GDPR: Profiling Feedback
DMA Response

Information about the DMA (UK)

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

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

The DMA also administers the Mailing Preference Service, the Telephone Preference Service and the Fax Preference Service. The DMA promotes best practice through the DMA Code, designed to maintain and build trust and confidence in the digital and data-driven marketing industry.

Please visit our website www.dma.org.uk for more information about us.

Introduction

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

The DMA Code is more than just a rulebook. It's an agreement between organisations, the DMA and individuals designed to inspire our industry to serve customers with fairness and respect. The result is to cultivate a profitable and successful commercial ecosystem.

This guiding principle forms the backbone to our response to the ICO's GDPR Profiling Feedback.

What is profiling?

Profiling does not have an easily understood standard definition. This can confuse discussions as people may be talking about different issues.

Article 4 (4) of the GDPR defines profiling as: *"any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements"*

This definition is succinct and fundamentally neutral. It does not imply that profiling is negative or positive. It could be both. Future ICO guidance for profiling should also start from this neutral premise.

Within the marketing community profiling often has different meanings. For example, marketers will use the term 'segmentation' to describe breaking down their customers into groups, while others may use the term 'profiling'. It's imperative that everyone talks about the same thing when talking about 'profiling'.

What are the benefits for consumers?

Organisations usually carry out profiling to learn more about their existing customers, or to market to potential customers. Learning more about a customer means an organisation can better use their own resources and achieve a greater return on investment.

The customer benefits too. Customers receive relevant offers and discounts from brands when those brands understand them better. For example, Amazon is good at tailoring offers for their customers based on their profile. The company predicts what their customers may be interested in and what they might want to buy. Many people have benefitted from this type of profiling, such as discovering a new book or film they will love, but would never have heard of otherwise.

Profiling allows organisations to accurately identify consumers that will be interested in a product or service. This is not the whole picture however. It is not enough to just target a consumer and marketers must understand the context of their communications. Nuance is crucial. Consumers do not benefit from marketing that is irrelevant to them and profiling helps marketers build a comprehensive picture of their customers. Ultimately marketers must make judgements about when or how to contact a consumer.

Technological developments drive rapid change too. The ways in which consumers interact with brands have been through a revolution. The number of different touchpoints between a consumer and a brand have increased. Consumers can talk to brands through smartphones, games, apps, laptops, social media, and even smart televisions. This increase in touchpoints generates a huge increase in data. This could be personal data given by individuals or publically available information. Marketing can be made more personal by tapping into these data. If profiling is prevented then marketing will return to 'scatter gun' approaches where the same message is sent to many people irrespective of their preferences. This is a wasteful approach and one that can annoy consumers.

Take the example of a beauty shop selling products designed to prevent the ageing of the skin. This shop will not want to market products designed for the over 65s at a younger consumers which would be a waste of resources and may even aggravate younger customers, who would expect the shop to know better. Profiling based on age in this instance is common sense and beneficial for the beauty shop and its customers.

Feedback Questions

1. When, how and why does your organisation carry out profiling? Do you agree that there has to be a predictive element, or some degree of inference for the processing to be considered profiling?

Marketers profile consumers to learn more about their interests and so make communications personalised and relevant. Organisations want to be efficient and only contact those people who are interested in their products and services. Profiling allows them to do this.

Organisations profile consumers at various points. For example, Sainsbury's uses the Nectar Card to profile their customers based on their purchase history. This then informs which vouchers Nectar Card will send to customers. What discounts and offers a customer receives will depend upon their purchase history.

There do not have to be any inferences made about customers when profiling. Judgements may be made based on facts such as known hobbies or stated interests rather than inferred likes or preferences.

2. How will you ensure that the profiling you carry out is fair, not discriminatory, and does not have an unjustified impact on individuals' rights?

We will be advising our members that in order to ensure that any profiling is fair, not discriminatory and does not have an unjustified impact on individual's rights, they need to comply with the DMA Code and the other provisions of the GDPR, in particular carrying out data protection impact assessments (DPIA) and putting appropriate controls in place to mitigate any risks. The ICO's recent Big Data, artificial intelligence, machine learning and data protection paper gives a good example of this, where it states that the City of Boston is aware that its Street Bump app for mobile phones which records damage to roads may collect more information from areas of the city where there is high mobile phone ownership (Para 89).

Profiling for marketing purposes means that consumers receive marketing that is personalised for them, which customers prefer. DMA customer engagement research found that 63% of consumers are interested in receiving offers tailored to what they had bought after a purchase and 27% are interested in receiving interesting content about a brand/shop/site's history tailored to what they like after a purchase[1]. It means the communication will be relevant and useful. This benefits businesses too, as they know which messages will be of interest to which group of consumers based on their preferences.

For example, organisations reward loyal customers with discounts and offers relevant to them. Rewarding customer loyalty is one way marketers develop a relationship with a customer and keep their business. Customers who do not receive offers because they are not considered 'loyal customers' may be those who shop less frequently and spend less. Would this be unfair? In this example, whether a customer receives an offer or not is directly related to their relationship with and value to the business.

3. How will you ensure that the information you use for profiling is relevant, accurate, and kept for no longer than necessary? What controls and safeguards do you consider you will need to introduce, internally and externally to satisfy these particular requirements?

We will be advising our members to consider this question carefully and to pay particular attention to paras 84-91 of the ICO Big Data paper. This is something which our members and all organisations will have to consider on a case by case basis depending on the objectives of the profiling.

It is in the interest of organisations to only use the most up-to-date data possible as this will give a greater degree of personalisation. Inaccurate data could mean a marketer's message is irrelevant and so frustrate a customer. This is not an outcome marketers want.

In the run-up to the GDPR coming into force in May 2018, organisations will need review their data governance in order to understand what personal data they hold and why. Only by recording this information can an organisation make sure that they hold accurate information and do not keep personal data about their customers for longer than is necessary. One option which organisations might consider, if they are keeping historical data beyond the period required for normal business purposes is to make the data truly anonymous. This will mean the historical data no longer falls within the definition of personal information in the GDPR and therefore the GDPR will no longer apply. Whether or not this is feasible will again depend on the objectives of the profiling.

Under the GDPR principle of accountability, organisations have a number of procedures they must stick to, to ensure that profiling is relevant, accurate, and personal data not kept longer than necessary. Procedures include hiring a data protection officer, carrying out data privacy impact assessments, implementing privacy-by-design and privacy-by-default.

4 (a). Have you considered what your legal basis would be for carrying out profiling on personal data? How would you demonstrate, for example, that profiling is necessary to achieve a particular business objective?

We will be advising our members that in our opinion five out of the six legal bases in the GDPR could be used for profiling for direct marketing purposes, depending on the purposes of the profiling and compliance with all the other legal requirements of the GDPR. It is difficult to see how the legal ground of protecting the vital interests of an individual could apply in a direct marketing context.

Consent is an obvious possibility, but as the draft ICO GDPR Consent Guidance points out there are a number of hurdles to overcome if the consent ground is to be correctly used.

Profiling may be necessary for the performance of a contract. For example, if an individual is taking out a mortgage or a credit card, then credit scoring is necessary for the lender to determine whether to give that individual a mortgage or a credit card.

In the financial services world, profiling may be necessary to ensure compliance with money laundering rules which the financial services organisation is legally obliged to ensure compliance with.

Profiling carried out to prevent fraud such as an e-commerce site verifying that the address goods are being delivered to is the same as the address the purchaser's credit cards are registered at could be said to be carried out in the public interest as it helps to prevent fraudulent transactions.

The above example could also fall within ground of being necessary for the purposes of legitimate interests pursued by the e-commerce website.

In the case of using the legitimate interest ground the organisation would have to ensure that it complied with the Article 29 Working Party's Opinion on Legitimate Interests Opinion 06/14 and documented its logic and reasoning in the decisions it came to.

4 (b). How do you mitigate the risk of identifying special category personal data from your profiling activities? How will you ensure that any 'new' special category data is processed lawfully in line with the GDPR requirements?

We will be advising our members to mitigate the risk of identifying special category personal data from their profiling activities by carrying out a DPIA. Any such DPIA should also ensure that any 'new special category data is processed lawfully in line with the GDPR requirements.

In 99% of cases digital and data-driven marketing does not use sensitive personal data as it is not necessary.

5. How do you propose handling the requirement to provide relevant and timely fair processing information, including "meaningful" information on the logic involved in profiling and automated decision-making? What, if any, challenges do you foresee?

The DMA will be advising members that paras 140 – 148 of the ICO Big Data paper and the ICO Privacy Notices Code of Practice provide a good starting point.

It depends on how much information needs to be given in order for a message to be considered "meaningful". Consumers are not experts in marketing processes, so any explanation of profiling must be written in language that can be easily understood by the target audience.

A clear challenge here is deciding what information about profiling an organisation should include in its explanation to customers. The level of detail will also be an issue as organisations will not want to confuse customers. The GDPR demands that consumers are informed. Detailed technical information will not inform consumers but confuse them.

Organisations should use a 'layered' approach, as recommended by the Information Commissioner's Office (ICO). In the Privacy Notices' Code of Practice, the ICO's guidance reads: "*provide the key privacy information immediately and have more detailed information available elsewhere for those that want it. This is used where there is not enough space to provide more detail or if you need to explain a particularly complicated information system to people.*" This approach gives consumers choice and ensures they have access to the level of detail appropriate for them.

For example, a first privacy notice could be shown when collecting someone's personal data, explaining that relevant marketing requires the use of profiling. A brief explanation of how marketers target segments with relevant offers could follow. Detailed technical information would be available in the full privacy policy.

In the main this is a problem for creatives and copywriters. They will need to decide the best way to explain profiling to their customers and make sure people understand how their personal data will be used for profiling and what the consequences will be. The DMA plans to guide as much as possible with the creation a toolkit of templates for its members to use to ensure customer messages are clear and easy to understand.

6. If someone objects to profiling, what factors do you consider would constitute "compelling legitimate grounds" for the profiling to override the "interests rights and freedoms" of the individual?

Profiling, ranges in scope up from the least privacy intrusive. For example, a loyalty card for a retailer that sends you offer or vouchers based on your purchase history will reflect what you are likely to be interested in. The most privacy intrusive includes the example of certain charities, fined by the ICO for carrying out wealth screening of their donors without their knowledge.

In order for digital and data-driven marketing to take place there has to be a degree of profiling so an organisation can communicate with a customer and understand their interests. If this profiling does not take place then in most instances the tailored part of the marketing is lost. If a customer objects to profiling then what they may actually be objecting to is the marketing in the first place. Consumers are not yet literate in the GDPR and the different rights it gives to them as EU citizens.

Instances of profiling that infringe upon the 'rights and freedoms' of individuals are those where a consumer does not know if profiling is occurring, such in the wealth screening case, where consumers were not told their personal data would be used in this way and nor was it in the charities' privacy policies.

7 (a). Do you consider that "solely" in Article 22(1) excludes any human involvement whatsoever, or only actions by a human that influence or affect the outcome? What mechanisms do you have for human involvement and at what stage of the process?

The DMA interprets "solely" in this context as meaning excluding any human involvement whatsoever. Hence individuals have the right in Article 22 (3) to obtain human intervention in automated individual decision making.

The wording in Article 22 (1) is very similar to the wording in Article 15 (1) of the 1995 European Data Protection Directive - "which is based solely on automated processing of data." and this has always been interpreted to exclude any human involvement whatsoever.

Not all marketing profiling is automatic and could be carried out manually. For example, breaking down a database into segments of interest could be done manually. However, in this context "solely" does exclude any human involvement.

7 (b). What is your understanding of a "legal" or "significant" effect? What measures can you put in place to help assess the level of impact?

The DMA agrees with the ICO's initial thoughts on what is considered a "legal" effect. However, "significant" effect is harder to define. The feedback form says that this could mean some kind of "unfavourable outcome" for the consumer. The DMA believes that an unfavourable outcome would need to be rather severe for it to be included under significant effects. For example, if consumer A receives a different marketing offer based on their customer profile to consumer B, this is not a significant effect. The two receive different offers justifiably based on their customer profile. Furthermore, not receiving a marketing is not unfair for consumer B and therefore not a significant effect.

8. What mechanisms or measures do you think would meet GDPR requirements to test the effectiveness and fairness of the systems you use in automated decision making or profiling?

The DMA will be advising its members to carry out a DPIA to test the fairness of the systems they use in automated decision making or profiling. The organisation would be able to balance its right to carry out automated decision making or profiling as against the impact such automated decision making or profiling would have on individual's data protection rights through a DPIA. If the organisation discovered through such an assessment that such automated decision making or profiling would have an large impact on individual's rights then it might have to put in place additional controls or checks and balances on the automated decision making and profiling

The DMA is not aware that there is any requirement under the GDPR for organisations to test the effectiveness of the systems they use in automated decision making or profiling.

9. Do you foresee any difficulties in implementing the GDPR requirement to carry out a DPIA, when profiling?

Organisations are already moving towards using DPIAs for their marketing. Profiling would be considered a part of the process. Profiling could have an impact on the privacy of individuals and so it would follow that profiling is considered a standard part of DPIA when analysing a potential marketing campaign.

10. Will your organisation be affected by the GDPR provisions on profiling involving children's personal data? If so, how?

The DMA does not believe that the provisions for profiling and children will have a significant impact upon the marketing community. However, the DMA supports the age of digital consent for children remaining at 13. The Regulation allows for it to be varied between 13 and 16. 13 years of age has become the default common UK standard for organisations to apply. The DMA recognises that specific measures are required to protect children, such as those regarding profiling or child-friendly privacy notices.

Conclusion

The ICO should seize the opportunity to lead the profiling debate within the Article 29 Working Party. The DMA does not believe that profiling for digital and direct marketing purposes has a legal or significant effect and we would ask that the ICO support this.

Restricting marketers' profiling activity will result in companies understanding less about their customers. Companies that understand less about their customers will be unable to market effectively to them. The end result is a return to 'scatter gun' marketing of a by-gone age, in essence mass, untargeted marketing. Customers could lose out on the benefits of receiving offers and vouchers for the products they like or product suggestions for things they're likely to enjoy.

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[2]. In 2013 businesses spent £16bn on advertising and marketing, which generated £100bn in contributions to the UK economy[3].

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 the Direct Marketing Association (DMA): 'Customer Engagement: Talking the Consumer's Language: Retail' (2016) - https://dma.org.uk/uploads/misc/575ad63572ed4-talking-the-consumer's-language---retail_575ad63572e3b.pdf

2. 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/

3. 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