take confidence from the fact that the GDPR negotiation process was long and thorough, and sought to take into account differing interests from diverse stakeholders. The resulting legislation was a carefully crafted compromise between protecting individual rights and supporting data businesses across the EU. **It is imperative that this compromise is upheld as the UK implements the GDPR**.

However, CACI has grave concerns that this will not be the case, judging by the draft guidance that the Information Commissioner's Office (ICO) has recently published. Beyond this consultation and work on derogations, we therefore strongly urge the Government to consider the following.

1. We hope that **the Government will ensure that the implementation in the UK does not go beyond what the GDPR actually prescribes**. We instructed Baker & McKenzie LLP to provide a detailed analysis on key points in the ICO's guidance on consent in GDPR. Counsel concluded that since the GDPR does not materially change the standard of consent compared to the Data Protection Directive (DPD), it is difficult to understand why the ICO would want to impose stricter and more burdensome obligations than it considered appropriate under the DPD. **We are concerned that such gold-plating of GDPR is unjustified** and would upset the balance so carefully crafted during the drafting of the GDPR.

2. **Particular consideration should be given to those most directly affected by the GDPR, for whom the details of the UK's implementation matter a great deal.** These include the direct marketing industry, important both in and of itself and for the value it feeds into a diverse range of other sectors including some of the UK's largest companies. Additionally, the effects of the ICO's guidance, as drafted, could prove anti-competitive, favouring those larger companies, who have extensive consented databases, over SMEs for whom it will be unduly expensive to create a fully consented database under the ICO's current interpretation of GDPR. If the ICO does indeed intend to tilt the balance further in favour of data subjects – beyond what the GDPR prescribes – then Government should be aware that this is likely to increase untargeted mass marketing communications and multiple requests for consent for essentially similar processing requirements. This will not be an improved experience for customers who expect direct marketing to be targeted and useful. In light of this impact on both business and consumers, we hope that **Government will consider carrying out further economic impact assessments on businesses of all sizes and studies into the potential burden on consumers**.

3. We consider it absolutely critical, particularly in these times, for Government to ensure that the UK creates a favourable environment that rivals the interpretation of the most business friendly EU Member States in order to **retain our competitive edge in the fast-growing data economy – of which the direct marketing industry is a large and important part – which is estimated at £160 billion and employs 1.5 million people**. In this particular case, there is little to be gained from rushing ahead. In fact, the UK may lose out if we do move too quickly and get it wrong. For one thing, the Article 29 Working Party has not yet published its advice on consent guidance. **For another, it will be useful to scrutinise how other European economies adhere to the compromise intentionally devised for the final GDPR**

legislation.

4. In any case, we would urge Government to look at the GDPR implementation in conjunction with the ePrivacy Regulation which is still being negotiated. There is a **considerable risk that the ePrivacy Regulation as currently drafted is not fully aligned with elements of the GDPR**, particularly the details of the consent-giving process. It therefore seems advisable to pay careful attention to the negotiations producing the finalised version of the ePrivacy Regulation, so that the UK's implementation of the GDPR does not risk being immediately outdated.

CACI feels it has to make these points to DCMS now because of the way the ICO has started to implement GDPR, with potentially devastating impacts. We are particularly concerned about the ICO's guidance on consent in GDPR and the text of its feedback document on profiling in the GDPR. The following are some of the most problematic elements of these, covering what we have already submitted to the ICO and about which we remain very concerned.

Consent

- The ICO's draft guidance asserts that under GDPR all consent must be opt-in consent and that there is no such thing as "**opt-out consent**". However, in the text of the GDPR there is nothing that specifically prohibits opt-out consent. If the European legislators had intended to exclude all forms of opt-out consent from the concept of consent it would have been a simple matter for them to say so.

- The ICO states in the guidance that **separate consent** is required **for different purposes**, as opposed to different processing operations. This would require separate consent to be obtained each time the controller carried out a processing operation on a data subject's data, even in situations where both the data subject and the controller reasonably anticipate that the processing operation will be carried out on multiple occasions. Recital 43 of the GDPR does not provide support for the ICO's statement, which we can see would prove very complicated and burdensome.

- The draft guidance states that the data controller must "**name any third parties who will be relying on consent**" and that the data controller must as a minimum include "the names of any third parties who will rely on the consent". Since the GDPR requires the data controller to provide the data subject with information as to "the recipients or categories of recipients of the personal data, if any", we do not see that a requirement to provide information as to "categories of recipients" can be sensibly interpreted as a requirement to name each third party recipient, which would prove incredibly burdensome to business and consumers alike.

This combination of a ban on opt-out boxes as a means of gaining consent; the need to notify the subject of all third parties relying on consent at the time it is given; and the unbundling of consent for different types of processing would **effectively make direct marketing as currently practised in the UK impossible**.

The **ICO's interpretation of the consent rules has already had a negative effect on innovative data analytics and marketing businesses** and an overtly strict view of the implementation of GDPR will ultimately lead to investment write-downs, possibly job losses and other adverse consequences to the industry and to growth generally.

Baker McKenzie.

Profiling

- The wording of the ICO's feedback document seems to indicate that a restrictive approach has already been adopted. Crucially, the **GDPR itself is neutral in relation to profiling**. **By contrast, the ICO seems to adopt a much stricter approach to profiling than required by the GDPR**; we counted 20 negative references to profiling and only 6 positive comments in the document. In order to help industry and other stakeholders to best understand the GDPR, we feel that the ICO should stick to the definition of profiling in the GDPR, rather than embellishing it with further description which may cause confusion.

- The GDPR is particularly concerned with profiling that might have a legal or significant effect, providing two examples. However, the ICO's document suggests several other examples; this list contains things that we think would set such a low threshold for "significant" that almost any type of profiling might be caught. In addition, the feedback document implies that profiling is difficult to do fairly and transparently, despite the fact that the GDPR sets out how it is possible "to ensure fair and transparent processing in respect of the data subject".

For these reasons, CACI strongly urges the Government to re-think and adjust the current implementation process, which needs more time, further deliberation and above all a better balance to accurately reflect both the text and the spirit of GDPR.