

Information Commissioner's Office

# Consultation: GDPR consent guidance

Start date: 2 March 2017

End date: 31 March 2017

# Introduction

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The General Data Protection Regulation (GDPR) will apply in the UK from May 2018 and replaces the Data Protection Act 1998 (DPA).

The GDPR sets a high standard for consent. It builds on the DPA standard of consent in a number of areas and it contains significantly more detail that codifies existing European guidance and good practice.

Our draft guidance on consent explains our recommended approach to compliance and what counts as valid consent. It also provides practical help to decide when to rely on consent, and when to look at alternatives.

We are now running a short consultation on the draft guidance to gather the views of stakeholders and the public. These views will inform the published version of the guidance.

We are provisionally aiming to publish this guidance in May 2017, although this timescale may be affected if we need to take account of developments at the European level. We intend to publish this guidance as a series of linked webpages that can be downloaded as a pdf.

As the GDPR is a new regulation which applies consistently across the EU, our published guidance will need to continue to evolve to take account of any guidelines issued in future by relevant European authorities (including the Article 29 Working Party of European data protection authorities and the EDPB), as well as our developing experience of applying the law in practice.

Responses to this consultation must be submitted by 31 March 2017. You can submit your response in one of the following ways:

**Download this document and email to**  
[joanne.crowley@ico.org.uk](mailto:joanne.crowley@ico.org.uk)

**Print off this document and post to:**  
Joanne Crowley  
Information Commissioner's Office  
Wycliffe House  
Water Lane

Wilmslow  
Cheshire SK9 5AF

If you would like further information on the consultation please telephone 0303 123 1113 and ask to speak to Joanne Crowley or email [joanne.crowley@ico.org.uk](mailto:joanne.crowley@ico.org.uk).

## **Privacy statement**

Following the end of the consultation we shall publish a summary of responses received. Information people provide in response to our consultations, including personal information, may be disclosed in accordance with the Freedom of Information Act 2000 and the Data Protection Act 1998. If you want the information that you provide to be treated as confidential please tell us, but be aware that we cannot guarantee confidentiality.

# Section 1: Your views

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Please provide us with your views by answering the following questions:

## 1. Is the draft guidance clear and easy to understand?

Yes

No  
Please explain why not:

## 2. Does the guidance contain the right level of detail?

Yes

No  
Please explain why not:

## 3. Do you have any examples of consent in practice, good or bad, that you think would be useful to include in the guidance?

Yes

No  
Please outline your examples:

## 4. Does the guidance cover the right issues about consent under the GDPR?

Yes

No  
If not what do you believe is missing? Please see our comments below.

**5. Please provide any further comments or suggestions on our draft guidance.**

**Information about the DMA (UK)**

The Direct Marketing Association (DMA) is Europe's largest trade association in the marketing and communications sector, with approximately 1,050 corporate members and positioned in the top 5% of UK trade associations by income.

The DMA represents both advertisers, who market their products using one-to-one marketing channels – including email, mobile, social media, advertising mail and inserts – and specialist suppliers of one-to-one marketing services to those advertisers – for example, advertising agencies and technology companies.

The DMA also administers the Mailing Preference Service, the Telephone Preference Service and the Fax Preference Service. On behalf of its membership, the DMA promotes best practice through its DMA Code, in order to maintain and enhance trust and confidence in the one-to-one marketing industry.

Please visit our website [www.dma.org.uk](http://www.dma.org.uk) for further information about us.

**Introduction**

The DMA welcomes the opportunity to respond to this consultation. We aim to be business' most customer-focused community and, while we represent the full spectrum of organisations involved in one-to-one marketing, our point of difference is the guiding principle of the DMA Code: Put your customer first.

The Code is more than just a rulebook: it stands as an aspirational agreement between organisations, the DMA and individuals to inspire our industry to serve each customer with fairness and respect – and, in consequence, to cultivate a profitable and successful commercial ecosystem.

This guiding principle forms the backbone to our response to the ICO's draft GDPR Consent Guidance (the Guidance) below.

***The impact on customers and the UK economy***

The DMA agrees with the ICO that the GDPR sets a high standard for consent and industry will have to adapt to those changes. However, the DMA believes that some aspects of the ICO's Guidance will have a significant effect on both the customer experience and the industry at large. If the Guidance remains as outlined the sheer volume of new tick boxes could only serve to confuse consumers rather than inform them.

The requirement in the Guidance for organisations to specifically name every third party in receipt of personal data, rather than allowing them to name a set of narrow sector categories that the third party organisations belong to will impact both the customer experience and the industry.

The requirement to specifically name third parties in receipt of personal data will hurt all businesses and their ability to grow. It will, however, disproportionately restrict the ability of small to medium size businesses to bring new products or services to market and grow successfully. Unlike larger organisations that already have extensive amounts of data on existing customers, SMEs often need to source this data from third parties to introduce their business to prospective customers. With this in mind, the DMA believes the Guidance as it stands is anti-competitive; it will only benefit large organisations with substantial lists of existing customers, while making it harder for SMEs to communicate with potential customers and stifle growth in this integral part of the UK economy.

Another consequence of this lack of third party data will be an increase in untargeted advertising and marketing approaches. Organisations will be forced to rely on mass marketing techniques so consumers will receive marketing communications regardless of whether they're interested in a sector, product or service. This could increase complaints as consumers receive more untargeted marketing and further benefit larger organisations that are able to afford a higher marketing spend than their SME competitors.

This will have repercussions on the wider economy by making it more difficult for companies to sell their products and services. A study from Deloitte<sup>1</sup> predicts UK businesses using direct marketing will lose €15.1bn in sales – the equivalent to around £13bn – with the implementation of GDPR. The additional restriction on third party data could have a further impact, with a knock-on effect for consumers being price increases, coming about as businesses seek to recover the increase in marketing costs.

### ***Damage to UK marketing sector and jobs***

This interpretation will also make it harder for organisations to enrich their own customer data and understand more about their customers to deliver relevant products or offers. For example, mobile phone companies can use such insight to create tailored offers around products or services, offering better deals and rewards. If brands are unable to enrich their data sets then customers could potentially lose out.

The fact that organisations will have to specifically name third party organisations they want to pass personal data to, rather than specifying narrow sectors, will mean a large scale reorganisation for

the entire marketing industry, resulting in a potential loss of jobs and productivity. An initial study from the Ministry of Justice<sup>2</sup> estimated the cost to the UK economy of becoming compliant with GDPR would result in a net loss of £250m in the first year, rising to £2.1bn over the following 14 years. Of course, in the interests of the customer, the investment to become compliant with GDPR is essential and many organisations will have made financial provisions to achieve compliance with the GDPR. These provisions will not have included unexpected costs, such as a need to specifically name third party organisations in receipt of personal data.

A DMA member, a marketing services provider, estimates that up to 65% of the company will need to be made redundant under the proposed Guidance. Similar marketing services providers could find themselves in the same situation. Of course, this has a knock-on effect down the supply chain where reduced activity will also mean job losses for marketing agencies, mailing houses and with the end clients.

### ***Implications of retrospective application***

A recent survey by the GDMA<sup>3</sup> estimates that 78% of UK marketers use third party data in some way to improve the targeting of campaigns (globally this figure is 64%). Therefore, if the ICO persists in its view that third party organisations need to be specifically named, much of this data will be unusable after 25 May 2018

Data collected legitimately under the current law should be permitted to be used after 25 May 2018. New data that is collected after May 2018 should be compliant with the GDPR. It is unfair to retrospectively apply the law to data collected legally by organisations, which underpins much of their marketing activity. The DMA is asking for there to be no retrospective application of the GDPR and that data collected legally will be compliant after May 2018.

If the law was applied retrospectively then organisations would need to start from scratch. Rebuilding databases would take a long time and in some instances may not be possible. Even those businesses that have been proactive about gathering the correct consents since the final text of the GDPR was agreed could very well need to again under this interpretation.

For example, RNLI is one of a number of charities who have made a high profile statement about re-contacting their entire database to make sure that they only contact people with fundraising messages who have positively opted in. They did this in consultation with the ICO, but prior to the publication of the consent Guidance and the statement they used does not unbundle the different trading

departments of the RNLI (RNLI, RNLI Shop and RNLI College) nor does it offer granularity of consent for their different activities that this Guidance requires. Does this mean that all the work that RNLI has done, while consulting with the ICO, will not be compliant after May 2018? The result would surely be further financial impact on the charity as it is forced to re-contact its entire database again before the cut-off date.

In order to ensure organisations are able to meet the new consent requirements, they would need a period of time to re-permission their database and get in contact with individuals. A grace period from when the ICO's Guidance on GDPR has been finalised would be necessary for organisations to contact individuals on their database and gather consent to process their personal data. Enforcement of the new rules from May 2018 will likely leave less than a year from the ICO's final Guidance for organisations to ensure they are compliant and contact individuals necessary.

### **Areas where the DMA membership are seeking changes or clarification**

The DMA agrees organisations should offer individuals genuine choice and control over how their personal data is processed. This means organisations being accountable and maintaining detailed evidence of how consent was gained and when. The DMA agrees with many parts of the Guidance but does have various concerns. The areas where the DMA are seeking changes or clarification are outlined below.

#### ***1) Naming third parties***

The requirement to have all third parties explicitly named is in direct contradiction of article 13.e and article 14.e of the GDPR, which deem it sufficient to provide categories of recipients to the data subject. Articles 13 and 14 do not make any differentiation between the legal grounds on which personal data is processed, thus, the choice between recipients or categories of recipient should also apply to processing based on consent.

Currently, the requirement is to name the sector with whom the personal data may be shared and this is an effective way to inform individuals of how their personal data will be processed. It is not necessarily the case that individuals will be more informed because specific organisations are named. The names of the specific organisations stated may be unfamiliar and leave individuals with less information about who their data will be shared with than a clear sector, for example, 'car insurance companies'. The insistence on named third party consent also makes it impossible for any organisation to use pre-existing consent for an organisation identical in all but name.

As an example, the automotive industry will struggle to maintain effective one-to-one customer communications without the use of third party data. Many brands in this sector use third party data solutions to acquire customers. They're interested in identifying customer profiles as different people drive different types of car. Demographic factors, such as life stage, affluence, profession and interests come into play when targeting an automotive buyer. If automotive organisations are only able to use their own first party data then this greatly reduces their ability to reach the right customer at the right time, potentially depriving the customer of offers they would appreciate.

Offers websites, such as Wowcher, highlight the need for further clarity in the Guidance. They continually add offers from various organisations to their website and then use one-to-one marketing to promote those offers. Any communication comes from the offers/voucher website, but contains a range of information from other organisations promoting their offers on the website too.

If Wowcher outlines in its privacy notice/policy that it will send offers to customers from yet unknown organisations and individuals opt-in, does Wowcher have consent to do this? The requirement to specifically name third party organisations rather than the sectors in which they operate is simply unworkable in this context.

## **2) Opt-out consent**

Recital 32 states that silence, inactivity and pre-ticked boxes do not constitute consent. The Guidance equates opt-out consent with a pre-ticked box and implies the GDPR bans its use. The DMA believes this interpretation is incorrect. After thorough debate within the EU Parliament and Council of Ministers opt-out methods were not included within recital 32, but pre-ticked boxes were.

For example, the edited electoral register is run via an opt-out consent and there is a high level of engagement as around half the individuals on electoral register do indeed opt-out.

The potential impact of the implied ban on opt-out consent could be significant for many businesses, but particularly those in the third sector.

### Case study: Charity

One example shared with us is from a charity that is heavily reliant on traditional direct marketing activity. The charity updated its privacy notices in Autumn 2015 to ensure it was collecting unambiguous and informed consent, using an opt-in for channels covered under PECR and opt-out for post.

If post was to become opt-in under GDPR, as the Guidance implies, the presumption is that this would require businesses to

re-permission its customers or supporters, which would result in a significant reduction in people the business is able to contact. The charity has conducted some initial testing and combined this with preliminary response rates provided by other charities to estimate potential impact and ultimate loss of income.

The charity found that an opt-in box for post generated around 20% of people to consent. The impact of re-consenting supporters will clearly have a negative effect on the third sector's ability to continue to raise funds from its pool of existing donors—at best reducing the pool to a fifth of the size.

### **3) Contradiction with ePrivacy legislation**

There is tension with the proposed ePrivacy Regulation, which would allow cookies to operate on the basis of implied consent. Individuals could consent to cookies by altering technical settings within their internet browser. It is not clear whether this would be possible given the ICO's interpretation of consent in GDPR. Care needs to be taken to ensure that the Guidance is compatible with ePrivacy requirements when the new GDPR is sitting above the current ePrivacy legislation before the new ePrivacy Regulation comes into force.

### **4) Programmatic advertising**

Programmatic advertising mostly uses anonymised data sourced from cookies. However, under the GDPR online identifiers can be considered personal data so this Guidance could apply to programmatic advertising. Data used in programmatic advertising is currently not considered personal data as it is mostly general data shared between segments, such as, age range or an interest.

If the new consent Guidance did apply then there would be a similar impact as with third party data marketing. For example, an organisation collects cookie data and sells it in a data marketplace. The data is then bought by an advertising agency on behalf of a brand. The organisation that collected the cookie does not know who the data will be sold on to and may never know of the end-user of the data, the brand.

In addition, the draft ePrivacy Regulation makes the point that users are currently overloaded with requests to provide consent to the storage of cookies. To address this problem, the Regulation proposes that users should be able to give blanket consent through settings on their web browser. This seems to be in direct opposition to the call in the Guidance for granularity and unbundling of consent.

### **5) Granularity and unbundling consent**

The Guidance requires organisations to give granular consent options for different types of data processing. However, this has the potential to become very unwieldy for customers and could make data collection for marketing purposes extremely difficult. For example, how could an organisation detail options for marketing, different channels, analytics, profiling and sharing with third parties? Explaining all this information and having separate consents would be complicated and do little to inform consumers.

Case study: Consent under the ICO's current guidance vs. its interpretation of GDPR

<p><b>How a consent statement might be worded currently in line with the ICO Privacy Notices Code of Practice</b></p>	<p><b>How this consent statement would need to be worded in line with the draft Guidance</b></p>
<p>Here at Sunshine Insurance we take your privacy seriously and will only use your personal information to administer your account and to provide the products and services you have requested from us.</p> <p>However, from time to time we would like to contact you with details or offers on the products and services we provide including limited time discounts and occasional competitions.</p> <p>If you consent to us contacting you for this purpose please tick to say how you would like us to contact you:</p> <p style="text-align: right; font-size: small;"><i>please tick</i></p> <p><b>Post</b> <input type="checkbox"/></p> <p><b>Email</b> <input type="checkbox"/></p> <p><b>Telephone</b> <input type="checkbox"/></p> <p><b>Text message</b> <input type="checkbox"/></p> <p><b>Automated call</b> <input type="checkbox"/></p>	<p>Here at Sunshine Insurance we take your privacy seriously and will only use your personal information to administer your account and to provide the products and services you have requested from us.</p> <p>However, from time to time we would like to contact you with details of other products we provide:</p> <p style="text-align: right; font-size: small;"><i>please tick</i></p> <p><b>Life Insurance</b> <input type="checkbox"/></p> <p><b>Motor Insurance</b> <input type="checkbox"/></p> <p><b>House Insurance</b> <input type="checkbox"/></p> <p><b>House Contents Insurance</b> <input type="checkbox"/></p> <p><b>We may also like to send you limited time offers or discounts relating to these products</b> <input type="checkbox"/></p> <p><b>We also occasionally run competitions for our customers</b> <input type="checkbox"/></p> <p>If you consent to us contacting you for any of these purposes please tick the relevant box(es) above and indicate how you would like us to contact you by ticking one of the boxes below:</p> <p><b>Post</b> <input type="checkbox"/></p> <p><b>Email</b> <input type="checkbox"/></p> <p><b>Telephone</b> <input type="checkbox"/></p> <p><b>Text message</b> <input type="checkbox"/></p> <p><b>Automated call</b> <input type="checkbox"/></p>

The case study clearly demonstrates how the Guidance could lead to confusing consent statements, with a plethora of different tick boxes. This makes for a poor customer experience and may only confuse individuals rather than inform them.

### **6) Legitimate interest**

Throughout the Guidance legitimate interest is alluded to. If consent is too hard to achieve then another legal ground for processing personal data may be appropriate. Recital 47 recognises direct marketing as a legitimate interest, it states, "The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest." This should be specifically referenced in the Guidance.

On page 16, the Guidance states "if you are a private-sector organisation, you can process personal data without consent if you have a genuine and legitimate reason (including commercial benefit), unless this is outweighed by harm to the individual's rights and interests." However, there is no mention of direct marketing being recognised as a legitimate interest and, as per the GDPR, this should be included in the Guidance.

### **Conclusion**

The DMA believes that under this interpretation of the GDPR the result will be an increase in untargeted and impersonal marketing, ultimately resulting in less relevance to consumers. It will also present the consumer with confusing consent scenarios.

Our 'Sunshine Insurance' example encapsulates how this Guidance will make gathering consent extremely difficult for organisations and complicated for consumers to understand.

The impact on marketing service providers will also be severe with significant job losses in the sector, which will have a knock-on impact down the supply chain. The UK can ill-afford to sacrifice jobs during a period of economic uncertainty.

It is important to keep in mind the economic contribution marketing and advertising makes to the UK economy. Annual UK exports of advertising services are worth £4.1bn<sup>4</sup>. In 2013 businesses spent £16bn on advertising and marketing, which generated £100bn in contributions to the UK economy<sup>5</sup>.

An over strict interpretation of the GDPR will have a negative impact on consumers, have economic consequences for the marketing industry and impact the UK economy more broadly.

**References:**

1. Research by Deloitte: 'The Economic Impact of the European Reform of Data Protection: Final report' (December 2013) - <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/about-deloitte/deloitte-uk-european-data-protection-tmt.pdf>
2. MoJ study cited by Stéphane Ciriani in 'The Economic Impact of the European Reform of Data Protection' (*Digiworld Economic Journal*, no. 97, 1st Q. 2015, p. 41) - [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2674010](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2674010)
3. Research by the GDMA: 'The Global Review of Data-Driven Marketing and Advertising' (January 2017) - [https://dma.org.uk/uploads/misc/588f3f9e8bbd9-gdma-and-winterberry-group----the-global-review---january-2017\\_588f3f9e8bb1c.pdf](https://dma.org.uk/uploads/misc/588f3f9e8bbd9-gdma-and-winterberry-group----the-global-review---january-2017_588f3f9e8bb1c.pdf)
4. Research by the Advertising Association (AA): 'Advertising Pays 4: Export Value and Global Impact' (April 2016) - <http://www.adassoc.org.uk/publications/advertising-pays-4-export-value-global-impact/>
5. Research by the Advertising Association (AA): 'Advertising Pays: How Advertising Fuels the Economy' (2013) - [http://www.adassoc.org.uk/wp-content/uploads/2014/09/Advertising\\_Pays\\_Report.pdf](http://www.adassoc.org.uk/wp-content/uploads/2014/09/Advertising_Pays_Report.pdf)

## Section 2: About you

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### Are you:

A member of the public who has used our service?	<input type="checkbox"/>
A member of the public who has not used our service?	<input type="checkbox"/>
A representative of a public sector organisation? Please specify:	<input type="checkbox"/>
A representative of a private sector organisation? Please specify:	<input type="checkbox"/>
A representative of a community, voluntary or charitable organisation, or of a trade body? Please specify: A trade body, the Direct Marketing Association.	<input type="checkbox"/>
The Direct Marketing Association (DMA) is Europe's largest trade association in the marketing and communications sector, with approximately 1,050 corporate members and positioned in the top 5% of UK trade associations by income.  <a href="http://www.dma.org.uk">www.dma.org.uk</a>	<input checked="" type="checkbox"/>
An ICO employee?	<input type="checkbox"/>

Other? Please specify:	<input type="checkbox"/>
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**Thank you for completing this consultation.  
We value your input.**