

Consultation Response

Smart data

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Introduction

The Law Society of Scotland is the professional body for around 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Consumer Law and Privacy Law Sub-committees welcome the opportunity to consider and respond to the UK Government's consultation on *Smart Data: Putting consumers in control of their data and enabling innovation*.¹ We have the following comments to put forward for consideration.

General comments

We previously responded to the 2018 green paper on Modernising Consumer Markets.² We have also addressed relevant issues in responses to related consultations on regulation of the internet and the digital economy.³

We note the principle of data portability enshrined in the GDPR (as implemented by the Data Protection Act 2018) which requires that personal data be portable between service providers. This right may also apply in the context of third-party services and Smart Data.

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808272/Smart-Data-Consultation.pdf

² https://www.lawscot.org.uk/media/360683/comp-con-priv-beis-modernising-consumer-markets_july-2018.pdf

³ See, for example, previous responses to: the House of Lords Communications Committee inquiry, *The Internet: to regulate or not to regulate?* available here - <https://www.lawscot.org.uk/media/360264/regulation-of-the-internet-consultation-response.pdf> ; the Body of European Regulators for Electronic Communications' Public consultation on the data economy, available here - https://www.lawscot.org.uk/media/361380/comp_lss-response_berec_november-18.pdf ; and the Digital Competition Expert Panel's call for evidence available here - https://www.lawscot.org.uk/media/361505/7-12-18-comp_lss-response_dcep-call-for-evidence.pdf

Consultation questions

Enabling data driven innovation in consumer markets

1. Do you agree with the proposed objectives and expected benefits of Open Communications? Are there any other benefits or risks that we should consider?

We agree with the proposed objectives of the paper. As we have highlighted elsewhere, we believe that data can be used to provide a wide range of benefits to consumers. However, there is also a significant risk of exploitation of consumer data which could have a detrimental impact. This is not confined to Open Communications dealing with “personal data” as defined in the General Data Protection Regulation (GDPR) and implemented in the UK through Data Protection Act 2018. “Personal data” in this context is limited to data, which can be linked to an identified or identifiable individual. However, aggregated anonymised data may also be used in ways which could be used to achieve both positive and negative outcomes for consumers or particular groups of consumers.

Data already plays a pivotal role in driving innovation across many sectors. It is therefore crucial to create a regulatory framework which supports such innovation; the new framework should ensure that all consumers, including vulnerable consumers, are able to benefit from innovative products and services. One aspect of this is in facilitating an environment which fosters competition, allowing existing entities to continue innovating and developing while creating opportunities for new entrants to the market to harness the creativity of the broadest possible range of stakeholders.

2. What is the most effective approach to implementation to ensure the success of Open Communications in enabling innovation and delivering the best consumer outcomes?

We consider that Open Banking may provide a helpful model in considering how best to implement the Open Communications initiative. In this instance, the Payment Services Directives, as implemented in UK law through the Payment Services Regulations set out the framework. However, the way in which this was realised – Open Banking itself – was an industry initiative. Industry buy-in is key to successful implementation. Similarly, there may be some crossover with the central hub aspect of data collection in the energy industry and lessons which can be taken from its implementation also.

In terms of data collection and use, implementation should be guided by and comply with the principles of the GDPR.

3. Are there any further actions we should take to enable consumers to benefit from Smart Data in regulated markets?

Education is essential if consumers are to realise the benefits of Smart Data. Consumers need to be able to understand their own data, its value and what its being used for if they are to engage effectively with the

system. This will require a detailed and sustained education campaign to ensure that individuals understand what their data is, how it is being used, and the potential risks of that data being collected, as well as the benefits they can expect to see. This education should be at the heart of the Government's agenda when it comes to Smart Data initiatives. In practical terms there are questions as to who would take responsibility for this education program, ie whether it would be the Third Party Providers (TPPs) themselves or a more general government/regulator/industry led campaign. There is also a question as to how the TPPs would be regulated in this respect.

We have not identified any further suggested actions at this stage. However, we consider the government should review the success of the Open Communications initiative to ensure that further action can be taken if it does not achieve the intended objectives or where opportunities for improvement are identified.

4. In which other markets, outside of the regulated and digital markets, would there be the greatest benefits from Smart Data initiatives? Please explain your reasoning

Smart Data initiatives may be useful in any context where data can be used to identify particular patterns of use or behaviours.

Transport may be one example of this. For example, data on driving patterns might suggest that a person is better suited to a particular type of car or might find it more economical to join a car club or hire on the odd occasion that they need to drive rather than taking public transport. Similarly, some hire purchase deals are tied to expected mileage. Knowledge of actual weekly/monthly/annual mileage might help them make the correct decision in this situation.

In a public transport situation, knowledge of public transport usage patterns might help an individual decide whether it was cheaper to buy weekly or month tickets or purchase an annual travel card.

Services across the spectrum of health and wellbeing are another area where Smart Data could provide benefits – from exercise and nutrition to monitoring of the effects of medication/management of medical conditions.

5. What other roles might industry find it useful for Government to perform in addition to it acting as a facilitator for Smart Data?

We have no comment on this question.

6. Do you agree that we should establish a cross-sector Smart Data Function with the proposed responsibilities set out above?

As a general rule it is likely to be more cost effective for duties to be taken on by an existing public body. However, we note that, for example in relation to competition law, specific sector regulators have competition powers, in addition to those of the primary competition regulator, the Competition and Markets Authority. A similar approach, which harnesses the general oversight which a "lead" regulator can provide

in addition to close collaboration with other bodies, which are empowered to take action in a sector-specific context.

7. What would be the best form for the Smart Data Function to take? Should it be, for example, a new body, part of an existing body or some other form?

See comments in relation to question 6 above.

8. How can we ensure that the costs of Smart Data initiatives are shared fairly between the participating businesses?

We have no comment on this question.

Using data and technology to help vulnerable consumers

9. What other actions could the Government or regulators take to support the use of data and innovative services to improve outcomes for vulnerable consumers?

The most obvious action for Government would be to provide funding for this kind of socially beneficial innovation. In the first instance a working group or focus group might be established by the Government and or regulators to consider this question in further detail and identify practical measures which would assist innovative service providers in developing solutions for issues affecting vulnerable consumers.

10. Should we strengthen the powers of sector regulators to enable them to use consumer data to improve their understanding of the challenges faced by vulnerable consumers and to intervene to improve outcomes?

We consider it should be possible for sector regulators to improve their understanding of the challenges faced by vulnerable consumers through use of their existing powers within the current data law framework. If specific problems are identified in terms of the limits of their powers, these could be addressed at a future juncture to ensure that any extension of powers is targeted and proportionate.

11. How can we ensure that the Smart Data Function improves outcomes for vulnerable consumers? Do we need to consider any further actions?

We are confident that smart data and innovative services can be used to improve outcomes for vulnerable consumers. However, we are concerned that vulnerable customers are amongst the most at risk of being taken advantage of. The Government could consider establishing a TPP advocacy function or encouraging the creation of advocacy bodies, with statutory responsibilities and duties of care that could act on behalf of vulnerable customers in relation to collection and use of Smart Data - eg a TPP advocate group could help the vulnerable person make the most of any data, while also ensuring that such data is not exploited by organisations.

Furthermore, it is essential that Smart Data services are not set up in such a way as to provide a proxy power of attorney by giving carers or supporters de facto financial guardianship powers. Where the intention is to grant this type of financial control, this must be achieved through the proper legal mechanisms. All such arrangements must include robust protections that comply with Article 12.4 of the UN Disability Convention. In the case of Scotland, any such arrangements should be properly integrated into our adult incapacity regime, or any successor regime implemented as a result of the Scott review.

However, where these powers do properly exist, we consider that Smart Data could indeed be used to provide better outcomes for the vulnerable individuals. Where vulnerable individuals have limited capacity for decision-making, we believe that Smart Data services might potentially facilitate greater autonomy and control of day-to-day affairs, whilst guarding against the potential for them to enter into major transactions which could cause significant detriment.

Protecting consumers and their data

12. Do you agree these protections for when TPPs use Smart Data are needed? Are there others we should consider?

Smart Data initiatives would need to incorporate in full the GDPR standard of explicit consent. Consumers should be able to choose how much of their data they wish to share. Consideration should be given to what the consumer would expect to happen should they remove their consent to any sharing and indeed whether this would be possible and there are guarantees that their information could be effectively deleted. A further question relates to TPP data and whether access will be time limited.

Lastly, in comparison to the security of payments across the UK, there is a question as to whether Smart Data systems will be considered critical infrastructure and therefore subject to the same security requirements.

13. How should our proposed approach to accreditation operate in practice if it is to effectively ensure that consumers' data are protected and minimise burdens for TPPs?

We have no comment on this question.

14. What are the advantages and risks of introducing a cross-sectoral general authorisation regime for TPPs?

A cross-sectoral general authorisation scheme may be efficient in terms of cost and practicality but it is essential that there is space within that to address any industry-specific characteristics or concerns. Different regimes for different sectors could lead to separate classes of consumer protection depending on the sector – an aspect that the consumer will likely not understand. Consumers will not expect that their data will be subject to varying degrees of protection in different scenarios and as a matter of principle this should not be the case.

15. What other options should we consider to ensure that consumers are protected when using TPPs?

Specific guidance directed at TPPs from an experienced regulator such as the ICO may also be helpful. Smart data and the growing number of TPPs present a new regulatory area. While we have previously referred to the Open Banking initiative and comparisons can be drawn with financial services, it is important to note that there is a strong record of experienced and sophisticated regulator activity in this area and well-established principles of conduct and conduct risk within these sectors. Businesses also operate on the basis of experienced in-house and external compliance advisers. However, the new TPPs may not have such expertise within their organisations or be able to adequately and appropriately manage and deal with the compliance risk.

We consider that onward selling of data should also be considered. It must be clear what TPPs may or may not do with the information collected and whether there will be restrictions on how the TPPs can harvest and use data, even where it is not “personal data” within the meaning of the GDPR.

Lastly large-scale profiling should be addressed. There will be the on-going risk of large scale profiling of individuals, where some TPPs – depending on the sector and the amount of information harvested – could have a very detailed overview of very private information of individuals – this could be utilised in a range of commercial and political purposes, beyond consumer rights. Further guidance should be given as to how privacy and data protection rights can be enshrined in practical terms to ensure that TPPs understand how to comply effectively with their obligations.

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