



Summer Update

August 2016

New Government

Theresa May is the new Prime Minister, David Cameron having resigned in the wake of the EU referendum vote. Theresa May was elected Prime Minister in a Conservative Party internal process.

She has indicated that she is in no rush to begin Brexit negotiations with the EU and will take her time formulating the UK's position. British business will be waiting a little while longer for clarity on what the UK's future relationship with the EU will be.

There has been a cabinet reshuffle and the new Ministers relevant for the DMA Group are; [Secretary of State for DCMS, Karen Bradley](#), [Minister for Digital and Culture, Matt Hancock](#) and [Secretary of State for Education, Justine Greening](#).



Prime Minister, Theresa May

Matt Hancock is the Minister responsible for data protection policy so he will likely be the main point of contact for the DMA moving forward. He has a background with the DMA, his family business is a DMA member (Border Business Systems) which he use to work for.

EU Referendum



The referendum on whether the UK should remain or leave the EU was held on the 23 June 2016, and won by the leave group by 52% to 48%. The referendum turnout was 72% with more than 30 million people voting, higher than the turnout at the 2015 General Election when it was 66%.

This result means that the UK will eventually leave the EU. Before that can happen the UK must activate article 50 of the Lisbon Treaty, but there is no timetable for that to begin. Once the UK has

done this it has 2 years to negotiate a new relationship with the EU, although the 2 year deadline could be extended.

One major concern for the UK is to what extent the country will retain access to the single market, if indeed at all. The UK may decide to go down the route of Norway and join the European Economic Area (EEA) but this means accepting regulations from Brussels without a say in the process and accepting the free movement of people.

It's possible that the UK could join the EEA for a short while until it decided what the future relationship with the EU would be, and may limit economic shocks. Switzerland is a part of the European Free Trade Association (EFTA) and also a part of the Schengen Agreement, which permits free movement of people. The UK could also shun both of these models and form its own bilateral relations with the EU, like other nations around the world, and trade under the World Trade Organisation (WTO) rules but this would mean a return to tariffs, which could be a disadvantage for people selling products or services in to the EU.

Data Protection

DMA members had a clear idea about future data protection regulation through many years lobbying by the DMA. During the General Data Protection Regulation (GDPR) negotiations we had achieved a compromise that was better for one-to-one marketing. The EU referendum has taken away that certainty and now the future is unknown. Until the UK Government reveals its intentions and the negotiations get underway, the industry will not know the lay of the land.

While we do not know exactly what the future regulatory landscape will be, we do know that many UK firms both market to EU citizens and process their personal data. This means those companies must be GDPR compliant. Any future negotiations with the EU must have data protection on the table if the UK wants to continue trading freely with the EU. It may be that any deal will require a 'copy and paste' of the GDPR legislation into UK law. If the UK were to trade with the EU under a WTO framework then it would seek adequacy status from the EU under the GDPR and this would mean offering "essentially equivalent" safeguards as per the GDPR to data transferred to the UK from the EU and held in the UK, much like transfers of personal data from the EU to US based organisations are permitted under the EU-US Privacy Shield.

The future of data protection policy in the UK will be dependent on the GDPR or something very similar to it, so there is no reason for organisations to put off their plans to become GDPR compliant.

For those who process the data of UK citizens alone there may be some flexibility. DCMS civil servants have said that they would be happy to hear industry's views on where they would favour a less prescriptive approach than the GDPR. The UK negotiating team at the Council of Ministers was critical of much of the Parliament text, which they saw as overly prescriptive. The UK supported a so called risk-based approach.

The EU has commenced its review of the ePrivacy Directive, which is the legislation that informs the Privacy and Electronic Communications Regulations (PECR). The DMA in its response made the point that many of the rules in the ePrivacy Directive are no longer necessary as the GDPR covers it off. For example, the ePrivacy Directive has rules on breach notification but so does the GDPR, and so there is no need for two layers of rules. If the ePrivacy Directive is going to be reformed then much of it should be trimmed to ensure that it doesn't add another layer of rules on top of the GDPR.

The ePrivacy Directive is important to the UK because it is the piece of legislation that maintains the existing customer exemption for email and opt-out consent for telemarketing. Other EU member states decided to operate an opt-in consent for telemarketing as the directive left it up to member states to decide.

The ePrivacy review may be concluded once the UK has left the EU and it is unclear how rules around electronic communications would be considered in an adequacy judgement. Still, the UK will need to make its voice heard and the DMA will continue to lobby Brussels with FEDMA.

EU-US Privacy Shield

On 12 July 2016 the EU Commission deemed the EU-US Privacy Shield adequate to enable trans-Atlantic data transfers, which are essential for commerce between the EU and US. The new deal poses stronger obligations on US companies to uphold EU data protection standards. Something US companies failed to do under Safe Harbour and that led to it being struck down in the European Court of Justice.



Negotiations towards the EU-US Privacy Shield were ongoing before Safe Harbour was struck down in October 2015. The EU Commission were aware of the privacy limitations of Safe Harbour.

The major concerns of the European Court of Justice regarding Safe Harbour were the lack of redress for EU citizens and the mass surveillance of the US security services. Privacy Shield addresses these concerns. Firstly, there will be several redress possibilities, an EU citizen can complain directly to a US company and they must respond within 45 days or with their national data protection authority who will work the US Department of Commerce to ensure a swift resolution to unresolved complaints. Secondly, the US has ruled out indiscriminate mass surveillance of personal data transferred under the Privacy Shield programme.

The Office of the Director of National Intelligence further clarified that bulk collection of data could only be used under specific preconditions and needs to be as targeted and focused as possible. These new provisions are designed to meet the European Court of Justice demands that EU citizens personal data transferred outside the EU receives “essentially equivalent” safeguards to those found in the EU.



However, the US has not only provided assurances that surveillance will be targeted and in accordance with the law. They have setup an ombudsman, within the State Department, who will operate independently of national security agencies and be free to examine complaints and resolve disputes. The ombudsman will be able to verify that surveillance measures have been conducted in line with the law, and address any violations of citizens’ rights.

To ensure that the US is upholding the agreement there will be joint review by the US and EU authorities at least annually. During this process they can discuss how Privacy Shield is working and take action where it is needed. Organisations may need to be excluded from Privacy Shield. Furthermore, the EU Commission could suspend Privacy Shield, if it believed that the US was not providing an essentially equivalent level of data protection.

Nuisance Calls

In December 2015 Ofcom began consulting on changing the rules around silent and abandoned calls. Their new proposed approach would be a zero tolerance approach to silent calls, a move the DMA supported. These calls do cause real harm to consumers. People often think that their house is being watched by potential burglars, especially frightening for those living alone. The second part related to

abandoned calls and Ofcom suggested that any more than three single abandoned calls would be considered a persistent misuse of telecoms network and therefore non-compliant.

The DMA pointed out a number of problems with this approach. In practical terms the policy would be very hard to comply with. Abandoned calls can happen when someone making a phone call hangs up as the respondent picks up the phone.



Moreover, the rules amount to an effective ban on automated calling systems. This would have a large scale economic impact on the contact centre sector as it would seriously dent efficiency. For example, organisations would need to hire more agents to make up the gap, organise new premises to place the agents and all the overheads associated with running a larger operation.

The ICO have been calling for custodial sentences for the most egregious breaches of the Data Protection Act 1998 in order to crack down on nuisance calls and spam texts. For example, at the start of 2016 Prodiat Ltd were hit with a £350,000 fine from the ICO as the firm was responsible for 46 million automated PPI calls. As soon as the fine was served the company went into liquidation. In this instance the directors of the company knew they were breaking the law and will most likely now avoid paying the fine. The threat of a custodial sentence would make the rogues think twice as a prison sentence is a greater threat than a fine, which in all likelihood an offending director will be able to avoid paying.

The Justice Secretary has the power under Section 77 of the Criminal Justice and Immigration Act 2008 to introduce a new Statutory Instrument requiring a positive vote in both Houses of Parliament to allow custodial sentences for breaches of Section 55 of the Data Protection Act 1998. This power was introduced in the wake of the phone hacking scandal. The Information Commissioner, Christopher Graham, recently called for this during evidence hearing with the Science and Technology Select Committee.

Fundraising

The DMA has published its latest report – ‘An ideal future for one-to-one fundraising’ – into the fundraising sector and this time provides possible long-term solutions. The report asks charities to put their supporters at the heart of everything they do, which means not always requesting donations from someone but building a meaningful relationship. A donor will be more giving if their needs are understood and this means only sending out timely, relevant, appropriate and coordinated one-to-one communications.

The report is available [here](#).

The Fundraising Preference Service is now being finalised. The Fundraising Regulator are due to release a report at the end of August formalising their views but also to invite one last round of comments from stakeholders. The DMA will keep its eye on any developments and keep members informed.

OFGEM

OFGEM intend to setup a new scheme to encourage consumers to switch their energy supplier so they receive the best deal. Under the scheme any consumer who has not switched supplier in 3 years will be sent a message by OFGEM informing that unless they opt out their personal details will be made available to the other energy companies. Other energy companies will then be able to send consumers direct mail offering better deals.

The DMA has spoken out against the proposed scheme as it will likely mean a deluge of direct mail for consumers, which will not be appreciated. Furthermore, the volume of messaging will likely mean that consumers will be confused and therefore will not necessarily switch and find a better deal. Talks with OFGEM are ongoing and the DMA will keep members updated.

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