DCMS call for comment: Estonian Presidency Council Text ePrivacy Regulation

Introduction

The DMA thanks DCMS for inviting us to comment on the Estonian text. The potential impact on marketing and advertising industry from the proposed ePrivacy Regulation is great. Therefore, it is important that the text is aligned with GDPR and doesn't unnecessarily restrict electronic marketing. Particularly concerning for DMA members is that legitimate interest is not recognised in the text as a legal basis for processing personal data and that B2B marketers would be required to obtain opt-in prior consent.

The impact on consumers will be great too, namely:

1) Restricting access to online content
2) Increased volume of communications from organisations
3) Confusion around their rights resulting from contradictory pieces of legislation.

The DMA aims 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 below:

Impact on customers and the economy

The DMA believes that ePrivacy Regulation proposed by the Commission will have a detrimental effect on the customer experience and the UK economy. The Estonian text makes some important improvements to the text but does not fully alleviate these problems.

The proposed changes in the Estonian text seem intended to maintain the opt-out for B2B corporate marketing, an aim we support but which requires greater clarity.

Only allowing organisations to communicate with corporates using consent as a legal ground is anti-competitive. It will restrict new market entrants by making it harder for SMEs to contact corporate companies. Large companies already have big databases that they can rely on.

From a customer experience point of view, the requirement for organisations to remind customers of their right to opt-out at either 6 or 12 month intervals seems unnecessarily prescriptive and will lead to customers being overwhelmed with communications from organisations. Organisations are already obliged to remind customers that they can opt-out. For example, in email marketing an unsubscribe link will always be included at the bottom of the email. This is a requirement of the GDPR too.

Consistency with GDPR

The General Data Protection Regulation (GDPR) is the over-arching framework that deals with the processing of personal data. It is therefore vital that the ePrivacy Regulation does not contradict it. As per the objectives of the reform to ensure consistency with the GDPR, the provisions in the ePrivacy Regulation should be in areas where there is as little overlap as possible to avoid creating confusion between the two pieces of legislation. The Estonian draft makes progress in this area but the DMA still has concerns.

It is not only organisations that this applies to. Consumers may also be confused by the extra layer of legislation. Dealing with one set of rules and rights is easier for consumers to understand. Wherever possible the GDPR should take precedence and the case for new rules above GDPR must be concise and with clear objectives.

There will also be a period of time when organisations are subject to the new GDPR and the old Privacy and Electronic Communications Regulations **(**PECR). This could potentially create confusion for businesses and their customers.

The ePrivacy Regulation must have the same definitions of key terms, have the same legal grounds for processing personal data as the GDPR and only contain extra rules for electronic communications services where these rules are essential.

Legal bases for processing

The DMA supports moving Article 9 of the Regulation to Article 4a. However, it still introduces extra rules not contained within the GDPR definition of consent, which the DMA does not support. For example, the requirement for organisations to remind data subjects that they can object to their data being processed at least every 6 months. The Council text suggests increasing this to 12 months. However, the DMA believes that this measure should be scrapped altogether because of the impact it will have on consumers. Consumers will receive more communications from organisations when it is not necessary. Organisations do already remind consumers in communications that they can opt-out from future marketing and will be required to do so by the GDPR.

Furthermore, the GDPR will mean that all organisations have to be transparent with data subjects, consent must be specific, unbundled from other aspects and they must offer a clear right to opt-out of all future communications. This is a robust consent standard and one that does not need to be bolstered by the ePrivacy Regulation.

Legitimate interest should be included within the ePrivacy Regulation. The DMA supports the proposed DCMS position of a risk-based approach to the use of legitimate interest. If sensitive personal data is not being processed then legitimate interest should be a valid legal ground in the Regulation.

Limiting the legal ground for processing to consent only is restrictive and goes against the spirit of the GDPR, which embraces a risk-based approach. In some instances consent will be the appropriate method but, depending on the context, legitimate interest may be suitable. The ePrivacy proposal does not take into consideration the context in which the processing takes place, nor the impact on the individual's privacy. This is true for the Commission and Estonian Council text.

The DMA is concerned by the fact that the presidency proposal does not address the issue of freely given consent. Indeed, the ePrivacy Regulation requires consent in Article 8 for cookies and any other form of tracking. DMA members have expressed serious concerns that if consent under the GDPR must remain freely given, this might lead to situation where websites have to provide their content to individuals who have refused to consent, thus without receiving any revenues derived from targeted advertising. This would reduce competition in media markets and potentially undermine freedom of the press as a result.

The best solution to this problem is for the ePrivacy Regulation to reference Article 6.1 in the GDPR, which lays out the 6 legal grounds for the processing of personal data. Only by incorporating this section of the GDPR can the ePrivacy Regulation align itself with the GDPR.

Legitimate interest assessment

Before using the legitimate interest legal ground an organisation should carry out a legitimate interest assessment (LIA).The assessment process is designed to ensure that an organisation is justified in processing personal data under the legitimate interest legal ground and to identify possible mitigation processes for data subjects, in order to minimise any possible risks to privacy. The DMA and ISBA assisted the Data Protection Network (DPN) in creating the guidance. The ICO suggested amendments and the DPN mostly accepted.

Link to guidance: https://www.dpnetwork.org.uk/dpn-legitimate-interests-guidance/

Free Press

The Presidency proposal does not address the issue of a free and independent press. The requirement for individual consent for cookies will have a disastrous effect on publishers. Reduced advertising revenues for them would lead to less news articles being published or an increase in paid for content.

This would restrict consumers' access to quality journalism. A very different world from today, where consumers have instant and free access to plethora of different news websites and publications.

Business-to-business marketing

Article 16.1 in the Regulation will mean that business-to-business (B2B) marketing will require a prior opt-in consent. Currently, organisations are able to market to corporate subscribers on an opt-out basis, which would be covered by the legitimate interest legal ground in the GDPR. It is unclear how the proposed amendments in the Estonian text change the outcome but it is a move in the right direction.

Restricting organisations ability to market to corporate companies will have detrimental impact on the economy. Organisations will find it harder to market their products and services to corporate companies. Especially so in the case of SMEs, which do not have large databases and rely on being able to easily reach out to potential new customers. B2B marketers aim to market goods and services that may be of interest to a company. Their offerings are genuinely useful for corporate employees and are a vital source of knowledge.

Many corporate employees have purchasing responsibilities, including responsibilities to compare offers to ensure the organisation gets the best value product or service. Unsolicited marketing plays an important role for the daily running of an organisation, while having little impact on individual's privacy. Consequently, it is justified to benefit from a lighter regime which ensures sufficient flexibility for B2B marketing communications.

The proposed changes are also anti-competitive, as stated in our introduction, particularly for SMEs. Securing consent to communicate with B2B corporate employees will add an extra hurdle for SMEs with limited resources, and instead, will empower large organisations that already have large quantities of consented data. New entrants to the market will be reduced because it will be harder to gain new customers.

The DMA believes that the UK should be free to maintain its current approach to B2B marketing. B2B marketing to corporate subscribers should be permitted under

the legitimate interest legal basis in the GDPR and not require consent. The UK should be free to maintain its current approach. Member states could be left to decide their own approach to B2B marketing, in a similar way to the approach to telemarketing in the Regulation.

Definition of direct marketing

The Estonian text makes an amendment to Article 16 by referring to direct marketing communications as 'presented' rather than 'sent'. However, the DMA believes that the current wording 'sent' is a clearer way of describing marketing across electronic channels. This amendment should be dropped and the Commission wording maintained.

The use of the word presented may create a very broad definition of direct marketing which may include all type of advertising. This broad definition creates several risks. Regarding online behavioural advertising (OBA), it creates the risk of OBA being subject to both a consent requirement in article 8 and article 16.

Additionally, the GDPR, in article 21.2 (right to object) provides the right to individuals to object to the processing of personal data for direct marketing purposes. If the definition of direct marketing becomes too broad as to include any advertising presented to individuals, this may give the false impression that individuals can object to any advertising.

Consequently, the DMA strongly advises to keep the word 'sent' and to not use the word 'presented'.

Privacy settings

Article 10 (2a) introduces a new clause to allow end-users an easy way to change their privacy settings and the DMA supports this move.

Cookies

Problems remain regarding Article 8. The proposed Article 8.1 of the ePrivacy Regulation aims to protect users' information stored in and related to end users' terminal equipment. While being technologically neutral, the proposal's main intent is to legislate the use of cookies and other technologies enabling online tracking.

The GDPR classifies cookies as personal data. In recitals of the GDPR online identifiers are considered personal data. Cookies are an online identifier. The GDPR applies without doubt to the collection of information from end-users terminal equipment, including from software and hardware. Consequently, the collection of personal information from an end-user's terminal equipment is submitted to the rules laid down by the GDPR for the processing of personal data, such as collection, storage and retrieval.

The Estonian amendments do not make any changes to the fact that cookies will be processed via consent. Legitimate interest should be recognised in the text as an equally valid legal ground that can be applied depending on the context and subject to the requirements of an LIA.

Leaving it up to internet browsing organisations to design consent functionality for cookies is a blunt instrument and one that could seriously weaken online revenues by restricting marketing and advertising. In many cases this could mean websites charging consumers for content.

There are no examples of how internet browsing companies would facilitate consent for individual cookies and the ePrivacy Regulation does not provide solutions either. When the cookie rules were last revised the ICO concluded that the technology was not adequate to facilitate individual cookie consent.

The DMA supports the proposed risk-based approach to cookies as outlined in the email to stakeholders.

Machine-to-machine communications

Regardless of whether it is machine-to-machine communications, if personal data is being processed then the same rules should apply. However, if the personal data

was anonymised, removing personal identifiers, then this should take it outside the scope of the Regulation. Thereby, reflecting the position taken in the GDPR.

Telemarketing

The DMA would like to take this opportunity to make the case for telemarketing remaining an opt-out marketing channel in the UK. Consumers are able to sign up to the Telephone Preference Service (TPS) to register the fact they do not want to receive live marketing calls. Organisations must screen their data against the TPS file to make sure TPS registered consumers do not receive calls.

The ePrivacy Regulation leaves it up to member states to decide whether an opt-in or opt-out regime is more appropriate. The UK Government should maintain the current approach. A move to opt-in will have no effect on the rogue companies responsible for the bulk of nuisance calls that frustrate consumers. The rogues would continue to ignore the rules, as they do currently. Targeted measures against rogue companies will achieve far better results in terms of reducing the damage caused by nuisance calls.

There is little legislation can do to prevent rogue companies breaking the law. However, technology is increasingly providing ways to crack down on their activities. For example, the new TPS Protect app allows users to block nuisance calls numbers and report them to the service. The TPS can then alert the ICO to these problem numbers. The network providers are also creating their own solutions such as BT's new call blocking service for customers. BT now also proactively blocks nuisance call numbers on their network.

Conclusion

The DMA thanks DCMS for inviting us to comment on the Estonian text.

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

Information about the DMA (UK)

The Direct Marketing Association (DMA) is Europe's largest trade association in the marketing and communications sector, with approximately 1,000 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, technology companies etc.

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 for further information about us.

References

1. 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/

2. 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

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