



One-to-One Public Affairs Bulletin

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Data Protection

- EU Data Protection Regulation

The General Data Protection Regulation (GDPR) has finally been agreed. The EU Parliament and Council reached a joint decision 16 December 2015. Although, the regulation has yet to be written down in the official EU Journal. Once published in the EU Journal the 2-year implementation phase will officially begin. The DMA anticipates this to happen before June 2016. But, there is a near final leaked version of the regulation available and so the DMA has a good idea of the main changes.

In a nutshell, some of the worst aspects of what could have been in the regulation didn't make it. This is in part down to the lobbying the DMA and FEDMA have carried out over the last few years. Moreover, Commission President Juncker has made the digital single market the centrepiece of his Presidency and it relies on harmonised data protection law that encourages economic growth, and does not hold business back. This message appears to have had an effect on the trilogue negotiations.

Some important points to consider:

Direct marketing as a legitimate interest

The text recognises that the processing of personal information for marketing purposes may be regarded as carried out for a legitimate interest. While processing for direct marketing purposes is considered a legitimate interest, if an organisation relies on legitimate interest for its processing then it needs to make a careful assessment of the relationship between it and the individual.

Definition of personal data

Personal data is any information relating to an identified or identifiable person. How companies interact with personal data is the focus for the legislation. An identifiable person is somebody who can be identified directly or indirectly, particularly by reference to a name, identification number, location data or online identifier.

Whether or not online identifiers such as cookies fall into the definition of 'personal data' will depend on where they are placed in the online ecosystem. For example, a cookie placed by my internet service provider will be classified as personal data as it could identify me, whereas a cookie placed by an advertiser lower down the online ecosystem and cannot be linked to my email address or anything else which could identify me, is unlikely to be considered as personal data.

This represents a sensible compromise as it was feared that all online identifiers would be considered as personal data. This separation means non-identifiable, 'blind' data can be more widely used than identifiable personal data.

Consent

The text refers to 'unambiguous' consent rather than 'explicit' consent, which is a stricter definition. Under unambiguous consent, consent for postal and telephone marketing can still be given on an unsubscribe or opt-out basis.

Either way, marketing organisations should bear in mind that the rules on consent will tighten up. Information must be provided concisely, in a transparent and intelligible way, and be easily accessible using clear and plain language.

Days when the consent could be buried in lengthy terms and conditions are numbered.

Right to object (unsubscribe/opt-out)

Under the new Regulation, individuals will have the right to object to any processing of their personal information, including profiling, at any time and free of charge. If individuals object, then their personal information can no longer be processed for marketing purposes.

Most marketers will use the legitimate interest grounds for processing personal information (see above) if they are using an unsubscribe/opt-out methods. But the right to unsubscribe/opt-out must be brought to the attention of the individual in the first communication and be clearly and separately stated.

Again, existing unsubscribe/opt-out language will need to be revised.

Profiling

Profiling has now been included under the label 'automated decision making'. Individuals have the right not to be subject to the results of automated decision making, including profiling, which produces legal effects on him/her or otherwise significantly affects them. So, individuals can opt out of profiling.

But, individuals have no right to opt-out of profiling if they have already explicitly consented to it, or if profiling is necessary under a contract between an organisation and an individual, or if profiling is authorised by EU or Member State Law.

- 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.
- 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.

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 was effective immediately without a grace period.

The Article 29 Working Party – the grouping of Europe’s data protection authorities – will soon be meeting to discuss next steps. The group’s last statement promised that no enforcement action would be taken before the end of January at which point the group would review their position.

FEDMA and the DMA recently met with an EU Commission official to discuss the state of play regarding Safe Harbour 2.0, as it’s popularly known, which is the new agreement being negotiated. The Commission official was positive that a number of concessions had been made on the US side, namely that surveillance must be targeted and not part of a general fishing expedition, where many peoples’ data is collected. If serious progress can be made in these discussions it is possible that the Article 29 Working Party will extend the window of no enforcement action.

The Commission has hinted that agreement may be reached by the end of January 2016.

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.

Safe Harbour Survey

The DMA recently surveyed its membership to find out how organisations were being affected by the invalidation of Safe Harbour. You can view the results [here](#).

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](#).

The report also advised that charities move towards a model of explicit consent. This was advised because it was thought explicit consent would make into the final text of the GDPR. However, the EU Council and Parliament reached a compromise and opted to use unambiguous consent, which offers more flexibility than explicit consent.

George Kidd, Chair of the Direct Marketing Commission, has been appointed as chair of the fundraising preference service working party.

The DMA is setting up its own fundraising preference service working party.

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. The Baroness Neville-Rolfe is the Minister with responsibility for data protection policy at DCMS.

Information Commissioner's Office (ICO) Announcements

- The ICO has called for stronger penalties for data thieves after Sindy Nagra, 42, from Hayes, sold almost 28,000 customers' records for £5,000. Appearing at Isleworth Crown Court on Friday, she was fined £1,000, ordered to pay a £100 victim surcharge and £864.40 prosecution costs. Current fines simply are not a great enough deterrent to breaking the rules.
- The ICO issued a press release warning nuisance call companies to expect more hefty fines in the New Year. The ICO imposed more than a million pounds worth of penalties for nuisance calls and text messages in 2015, with the same amount in the pipeline for early 2016.
- Agreement has finally been reached on the GDPR. On planning for GDPR the Information Commissioner, Christopher Graham, said; *"We are planning a series of explanatory blogs, events, and webinars to help everyone to get ready for the new regime, notably our data protection practitioners conference in March. We'll be updating our publications and using our website to make things easy – and above all clear – for all who need to know. We'll also be working closely with the Department of Culture, Media, and Sport who are the Whitehall Department leading on the digital economy."*

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

- Chris Combemale, DMA Group CEO, gave evidence to the Science and Technology Select Committee as a part of their [investigation](#) into big data. This was off the back of our response to their call for information. You can watch the evidence session [online](#).
- The DMA Awards took place in December with Proximity London and UM London winning the DMA Awards Grand Prix last night for their 'Raising Eyebrows and Subscriptions' campaign for The Economist.
- Data Protection Day is approaching and will take place 28 January 2016.

- The Information Commissioner, Christopher Graham, and the Minister responsible for data protection policy, Baroness Neville-Rolfe, are keynote speakers at [Data Protection 2016](#).

Consultations

- Ofcom are currently consulting on changing the rules for silent and abandoned calls. Ofcom are proposing to remove the 3% threshold for silent and abandoned calls. The deadline for responses is 24 February 2016. See the consultation document [here](#).
- DCMS intend to make marketing companies to display caller ID subject to a consultation. See the consultation document [here](#). The deadline for responses is 23 February 2016.

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