FLA SUBMISSION TO DCMS CALL FOR VIEWS ON GDPR DEROGATIONS

This response will be submitted online in the form of a questionnaire.

THEME 1 – Supervisory Authority

We have no views.

THEME 2 – Sanctions

Article 84 - Penalties
GDPR Article 84(1) permits Member States to lay down rules on other penalties applicable to infringements which are not subject to administrative fines in Article 83.

Firstly, would this go beyond the existing law? Secondly, we'd like clarification on what this might include, for example are fines levied for certain offences in other Member States but not in the UK?

THEME 3 – Demonstrating Compliance

We believe that the ICO is best place to take a view on and deliver a code of conduct. Any standalone codes would in any event have to be signed off by the ICO.

THEME 4 – Data Protection Officers

We have no views.

THEME 5 – Archiving and Research

We have no views.

THEME 6 – Third Country Transfers

We have no views.

THEME 7 – Sensitive personal data and exceptions

We believe that article 9 provides the appropriate level of coverage. We are therefore opposed to use by the UK of the derogations provided. If the Government or stakeholders have in mind suggestions for applying article 9 to new categories then we would like to be consulted. We would also emphasise the need for any proposed changes by UK Government to be consistent with sector rules, for example the FCA's rules on vulnerable consumers.

THEME 8 – Criminal Convictions

Derogation is required to support employment screening in relation to jobs where a previous conviction or offence would be an issue of serious concern. These will not always be situations where failure to conduct a check would breach other regulations. They may also include situations where there is no legal requirement yet checks are clearly justified. Examples would include working in financial services (in roles not formally designated by the FCA to require such checks) or in other areas where roles have the capability to facilitate fraud or other offences, and working with vulnerable persons.

We understand that the Home Office will be designated as the official authority. Given that the Home Office has not been active in this area, it is essential that it puts measures in place as soon as possible to enable the processing of criminal conviction data.

THEME 9– Rights and Remedies

Article 22 – Automated individual decision-making, including profiling
Suitable derogations should be created to support the use of automated decision making and profiling, such as to protect against fraud. It will be necessary to consider these particularly carefully, as GDPR could potentially be interpreted to cover more ground here than is the case under the Data Protection Directive 1995.

In a credit context, fraud can include first party fraud where a borrower legitimately obtains credit but has no intention of repaying it, such as misstating their commitments or income at application, or changing address in an attempt to distance themselves from debts and mislead lenders, as well as misrepresentation of identity. It is important that derogation supports the need to prevent all frauds of these kinds.

Attention should also be given here to “future-proofing” against fraud methodologies as yet unknown, particularly given the ongoing evolution of Open Banking and associated advances in payments services.

Article 26 – Joint controllers
The UK implementation of the Data Protection Directive created a concept of controllers in common, and we suggest this should be retained alongside the concept of joint control.

Article 80 – Representation of data subjects
UK law should carefully define how relevant not-for-profit entities must be constituted and authorised to exercise rights on behalf of data subjects, to avoid any unintended consequences that might not be directly in line with consumer interests. Existing models, such as the class action provisions introduced by the Consumer Rights Act 2015, could perhaps be drawn on to inform this work and create consistency.

THEME 10– Processing of Children’s Personal Data by Online Services

We have no views.

THEME 11 – Freedom of Expression in the Media

We have no views.

THEME 12 – Processing of Data

Article 6 – Lawfulness of processing
It is not clear what the intention is behind the derogations set out in article 6. FLA members wish to implement the provisions in article 6 right away so therefore do not wish to see any further changes introduced.

Article 18 – Right to restriction of processing
The right to restrict processing carries with it a clear risk that it could be abused by individuals who challenge processing for unrelated reasons. For example, an individual might seeks to conceal information about themselves in order to secure an advantage, by challenging the continued processing of that information. There is protection here of the rights of another natural or legal person, but consideration could be given to strengthening this through derogation.

THEME 13 – Restrictions

Article 29 – Processing under the authority of the controller or processor
We would like the DCMS to safeguard the restrictions that currently exist under article 29(3) of the Data Protection Act, for example the prevention or detection of crime.

THEME 14 – Rules surrounding Churches and Religious Associations

We have no views.

Additional question – cost impact

We believe that current exemptions should be continued unchanged so far as is possible in order to reduce the burden on industry, with the exception of specific enhancements such as those we mention above. The cost of uncertainty to business must also be recognised, and we request that a draft of the final form of derogations should be shared as soon as is practicable.

10 May 2017