

# Memorandum of Understanding between the Information Commissioner and the Competition and Markets Authority

## Introduction

1. This Memorandum of Understanding (MoU) establishes a framework for cooperation and information sharing between the Information Commissioner ("**the Commissioner**") and the Competition and Markets Authority ("**the CMA**") collectively referred to as "**the parties**" throughout this document. In particular, it sets out the broad principles of collaboration and the legal framework governing the sharing of relevant information and intelligence between the parties. The shared aims of this MoU are to enable closer working between the parties, including the exchange of appropriate information, so as to assist them in discharging their regulatory functions.
2. The parties recognise that over the next few years the nature of bilateral, and multilateral cooperation (involving other regulatory agencies), will evolve with the maturation of the Digital Regulation Cooperation Forum and the creation of the proposed Digital Markets Unit. The parties will address these developments as they occur, including undertaking reviews of this MOU as necessary to ensure it reflects appropriate bilateral cooperation.
3. This MoU is a statement of intent that does not give rise to legally binding obligations on the part of either the Commissioner or the CMA. The parties have determined that they do not exchange sufficient quantities of personal data to warrant entering into a separate data sharing agreement, but this will be kept under review.

## Overall purpose

4. The purpose of this MoU is to set out the terms of the ongoing collaboration between the parties and replaces the previous MOU dated March 2015. Since agreeing our previous MOU there has been a step-change in cooperation between the CMA and the ICO. This is in part due to the increased role that personal data processing plays in markets that the CMA regulates, and equally the impact that

CMA's regulatory decisions may have on how personal data is processed by businesses in the UK.

5. The parties are committed to fostering effective working relations, principally by promoting a culture of cooperation and collaboration between the two organisations.

### **The role and function of the Information Commissioner**

6. The Commissioner is a corporation sole appointed by Her Majesty the Queen under the Data Protection Act 2018 to act as the UK's independent regulator to uphold information rights in the public interest, promote openness by public bodies and data privacy for individuals.
7. The Commissioner is empowered to take a range of regulatory action for breaches of the following legislation:
  - Data Protection Act 2018 (DPA 2018);
  - UK General Data Protection Regulation (UK GDPR);
  - Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR);
  - Freedom of Information Act 2000 (FOIA);
  - Environmental Information Regulations 2004 (EIR);
  - Environmental Protection Public Sector Information Regulations 2009 (INSPIRE Regulations);
  - Investigatory Powers Act 2016;
  - Re-use of Public Sector Information Regulations 2015;
  - Enterprise Act 2002;
  - Security of Network and Information Systems Directive (NIS Directive); and
  - Electronic Identification, Authentication and Trust Services Regulation (eIDAS).
8. Article 57 of the UK GDPR and Section 115(2)(a) of the DPA 2018 place a broad range of statutory duties on the Commissioner, including monitoring and enforcement of the UK GDPR, promotion of good practice and adherence to the data protection obligations by those who process personal data. These duties sit alongside those

relating to the other enforcement regimes outlined in paragraph 7 above.

9. The Commissioner's regulatory and enforcement powers include:
  - conducting assessments of compliance with the DPA 2018, UK GDPR, PECR, eIDAS, the NIS Directive, FOIA and EIR;
  - issuing information notices requiring individuals, controllers or processors to provide information in relation to an investigation;
  - issuing enforcement notices, warnings, reprimands, practice recommendations and other orders requiring specific actions by an individual or organisation to resolve breaches (including potential breaches) of data protection legislation and other information rights obligations;
  - administering fines by way of penalty notices in the circumstances set out in section 155 of the DPA 2018;
  - administering fixed penalties for failing to meet specific obligations (such as failing to pay the relevant fee to the Commissioner);
  - issuing decision notices detailing the outcome of an investigation under FOIA or EIR;
  - certifying contempt of court should an authority fail to comply with an information notice, decision notice or enforcement notice under FOIA or EIR; and
  - prosecuting criminal offences before the Courts.
10. Regulation 31 of PECR also provides the Commissioner with the power to serve enforcement notices and issue monetary penalty notices as above to organisations who breach PECR. This includes, but is not limited to, breaches in the form of unsolicited marketing which falls within the ambit of PECR, including automated telephone calls made without consent, live telephone calls which have not been screened against the Telephone Preference Service, and unsolicited electronic messages (Regulations 19, 21 and 22 of PECR respectively).

## Functions and powers of the CMA

11. The CMA is a non-ministerial department and it is the independent regulator for competition and consumer matters in the UK. Established under the Enterprise and Regulatory Reform Act 2013, the CMA's primary duty is to promote competition, both within and outside the United Kingdom, for the benefit of consumers. Its aim is to make markets work well for consumers, businesses and the economy.
12. To carry out its duty the CMA is equipped with a broad range of statutory roles and functions. These include (but are not limited to):<sup>1</sup>
  - Investigating agreements between undertakings that prevent, restrict or distort competition, or any abuse by an undertaking of its dominant position contrary to the prohibitions set out in Chapter I and Chapter II of the Competition Act 1998. Investigating and/or prosecuting individuals in respect of the criminal cartel offence under section 188 of the Enterprise Act 2002.
  - Undertaking market studies or making references for in-depth market investigations into single or multiple markets for goods or services in the UK under the Enterprise Act 2002.
  - Investigating a range of consumer protection concerns as an enforcer under Part 8 of the Enterprise Act 2002, the Consumer Protection from Unfair Trading Regulations 2008, and the Consumer Rights Act 2015.
  - Investigating mergers that may have the potential to result in a substantial lessening of competition under the Enterprise Act 2002.
  - Conducting regulatory appeals and references in relation to price controls, terms of licences or other regulatory arrangements under sector-specific legislation.

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<sup>1</sup> At the date of this MoU, and as a result of the passing of the UK Internal Market Act 2020, from August 2021 the CMA is also expected to assume responsibility for overseeing and supporting the Office for the Internal Market in relation to its independent advisory, monitoring and reporting functions which it will perform to support the development and effective operation of the UK internal market.

- Providing information or advice in respect of matters relating to any of the CMA's functions to the public, to Ministers or other public authorities.
13. In exercising its statutory responsibilities, CMA will co-operate with sectoral regulators and encourage sectoral regulators to use their powers to apply relevant legislation, in the interests of competition for the benefit of consumers. In addition to its specific statutory powers, the CMA may do anything that is calculated to facilitate, or is conducive or incidental to, the performance of its functions.

### **Purpose of information sharing**

14. The purpose of the MoU is to enable the parties to share relevant information which enhances their ability to exercise their respective functions.
15. This MoU should not be interpreted as imposing a requirement on either party to disclose information in circumstances where doing so would breach their statutory responsibilities. In particular, each party must ensure that any disclosure of personal data pursuant to these arrangements fully complies with both the UK GDPR and the DPA 2018. The MoU sets out the potential legal basis for information sharing, but it is for each party to determine for themselves that any proposed disclosure is compliant with the law.

### **Principles of cooperation and sharing**

16. The ICO may offer provision of data protection advice to the CMA, in the context of the CMA's statutory roles and functions. Similarly, the CMA may offer provision of advice relating to any of its consumer, competition, markets or mergers functions, in the context of the ICO's statutory roles and functions.
17. Subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) and at her discretion, the Commissioner will alert the CMA to any potential breaches of the legislation regulated by the CMA, discovered whilst undertaking regulatory duties, and will provide relevant and necessary supporting information.
18. Subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) and at its discretion, the

CMA will alert the Commissioner of potential breaches of the legislation regulated by the Commissioner, discovered whilst undertaking regulatory duties, and will provide relevant and necessary supporting information.

19. Subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) and at their discretion, the parties will:
  - Communicate regularly to discuss matters of mutual interest including developments affecting the parties' joint projects or investigations.
  - Communicate regularly to discuss matters of mutual interest affecting work where the parties participate in multi-agency groups to address common issues and threats.
  - Consult one another on any issues which might have significant implications for the other organisation.
20. The parties will comply with the general laws they are subject to, including, but not limited to, data protection laws; the maintenance of any prescribed documentation and policies; and comply with any governance requirements in particular relating to security and retention, and will process personal data in accordance with the statutory rights of individuals.
21. The Commissioner and the CMA will exchange information on relevant issues of interest to the extent permitted by law, and as appropriate and relevant to their respective objectives. This may include, but is not limited to:
  - Information obtained during the exercise of either party's respective functions which is relevant to the functions of the other.
  - Notifying the other about any relevant action contemplated (or taken) by one regulator which is relevant to the functions of the other.
  - Information obtained during the exercise of either party's respective functions that is relevant for the purposes of any joint undertaken project or investigation.
22. The Commissioner and the CMA may request information from each other and will include the details of the information sought and why it would assist them to carry out their functions. Each may suggest

a reasonable deadline for response, including an explanation of any urgency.

23. The Commissioner and CMA may consult and co-ordinate in respect of reviews, calls for evidence and recommendations directed towards both parties, where appropriate. In addition, if one regulator considers that information it has gathered will be materially relevant to the other, then subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) it will notify the other to enable the other to request disclosure of such information.

## **Legal basis for sharing information**

### *Information shared by the CMA with the Commissioner*

24. The Commissioner's statutory function relates to the legislation set out at paragraph 7, and this MoU governs information shared by the CMA to assist the Commissioner to meet those responsibilities. To the extent that any such shared information is to comprise personal data, as defined under the UK GDPR and DPA 2018, the CMA is a Data Controller so must ensure that it has a legal basis to share it and that doing so would otherwise be compliant with the data protection principles.
25. Section 131 of the DPA 2018 may provide a legal basis for the CMA to share information with the Commissioner. Under this particular provision, the CMA is not prohibited or restricted from disclosing information to the Commissioner by any other enactment or rule of law provided it is "*information necessary for the discharge of the Commissioner's functions*".
26. Part 9 of the Enterprise Act 2002 prohibits the CMA from disclosing 'specified information'<sup>2</sup> except in certain circumstances. Information which falls within this definition must not be disclosed unless disclosure is permitted under Part 9 of that Act. Accordingly, the

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<sup>2</sup> Specified information is defined in section 237 EA02 as information which relates to the affairs of an individual or the business of an undertaking which has come to the public authority in connection with listed functions or by virtue of listed enactments and specified subordinate legislation.

CMA may share certain types of information with the Commissioner, including:

- for the purposes of facilitating any of the CMA's functions (section 241(1));
  - for the purposes of criminal or civil proceedings (section 241A(1) and section 242); or
  - having obtained the individual or business' consent (section 239(1)).
27. Where the CMA intends to share information with the Commissioner the CMA must consider the need to exclude from disclosure information that is contrary to the public interest, that might significantly harm a business or individual's legitimate business interest (or interest relating to the individual's private affairs). The CMA must also consider whether disclosure of information is necessary for the purpose which it is permitted to make the disclosure.

*Information shared by the Commissioner with the CMA*

28. The Commissioner, during the course of her activities, will receive information from a range of sources, including personal data. She will process all personal data in accordance with the principles of the UK GDPR, the DPA 2018 and all other applicable legislation. The Commissioner may identify that information she holds, which may include personal data, ought to be shared with the CMA as it would assist them in performing their functions and responsibilities.
29. Section 132(1) of the DPA 2018 states that the Commissioner can only share confidential information with others if there is lawful authority to do so. In this context, the information will be considered confidential if has been obtained, or provided to, the Commissioner in the course of, or the purposes of, discharging her functions, relates to an identifiable individual or business, and is not otherwise available to the public from other sources. This therefore includes, but is not limited to, personal data. Section 132(2) of the DPA 2018 sets out the circumstances in which the Commissioner will have the lawful authority to share that information with the CMA. In particular, it will be lawful in circumstances where:



- the sharing was necessary for the purpose of the Commissioner discharging her functions (section 132(2)(c));
  - the sharing was made for the purposes of criminal or civil proceedings, however arising (section 132(2)(e)); or
  - the sharing was necessary in the public interest, taking into account the rights, freedoms and legitimate interests of any person (section 132(2)(f)).
30. The Commissioner will therefore be permitted to share information with the CMA in circumstances where it has determined that it is reasonably necessary to do so in furtherance of one of those grounds outlined at paragraph 28. In doing so, the Commissioner will identify the function of the CMA with which that information may assist, and assess whether that function could reasonably be achieved without access to the particular information in question. In particular, where the information proposed for sharing with the CMA amounts to personal data the Commissioner will consider whether it is necessary to provide it in an identifiable form in order for the CMA to perform its functions, or whether disclosing it in an anonymised form would suffice.
31. If information to be disclosed by the Commissioner was received by her in the course of discharging her functions as a designated enforcer under the Enterprise Act 2002, any disclosure shall be made in accordance with the restrictions set out in Part 9 of that Act.
32. Where information is to be disclosed by either party for law enforcement purposes under section 35 (4) or (5) of the DPA 2018 then they will only do so in accordance with an appropriate policy document as outlined by section 42 of the DPA 2018.
33. Where a request for information is received by either party under data protection laws, FOIA, or EIR the recipient of the request will seek the views and fully consider such representations of the other party as described in the FOIA section 45 Code of Practice, where the information being sought under the request includes information obtained from, or shared by, the other party. However, the decision to disclose or withhold the information (and therefore any liability arising out of that decision) remains with the party in receipt of the request.

### **Method of exchange**

34. Appropriate security measures shall be agreed to protect information transfers in accordance with the sensitivity of the information and any classification that is applied by the sender.

### **Confidentiality and data breach reporting**

35. Where confidential material is shared between the parties it will be marked with the appropriate security classification.
36. Where one party has received information from the other, it will consult with the other party before passing the information to a third party or using the information in an enforcement proceeding or court case.
37. Where confidential material obtained from, or shared by, the originating party is wrongfully disclosed by the party holding the information, this party will bring this to the attention of the originating party without delay. This is in addition to obligations to report a personal data breach under the UK GDPR and/or DPA 2018 where personal data is contained in the information disclosed.

### **Duration and review of the MoU**

38. The parties will monitor the operation of this MoU and will review it no later than two years from the date of signing the agreement, and thereafter every two years.
39. Any minor changes to this memorandum identified between reviews may be agreed in writing between the parties.
40. Any issues arising in relation to this memorandum will be notified to the point of contact for each organisation.



### **Key contacts**

41. The parties have both identified a key person who is responsible for managing this MoU:

<b>Information Commissioner's Office</b>	<b>Competition and Markets Authority</b>
<p>Adam Ingle Principal Policy Adviser – Digital Economy Team Email: DigitalEconomyTeam@ico.org.uk Telephone: 0303 123 1113 Address: Wycliffe House, Water Lane, Wilmslow, SK9 5AF</p>	<p>Noel Tarleton Assistant Director – Digital Markets Unit Email: noel.tarleton@cma.gov.uk Telephone: 020 3737 6228 Address: The Cabot, Cabot Square, London, E14 4QZ</p>

42. Those individuals will maintain an open dialogue between each other in order to ensure that the MoU remains effective and fit for purpose. They will also seek to identify any difficulties in the working relationship, and proactively seek to minimise the same.

### Signatories

<b>Claudia Berg, General Counsel, Information Commissioner's Office</b>	<b>Sarah Cardell, General Counsel, Competition and Markets Authority</b>
	
<b>Date:</b> 30 April 2021	<b>Date:</b> 30 April 2021

Note: This document has been signed and signatures redacted for publication.