

SMART DATA: UK GOVERNMENT CONSULTS ON DATA SHARING IN REGULATED MARKETS

The UK Government has launched a consultation on how the financial services, utilities and communications sectors could benefit from open and accessible data sharing.

The "Smart Data" initiative aims to boost productivity and innovation, promote competition and benefit consumers by ensuring that data can be safely and easily transferred across providers.

This briefing provides an overview of the Smart Data consultation and explains how businesses can effectively engage with the Government to share their views on the topic.

BACKGROUND

In January 2018, the UK introduced wide-ranging reforms to its banking system, with the specific aim of facilitating data portability. The so-called "Open Banking" standard gives account holders unprecedented access to their data: on a customer's request, banks are required to share the account holder's data with third-party providers (TPPs) in a common format. These TPPs can then use the information received to help customers compare financial products, analyse their spending, and monitor direct debits, standing orders and other payments across multiple accounts.

While the uptake of Open Banking applications and services has been relatively limited, the potential benefits for consumers are clear. By putting account holders in charge of their data, Open Banking is intended to inform and empower customers, ultimately enabling them to make better financial decisions.

With its Smart Data initiative, the Government now seeks to apply the same principle to consumer markets in the financial services, utilities, digital and telecommunication sectors. If data is readily accessible and portable to third parties, consumers should be better able to navigate complex utility plans, track their usage, protect their privacy, keep abreast of the various products and services available to them and switch providers with minimal effort.

Under existing data protection laws, consumers in the UK already have a limited right to data portability. In line with many other jurisdictions across the

Key issues

- The UK Government is consulting on proposals to introduce an enhanced right to data portability across a range of sectors.
- Inspired by the UK's Open Banking standard, the plans would allow consumers to easily access and transfer their data to third-party providers.
- Improved data sharing laws could encourage new entrants and deliver innovative services to consumers.
- The Government is inviting businesses and consumer groups to submit their views by 6 August 2019.

world, the UK Government is looking to improve the current framework and allow consumers to access and transfer their data more easily. The Smart Data initiative shows the Government's determination to build on its experience with Open Banking and expand the concept to other sectors of the economy.

The Smart Data consultation, launched by the Department for Business, Energy and Industrial Strategy (BEIS), coincides with the publication of the Smart Data Review, a report setting out the Government's data-sharing proposals. The review was first announced in October 2018 and builds on the BEIS green paper 'Modernising consumer markets'.

KEY PROPOSALS

The Government has set out plans for the implementation of data-driven reforms in a number of sectors.

Communications

BEIS considers that data sharing could be particularly useful in the communications market. The telecoms sector, which encompasses mobile, fixed phone, broadband and pay-TV services, is characterised by a significant loyalty penalty. Consumers report difficulties in identifying the best offers available and are often reluctant to change providers.

Against this background, the Government has proposed an "Open Communications" initiative designed to enhance access to consumer data. The plans envisage requiring providers to share customer and product data to TPPs if requested by the consumer. This should facilitate market-wide comparisons, increase transparency and reduce frictions when switching providers. In fact, BEIS leaves open the possibility of "*more radical approaches that could be explored*", including automatic switching.

Under the consultation proposals, new legislation would empower regulator Ofcom to lead the implementation of the Open Communications project.

Digital markets

Another area of focus is the digital sector. In the Government's view, digital markets suffer from closed platforms that benefit a small number of incumbents while discouraging competition from new entrants.

Smart Data is seen as a way of disrupting the status quo by promoting innovation, usability and choice. As the Government-appointed Digital Competition Expert Panel concluded in its report 'Unlocking Digital Competition', published in March 2019, data portability, along with interoperability and data openness, could significantly enhance the user experience of digital services.

Examples of how data sharing could be used to improve consumer outcomes include:

- transferring a user's social media history to new platforms;
- moving business reviews between different review aggregator websites; and
- improving the interaction between digital service providers to allow for the seamless use of consumer data across platforms.

The Government has indicated that it will set out its analysis of the Expert Panel's recommendations later this year. This will form part of a broader Competition Green Paper, which will also consider the establishment of a Digital Markets Unit tasked with promoting competition in the digital sector.

Financial services

The consultation also considers action in the financial services sector. While Open Banking has been in effect since 2018, other types of financial services could benefit from increased transparency and data portability. The UK Competition and Markets Authority (CMA) noted in its report on the loyalty penalty that certain financial services markets, such as savings, household insurance and mortgages, are known to have low switching rates. Data-driven reforms could boost competition and improve outcomes for consumers.

In response to the CMA's report, the Financial Conduct Authority (FCA) has committed to exploring data-sharing opportunities in the sector. Interested parties will be able to share their views on the development of "Open Finance" during a call for input later in the year. The FCA has also launched a study in relation to the home and motor insurance markets and said that it would consider all options to achieve better consumer outcomes.

In its Smart Data Review, the Government agreed with the proposals by the CMA and FCA and signalled that it would collaborate with the regulators to introduce additional data-sharing initiatives in the financial services sector.

IMPLEMENTING SMART DATA INITIATIVES

To put the above initiatives into practice, the Government has proposed the establishment of a new, cross-sector Smart Data Function (SDF). The SDF may form part of an existing government department, regulator or independent statutory body. Alternatively, a new body may be set up for the purpose of implementing the Government's Smart Data proposals.

Under the plans set out in the consultation paper, the SDF's designated objective should be "*to support the development and delivery of Smart Data infrastructure for the benefit of consumers, particularly vulnerable consumers*".

Specifically, the SDF will have responsibility for:

- developing rules, security standards and specifications;
- agreeing implementation timelines;
- providing long-term governance; and
- managing the accreditation of TPPs and retaining a register of TPPs.

An initial priority of the SDF will be the simplification of consumer authentication processes. In the Government's view, this could be achieved by making it easier for consumers to share data across businesses and markets. For example, customers who have confirmed their identity with their bank might in future be able to provide this confirmation to other organisations. In that case, consumers would no longer be required to re-authenticate separately with each service provider.

CONSUMER AND DATA PROTECTION

Trust in the security of data-sharing processes is crucial to ensuring widespread consumer adoption of Smart Data initiatives. This is why the Government has proposed several additional protections for consumers when

transferring data to TPPs, which go beyond those required under existing data protection legislation.

In particular, the Smart Data Review proposes the following measures:

- TPPs should only be able to access consumer data once the consumers' explicit consent has been gained and identity verified through a secure authentication process;
- consumer data will only be shared through secure application programming interfaces (APIs);
- TPP access to consumer data will be time-limited, and it should be as simple for consumers to revoke access as it is for them to grant access;
- only accredited TPPs will be able to access high risk data, for example banking or pensions data, via a Smart Data initiative;
- accredited TPPs will only be able to pass consumer data obtained via Smart Data initiatives to other third parties for approved purposes and only once the consumer has provided their consent; and
- in the case of data loss or misuse, there will be a clear way to ensure swift consumer redress. Clear liability rules will ensure a transparent system for settling disputes between data holders and TPPs.

PROTECTING VULNERABLE CUSTOMERS

One area of focus of the Government's consultation is to ensure vulnerable customers will benefit from the Smart Data plans. The Government is determined to "*place the needs of vulnerable consumers at the centre of future Smart Data initiatives*" and considers that automatic switching, utility management services and user-friendly mobile applications are some of the ways in which vulnerable customers can be helped. To encourage the development of further innovations in this area, the Government will launch a "Vulnerable Consumer Challenge" when rolling out the Smart Data initiatives. The consultation paper also provides information and examples of how charities, carers, appointed attorneys and other trusted third parties can use Smart Data for the benefit of vulnerable consumers.

TAKING PART IN THE PROCESS

The Government is now inviting comments and enquiries in relation to its Smart Data proposals. Feedback should be submitted to the Consumer and Competition Policy Directorate at BEIS, via its [online survey](#) or [by email](#).

BEIS is particularly interested in hearing from businesses operating in regulated markets, such as utilities, telecommunications and financial services, as well as consumer groups and organisations specialising in technology, innovation or data.

The Government has published a list of consultation questions which are considered especially pertinent to the Smart Data proposals. Businesses and stakeholders that address some or all of those questions are more likely to have their views taken into account. The full list of consultation questions is appended to this briefing.

Responses must be received by midday on 6 August 2019.

INTERNATIONAL SMART DATA DEVELOPMENTS

While the UK Government builds on its pioneering work in relation to Open Banking, the Smart Data Review forms part of a global trend towards data portability. Across the world, regulators are taking note of the benefits that interoperability and data sharing could have for consumers.

The Australian Government, for instance, has introduced a new law, known as the Consumer Data Right (CDR), with a view to giving consumers easier access to their data. The CDR currently applies to the banking and energy sectors, but its reach may be extended to other areas of the economy over time.

Similarly, in February 2019, Singapore's Minister for Communications and Information announced a review of the country's data protection laws. Based on recommendations from the Personal Data Protection Commission and the Competition and Consumer Commission, one of the principal reforms will be the introduction of a data portability requirement.

As for the EU, the General Data Protection Regulation (GDPR) also includes a right to data portability. Article 20 provides that a data subject "*shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided*". Moreover, while there is no formal requirement of interoperability, recital 68 provides that "[d]ata controllers should be encouraged to develop interoperable formats that enable data portability". This focus on data sharing in GDPR is thus evidence of a global movement towards data portability and interoperability.

THE CLIFFORD CHANCE TECH GROUP POLICY UNIT

Our global Tech Group Policy Unit assists clients in preparing responses to consultations and in alerting clients to the implications of government proposals.

The regulation of the tech space is evolving rapidly as governments around the world grapple with the legal implications of developments in a range of areas from e-commerce and connected vehicles to artificial intelligence, blockchain, data privacy and cybersecurity.

Public consultations and policy papers play an essential role in the process of regulating new and rapidly developing areas and they provide vital opportunities for organisations to provide input into the policy process.

Our combination of tech, legal and policy expertise ensures that the responses are targeted, informed and effective. The public policy practice can also advise on the legal aspects of consultations, including possible legal challenges and statutory requirements.

To learn more about the Tech Group Policy Unit or the topics covered in this briefing, please contact a member of the Clifford Chance team.

APPENDIX: 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?
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?
3. Are there any further actions we should take to enable consumers to benefit from Smart Data in regulated markets?
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.
5. What other roles might industry find it useful for Government to perform in addition to it acting as a facilitator for Smart Data?
6. Do you agree that we should establish a cross-sector Smart Data Function with the proposed responsibilities set out above?
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?
8. How can we ensure that the costs of Smart Data initiatives are shared fairly between the participating businesses?

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

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?
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?
14. What are the advantages and risks of introducing a cross-sectoral general authorisation regime for TPPs?
15. What other options should we consider to ensure that consumers are protected when using TPPs?

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