



PERSONAL DATA  
PROTECTION COMMISSION  
S I N G A P O R E

**CLOSING NOTE FOR ADVISORY GUIDELINES**

**24 SEPTEMBER 2013**

Part I.....	3
1 Background and Introduction.....	3
Part II: Overview of Key Issues .....	5
2 Whether failure to opt-out constitutes valid consent .....	5
Position consulted.....	5
Feedback received .....	5
Failure to opt out can constitute valid consent in limited circumstances .....	5
Opt in consent necessary to override DNC registration .....	6
Flexibility to determine processes for obtaining consent.....	7
3 “Publicly available exception” .....	8
Position consulted: “observed by reasonably expected means” .....	8
Feedback received .....	9
Considerations in determining “reasonably expected means” .....	9
“Photo-taking” generally considered a form of reasonably expected means .....	10
Position consulted: “location open to the public” .....	11
Feedback received .....	11
Recognising private spaces within public places .....	11
Part III: Common Issues and Queries .....	12
4 Overview.....	12
5 The Accuracy Obligation.....	12
Requirement of reasonable effort to verify.....	12
Policies and procedures to verify personal data likely to be part of existing business needs.....	13
6 The Consent Obligation .....	14
Withdrawal of consent .....	14
Use of Closed-Circuit Television Cameras (“CCTV”).....	14
Obtaining consent for common business practices .....	15
7 Retention Limitation Obligation .....	16
8 Openness Obligation - Appointing a “Data Protection Officer”.....	16
9 “News Activity exception” .....	16
10 The concept of reasonableness .....	17
11 Related and consequential amendments .....	17
Part IV .....	18
12 Conclusion.....	18

## **Part I**

### **1 Background and Introduction**

- 1.1 The Personal Data Protection Commission (the “PDPC”) launched a public consultation on 5 February 2013 on three sets of documents:
- i. Advisory Guidelines on Key Concepts in the PDPA; and Advisory Guidelines on the PDPA for Selected Topics (together, “**Guidelines**”)
  - ii. Proposed Regulations under the PDPA (“**Regulations**”)
- 1.2 The Regulations and Guidelines aim to give organisations and individuals greater clarity by elaborating on how the PDPC will interpret specific obligations of organisations under the PDPA.
- 1.3 The consultation closed on 1 April 2013 with 35 responses from organisations (including business associations) representing various sectors. The majority of responses came from organisations in the Finance, Information Technology/Telecommunications and Legal/Academic sectors. Please refer to the PDPC website for the full list of respondents and their submissions<sup>1</sup>. The PDPC thanks all respondents for their comments and participation.
- 1.4 Most of the responses received focussed on asking the PDPC to elaborate on or adjust the existing illustrations in the Guidelines, and on raising new scenarios for the PDPC to illustrate the applicability of the PDPA. Some respondents asked for more elaboration on specific parts of Guidelines.
- 1.5 The PDPC has carefully considered all the comments and has endeavoured to address them as fully as possible in these finalised Guidelines. Organisations will notice new and revised examples, and more elaboration on particular sections of the Guidelines that had been highlighted by many respondents as areas of concern.
- 1.6 This closing note for the Guidelines (“closing note”) should be read in conjunction with the finalised Guidelines and Regulations. This closing note seeks to:
- highlight and summarise the key issues in this consultation, and
  - address common issues or queries which were raised by several respondents.

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<sup>1</sup><http://www.pdpc.gov.sg/personal-data-protection-act/public-consultations/responses-received-at-1-april-2013>

- 1.7 This closing note would not address matters to be prescribed in the Regulations, as the PDPC is still in the process of reviewing them. Advisory Guidelines relating to these matters will be issued at a future date:
- a) The Access and Correction Obligation
  - b) The Transfer Limitation Obligation, and
  - c) Individuals who may act for others under the PDPA.
- 1.8 The PDPA's Do Not Call registry provisions are set out in Part IX of the PDPA (the "Do Not Call Provisions") and fully come into force on 2 January 2014 . These deal with the establishment of Singapore's national Do Not Call registry (the "Do Not Call Registry") and the obligations of organisations relating to the sending of certain marketing messages to Singapore telephone numbers. The PDPC is currently in the process of developing the Do Not Call Registry and details relating to the operation of the Do Not Call Registry will be made known by the PDPC separately in due course.

## **Part II: Overview of Key Issues**

### **2 Whether failure to opt-out constitutes valid consent**

#### Position consulted

- 2.1 The PDPC consulted on the position that by and large, an individual's mere failure to opt out (or other instances of inaction) would not constitute consent as the failure to opt out may be due to other reasons than the individual's desire to give consent. However, there could be circumstances when an individual's failure to opt out could constitute valid consent. In the proposed Guidelines, the PDPC gave an example of when an individual's failure to opt out would more likely constitute consent. In the example cited in the proposed Guidelines, the purpose was clearly explained to the individual by a customer service officer and the individual did not indicate that he did not consent to the use of his personal data for that purpose.

#### Feedback received

- 2.2 Organisations' feedback on this issue was generally along the lines of the following two categories:
- a) Clarifications as to the circumstances under which failure to opt out would constitute valid consent. A few organisations asked if it was a necessary condition that an organisation provides notification in person when attempting to obtain consent by way of failure to opt out.
  - b) Objections to the proposed position on the grounds that it would have a significant impact on existing business operations and practices. Organisations were of the view that failure to opt out could constitute valid consent in certain circumstances and therefore that the PDPC should accept failure to opt out as a valid form of consent.

#### Failure to opt out can constitute valid consent in limited circumstances

- 2.3 The PDPC recognises that failure to opt out can be a valid manner of consent in some situations. In determining if consent had in fact been given, it is more important to prioritise substance over form – i.e. whether the individual had in fact provided consent in the circumstances is more crucial than how he provided it. Being overly prescriptive of the acceptable forms of consent could impose great costs on businesses and inconvenience to consumers, especially because the PDPA, as a baseline standard for the protection of personal data across the economy, would affect all types of businesses.

2.4 Therefore, the PDPC maintains the position that failure to opt out could constitute valid consent in limited circumstances where: i) the organisation has met the Notification Obligation and clearly notified the individual the purpose(s) for which his personal data is being collected, used or disclosed, and ii) it is clear that the individual's failure to opt out is not due to an inability to give consent, lack of awareness that he is required to give consent, or similar circumstances.

2.5 Beyond the form of consent, it is also important for organisations to consider other relevant obligations when obtaining consent. Section 18 of the PDPA limits the purposes for which and the extent to which an organisation may collect, use or disclose personal data to purposes that a reasonable person would consider appropriate in the circumstances. Section 14(2)(a) provides that an organisation providing a product or service to an individual must not, as a condition of providing the product or service, require the individual to consent to the collection, use or disclosure of his personal data beyond what is reasonable to provide the product or service. The next subsection also prohibits organisations from obtaining or attempting to obtain consent by providing false or misleading information or using deceptive or misleading practices.

#### Opt in consent necessary to override DNC registration

2.6 Under the DNC provisions, an organisation may send a specified message to a Singapore telephone number registered on the DNC Registry if it has obtained "clear and unambiguous consent" in evidential form from the individual to the sending of the message. Organisations that intend to rely on consent to send a specified message to a Singapore telephone number registered on the DNC Registry are advised to obtain clear opt in consent from the individual in evidential form.

2.7 The PDPA does not define the terms 'clear' and 'unambiguous' as the determination of whether consent was clear and unambiguous will depend on the specific facts in question. Factors that would determine if consent was clear and unambiguous would include:

- a) Whether the organisation had notified the user or subscriber clearly and specifically that specified messages would be sent to his or her Singapore telephone number; and
- b) Whether the user or subscriber gave consent to receive specified messages through some form of positive affirmative action. The PDPC is unlikely to consider that clear and unambiguous consent has been given purely through inaction.

- 2.8 The Guidelines provide illustrations and examples of how organisations may obtain clear and unambiguous consent from individuals for the purposes of telemarketing.

Flexibility to determine processes for obtaining consent

- 2.9 The PDPA does not prescribe the specific manner in which organisations are to obtain consent for the purpose of the DP and DNC provisions. Organisations thus have considerable flexibility in how they obtain consent, within the limits of the PDPA. The PDPC is mindful that it will need to consider the substantive effect of the actual arrangements employed by an organisation in determining whether it has adopted an 'opt in' or 'opt out' approach and met the necessary requirements under the PDPA.
- 2.10 The PDPC notes that consent may be deemed in some situations. Also, organisations may have business or other reasons to adopt an opt out approach to obtaining consent. However, where practical, it would be good practice for organisations to obtain consent from an individual through a positive action of the individual to consent to the collection, use and disclosure of his personal data for the stated purposes.

### 3 “Publicly available exception”

Position consulted: “observed by reasonably expected means”

- 3.1 The PDPA provides for certain exceptions to the obligation to obtain consent. One significant exception in the Second, Third and Fourth Schedules to the PDPA relates to personal data that is publicly available. Organisations are able to collect, use and disclose personal data that is publicly available without consent. The term “publicly available” is defined in section 2(1) of the PDPA and refers to *personal data (about an individual) that is generally available to the public, including personal data which can be observed by reasonably expected means at a location or an event at which the individual appears and that is open to the public.*
- 3.2 Personal data is observed by reasonably expected means if the individual whose personal data is being observed ought reasonably to expect that their personal data could be collected in that particular manner at that location or event. It is important to note that this test is an objective one, considering what individuals ought reasonably to expect instead of what a particular individual actually expects (which would vary from individual to individual).
- 3.3 In considering what would be “reasonably expected means” under the definition, the issue is not whether an individual would expect his personal data to be collected, but whether the means used to collect his personal data is reasonably expected given the location and other relevant circumstances. In general, there would be a wider range of reasonably expected means and hence less restriction on the collection of personal data the more open the location is (e.g. a private dining area in a restaurant as compared to a public park).
- 3.4 The PDPC provided the following example in the proposed Guidelines:

Example:

Jeff is strolling down the aisles in a shopping mall. It would be reasonably expected that his image would be captured by CCTVs installed for security reasons.

Jeff subsequently enters a store to make a purchase. It would not be reasonably expected for Jeff to be photographed by a photographer engaged by the store if the store did not put up notices on the presence of the photographer.



### Feedback received

- 3.5 Feedback on this issue was mostly limited to whether certain scenarios would fall within this exception – for example, whether an organisation would require consent before capturing personal data via CCTV installed within a shop. The general sentiment behind the comments suggest that organisations desire greater clarity as to what ways of collecting personal data would count as “reasonably expected means”.

### Considerations in determining “reasonably expected means”

- 3.6 The PDPC is of the view that the interpretation of the term “reasonably expected means” must be consistent with the interpretation of “generally available to the public”, within the definition of “publicly available”. Personal data is generally available to the public if any member of the public could obtain or access the data with few or no restrictions. However, the mere existence of some restrictions is not sufficient to prevent the location from being regarded as open to the public. For example, events that may be entered only upon payment of a fee by a member of the public may be considered to be open to the public for the purposes of the PDPA.
- 3.7 Given that organisations act through individuals, there would not be a distinction between what an organisation and what an individual can do in a public place. As an example, if an individual could take a photograph of another individual at a particular public place, an organisation’s employee could also take such a photograph for use by the organisation.
- 3.8 Related to the above, the PDPC also notes that the term “publicly available” does not consider the purposes for which an organisation is collecting personal data. In general, the purpose for which the personal data is collected is immaterial to whether the means used to collect the personal data was reasonably expected (e.g. an individual taking a photograph for his private collection is similarly situated as the journalist taking a photograph for publication in a newspaper).
- 3.9 Relevant circumstances at the public place in question would also have an impact on what may be reasonably expected means for collecting personal data at that location. For example, while photo-taking would be considered a reasonably expected means in a public park, it would not be so in a theatre or other location which prohibits all forms of photography. The manner in which the personal data was collected could be a relevant factor too. For example, “upskirt” photography in a public park would not be considered a reasonably expected means.

- 3.10 Generally speaking, prevailing societal norms and the availability of means that can collect personal data to the average man on the street are relevant factors too. The more widely available the means, e.g. cameras in smart phones, the more likely it may be considered to be reasonably expected.

“Photo-taking” generally considered a form of reasonably expected means

- 3.11 Having regard to the considerations outlined above, the PDPC will take the position that at present, photo-taking would in many circumstances be considered a reasonably expected means of collecting personal data in a public place. The effect of such a position would be that individuals’ personal data could be collected without consent from public areas like shopping centres, food courts and HDB common spaces like void decks or lift lobbies. However, as a good practice, the PDPC will still advise organisations collecting images of individuals in public places to inform individuals of such collection, for example through a notice in the vicinity that such collection is occurring. The example cited in the proposed Guidelines, extracted above, has been amended to reflect this position, as follows.

Example:

Jeff enters Store ABC to make a purchase. It would be reasonably expected that his image would be captured by CCTVs installed by Store ABC for security reasons. However, as best practice, Store ABC should put up relevant notices to inform their customers about the CCTVs in operation.

Jeff subsequently enters Store XYZ, who has engaged a photographer for the day. Generally speaking, photo-taking is reasonably expected in a location like a store that is open to the public. Therefore, it would be reasonably expected for Jeff’s personal data to be captured by Store XYZ’s photographer (or by other photo-taking equipment, e.g. smart phones of fellow patrons). However, as best practice, Store XYZ should put up relevant notices to inform their customers about its photographer.

Position consulted: “location open to the public”

- 3.12 PDPC also consulted on the proposed position in the Guidelines that a location or event would be considered “open to the public” if members of the public can enter or access the location with few or no restrictions. However, the existence of some restrictions in and of itself may not prevent the location from being regarded as open to the public. In some situations, a private event may be held at a location that is usually open to the public. A location is not open to the public merely because members of the public may look into the premises or location.

Feedback received

- 3.13 Respondents mostly asked for more guidance with regard to when personal data would be publicly available.

Recognising private spaces within public places

- 3.14 The PDPC maintains the position that a location is not open to the public merely because members of the public may look into the premises or location. However, the more open a location is, the more likely it would be regarded as a location that is open to the public. Taking reference from the discussion above on “reasonably expected means”, the PDPC is of the view that similar considerations should apply in the determination of whether a location or event is a public place. That is, regard must be had to the consistency of interpretation with the meaning of “generally available”.
- 3.15 Relevant circumstances at the place in question should matter too, including but not limited to factors such as the existence of restrictions around it, the intentions and actions of the individuals who own or manage the location or event, and specific legal rights that may apply (e.g. where the Government places legal restrictions blocking off a public road). Therefore, the PDPC is of the view that there can be private spaces within public spaces taking into account the nature of restrictions and public expectations. Examples would include the interior of a taxi during the duration hired by a passenger, or a locked cubicle in a public toilet. In contrast, a public bus or MRT carriage with many individuals simultaneously boarding or alighting would be considered a public place.

## **Part III: Common Issues and Queries**

### **4 Overview**

- 4.1 This section addresses common issues or queries which were raised by several respondents.
- 4.2 In considering how to ensure compliance with the PDPA obligations, organisations should not assume that they would need to adopt very novel or impractical business practices. The PDPA was drafted as a baseline law to ensure that all organisations can meet the basic data protection obligations with manageable compliance costs.

### **5 The Accuracy Obligation**

- 5.1 Many respondents expressed concerns that it would be very onerous to verify personal data each and every time it is used. The PDPC would like to emphasise that the Accuracy Obligation does not require organisations to verify personal data each and every time it is used. The aim of the Accuracy Obligation is to ensure that where personal data may be used to make a decision that affects the individual or disclosed to another organisation, the data is reasonably correct and complete.

#### Requirement of reasonable effort to verify

- 5.2 In addition, the requirement is to “make a reasonable effort”, which means that the effort required of an organisation depends on the exact circumstances at hand, including the degree of impact on the individual concerned if inaccurate personal data was used to make a decision or disclosed to another organisation. The greater the impact on the individual concerned, the more steps organisations should take to ensure that the personal data is accurate and complete.
- 5.3 The PDPC had consulted on the following position in paragraph 15.7 in the proposed Guidelines issued for consultation:

#### Position consulted in the proposed Guidelines

An organisation may, in many circumstances, presume that personal data provided directly by the individual concerned is accurate. However, an organisation should be alert to the circumstances where it should not make such a presumption, e.g. where it is in the individual’s interest to provide inaccurate personal data.

- 5.4 In response to feedback that it would be impractical or unreasonable to require organisations to consider any given individual's state of mind or intention, the PDPC has revised the original paragraph 15.7 to the following:

Revised position in final Guidelines

Organisations may presume that personal data provided directly by the individual concerned is accurate in most circumstances. When in doubt, organisations can consider requiring the individual to make a verbal or written declaration that the personal data provided is accurate and complete

Policies and procedures to verify personal data likely to be part of existing business needs

- 5.5 The PDPC considers that organisations whose business needs require accurate and complete personal data would already have policies and systems in place which aim to achieve the same objectives as the PDPA's Accuracy Obligation. In other words, these organisations would unlikely need to adopt drastically different practices. For example, banks would often seek confirmation from their customers that the address they have on file is still current, or ask for recent pay slips before deciding whether to provide a loan. Organisations with existing practices which meet the requirements of the Accuracy Obligation should continue those practices.
- 5.6 Likewise, it can be reasonably expected that organisations which regularly collect personal data would have an interest in ensuring that their employees exercise due diligence to ensure that the personal data collected is accurate and complete. For example, organisations would often ask individuals to look over particular fields in completed forms to ensure that important information was accurately recorded. As long as the organisation has acted reasonably and exercised due diligence that is appropriate to the circumstances when collecting personal data, it would have discharged the Accuracy Obligation. Please see the section on "The Accuracy Obligation" in the finalised Guidelines for more details.

## 6 The Consent Obligation

### Withdrawal of consent

- 6.1 Section 16 of the PDPA provides that individuals may, on giving reasonable notice, withdraw any consent given or deemed to have been given under the PDPA in respect of the collection, use or disclosure of their personal data for any purpose by an organisation. Organisations must facilitate and allow withdrawal of consent by individuals. On receipt of the notice of withdrawal, the organisation must inform the individual of the likely consequences of withdrawing consent (section 16(2)); and must cease (and cause its data intermediaries and agents to cease) collecting, using or disclosing the personal data, as the case may be, unless the collection, use or disclosure of the personal data without consent is required or authorised under the PDPA or any other written law (section 16(4)).
- 6.2 Some respondents asked if organisations are required to delete all personal data in their possession relating to the individual concerned upon receipt of a notice withdrawing consent. The PDPA does not require an organisation to delete all personal data about the individual concerned upon receipt of a notice withdrawing consent.
- 6.3 The PDPA requires an organisation to cease to retain its documents containing personal data, or remove the means by which the personal data can be associated with particular individuals, as soon as it is reasonable to assume that the purpose for which that personal data was collected is no longer being served by retention of the personal data, and that retention is no longer necessary for legal or business purposes. Please see the section on “The Retention Obligation” in the finalised Guidelines for more details.

### Use of Closed-Circuit Television Cameras (“CCTV”)

- 6.4 Several respondents asked if consent was required when collecting personal data via CCTV in locations open to the public.

6.5 Section 17 of the PDPA permits the collection, use and disclosure of personal data without consent in certain circumstances described in the Second, Third and Fourth Schedules. One such exception to the Consent Obligation relates to personal data that is publicly available<sup>2</sup>. Organisations may collect, use or disclose personal data that is publicly available without consent. Therefore, organisations which use CCTV to collect personal data that is publicly available do not need to obtain consent from the individuals concerned. However, as a best practice, organisations should put up appropriate notifications to inform individuals that CCTVs are in operation. To better address these and other queries related to the use of CCTVs, the PDPC has included a new section on CCTVs in the Guidelines on Selected Topics.

#### Obtaining consent for common business practices

6.6 Some respondents have asked if consent was necessary, and how to obtain consent for activities that are commonly undertaken by businesses as part of the proper functioning of the business operations.

6.7 Organisations do not need to specify every activity that they will undertake in relation to collecting, using or disclosing personal data when notifying individuals of its purposes. This includes activities that are directly related to the collection, use or disclosure of personal data or activities that are integral to the proper functioning of the overall business operations related to the purpose. For example, if an organisation wishes to obtain consent to collect or use personal data for the purpose of providing a service to an individual, the organisation does not need to seek consent for: (a) every activity it will undertake to provide that service; and (b) internal corporate governance processes such as allowing auditors to access personal data as part of an audit.

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<sup>2</sup> Please see the section on the “Public Available Exception” above for more information.

## **7 Retention Limitation Obligation**

- 7.1 Some respondents have expressed concerns about how the Retention Limitation Obligation would apply to existing data retention policies. The PDPC recognises that organisations may have existing retention policies which are applied to groups or batches of personal data instead of individual sets of personal data. In these situations, the PDPC does not require organisations to review its entire archive in order to apply a unique “retention expiry date” to each set of personal data insofar as the current policies are in line with the Retention Limitation Obligation.
- 7.2 Generally, organisations should start developing or reviewing or adjusting relevant processes to ensure that personal data is recorded and stored in a manner which facilitates the organisation’s compliance with the Retention Limitation Obligation.

## **8 Openness Obligation - Appointing a “Data Protection Officer”**

- 8.1 The PDPA requires organisations to designate one or more individuals to be responsible for the organisation’s compliance with the PDPA and to answer questions relating to certain of their data protection policies and practices.<sup>3</sup> Some respondents have asked if such individual (or individuals) needs to be an employee of the organisation or based in Singapore.
- 8.2 The individual(s) designated by an organisation need not be an employee of the organisation and does not need to be based in Singapore. However, the business contact information of this individual should be readily accessible from Singapore, operational during Singapore business hours and in the case of telephone numbers, be Singapore telephone numbers. This is especially important if the individual is not physically based in Singapore.

## **9 “News Activity exception”**

- 9.1 The PDPA provides exceptions for news organisations to collect, use and disclose personal data without consent solely for their news activity, regardless whether the personal data is publicly available. Please refer to the PDPA for full definitions of “news organisation” and “news activity”.

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<sup>3</sup> section 11; section 20(1)(c); and section 20(4).



## **10 The concept of reasonableness**

10.1 A number of provisions in the PDPA make reference to the concept of reasonableness. For example, section 11(1) states that an organisation shall, in meeting its responsibilities under the PDPA, consider what a reasonable person would consider appropriate in the circumstances. Other Data Protection Provisions similarly make reference to something or some set of circumstances which is reasonable. For example:

- The Purpose Limitation Obligation limits the purposes for which an organisation may collect, use or disclose personal data to purposes that a reasonable person would consider appropriate in the circumstances<sup>4</sup>
- The Protection Obligation requires an organisation to make reasonable security arrangements to protect personal data in its possession or under its control in order to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks<sup>5</sup>

10.2 Many respondents have asked for more guidance on what “acting reasonably” means. The PDPC has provided several illustrations and examples in these Guidelines to facilitate organisations’ understanding of the concept of reasonableness. As far as possible, the PDPC will continue to provide greater clarity through our various guidance channels.

10.3 However, it is neither possible nor helpful for the PDPC to prescribe, ex ante, a list of actions or processes which meet the standard of reasonableness that apply to all organisations in various sectors.

## **11 Related and consequential amendments**

11.1 As some organisations had referred to the following legislation in their comments, the PDPC would like to highlight that section 67 of the PDPA sets out related and consequential amendments to the Banking Act, Electronic Transactions Act and Info-communications Development Authority of Singapore Act. Please refer to the full text of the PDPA for details.

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<sup>4</sup> Please see Section 18 of the PDPA.

<sup>5</sup> Please see Section 24 of the PDPA.

## **Part IV**

### **12 Conclusion**

- 12.1 The PDPC will continually assess the need to issue guidelines in future on other topics to facilitate understanding and compliance of the PDPA obligations. The PDPC notes that some sector-specific issues have been raised through the consultation and other avenues and has commenced work with different sectoral regulators and representatives to develop sector-specific guidelines.
- 12.2 There are other resources available to organisations apart from guidelines issued by the PDPC. Organisations should visit [www.pdpc.gov.sg](http://www.pdpc.gov.sg), for more information on the following:
- How to contact the PDPC for general queries
  - Answers to Frequently Asked Questions
  - Briefing sessions and workshops conducted by the PDPC to help organisations gain further insights into the requirements of the PDPA
  - Advisory clinics for SMEs
  - PDPC's informal guidance process
- 12.3 This closing note should be read in conjunction with the finalised Guidelines and Regulations. Once again, the PDPC thanks all respondents for their comments and participation in this public consultation.