



One-to-One Public Affairs Bulletin

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Data Protection

- EU Data Protection Regulation

The trilogue negotiations between the EU Commission, Council and Parliament are now well underway. They began on the 24th June before the summer break interrupted progress.

The trilogue negotiations have run into trouble as the EU Parliament, Commission and Council struggle to reach agreement on a variety of issues including consent and profiling. As a result, further discussions on chapter II (principles) and III (rights of individuals) have been pushed back until late October to allow all parties to consider a revised version of the text. The Council, Commission and Parliament still aim reach political agreement, but this is different from agreeing a final version of the text. So once again a target on the Data Protection Regulation will be missed.

In the last public affairs bulletin I was hopeful that with the increased political pressure a general agreement on the text would be reached sometime in Q1 2016. However, given that the Council and Parliament are at loggerheads on various issues and the current delays that now seems unlikely. The DMA's best estimate is that the regulation will not be formally approved until circa June 2016 and this means the regulation will not be enforced in the UK until the middle of 2018.

Overall, the Council text is preferable to the Parliament text it is a better balance of the legitimate interests of business and the rights of consumers. Particularly in these key areas:

- **Definition of Personal Data:** The Justice and Home Affairs Council definition is preferable to the European Parliament's one as in the Council definition online identifiers are only personal data if they can be linked to an individual. In the Parliament version of the text all online identifiers were personal data regardless of whether they could be linked back to an individual.
- **Consent:** The Council text is preferred. Both other texts refer to explicit consent, whereas the Council text has removed the word 'explicit'.
- **Legitimate Interest:** The Council text makes it clear that organisations can process personal information based on their legitimate interests provided they respect the rights of individuals in particular children and certain other caveats. This is much better than the Parliament text which gave a strong emphasis that processing based on legitimate interests was inferior to getting the individual's consent. In the Parliament version of the text, Legitimate Interest including specific clauses for B2B marketing and postal direct marketing only. However, the new Council text includes the following: "The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest," which is broader.

- **Automated Decision Making and Profiling:** The Council have gone back to a definition of automated decision making (including profiling) which only applies where the decision is based solely on automated processing. If there is any review of the automated decision by an individual then this will fall outside the definition of an automated decision. This is much more similar to the current definition in the 1995 Directive/Data Protection Act 1998 than the Parliament's version.

- **Right to be Forgotten:** Once again, the Council text seems preferable. The Parliament text reads that subjects should have the right to obtain erasure, "when a data subject objects to the processing of personal data". The Council text adds the words, "and there are no overriding legitimate grounds", which is preferred.

- E-Privacy Directive

- The introduction of the EU Data Protection Regulation will necessitate a revision of the directive.
- Commissioner Gunther Oettinger is tasked with leading this work within six months after the approval of the Data Protection Regulation.
- This will also affect telemarketing, the directive currently leaves it up to member states to decide whether telemarketing is opt-in or opt-out. The introduction of explicit consent in the EU Data Protection Regulation will mean re-examining the directive.

- EU commission – Commission president Jean-Claude Juncker re-organised the structure of the commission. He has put in place a system of Vice-Presidents, there are six of them and each is responsible for a broad policy area, commissioner's report into their respective Vice-Presidents. Andrus Ansip, former prime minister of Estonia, is responsible for the digital economy, this includes the Data Protection Regulation and the E-Privacy Directive. Further to this, all new policy initiatives must be vetted by Frans Timmerman, who is in charge of ensuring that new regulation does not increase the overall burden of red tape, a promising development.

For more information about the Data Protection Regulation visit the DMA [toolkit](#).

Digital Single Market

The digital single market strategy has been announced by the European Commission and it is priority for Mr Juncker's presidency.

The strategy intends to get rid of barriers to trade across Europe and guarantee citizens the same digital rights no matter where they are, ending unjustified geo-blocking for example.

The E-Privacy Directive will also be reviewed as a part of the digital single market strategy. This is the piece of the legislation that informs the Privacy and Electronic Communications Regulation otherwise known as PECR.

The strategy is made up of three pillars:

- Better online access.
- Investing in digital infrastructure and creating the right conditions for entrepreneurialism and innovation to thrive in the digital arena.
- Maximising economic growth.

It is estimated that the digital single market could create €340 billion in additional growth, 3.8 million jobs and potential savings of €100 billion per annum if all public procurement could be carried out online.

The digital single market is in its infancy, so far a roadmap for action has been set for the next two years including, a review of geo-blocking and copyright laws.

European leaders are concerned that delays with the Data Protection Regulation will hold back the digital single market. Data protection policy is a bedrock of the digital single market.

You can find out more [here](#). The [view of the UK government](#) is also particularly helpful when trying to understand the aims of the digital single market.

Safe Harbour Agreement

The European Court of Justice (ECJ) ruled that the Safe Harbour Agreement was invalid. This means that some 4,000 US businesses that use the agreement to transfer personal data from the EU to the USA can no longer do so. The decision is immediately effective without a grace period.

The Article 29 Working Party – the grouping of Europe's data protection authorities – have already scheduled an emergency meeting to discuss the consequences of the ECJ's ruling. The [Information Commissioner's Office \(ICO\) recognise that it'll take some time](#) for businesses to review their processes and ensure that all data is transferred in line with the law.

There are two main other avenues, which businesses can use to transfer personal data to the US, they are; binding corporate rules and modal clauses. Please see [DMA guidance](#) on these other options.

Fundraising

Over the summer fundraising featured prominently in the media. Olive Cooke was thought to have committed suicide after receiving too many requests for money from charities. Her family later spoke out and said that charities were not a factor in her unfortunate death but the story had clearly touched a nerve. Following on from this there were a number of other stories, mostly by the Daily Mail, that unearthed problems with charities sharing personal data and so called 'sucker lists' where vulnerable people's personal details are compiled.

The Government commissioned Sir Stuart Etherington to undertake a review into fundraising. Sir Stuart is chief executive of the National Council for Voluntary Organisations (NCVO), he was joined by a panel of experts in the review.

The report had a number of key recommendations for government in order to improve the fundraising sector. Below are the headline announcements:

- Replace the Fundraising Standards Board with a new regulator with the public interest at its heart. The new regulator would be better funded by charities and have strong working links with the ICO and Charity Commission and will be named the Fundraising Regulator.
- Creation of a fundraising preference service.

You can read the full report [here](#).

Data Protection Policy

Data protection policy has been moved from the Ministry of Justice (MoJ) to the Department of Culture, Media and Sport (DCMS). DCMS is already responsible for Privacy and Electronic Communications (EC Directive) Regulation (PECR), making it the department tasked with dealing with nuisance calls and spam texts. The move creates one single government department leading both PECR and data protection policy.

Information Commissioner's Office (ICO) Announcements

- The ICO issued its largest ever fine, £200,000, to Home and Energy Lifestyle Management Ltd after discovering it made over 6 million automated calls offering free solar panels. The business did not have permission to call people, in the case of automated calls the company must be named for a consent to be valid and this was not the case. The business admitted to not even understanding the rules.
- Cold Call Elimination Ltd breached TPS to call people offering to help stop nuisance calls. An offer to stop the type of calls that it was itself making. The company was fined £75,000.

Consumer Protection

- [Midata Project](#) – The government scheme works with business to give consumers better access to electronic data held about them. It aims to get more private sector businesses to release personal data to consumers

electronically, among other aims. The scheme has been rolled out to online customers of banks and utility companies.

- Consumer Rights Act – This has simplified consumer law provisions that were contained in eight pieces of legislation which had built up over 40 years. It came into force on 1 October 2015. The Bill will bring new rules on digital products and will clarify the remedies available for faulty goods and services. Unfair contract terms provisions will also be updated.
- The Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 – It came into effect 13 June 2014. This implemented into UK law the remaining parts of the Consumer Rights Directive. The Regulations bring in, among other things, new provisions with regard to the information to be provided for an off premises, on premises and distance contract, cancellation rights in respect of distance contracts and a ban on using premium rate numbers for customer service lines.
- New Consumer Redress powers – The Law Commission consulted UK business on proposals to reform consumer redress for breaches of The Consumer Protection from Unfair Trading Regulations 2008. The DMA responded to the consultation. The Consumer Protection (Amendment) Regulations 2014. These Regulations allow consumers to seek redress if they have been the victim of a misleading or aggressive practice under the 2008 Regulations. They came into force on 1 October 2014.
- Misleading and Advertising Directive – It is under review by the European commission. The DMA is working with the Federation of European Direct and Interactive Marketing (FEDMA) on this.

General News

- The DMA has been invited to take part in the Science and Technology Select Committee's [investigation](#) into big data. This was off the back of our response to their call for information.
- John Mitchison, head of the preference services, appeared on the Victoria Derbyshire show on the BBC to talk about nuisance calls issues and give commentary on the largest ever ICO fine to a business, that was making illegal cold calls to sell a service that blocks cold calls, the irony.

Consultations

- The DMA responded to the Science and Technology Select Committee [consultation](#) on big data.
- Submitted evidence to the [National Council for Voluntary Organisations](#) (NCVO) who hosted the Etherington review, which was commissioned by the government in the wake of the fundraising scandal and led by Sir Stuart Etherington. The DMA received a number of favourable mentions in the [final report](#).
- The [Scottish Council for Voluntary Organisations](#) (SCVO) initiated a similar process to the NCVO and the DMA submitted evidence to that review.
- The [Public Accounts Select Committee](#) led a review into fundraising as well, which the DMA submitted evidence to.
- [Ofcom](#) consulted on reviewing regulation of Royal Mail where the DMA response reflected members view that the regulatory regime should change especially in relation to Royal Mail's unrestricted pricing freedom.

Political

- Jeremy Corbyn MP is now leader of the Labour Party. The veteran Labour MP has spent the majority of his career as a backbencher championing Old Labour policies, always an uneasy bedfellow with Blairism. His style of politics is unorthodox, a believer in consultative and inclusive politics, not a forthright leader in the Westminster tradition.
- The conference season finished in the first week of October and MP's have returned to Parliament from their conference recess. The DMA was present at the Conservative and Liberal Democrat conference ensuring the DMA was well represented. The Conservative conference featured a number of events on digital economy issues where it was clear that the creative industries will be championed by this government.

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