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CMS Cameron McKenna Nabarro
Olswang LLP

Urgent
By Special Delivery

Data Protection Team
Department for Culture, Media & Sport

9 May 2017

Our ref

Dear Sir or Madam

CMS Response to Call for Views on the General Data Protection Regulation Derogations

Please find enclosed CMS Cameron McKenna Nabarro Olswang LLP's response to the Department for Culture, Media and Sport's call for views on the General Data Protection Regulation derogations.

Yours faithfully

CMS Cameron McKenna Nabarro Olswang LLP

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CMS response to call for views on the General Data Protection Regulation derogations

This document sets out the response of CMS Cameron McKenna Nabarro Olswang LLP ("**CMS**") to the Department for Culture Media and Sport's call for views on the General Data Protection Regulation ("**GDRP**")'s derogations.

CMS is a full-service commercial law firm. Its pensions team is one of the largest in the UK and has a market leading reputation. Advising a wide range of pension schemes, insurance providers, employers and other service providers across all industries and sectors.

This response therefore focuses on the impact on the pensions industry of the GDPR and the ways in which we believe the Government should use the derogations available to it to allow the pensions industry to continue to operate under the new regime. We have broken down our response in line with the themes presented in the call for views.

Any queries in relation to this response should be directed to

Theme 1 – Supervisory Authority

No comment

Theme 2 – Sanctions

No comment.

Theme 3 – Demonstrating Compliance

No comment. See Themes 4, 7 and 12 below.

Theme 4 – Data protection officers

The potential additional cost of designating a data protection officer is of significant concern to the pensions industry as a whole and to pension scheme trustees in particular. We are therefore concerned about whether or not processing of data for the purposes of pension schemes will require the designation of a data protection officer under Article 37.

Article 37 requires data controllers and processors to designate a data protection officer where: (i) their core activities consist of processing operations on a large scale which requires regular and systematic monitoring of data subjects on a large scale; or (ii) their core activities consist of processing on a large scale of special categories of data under Article 9 or criminal convictions data.

In our view, the first limb (in Article 37(1)(b)) would not apply to the pensions industry, because, although it is arguable that pension schemes' core activities require processing operations on a large scale, we do not think this involves regular and systematic monitoring of data subject on a large scale.

However, pension schemes do process special categories of data in a number of circumstances and it is currently unclear whether these would require the designation of a data protection officer as a result of Article 37(1)(c). In particular:

1.1 In relation to ill-health benefits, pension schemes typically offer incapacity pensions to members who are unable to work and/or the payment of all of a member's benefits as a single lump sum where they are terminally ill. Processing these benefits involves the processing of special categories of data; however, given that these cases are relatively rare and are dealt with on an ad hoc basis, we do not believe that such processing would qualify as a *core activity* or should be considered as processing special categories on a large scale.

1.2 Similarly, on occasion trustees are obliged to consider a criminal conviction of a data subject in order to comply with their obligations under the trust and so data in relation to criminal convictions sometimes needs to be processed (see our response to Theme 8). This processing is relatively uncommon due to the limited number of criminal offences that are relevant, so we do not believe that such processing would qualify as a core activity or be carried out on a large scale.

1.3 Pension scheme rules also typically include discretionary death benefit payments under which the trustee must decide which beneficiary receives a lump sum benefit. In taking that decision trustees are legally obliged to consider all potential beneficiaries under the trust deed that they are aware of, and they need to take into account all relevant factors. Such factors would certainly include the potential beneficiaries' relationship with the deceased member, which could potentially provide an indication of their sexual orientation, and often includes a requirement to consider financial dependency of the potential beneficiary, for example if the deceased member was paying for the healthcare of an elderly relative. Therefore, in order to comply with their legal obligations, trustees must process special categories of data.

We would also note that, on a purist view, this is exacerbated by the fact that the GDPR treats as "special categories" all forms of sexual orientation, including homosexual and heterosexual and therefore every time a death benefit is processed for a spouse or civil partner, a pension scheme's trustees could be argued to be processing data in relation to sexual orientation.

The processing of death benefits could be argued to be a core activity of a UK pension scheme and carried out on a "large" scale. Our view, however is that this approach is not aligned with the intention of the GDPR and is not a pragmatic interpretation of the relevant provisions. The same logic could lead to the conclusion that names are a special category of data under Article 9 because they potentially indicate racial or ethnic origin.

We suggest guidance is issued, potentially in the form of a code of conduct under Article 40, confirming that the data processing activities set out above do not qualify as large scale core activities and there is therefore no requirement for conventional UK pension schemes to incur the costs of designating a data protection officer.

Theme 5 – Archiving and Research

No comment

Theme 6 – Third Country Transfers

No comment

Theme 7 – Sensitive personal data and exceptions

There are a number of areas in which pension schemes need to process data that qualifies as a special category of personal data under Article 9, which we have set out above.

In relation to discretionary death benefits, pension scheme trustees are required to consider all potential beneficiaries (that they are aware of) and to take into account all relevant factors in making their decision about who to pay benefits to. This could include information on the member's personal relationships (which would potentially include a beneficiary's sexual orientation and/or marriage status).

Article 9 allows the processing of such data only in very limited circumstances and we believe that there is some difficulty in relying on limbs of Article 9(2) to permit the necessary processing that trustees are required to carry out.

It would be difficult for pension scheme trustees to rely on consent under Article 9(2)(a) in all cases. While members submitting nomination forms or ill-health pension requests would be able to give their consent to the data being processed, it is more problematic in other cases. For members suffering from serious ill-health it may be difficult to obtain consent from the member in a suitable form within a reasonable time frame and, in our view, the wording of Article 9(2)(c) could not be relied upon. This is not in data subjects interests. Pension scheme rules also often require trustees to review members' ongoing ill-health pensions to ensure that the data subject is still eligible to receive them, but members may be unwilling to consent to this given that it might result in their ill-health pension being (rightly) suspended.

There is also an issue in relation to obtaining consent for processing data in beneficiary nomination forms provided by pension scheme members. These are used to give pension scheme trustees an indication of how a member would like any discretionary death benefits to be paid out. It is often the case that the member does not want their nominee(s) to know that they have been nominated to receive benefits in the event of the member's death. However, this would not be compatible with the trustees of a pension scheme obtaining the nominee's consent to the processing of their data when the nomination is received. As set out above, some of the nominee's data may well qualify as a special category of data under Article 9.

[CASM note: this is more an issue about needing to avoid sending the privacy notice to the potential beneficiary rather than processing special categories. Consent should be able to be obtained from most potential beneficiaries because it is in their interests. Though technically in breach of trust if they don't consider all beneficiaries, is a court really going to find against a trustee when a potential beneficiary to a death benefit refused to provide their consent and were therefore not considered?]

Therefore, it is our view that in order to meet their legal obligations, pension scheme trustees would need to rely on Article 9(2)(b) to process special categories of data in many circumstances. To qualify under that Article, processing would have to be necessary to carry out the obligations of the data controller (i.e. a pension scheme's trustees) in the field of employment and social security. That processing would also have to be authorised by EU or national law. We are comfortable that pensions satisfy the requirement to be in the field of employment and social security. However, we are not aware of any EU or national law which would allow trustees to process special categories of data under Article 9(2)(b). We would therefore suggest that laws be implemented allowing pension schemes to process special categories of personal data in order to meet their legal obligations.

Similarly, we are of the view that pensions would come under Article 88 as "rights and benefits related to employment". We would therefore request that the needs of the

pensions industry in relation to processing of special categories of data under Article 9 be reflected in laws made under Article 88.

We would also suggest that a code of conduct/guidance be published under Article 40, setting out the circumstances under which pension schemes are able to process special categories of data.

Theme 8 – Criminal Convictions

Article 10 only allows data controllers to process data relating to criminal convictions and offences where they are authorised to do so by national law. Pension scheme trustees have a need to process criminal convictions because they would be forced to act in breach of trust if they could not consider the criminal behaviour of certain members and/or beneficiaries.

For example, a trustee will seek to avoid paying a discretionary death benefit to a potential beneficiary who has been convicted of murdering their spouse. Legislation also allows (and trust deeds often require) the forfeiture or set-off of a pension to discharge a monetary obligation arising out of a member's fraudulent act towards a scheme employer or the scheme itself.

We would therefore suggest that laws be implemented allowing pension scheme trustees to process data on criminal convictions.

Theme 9 – Rights and Remedies

No comment

Theme 10 – Processing of Children's Personal Data by Online Services

No comment

Theme 11 – Freedom of Expression in the Media

No comment

Theme 12 – Processing of Data

Article 5(c) states that processing of data should be limited to what is necessary in relation to the purposes for which it is processed (minimisation). Similarly, Article 5(e) requires that data is kept for no longer than is necessary for the purposes for which it is processed. The nature of pensions means that pension scheme trustees sometimes receive claims for benefits from former members many years after they have left a scheme. A requirement to delete data held on the termination of an individual's membership of a pension scheme could leave trustees unable to establish a person's entitlement in the face of a subsequent complaint or to defend themselves against that complaint. This could disadvantage both the individual making the complaint and the trustees.

While pension scheme trustees can rely, to an extent, on Article 17(3) to resist requests for erasure of data, there is limited scope for retaining data under Article 5(c) and (e). We would also note that the costs of partial erasure of member data (i.e. minimisation) would be prohibitive for pension scheme trustees and administrators. We would therefore request that laws be implemented under Article 23 clarifying that Articles 5(c) and (e) do not restrict pension schemes from maintaining their records after they have ceased to process an individual's personal data.

Alternatively (or in addition), we would request that a code of conduct/guidance be published under Article 40 setting out the circumstances in which pension schemes would be required to complete a data protection impact assessment.

Article 28(3)(g) requires that data processors, at the choice of the data controller, delete or return all personal data to the data controller at the end of their provision of services, unless EU or member state law requires storage of the personal data.

Pension scheme administrators are generally data processors in relation to member data and are responsible for administering the benefits paid under a pension scheme, under the direction of the trustees. It is inevitable that issues will arise in relation to the administration of a scheme. This can result in substantial claims being made against pension scheme administrators (and trustees), and often the issues are only discovered a significant period of time after the termination of the administrator's contract.

Under the wording of Article 28(3)(g), there is currently no scope for a pension scheme's administrator to retain its records if the data controller wishes it to destroy or return them. This could leave it unable to establish a defence to any future claim in relation to its period of administration or even to work out what the correct benefits payable should be. We would therefore suggest that laws be implemented requiring pension scheme administrators to retain their records for a period of at least six years following the termination of a contract.

In relation to Article 35, we are concerned that pension scheme trustees might be considered to be carrying out processing on a large scale of special categories of data for the reasons we set out in our response to Theme 4. In our view, the pragmatic approach is to conclude that pension schemes are not in fact carrying out large scale processing of such data.

However, pension scheme trustees are clearly not carrying out high risk processing and there are good arguments that their processing of special categories of data is not sufficient to qualify as being on a large scale. Therefore, in order to save pension schemes the substantial costs of establishing whether a data protection impact assessment is necessary, we would request that pension schemes' data processing activities be included in a list published under Article 35(5). Alternatively (or in addition), we would request that a code of conduct/guidance be published under Article 40 setting out the circumstances in which pension schemes would be required to complete a data protection impact assessment.

In relation to Article 88, we are of the view that pensions would come under 'rights and benefits related to employment'. We would therefore request that guidance is issued making it clear that pensions does indeed come under Article 88 and that the needs of the pensions industry be considered when using the derogations under that Article. In particular, we would request that laws be implemented under Article 88 that provide for the types of processing needed by pension schemes, as set out in our response to themes 7 and 8.

Theme 13 – Restrictions

No comment

Theme 14 – Rules surrounding churches and religious organisations

No comment

Additional question – cost impact

If it could be made clear when the pensions industry falls outside the requirements to designate a data protection officer under Article 37 or carry out a data protection impact

assessment under Article 35 this would save the substantial costs for the pensions industry as there would be less need for each pension scheme to obtain its own legal advice on whether these were necessary. This could be done through a code of conduct/guidance under Articles 35(5) and 40.

CMS Cameron McKenna Nabarro Olswang LLP

9 May 2017