



Information Commissioner's Office

The Information Commissioner's Office response to the Competition & Markets Authority's consultation on The Retail Banking Market Investigation Order 2017

The Information Commissioner's Role

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and the Privacy and Electronic Communications Regulations 2003.

She is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

The Information Commissioner previously responded to the retail banking investigation notice of possible remedies¹ and welcomes the opportunity to respond to this consultation on The Retail Banking Market Investigation Order 2017.

The Commissioner is encouraged by the measures taken by the CMA to anticipate and address the potential data protection and privacy concerns that were set out. In particular, the Commissioner welcomes the opportunity to observe the work of the Implementation Entity Steering Group as it develops open API standards.

There are, however, a several points concerning the draft Order that the CMA should take account of as detailed below.

Paragraph 16.4

This paragraph concerns the sharing of data about PCA and BCA customers, and their contact numbers, for the purposes of selecting a statistical sample. This would appear to have the effect of sharing large amounts of personal data with the research company. This creates unnecessary risk, and we are concerned about the necessity and proportionality of this approach. Whilst we note this provision is qualified by the requirement that this is "subject to

¹ <https://ico.org.uk/media/about-the-ico/consultation-responses/2015/1560270/ico-response-to-cma-retail-banking-market-investigation-20151119.pdf>

the requirements of the Data Protection Act” we believe this sets an expectation as to the approach to be followed, and the CMA should address this point from the outset.

Paragraph 21.3 and 21.4

This paragraph states that:

“Providers are not required to provide a Payment Transaction History unless they have requested and received a fee no greater than would be payable for a subject access request made under section 7 of the Data Protection Act.”

The provision of Payment Transaction History is not a matter falling within either Section 7 of the DPA or Article 15 of the GDPR, as it is a proactive disclosure and not the customer exercising their legal rights. It is important not to conflate the requirement under the Order with the requirements of data protection law, but it would make sense for the Order to reflect the data protection requirements. That being the case, there are two points the CMA may wish to consider.

First, the provision may be construed as meaning the Provider *must* request a fee from the customer in order for the requirement to provide PTH to apply. The provision may be better drafted as “Providers are not required to provide a Payment Transaction History unless they have received any fee (if requested)”.

Second, and notwithstanding the above, it should be noted Article 15 of GDPR will provide individuals with the right to obtain personal information within scope free of charge. There are provisions for the charging of additional copies. Consideration should be given to reflecting the requirements of Article 15 in the Order.

In terms of the time period within which the information has to be provided, the requirement under GDPR is that this should be without undue delay and in any event within one month of receipt of the request. That period may be extended by two further months where necessary, taking into account the complexity and number of the requests. This differs to the 40 day limit in the DPA.

Part 4 - prompts

We wish to reiterate the point made in previous discussions and correspondence with the CMA the potential for prompts to constitute direct marketing.

Care should be taken to ensure those affected by the Order are not required to do anything that might lead them to breach the requirements of the Privacy and Electronic Communications Regulations (PECR) or the DPA, or

any successor legislation. We do not accept that the CMA or other regulators can never be engaged in direct marketing by virtue of their functions.

Information Commissioner
December 2016