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## Briefing Note

### **Briefing by AFME to the Public Bill Committee UK Data Protection Bill: Processing of special categories of personal data and criminal convictions personal data in the context of financial services**

12<sup>th</sup> March 2018

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#### **1. Introduction**

- 1.1 AFME welcomes the opportunity to comment on the progress of the Data Protection Bill during the period for consideration of amendments.
- 1.2 The international fight against financial crime, including money-laundering and terrorist financing, is of critical importance in these times. The UK and the EU are at the forefront of this, and have enacted a series of laws and regulations designed to instil principles of good practice for the financial services industry in checking its clients and employees so as to reduce the risk that our banks and capital markets are used by financial criminals. This includes the processing of personal data. It is essential that data protection laws are drafted so as not unintentionally or unnecessarily to prevent organisations from complying with these legal obligations or following generally accepted principles of good practice to counter financial crime.
- 1.3 To this end, AFME welcomes and supports the derogations set out in paragraphs 9 and 10 of Part 2 of Schedule 1 of the draft Data Protection Bill, and the amendment proposed by Margot James MP to insert a new derogation in paragraph 10A of the same Schedule.
- 1.4 In this memorandum we propose some minor though important conforming changes to avoid any unintended problematic consequences with the application of paragraphs 9 and 10 when read with the new paragraph 10A.

#### **2. Proposed Amendments**

- 2.1 Amend paragraph 9 of Part 2 to Schedule 1 as follows:

*'Preventing or detecting unlawful acts*

9 (1) This condition is met if ~~the processing—~~

(a) the processing is necessary for the purposes of the prevention or detection of an unlawful act,

(b) ~~must be carried out without the consent of the data subject so as not to prejudice those purposes~~ in the circumstances, the controller cannot reasonably be expected to obtain the consent of the data subject to the processing, and

(c) the processing is necessary for reasons of substantial public interest.

#### **Association for Financial Markets in Europe**

**London Office:** 39<sup>th</sup> Floor, 25 Canada Square, London E14 5LQ, United Kingdom T: +44 (0)20 3828 2700

**Brussels Office:** Rue de la Loi 82, 1040 Brussels, Belgium T: +32 (0)2 788 3971

**Frankfurt Office:** Skyper Villa, Taunusanlage 1, 60329 Frankfurt am Main, Germany T: +49 (0)69 5050 60590

[www.afme.eu](http://www.afme.eu)

(2) In this paragraph, “act” includes a failure to act.’

## 2.2 Amend paragraph 10 of Part 2 to Schedule 1 as follows:

*‘Protecting the public against dishonesty etc*

10 (1) This condition is met if ~~the processing—~~

(a) the processing is necessary for the exercise of a protective function,

~~(b) must be carried out without the consent of the data subject so as not to prejudice the exercise of that function—~~ in the circumstances, the controller cannot reasonably be expected to obtain the consent of the data subject to the processing, and

(c) the processing is necessary for reasons of substantial public interest.

(2) In this paragraph, “protective function” means a function which is intended to protect members of the public against—

(a) dishonesty, malpractice or other seriously improper conduct,

(b) unfitness or incompetence,

(c) mismanagement in the administration of a body or association, or

(d) failures in services provided by a body or association.’

## 3. Rationale for proposed amendments

3.1 The proposed changes are intended to ensure consistency in approach and language among the requirements for consent (when processing special categories of personal data and/or criminal record data) in paragraphs 9(1)(b), 10(1)(b) and 10A(1)(b) of Schedule 1, Part 2. There is no reason why the language concerning consent should be different in these paragraphs. Furthermore, maintaining differences may lead to inconsistent interpretation and enforcement.

3.2 On a literal reading of paragraph 9(1)(b), it is not immediately clear that obtaining consent would always prejudice the purpose of preventing or detecting unlawful acts, and as such consent will likely be required in some cases. The standard for obtaining valid consent under GDPR and under the Bill is very high and based on guidance issued by the Article 29 Working Party and by the Information Commissioner's Office it is likely to be extremely difficult to obtain valid consent at all in many cases, notably in the employment relationship and also where consent to process special categories of personal data is a required to enter into or perform a contract. Under GDPR consent can also be withdrawn at any time making it entirely inappropriate as a basis for lawful processing where the processing is necessary to comply with legal obligations such as AML. Yet as currently drafted, where consent is required and cannot be obtained validly (or is withdrawn), there is no

clear lawful ground to process for the purpose of preventing or detecting unlawful acts. A similar concern arises under paragraph 10 of Schedule 1, Part 2 as currently drafted.

- 3.3 The proposed amendment to replace paragraph 9(1)(b) and 10(1)(b) respectively with the wording used in paragraph 10A(1)(b) '*in the circumstances, the controller cannot reasonably be expected to obtain the consent of the data subject to the processing*' in addition to ensuring consistency will provide clarity for controllers. The proposed language provides a much clearer basis to argue that where it is either impossible to obtain valid consent (for example in the employment relationship) or inappropriate (for example where processing is necessary to comply with a legal obligation such as AML) then the controller would not need to obtain consent as it cannot reasonably be expected to obtain such consent in these circumstances.