GDPR Derogations Draft Response

For submission via online form

Theme 1 – Supervisory Authority
No response

Theme 2 – Sanctions
No response

Theme 3 – Demonstrating Compliance
We acknowledge Article 40 in the GDPR encourages the drawing up of codes of conduct.

We would support a flexible approach towards Codes of Conduct, to support taking into account the specific features of the various processing sectors, and to allow adaption to accommodate changes, for example in regulation or technology.

We would support UK national codes of conduct being approved by the ICO.

Theme 4 – Data Protection Officers
No response

Theme 5 – Archiving and Research
We would support DCMS exercising the derogation pursuant to Article 89(2) to preserve the protections relied upon in the UK today pursuant to section 33 of the Data Protection Act 1998. Historical research and statistical processing purposes support a wide range of statistical and analytics processing today, that has benefits in keeping scoring and classification mechanisms relevant, reliable and updated.

Theme 6 – Third Party Transfers
No response

Theme 7 – Sensitive Personal Data and Exemptions
No response

Theme 8 – Criminal Convictions
We would support DCMS in exercising the derogation pursuant to Article 10 to ensure organisations in the UK continue to be able to access services from private sector entities, as such services allow today for the processing of criminal convictions or offences data in appropriately controlled ways, including for example, processing of PEPs and sanctions data. This supports UK organisations in their making of responsible compliance and regulatory decisions.

Theme 9 – Rights and Remedies

We welcome discussing the Article 22 derogation further to support the continued viability of UK scoring systems. Models today are used extensively for well-established purposes across industries, and help e.g. to determine credit-worthiness, for responsible lending, to identify fraud, to guard against consumer detriment. They also have the potential to support

innovation and growth in new market entrants e.g. with new UK initiatives including Open Banking.

We understand A29WP is reviewing profiling to provide guidance later this year. Given the public interest benefits in scoring, we would have concerns if an EU interpretive approach is taken which extends the basis on which scoring activities are regulated, and threatens the continued operation of current models.

We are discussing this with ICO. Our concern is there are different cultural attitudes to scoring cross-EU, and if EU guidance regulates at a minimum threshold, there is risk to the UK, given the strength of UK credit systems

Article 26 – Joint controllers
The UK implementation of the 1995 Data Protection Directive (please see Section 1(1) – definition of "data controller" in the 1998 Data Protection Act), includes reference to controllers in common, and we would support review of the derogation at Article 26 to support retention of this.

Article 80 – Representation of data subjects
We would have concerns with the derogation at article 80(2), regarding the risk of speculative and abusive litigation practices and if a lack of appropriate forms of safeguards.

We would have concerns that the article could encourage the capture of the litigation process by actors who use litigation as an investment model, such as third party funders, and that it fails to encourage alternative forms of dispute resolution. None of this helps individuals to pursue their rights effectively or businesses to defend theirs. We also would have concerns where the provision does not meet the safeguards set out in the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

<u>Theme 10 – Processing of Children's Personal Data by Online Services</u>
No response

<u>Theme 11 – Freedom of Expression in the Media</u>
No response

<u>Theme 12 – Processing of Data</u>
Article 18
We welcome discussing further the derogation at Article 18. We have discussed with the ICO our concern if this Article is interpreted to allow data subjects to mask bad credit data before applying for credit. The effect could be seriously detrimental, both for the consumer if allowed access to credit that a complete and accurate credit report could have determined to be unsustainable; and for the lender who has a regulatory responsibility to demonstrate responsible lending decisions.

The UK CRAs highlight important public interest in the retention of complete and accurate credit files. The current system to dispute files allows for investigation of accuracy issues and protection of consumers whilst guarding against the risks raised above. We consider it

likely that the continued current processing of disputed files to fall within the circumstances listed in Article 18(2), including for reasons of important public interest, and would welcome exploring further with you directly.

Theme 12 – Processing of Data

Article 6

We support DCMS in exercising the derogation at Article 6 appropriately, to ensure that where processing is necessary in law or for the performance of a task carried out in the public interest and has to have a basis for processing in law in accordance with Article 6(3), that the derogation is applied appropriately to allow for continued access for the public sector to private sector services, to continue to support well-functioning, efficient and effective public services. As recognised by the UK Government's recent Transparency Strategy on better use of data, sharing private data between different parts of government has significant benefits for citizens and businesses and is critical to delivering many essential services.

Theme 13 – Restrictions

A range of exemptions are used, relied upon today to obtain and process credit reference data for appropriate purposes, including Sections 28, 29, 31, 34 and 35 in the 1998 DPA. We support DCMS exercising its derogation to retain these provisions.

We welcome discussing with DCMS its ability to exercise the Article 23 derogation in two important areas for credit reference activity:

(1) To retain a similar presumption to that under s.9 DPA 1998 today, to maintain the well-established mechanisms available to UK consumers today that supports efficient access and additional rights specifically in connection with credit files; and

(2) To retain the accuracy provisions at para. 7, sch. 1, Part II of the DPA 1998. This supports enhanced transparency, accountability and consumer education to fairly understand their rights if accuracy issues are raised with a credit file. We welcome discussing this in connection with Article 5, in so far as it corresponds in particular in Articles 16 and 18.

Theme 14 – Rules surrounding Churches and Religious Associations

No response

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?"*

Our view is that steps taken by Government to carefully review and to support appropriate derogations, including in particular those we raise at Theme 13 regarding the Article 23 derogation to maintain existing services, and to support new services in compliance with GDPR, will support minimising the cost or burden to business of the GDPR.