The Information Commissioner's Office (ICO) response to Her Majesty's Revenue and Customs' (HMRC) consultation on Tackling the hidden economy: conditionality ('the consultation')

The ICO has responsibility for promoting and enforcing the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR) and the Privacy and Electronic Communications Regulations 2003 (PECR). We also deal with complaints under the Re-use of Public Sector Information Regulations 2015 (RPSI) and the INSPIRE Regulations 2009. We are independent from Government and uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The ICO does this by providing guidance to individuals and organisations, solving problems where we can, and taking appropriate action where the law is broken.

The stated scope of this consultation is to explore the principle of conditionality and how this could reduce activity in the hidden economy. Section 2.2 of the consultation outlines the concept:

> *Introducing tax registration as a condition of access to some essential business services or licences would help to normalise tax registration and make it more difficult for businesses to continue trading in the hidden economy.*

The rationale for doing so is based on the understanding that no business or individual operating in the hidden economy can trade in a vacuum. Instead they must contract the services of business providers such as insurance providers, business bank accounts and commercial lessors, and hold certain licences issued by public authorities, such as those for private hire vehicles, scrap metal and property lettings.

The consultation sets out some general indicators of what approaches to conditionality the government may decide to take. We have not answered specific questions but instead raised considerations for HMRC where their proposed approaches may have data protection implications.

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Approaches to conditionality

A common feature of HMRC's proposed approaches to conditionality is a requirement for a method to enable a customer's tax registration status to be verified in order for them to use relevant licences or services. Customer in this sense refers to an individual or business user of such licences or services.

Approach 1 is set out in Section 2.6 of the consultation:
> *Conditionality would impose an upfront barrier by denying access to relevant licences or services before a business' tax registration is verified. This is likely to help to tackle non-compliance, but it would be important to develop this in a way which minimises potential burdens on compliant customers as far as possible.*

Approach 2 is set out in Section 2.7:
> *An alternative approach could involve licence or service providers collecting tax-registration data from customers applying for their licences or services. This information would be shared with HMRC through existing or amended data powers. It would then be matched to other data to determine whether the licence was being used for an unregistered business. This would not prevent the licence or service being granted in the first place, and it could also create some burdens for businesses (for example, through collecting and providing tax registration data to licence or service providers).*

In both approaches, it is envisaged that collection of the tax registration data of customers will be carried out by the licence issuer and business service provider.

Some of the customers of such services will be individuals and businesses in the form of sole traders and partnerships. It is a well-established view of the ICO that information relating to sole traders and partnerships are the personal data[1] of that individual/individual partners. The definition of personal data would include information relating to the tax registration of individuals and sole traders/partnerships. By collecting such data on behalf of HMRC for conditionality purposes, licence and service providers would be processing personal data. Whenever personal data is being processed, the requirements of the DPA must be considered.

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[1] DPA section 1(1): "Personal data means data which relate to a living individual who can be identified –
(a) from those data, or
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

Demonstrating tax registration

Chapter 4 sets out some general principles for how the demonstration of a customer's tax registration could work. We welcome Principle B which says that any approach should ensure customer information is secure and protected. Section 4.3 expands upon Principle B by stating:

> *HMRC takes its responsibility for data security extremely seriously, and the secure handling of taxpayer data is fundamental to the way in which it operates. The processes and infrastructure used to move and store data sets are kept under constant review. Any new processes to support conditionality would need to ensure customer information is handled securely and appropriately at all times.*

It is helpful to see that HMRC have considered data security from the outset of these proposals. As some of the customer data being collected by licence and service providers in order to verify tax registration status will be personal data, Principle 7[2] of the DPA should be a relevant consideration for both HMRC when designing the conditionality measures, and for licence and service providers carrying out the verification. Principle 7 does not prescribe specific safeguards or technical measures, but does charge data controllers with a responsibility to consider the nature of the data being processed and the harm that may result from misuse or loss when considering security measures and risk mitigants.

In relation to Principle B, Section 4.4 further states:

> *Measures to support conditionality must also strike a suitable balance between the privacy of customers and the risks posed to the tax system by the hidden economy. The importance of customer privacy would be a key consideration in the development of any process to verify customers' tax registration status – particularly if this involved changes to the way customer information is handled by HMRC or third-party licence or service providers.*

We welcome the considered, balanced approach HMRC propose here in relation to the privacy of customers relative to HMRC's legitimate objective of reducing the loss of tax revenue to hidden economy trading. It is important from a data protection perspective to ensure that customers' personal data is not processed in a manner that would be beyond the expectations of those customers. Customers should be made aware of the conditionality purpose for which their data may be processed in the privacy notice[3] given to them by the licence or service provider.

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[2] Principle 7: "Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data."

[3] The privacy notice should state the purpose or purposes for which a data controller intends to process the individual's information and any extra details a data controller needs to give that individual in the circumstances to enable them to process the information fairly.

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HMRC outline a number of existing conditionality models in this consultation – such as credit checks and anti-money laundering due diligence. Both of these existing regimes can be data-intensive in terms of the amount and sensitivity of customer data which is required in order to permit access to a licence or service. Both regimes are heavy in their data requirements partly because the resulting decisions are nuanced and specific to customers' circumstances and customers' risk profile. The HMRC conditionality regime would differ in that the resulting output is a binary registered/not registered outcome.

With that in mind, we note that HMRC also outline a third example of an existing conditionality model – that of driving licence check codes. This is a service whereby a third party, with appropriate consent, can check on Gov.UK to see some limited fields of data from a driver's driving licence information. This example seems to align more closely with the HMRC conditionality proposal in terms of providing a more binary suitably licensed/not suitably licensed output. This example also involves no personal data being collected by third parties for validation purposes; instead the Driver and Vehicle Licensing Authority provide the licence information to Gov.UK from where it can be checked on demand.

In considering the balance under Section 4.4, HMRC should satisfy themselves that the conditionality approach they adopt minimises the processing of personal data insofar as possible whilst still achieving the objective of determining whether a customer is registered or not. It is a decision for HMRC as to what eventual model of conditionality they adopt. However, in general, the ICO would encourage organisations to consider the use of a less privacy-intrusive measure, which minimises the processing of personal data, where such a measure would achieve the same goal as a more privacy-intrusive, data-intensive measure.

Future work

Section 1.4 of the consultation states:
> *This consultation focuses on the principles of conditionality. It does not propose specific measures at this stage, but seeks views on how conditionality can be best applied as a way of ensuring tax compliance. The evidence gathered through this consultation will be used to inform further policy development.*

We recognise that HMRC intend the proposals in this consultation to elicit preliminary views and do not intend the proposals to be seen as fully drawn or fixed at present. The ICO engages closely with HMRC in relation to considering the data protection impact of new proposals. We would be happy to offer advice and assistance in future when the proposals on

conditionality are more developed and specific policy measures are being proposed.

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