

## **Response to: DCMS Call for views on the General Data Protection Regulation derogations<sup>1</sup>**

### **Introduction**

On 12<sup>th</sup> April 2017, the Department for Culture, Media & Sport issued a call for views on the General Data Protection Regulation derogations.<sup>2</sup> The foreword of the Consultation stated:

The General Data Protection Regulation The EU General Data Protection Regulation (GDPR) will apply in the UK from 25 May 2018. The UK remains a member of the European Union until we leave and the full rights and obligations of membership will apply until then, which includes an obligation to implement the GDPR.

As the GDPR is a regulation, there is limited scope for flexibility in its application. However, the UK pressed hard throughout negotiations to ensure that the GDPR does not place unnecessary burdens on business. There are also derogations (exemptions) within the GDPR where the UK can exercise discretion over how certain provisions will apply.

For all derogations, stakeholders are encouraged to submit their views through the online 'Call for Views'. This exercise will capture views on the flexibilities permitted within the GDPR. This consultation approach is an opportunity to inform our derogations policy and is complemented by discussions we are already having with a range stakeholders.

### **Response to the call for views**

This response addresses three of the themes in the consultation in that it responds to the call for views in Theme 10 on Processing of Children's Personal Data by Online Services, and it responds to Themes 5 & 11 through the lens of how changes in the GDPR will impact on the ability of UK based university researchers to process personal data for research purposes.

Dr Karen Mc Cullagh, a Lecturer in IT, IP, Media & Public law at the University of East Anglia, prepared this response on behalf of and with the support of a group of academics based in the UK with expertise in Information technology law and related areas who collectively approved the submission under the auspices of the British & Irish Legal Education & Technology Association (BILETA).<sup>3</sup>

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<sup>2</sup> Department for Culture, Media & Sport, Call for views on the General Data Protection Regulation derogations, 12 April 2017  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/610133/EnglishGDPRCFV\\_v1.5.2pdf\\_2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/610133/EnglishGDPRCFV_v1.5.2pdf_2.pdf)>

<sup>3</sup> British & Irish Legal Education & Technology Association (BILETA) [www.bileta.ac.uk](http://www.bileta.ac.uk)

## Theme 5 - Archiving and Research

The derogations related to archiving and research include articles:

Article 89 - Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes

Government would welcome your views on the derogations contained in the articles above. Please ensure that you refer to specific articles/derogations.

### Response

Under Directive 95/46/EC, Universities could rely on 'legitimate interests' as a lawful basis for processing personal data when conducting research. However, Art 6(1)(f) GDPR stipulates that this basis can only be relied upon by private bodies, so UK Universities (public authorities) will have to rely on alternative processing conditions such as public interest (Art 6 (1)(e) or consent, Art 6 (1)(a), unless a derogation is introduced. **Recommendations:** (1) the Government legislate to either (a) classify Universities as hybrid bodies or (b) provide a mandate for Universities to continue to use 'legitimate interests' as a lawful basis for processing. This would provide legal clarity and certainty for UK-based researchers, and facilitate transnational research with European university partners (Recital 41, Art 89).<sup>[1 & 2]</sup> (2) ICO issue guidance on how the GDPR fits with common law and ethical approval frameworks e.g. Confidentiality Advisory Group, E&W.<sup>4</sup>

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

Processing of Children's Personal Data by Online Services

The derogation related to the processing of Children's Personal Data by Online Services include articles:

Article 8 - Conditions applicable to child's consent in relation to information society services.

Government would welcome your views on the derogations contained in the articles above. Please ensure that you refer to specific articles/derogations.

<sup>4</sup> Stevens, L. (2015) The Proposed Data Protection Regulation and Its Potential Impact on Social Sciences Research in the UK, *European Data Protection Law Review*, 97-112; Thompson, B. (2016) Wellcome Trust: Analysis: Research and the General Data Protection Regulation - 2012/0011 (COD), July 2016 (v1.4) <<https://wellcome.ac.uk/sites/default/files/new-data-protection-regulation-key-clauses-wellcome-jul16.pdf>> ,

## Response

Art 8 GDPR allows member states to determine what age between 13 and 16 to set as the digital “age of consent” for Information Society Services (ISSs). Currently, many ISSs do not allow u13s to register prompting many children to lie about their age. The effect: children are vulnerable to abuse, cyber bullying, grooming and exposure advertising aimed at adults. Recommendations: (1) the **Government should (a) conduct an impact assessment and sponsor independent research into children’s interaction with and capacity to understand** privacy notices and information regarding profiling, advertising and advergames (b) use the findings to set the threshold age to reflect the capacity of children; (2) The UK Council for Child Internet Safety and ICO should be tasked with (a) providing materials so that **all teachers are trained in delivering internet safety education** and (b) develop **public education programmes targeting parents** to address low levels of parental digital literacy (Art. 57(1)(b), Art 40).<sup>5</sup>

## Theme 11 - Freedom of Expression in the Media

### Freedom of Expression in the Media

The derogations related to Freedom of Expression in the Media include articles:

Article 85 - Processing and freedom of expression and information

Government would welcome your views on the derogations contained in the articles above. Please ensure that you refer to specific articles/derogations.

## Response

Article 85 enables Member States to provide derogations for academic expression. Some types of research conducted at Universities does not fit into the research model envisioned in Article 89, for example, arts and humanities research including politics, modern history and law. **Recommendation:** the Government legislates to implement Article 85 that facilitates research in the arts and humanities.<sup>6</sup>

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<sup>5</sup> Mc Cullagh, K. (2016) [The General Data Protection Regulation: A Partial Success for Children on Social Network Sites?](#), in *Data Protection, Privacy and European Regulation in the Digital Age*, Forum Iuris, ISBN 978-951-51-2530-9

<sup>6</sup> Erdos, D. (2015) From the Scylla of Restriction to the Charybdis of Licence? [Exploring the scope of the "special purposes" freedom of expression shield in European data protection](#), *Common Market Law Review*, Vol. 52 (1), pp. 119-153