



The Information Commissioner's Office (ICO) response to HM Treasury's consultation on Money Laundering Regulations 2017 ('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 purpose of this consultation is to seek views on the draft Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 [the 2017 Regulations] and the policy considerations raised by Government in its accompanying response document to an earlier consultation on the transposition of the Fourth Money Laundering Directive (Directive 2015/849, abbreviated to 4MLD). We have confined our comments to those areas that raise a data protection consideration.

Overview

Data protection is not, and should not be seen, as a barrier to an effective anti-money laundering and counter-terrorist financing regime. It is possible to introduce the changes required by 4MLD in a way that takes account of the DPA and upcoming changes to data protection law.

Our consultation response focuses mainly on politically exposed persons, and those individuals who will be brought under the scope of enhanced customer due diligence (EDD) for the first time by virtue of the changes in

4MLD. Many of these individuals will have no idea that they are due to be covered by the EDD requirements.

Transparency is a key aspect of data protection law. In general, individuals should be aware when organisations are processing their information. We have therefore provided advice on how HM Treasury can ensure that the processing of personal information about PEPs, and their relatives and associates, can be done in a transparent and privacy friendly manner.

Data protection law also extends to quality and accuracy of information. The new EDD requirements under 4MLD will extend to a wider range of individuals and this consultation suggests the use of credible, publicly known information to identify PEPs' relatives and associates. We have outlined the key data protection considerations regarding the use of accurate and up-to-date information.

Furthermore we have suggested that guidance should be issued to assist organisations covered by the 2017 Regulations in determining what information sources can be considered publicly known and credible.

Background

We note at the outset that the transposition consultation has formed part of a wider piece of cross-government work known as the 'Action plan for anti-money laundering and counter-terrorist finance¹.' The ICO has previously responded to a number of consultations arising from that action plan.

In June 2016, the ICO submitted a response² to proposals with data protection implications in Annex A (Consultation on legislative proposals) and Annex C (AML Supervisory Regime) of the action plan.

In December 2016, the ICO submitted a response³ to a Department for Business, Energy & Industrial Strategy (BEIS) consultation entitled 'Implementing the Fourth Money Laundering Directive: beneficial ownership register⁴.'

¹ <https://www.gov.uk/government/publications/action-plan-for-anti-money-laundering-and-counter-terrorist-finance>

² <https://ico.org.uk/media/about-the-ico/consultation-responses/2016/1624742/ico-response-hm-treasury-consultation-money-laundering-20160802.pdf>

³ <https://ico.org.uk/media/about-the-ico/consultation-responses/2016/1625632/ico-response-beis-paper-article-30-201612.pdf>

⁴ <https://www.gov.uk/government/consultations/implementing-the-fourth-money-laundering-directive-beneficial-ownership-register>

This current consultation acknowledges that data protection law is being reformed and that the UK is currently in the implementation phase of the EU-wide General Data Protection Regulation (GDPR). The provisions of the GDPR will come into effect in May 2018. The ICO expects organisations, both public and private, to take steps during this period to ensure they are ready for GDPR. Additionally, the changes to existing data protection law should be a consideration during the development of public policy.

It is important that the implementation of 4MLD takes account of the data protection obligations of organisations, and the data protection rights of individuals. A policy approach that considers data protection early in the design process is less likely to lead to complaints to the ICO in future regarding the lawfulness and fairness of the UK's anti-money laundering regime.

8. Politically exposed persons

4MLD broadens the anti-money laundering (AML) and counter-terrorist financing (CTF) requirements in relation to Politically Exposed Persons (PEPs).

This consultation states that the key change in the PEP regime is the requirement for EDD to apply to UK-based PEPs and their family members and close business associates. Up till now, UK-based PEPs were not subject to enhanced due diligence by relevant persons.⁵

Members of the governing bodies of political parties

We have focused our comments on one particular category of PEP - members of the governing bodies of political parties⁶. This was the only category where enough additional information was provided in the consultation for us to see a clear data protection impact. That is not to say that other categories of PEPs may not also raise similar data protection concerns. We would be happy to advise on other categories of PEP and whether a data protection impact is likely to arise as HM Treasury's work in this area progresses.

We have prefaced our considerations of this particular PEP category with some context of data protection law, and the obligations and rights arising from it.

⁵ We have understood the definition of 'relevant person' as a UK-based organisation or individual to whom the requirement to adhere to the Money Laundering Regulations 2017 applies, e.g. a bank, an estate agent.

⁶ Clause 35(13)(c) of the 2017 Regulations

Relevant aspects of data protection law

The Data Protection Act applies whenever personal data⁷ is being processed. The key requirements for organisations processing personal data are laid out in the eight data protection principles that appear in Schedule 1 of the DPA.

Principle 1 states, amongst other things, that personal data shall be processed fairly and lawfully. In practice, this means that the organisations processing personal data (known as data controllers under the DPA) must:

- have legitimate grounds for collecting and using personal data;
- not use personal data in ways that have unjustified adverse effects on the individuals to whom the data relates;
- be transparent about how they intend to use the data, and give individuals appropriate privacy notices when collecting their personal data;
- handle people's personal data only in ways those individuals would reasonably expect; and
- make sure they do not do anything unlawful with the data.

Principle 2 requires data controllers to ensure that if they wish to use or disclose personal data for any purpose that is additional to or different from the originally specified purpose, the new use or disclosure is fair.

Electoral Commission register of political parties

We note that in an earlier HM Treasury consultation on the transposition of 4MLD⁸, it was proposed that the Electoral Commission's list of registered political parties be used to identify this particular category of PEP. We acknowledge that there does not seem to be another list currently available that would provide details of the members of governing bodies of political parties.

However some of the information provided for party registration purposes constitutes personal data. Therefore the DPA, and in particular the requirements of Principle 1 and Principle 2 as set out above, must be considered.

⁷ 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."

⁸ Consultation on the transposition of the Fourth Money Laundering Directive:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553409/4mld_final_15_sept_2016.pdf

We note that at present neither the register, nor the accompanying Electoral Commission guidance on registering a political party, give any indication that the information provided to the Electoral Commission for party registration purposes will be put to an additional use such as the identification of UK PEPs. As Principle 1 of the DPA makes clear, organisations must be transparent about how they intend to use individuals' data and give those individuals privacy notices when collecting their personal data.

We therefore recommend that HM Treasury works with the Electoral Commission to ensure that the privacy notice provided to party registrants is updated to cover the use of their personal data for anti-money laundering purposes. This updated privacy notice should be provided to all new registrants and to existing registrants.

The ICO has recently updated its guidance on privacy notices⁹. The guidance provides an additional level of assurance for data controllers as it has been written so as to comply with the GDPR.

We acknowledge the rules around tipping off that exist in current AML law. However we do not see the requirement for providing transparency over how data will be used as incompatible with the tipping off rules. The privacy notice provided to political party registrants would cover the future use of the registration data for the purposes of identifying PEPs. It is not linked to any particular financial transaction or an application for a particular financial product.

Family members and close associates of members of the governing bodies of political parties

The 2017 Regulations require that enhanced due diligence measures are also applied to an individual who is a family member or known close associate of a PEP when such an individual transacts with a relevant person¹⁰.

In the case of family members of political party board members, it is important to note that many of these individuals will have no expectation that they will now be captured by the PEP regime and therefore subject to EDD.

In terms of identifying such family members and close associates, relevant persons "need only have regard to information which is in its

⁹ <https://ico.org.uk/for-organisations/guide-to-data-protection/privacy-notices-transparency-and-control/>

¹⁰ Clause 35(1)(b) of the 2017 Regulations

possession, or to **credible information** which is **publicly known¹¹** [our emphasis] when determining whether a person is a family member or close associate of a PEP.

Relevant aspects of data protection law

In addition to the Principle 1 and Principle 2 considerations made earlier in this response and which equally apply to family members and close associates of PEPs, there are other DPA principles of relevance to these categories of individuals.

Principle 4 states that personal data shall be accurate and, where necessary, kept up to date. In practice this means that data controllers must:

- take reasonable steps to ensure the accuracy of any personal data they obtain;
- ensure that the source of any personal data is clear;
- carefully consider any challenges to the accuracy of information; and
- consider whether it is necessary to update the information.

In general, under the DPA an individual should have an expectation that their personal data is being processed. And that data should be accurate and kept up to date.

Identifying family members and close associates and applying enhanced due diligence

In terms of fairness and reasonable expectation under the DPA, it is unlikely to be in the reasonable expectations of say the parent of the treasurer of a small local political party that they will be subject to EDD. And that therefore that their data may be gathered from public sources by a relevant person for the purposes of determining whether they are related to that treasurer as named on the Electoral Commission register.

Principle 4 is of particular concern where relevant persons will make the determination on whether an individual is related to or associated with PEP on the basis of 'publicly known' information. Publicly known information is not a term that has a widely agreed or understood definition. In terms of 'credible information', again this is not a term that enjoys a widely-understood and accepted definition. Beyond sources such as official registers, it is challenging to find a widely agreed understanding of credible information.

Under the DPA an individual generally has a right to know where the information to make decisions about them has been sourced from, and

¹¹ Clause 35(14) of the 2017 Regulations

that the information obtained can be challenged in terms of accuracy and relevance, i.e. that it is credible. This right would apply when relevant persons gather information about an individual to determine their link to a PEP.

The consultation document acknowledges that financial exclusion of individuals solely on the basis of their identification as a PEP or relative/associate of a PEP is a real concern¹². Individuals are being denied access to financial products on the basis of their EDD status.

There is the additional issue of misattribution. This might occur where due to inaccurate publicly sourced information, an individual is wrongly determined to be related to a known PEP. This could have a tangible adverse effect on an individual's access to financial products. Relevant persons must therefore consider safeguards to ensure that the information they are sourcing about individuals is both credible and lawfully and legitimately sourced when taken from publicly known sources.

The ICO sees a need for greater clarity on both the definitions of 'credible information' and 'publicly known' and guidance on the appropriate reliance on such information. This information is after all personal data. We welcome the suggestion from HM Treasury that the Financial Conduct Authority (FCA) will publish specific guidance on the treatment of domestic PEPs and their family members and close associates. However the FCA is only one of a number of supervisory authorities for the purposes of combating money laundering in the UK.

Therefore HM Treasury as the Government lead on AML should play a leading role in ensuring that all sectors covered by the 2017 Regulations receive adequate supervisory guidance on the identification of PEPs and their family members and close associates. This guidance should give regard to the data protection obligations incumbent upon organisations processing personal data for PEP identification purposes.

9. Beneficial ownership

Clause 44 of the 2017 Regulations establishes a register of beneficial ownership information for express trusts with tax consequences. The 2017 Regulations outline the information to be included in this register about the beneficial owners of trusts¹³. The fields include residential address, data of birth, national insurance number, and passport number where the residential address is not in the UK. It is clear

¹² The consultation document says that the Financial Ombudsman Service deal with complaints of this type.

¹³ Clause 44(5) of the 2017 Regulations

that this information will constitute personal data. Therefore the requirements of the DPA must be considered.

Inspection of the register is limited to law enforcement authorities in the UK, and disclosure of the information in the register may be provided only to a competent money laundering authority in the EEA¹⁴. This provides a level of comfort considering the sensitivity of the data fields included in the register. The data included in the register would alone, or in combination with other available data, pose a real risk of identity theft if made public.

The ICO is aware of current draft EU legislation that would amend 4MLD. During those legislative discussions there have been suggestions to amend 4MLD to allow full public access to registers of trust beneficial ownership¹⁵.

It will be important to ensure that any final decision on this proposed amendment, and its UK transposition if agreed, takes full account of data protection law and the right to privacy. BEIS have consulted previously on establishing the Persons of Significant Control Register, and on establishing a register under 4MLD. The ICO would therefore expect future proposals on trust beneficial ownership registers to be subject to the same scrutiny and public consultation.

12 April 2017

¹⁴ Clauses 44(11) and 44(12)

¹⁵ Measure 6 - http://ec.europa.eu/justice/criminal/document/files/aml-factsheet_en.pdf