Which?

Consultation response

Call for views on the General Data Protection Regulation derogations

Which? response

Which? is the largest independent consumer organisation in the UK with more than 1.5 million members and supporters. We operate as an a-political, social enterprise working for all consumers and funded solely by our commercial ventures. We receive no government money, public donations, or other fundraising income. Which?'s mission is to tackle consumer detriment by making individuals as powerful as the organisations they have to deal with in their daily lives. Which? empowers consumers to make informed decisions and campaigns to make people's lives fairer, simpler and safer.

Which? welcomes the opportunity to respond to the Department's call for views on derogations from the EU General Data Protection Regulation (GDPR) and the discretion the UK government can exercise on the application of provisions in the regulations. Which? would welcome further discussions on the views contained in this response and would urge the Government to bring forward the application of the provisions as outlined below.

More broadly, Which? welcomes the implementation of the GDPR and the strengthening of the data protection regime, improving the rights of consumers and the protection of their personal data online. We respond to the themes outlined in the consultation document through addressing relevant concerns rather than taking each of the themes in turn. However, where appropriate, we have referred to relevant Articles that the Government should consider further.

Collective redress for consumers (Article 80)

If Article 80 of the GDPR is implemented in the UK it would allow for independent organisations to bring collective redress actions on behalf of consumers for breaches of data protection rules. Which? wants the Government to ensure mechanisms that help to support and enforce consumer rights, such as this, are implemented into UK law.

Where a company fails to comply with data protection rules, affected individuals should have easy access to effective redress. At present, consumer and data protection laws do provide some ways in which consumers can seek redress following the loss or misuse of their personal data. However, these existing arrangements are inadequate:

- First, in most cases the only formal forum available to consumers for bringing a claim about unlawful data practices will be the Courts[1]. Many consumers will be reluctant to become embroiled in a potentially lengthy and costly legal process.
- Second, particularly in the absence of a regulatory decision that identifies company failings, it is often difficult for consumers to obtain the evidence they need to demonstrate that the trader's systems and processes were not sufficient. Equally, it can be difficult for individual consumers to prove that any losses they have suffered were directly caused by the trader's failings. The burden rests on the consumer to evidence these points – a challenging and sometimes impossible task.

[1] In certain sectors, an ADR scheme might be available. However, that scheme will be limited to assessing the culpability of the sector participant (e.g. a bank in the case of the Financial Ombudsman Service). In many cases it may be relevant to also consider the role of other parties – such as service providers outside of the sector, software providers, and retailers or manufacturers of hardware.

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A properly implemented redress system would enable consumers to more easily obtain compensation and also prevent future infringements by creating a deterrent effect. Collective redress has significant advantages in respect of costs and court time, and provides finality of liability for businesses since all claims are dealt with at once. Collective redress by way of a representative action is currently very limited in the UK. A robust collective actions regime was recently introduced under the Consumer Rights Act 2015, but this only applies to infringements of competition law. In other areas, including data protection, there are two main avenues open to consumers.

1. All potential claimants find each other and join together to bring an action. This includes appointing a lawyer and initiating a case, with all the associated costs. Needless to say this rarely happens as it requires a great deal of organisation. Also, if the loss of each claimant is small – a few hundred pounds each perhaps – the claimants are unlikely to seek redress due to the cost and hassle of bringing the claim to court. This means individual consumers do not get redress even when a wrong has occurred and loss has been suffered.
2. A law firm takes the initiative by advertising its intention to bring a particular action and asks potential claimants to contact them. Usually, the motive behind such advertising is commercial – the law firm will organise the action in order to make money – meaning that unless there is sufficient uptake for the case to be financially viable, no action will result. In any event, consumers will not be fully compensated as the law firm involved will take a 'cut' of the redress for its efforts.

Even where option 1 or 2 above is viable, it is procedurally very difficult to structure a case within the UK's current civil justice framework. Few options exist for pooling claims together, and those that do exist are only available in very narrow (and thus rare) factual circumstances, often not applicable to consumer claims.[2]

The consequence is that, currently, there are many instances where large groups of consumers who have suffered the same kind of harm cannot get effective redress.

We recognise that careful thought must be given to the way any new collective redress mechanism is structured. It is often argued, for example, that the "class action" regime in the US is profitable for lawyers but does little to effectively compensate victims of an infringement. We are not suggesting that the UK should adopt a regime of this kind.

Rather, we envisage a proportionate and effective system of collective redress that incorporates appropriate safeguards to ensure the system works in the interests of consumers, traders and the courts alike. The regime under the Consumer Rights Act 2015 provides one example of how the difficulties inherent in the US system can be avoided. Valuable lessons can also be learned from other jurisdictions with well-functioning collective redress regimes, such as Canada, Australia, Spain, Portugal, Poland, Norway and Belgium.

There are a number of provisions about redress in the GDPR, most of which are likely to have little impact on the current UK landscape. However, a significant opportunity is provided by Article 80(2) of the GDPR, which allows Member States to give independent organisations the right to bring claims on behalf of consumers for breaches of data protection laws.

Article 80(2) states:

> *Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing.*

[2] Options include seeking a Group Litigation Order or bringing a representative action under Rule 19.6 of the Civil Procedure Rules. Neither of these options have proved effective for the vast majority of consumer claims.

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This would create an effective collective redress regime in the data field, similar to the mechanisms provided by the Consumer Rights Act for competition law breaches. It would allow independent bodies, like Which?, to seek redress from infringing companies on behalf of *all* affected consumers, without those consumers each having to bring an individual case against the company involved.

Which? worked closely with the Department for Business, Innovation and Skills on the implementation of the collective redress mechanism under the Consumer Rights Act, and could similarly provide expertise to assist the Department of Culture, Media and Sport, and the Information Commissioner's Office in implementing this mechanism under the GDPR.

Which? would welcome the Government implementing the provisions allowed for under Article 80(2) to ensure that consumers who fall victim to unlawful data practices are able to get redress, by providing access to justice for consumers who would not or could not otherwise be compensated for their loss.

Redress for individual consumers

At present, it is difficult for consumers to get redress for personal data being 'lost', even in circumstances where current legal arrangements point to firms being liable.

The GDPR will provide for "better enforcement of data protection rights through improved administrative and judicial remedies in cases of violations" but it will not bring about any material changes to UK consumers' ability to access redress for breaches of data protection laws.

Essentially, the GDPR will not give individual consumers access to a quick and simple (and effective) method of redress in the event of a data breach. To improve the situation for UK consumers, the Government should make it easier for consumers to seek redress when their personal data is compromised.

Alongside a collective action regime via implementation of Article 80, the UK Government should also consider measures to keep customer data safe, to respond to data breaches, and to ensure that people get appropriate redress. This could include establishing a new data ombudsman to provide a clear single point of contact for consumers who have been unable to resolve problems with their provider.

Some cases will be more appropriate for collective actions - e.g. where there has been a clear breach of data protection law by one particular company that causes a large number of consumers to suffer financial harm. But other cases will be more appropriate for an Ombudsman e.g. where a small number of consumers have been affected by a data issue, or each consumer has suffered a different type of detriment (some financial perhaps, some increased risk of scams etc).

Fulfilling commitments from the Nuisance Calls and Texts Task Force on Consent and Lead Generation

In March 2014, working alongside the Department of Culture, Media and Sport as part of the Nuisance Calls Action Plan, Which? convened the Nuisance Calls and Texts Task Force on Consent and Lead Generation. The Taskforce made 15 recommendations for tackling the on-going problem of nuisance calls and texts[3].

Over the past two years Which? and others such as DCMS, the ICO, and Ofcom have taken forward the recommendations, and made positive steps in a number of areas. However, there is still a way to go until all the recommendations will have been fulfilled.

The implementation of the GDPR will have a significant impact on the gathering and revocation of consent data for marketing purposes. The GDPR offers an opportunity for the UK to improve upon its existing practices in this area and make the revoking of consent as easy as giving that consent in the first place. This would hand a great deal of power back to consumers to control the use of their

[3] http://www.staticwhich.co.uk/documents/pdf/nuisance-calls-task-force-recommendations-388317.pdf

personal data, which should help to curb one of the main causes of nuisance calls. To achieve this, the Government should implement Article 17 of the GDPR giving consumers the right to be forgotten.

The Nuisance Calls and Texts Task Force on Consent and Lead Generation first recommendation was to ensure board level responsibility:

1) *Businesses should treat compliance with the law on consumer consent to direct marketing as a board-level issue in the context of corporate risk and consumer trust, and should consider actively joining and promoting accreditation schemes aimed at preventing nuisance calls and texts.*

The Government announced in October 2016 that they were committed to introducing Director Level Accountability with fines up to £500,000 through amending the Privacy and Electronic Communications Regulations (PECR), which were due to be consulted on and come into force in Spring 2017.

The Government should continue with the implementation of Director Level Accountability through amending PECR to ensure this is urgently brought into legislation. This will also help with taking on nuisance callers, deterring repeat offenders and discouraging businesses from poor practice.

The Government should also consider the opportunity for further deterrents to be placed on businesses through the implementation of Articles 83 and 84 of the GDPR. The Government should consider strengthening the regime for Director Level Accountability in the second year of its implementation including how it would utilise the Articles 83 and 84 powers.

Freedom of Expression in the media

Which? is a member of the Media Lawyers' Association (MLA), an association of in-house lawyers from newspapers, magazines, book publishers, broadcasters and news agencies. The MLA's purpose is to promote and protect the fundamental right to freedom of expression.

Which? supports the principles of MLA's submission to this consultation in respect of their support for the implementation of Articles 17 (Right to erasure) and Article 85 (Processing and freedom of expression and information). In relation to the points made by the MLA on the current scope and wording of section 32 of the Data Protection Act (the existing protection for processing personal data for the special purpose of journalism, literature and art), Which? supports their considerations on the processing of data for special purposes, where there is public interest in doing so.

Section 32's 'journalism exemption' has been important in enabling Which? to process personal data during the course of undercover investigations if, as a publisher, we believe it's in the public interest. Our investigative programme of research has helped identify, expose and amplify areas of consumer detriment and harm in our publications. It has also enabled us to provide an evidence base of harm to government and regulators to intervene, where appropriate. Any restriction of our ability to process personal data in the public interest could have a considerable impact on the protection of consumers across markets.

Please refer to the MLA's submission for detail on the proposals relating to freedom of expression in the media. Which? would welcome the opportunity to discuss this further.

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Submitted to:
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