

Data: A New Direction – Roundtable Summary

October 2021

Responsible Marketing



Department
for Culture
Media & Sport

DM
Data &
Marketing
Association **A**

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/ Summary of Key Findings

On 7 October 2021 the DMA, in conjunction with DCMS, convened a round table of industry members to discuss the government's proposed update to data protection legislation.

The topics covered in the roundtable are those which will have a direct impact on building successful customer relationships, both in terms of greater certainty around customer acquisition or retention and safeguards for customers to ensure trust is earned and maintained over time.

In exploring these areas our questions primarily focussed on proposals in Chapter 2 but we also addressed critical issues in Chapter 1 around Legitimate Interests and Recitals (particularly recital 47).

Crucially, we explored the importance of data adequacy to our members and whether the proposals under consideration posed a risk to the recent adequacy decision.

The discussion guide, agenda and participants for the round table are in Appendix 1.

1. Availability and Use of Legitimate Interests

(Minute 00:00:00 to 00:34:47 of the video: [consultation pages 21 – 23](#))

DMA Members expressed a strong consensus in support of the consultation hypothesis that “uncertainty may have caused an over-reliance on consent” and agreed that many companies had shied away from using legitimate interests where appropriate because “using legitimate interests for lawful processing is more complicated and risky than other grounds”. Members shared examples where uncertainty has caused activity to be cancelled thus reducing revenue opportunities and innovation.

Members commented that the need for every business to conduct an LIA balancing test for processing that was standard across every company and where the risk of harm to customers was minimal seems like a waste of resources.

Members expressed the view that in some circumstances asking customers for consent (which must be specific and informed) could be a burden on consumers requiring the average person to review and understand fairly complex activity without specific understanding or knowledge.

The alternative in appropriate circumstances of using legitimate interests means that the controller takes greater responsibility for the way data is used and ensures that the processing has reasoning documented behind it.

Using their legal right to opt-out maintains consumer control over what communication they receive, whether that be specifically using an email unsubscribe, notifying the company, or registering with an industry level opt-out file such as the Telephone Preference Service.

One of the largest areas of concern for both consumers and business is the PECR requirements for consent for cookies. There is a wide gulf between first party cookies used for legitimate analysis, customer service and operational improvements which could use legitimate interests versus third party cookies used for online advertising which may still require consent.

Overall, the Members strongly supported the proposal to create a limited but exhaustive list defining where legitimate interests could be used and believed that in accordance Recital 47 that some direct marketing should be included.

Members agreed that the language along the lines of the Singapore business improvement exception would be appropriate in the UK.

- To improve, enhance or develop goods or services provided by the organisation, or methods or processes for the operations of the organisation.
- To learn about and understand the behaviour and preferences of customers in relation to the goods services provided by the organisation or to identify goods or services provided by the organisation that may be suitable for the organisation's customers other than individual customers.

It was noted that many companies would still seek consent as a matter of business preference and that many circumstances would continue to require consent such as protected characteristics or as specified in PECR. This would be easier for business to implement if data protection legislation was one text rather than UK GDPR, PECR and Data Protection Act 2018.

Members were positive towards the idea of moving some recitals to main text including Recital 47.

2. Automated Decision Making and Data Rights

(minute 00:34:47 to 00:43:51 of the video; pages 37 to 41 of the consultation)

Overall Members did not support removing Article 22 completely. They felt it was extremely important to get greater clarity on what were “legal effects or similarly significant effects”.

Members distinguished clearly between understanding customer preferences in order to offer different travel destinations or different types of vegetable to people which was not a legal or significant effect from offering different people different loan amounts and AI driven actions such as loan approvals which were more likely be significant.

3. Reducing Burdens on Business and Delivering Better Outcomes

(minutes 00:43:51 to 01:09:33 of the video; pages 53 to 72 of the consultation)

Members did not support the government proposals to replace the current accountability framework with a new Privacy Management Programme. Members believed strongly that the overall effect of the current regime and the new proposals was essentially similar with members describing it as “replacing apples with apples”.

The change would therefore create unnecessary confusion and uncertainty for little benefit.

Members believed strongly that DPIAs and Records of Processing Activity (RoPA) were essential tools that improved business outcomes. They did feel that flexibility around what these looked like would be useful.

Members could see that the change to the need for independence of DPOs could be useful for SME but broadly supported maintaining DPOs.

Members did not see the point of removing the need for prior consultation with the ICO prior to undertaking risky activity, but nor did they really see the point of maintaining it.

The view was that if the appropriate balancing test were implemented such as Privacy by Design and DPIA then mitigation would take place to reduce the risk, or the activity would be shelved. In short, they did not see that it was an onerous burden as they were unlikely to use it.

Regarding changing the threshold for breach reporting Members did feel that greater clarity would be useful, especially for SME. They believed that larger organisations that deal with the ICO regularly are usually only reporting when a significant threshold is achieved.

Members did not support implementing a fee for subject access requests. They believed that if a company has implemented an appropriate privacy by design regime then responding to SARs should be considered part of the customer experience.

However, they did note that Employee subject access requests could be weaponised against organisations and further clarity on thresholds in this regard would be useful

4. The Importance of Data Adequacy with the European Union

The Members were unanimous that data adequacy was critical to their business both from the perspective of data transfers and market access.

It was believed that if adequacy was lost larger organisations would most likely be able to work around it with Standard Contract Clauses and Binding Corporate Rules but that SMEs would be greatly disadvantaged.

Some of the government proposals such as removal of Data Protection Impact Assessments from the accountability framework could be triggers for the EU. Likewise removing Article 22 completely would likely be a trigger as would any significant reduction of ICO independence in Chapter 5.

It was not felt that the proposals relate to legitimate interests should pose a risk to adequacy given a long history of support to legitimate interests in EU legal history including Court of Justice rulings.

/ Appendix 1: Roundtable Discussion Guide, Agenda and Participants

Chairing:

Chris Combemale, CEO, DMA

DMA Members Participating:

Paul Cresswell, Data Protection and Privacy Lead, Experian

Mark Davies, Managing Director, Whistl (Doordrop Media) Ltd.

Alex Hazell, Head of EMEA Legal, Acxiom

Gilbert Hill, Privacy Technologist & CEO, FinFlo

Nuala Kennedy, Chief Data Officer, People's Postcode Lottery

Nick Johnson, Partner, Osborne Clarke

Di Mayze, Global Head of Data and AI, WPP

Simon Rice, Data Protection Officer, Merkle

Phil Ricketts, Wholesale Commercial Director, Royal Mail MarketReach

Tim Roe, Compliance Director, Redeye

Amerdeep Somal, Chief Commissioner Chair, DMC

Amy Travis, Senior Director for Privacy, Asda

Natasha Warner, Head of Privacy, Direct Line

DCMS team attending:

Andriana Doncic

Robin Edwards

Bilal Toure

Emily Rayner

Ariful Khan

10:30-10:40

Welcome and Introductions

10:40 – 11:00

Availability and Use of Legitimate Interests

In section 1.4 (page 21) the government proposes amendments to the legislation to provide greater clarity around when Legitimate Interest might be an appropriate lawful ground for data processing. The proposals are designed to provide greater clarity to companies and lawyers that may have lacked certainty at times leading to overuse of consent.

60. The government therefore proposes to create a limited, exhaustive list of legitimate interests for which organisations can use personal data without applying the balancing test in order to give them more confidence to process personal data without unnecessary recourse to consent.

Reporting of criminal acts or safeguarding concerns to appropriate authorities

- a. *Delivering statutory public communications and public health and safety messages by non-public bodies*
- b. *Monitoring, detecting or correcting bias in relation to developing AI systems (see section 1.5 for further details)*
- c. *Using audience measurement cookies or similar technologies to improve web pages that are frequently visited by service users*
- d. *Improving or reviewing an organisation's system or network security*
- e. *Improving the safety of a product or service that the organisation provides or delivers*
- f. *De-identifying personal data through pseudonymisation or anonymisation to improve data security*
- g. *Using personal data for internal research and development purposes, or business innovation purposes aimed at improving services for customers 23*
- h. *Managing or maintaining a database to ensure that records of individuals are accurate and up to date, and to avoid unnecessary duplication 62.*

1. Have you experienced barriers or difficulties within your organisations to using Legitimate Interest as a legal basis under the current legislation? If so, what were these and where did they come from within the business?

2. What effect would these new proposals have on your customer acquisition and retention activities? Do you believe that these changes would alter your customers' level of data protection?

3. Do you believe your customers would be impacted by a change in the use of Legitimate Interest (either positively or negatively)?

4. Recital 47 specifies that Direct Marketing may be a Legitimate Interest. Should this be one of the Recitals that is moved to the main text and should Direct Marketing as a result be included in the limited, exhaustive list of Legitimate Interests?

(47) The legitimate interests of a controller, including those of a controller to which the personal data may be disclosed, or of a third party, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller.

The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.

5. Does the proposed list cover the most important data processes for our sector or alternatively should DMA advocate for greater clarity. , For example, in Singapore they have a business improvement clause that is very specific to customer relationships:

... an organisation may rely on the business improvement exception to use personal data without consent for the following business improvement purposes:

- To improve, enhance or develop goods or services provided by the organisation, or methods or processes for the operations of the organisation.*
- To learn about and understand the behaviour and preferences of customers in relation to the goods services provided by the organisation or to identify goods or services provided by the organisation that may be suitable for the organisation's customers other than individual customers.*

The business improvement exception can be used only if these purposes cannot reasonably be achieved without the use of personal data in individual identifiable form and the use of the personal data by the organisation does not have any adverse effect on the individual.

11:00 - 11:15

Automated Decision-Making and Data Rights

Automated decision-making, driven by Artificial Intelligence, is increasingly used to select marketing audiences, product offers, advertising placements and other decisions necessary to ensure the right product is offered to the right customer at the right time.

Article 22 is intended to protect individuals in the context of 'solely automated' decision-making that 'produces legal effects concerning him or her or similarly significantly affects him or her'. However, limited case law and practical examples make it challenging to interpret. As such, the government is seeking further evidence on the potential need for legislative reform rather than making proposals at this stage.

99. *It is critical that UK GDPR's provisions for automated decision-making and profiling work for organisations and for individuals.*

It is therefore important to examine whether Article 22 and its provisions are keeping pace with the likely evolution of a data-driven economy and society, and whether it provides the necessary protection.

101. *The Taskforce on Innovation, Growth and Regulatory Reform has recommended that Article 22 of UK GDPR should be removed.*

The report recommends that UK law should instead permit the use of solely automated AI systems on the basis of legitimate interests or public interests. Such a change would remove the right not to be subject to a decision resulting from 'solely automated' processing if that decision has legal or 'similarly significant' effects on data subjects.

This would mean that solely automated decision-making in relation to personal data would be permitted, subject to it meeting other requirements of the data protection legislation, including the conditions of lawful processing in Article 6(1) of the UK GDPR (and, Articles 9 and 10, as supplemented by Schedule 1 to the Data Protection Act 2018) in relation to sensitive personal data, where relevant.

The government is considering this proposal and is seeking views from stakeholders

- 1. Do you believe Article 22 should remain as it is currently drafted?**
- 2. What amendments would you propose to ensure clarity around automated decision-making (specifically within marketing contexts), while also protecting the customer from “legal effects”?**
- 3. How could the proposals ensure transparency and accountability for fair processing in relation to marketing decisions and profiling? Should they do this explicitly?**

11:15 – 11:45

Reducing Burdens on Business and Delivering Better Outcomes

These proposals aim to reduce burdens on organisations in a number of key areas, while continuing to protect consumers.

Furthermore, the government's aim for a future data protection regime that will provide the flexibility to allow organisations to deliver better outcomes for customers in more efficient and innovative ways.

1. What impact would the proposals to create a Privacy Management Programme as an alternative to current Accountability requirements have on your business?

142. A key driver of unnecessary burdens on organisations is the accountability framework set out in the UK GDPR. This framework is made up of the accountability principle (Article 5), as well as a number of specific requirements designed to help organisations demonstrate compliance with the other principles in the UK GDPR.

145. To address this, the government is proposing to implement a more flexible and risk-based accountability framework which is based on privacy management programmes. Under this framework, organisations would be required to implement a privacy management programme tailored to their processing activities and ensure data privacy management is embraced holistically rather than just as a 'box-ticking' exercise.

2. What effect would removing legal requirements for DPOs, DPIAs and ROPAs have on your business? Would the proposed alternative approach increase or decrease Accountability?

163. The government therefore proposes to remove the existing requirements to designate a data protection officer. The new proposed requirement to designate a suitable individual, or individuals, to be responsible for the privacy management programme and for overseeing the organisation's data protection compliance (see paragraph 156a(l)) would place different obligations on organisations, potentially driving more effective data protection outcomes.

167. The government therefore proposes to remove the requirement for organisations to undertake a data protection impact assessment, so that organisations may adopt different approaches to identify and minimise data protection risks that better reflect their specific circumstances.

177. The government therefore proposes to remove record keeping requirements under Article 30. The record keeping requirement under Article 30 may help organisations to improve their data governance, comply with other aspects of the UK GDPR and assist with regulatory enforcement. There are risks that removing the requirements under Article 30 could hinder effective enforcement and offer less regulatory protection to data subjects. However the government considers the risks to be minimal.

3. What are your thoughts on the proposal to remove the requirement for prior consultation with ICO?

173. Removing this requirement may decrease the frequency of prior consultation with the ICO, however, given this is already infrequently used, the government considers the benefits may outweigh the risks by encouraging more proactive, open and collaborative dialogue between organisations and the ICO.

4. What effect would the proposal to change the threshold for breach reporting have on your organisation? Does it increase the potential for harms or risks to your customers?

180. ...the government is considering whether to change the threshold for reporting a data breach to the ICO so that organisations must report a breach unless the risk to individuals is not material. The government would encourage the ICO to produce guidance and examples of what constitutes a 'non material' risk, as well as to produce examples of what is and what is not reportable, in order to assist organisations.

5. The government is proposing a fee regime to Subject Access Requests. Do you believe this would prove to be a barrier to customers making these requests? Have you experienced more speculative and vexatious requests under the current system? Do you believe a change would reduce these?

186. The government and the ICO are aware that some organisations have experienced a number of issues with the ways that subject access requests are submitted and handled. These issues fall into two broad categories:

- a. Organisations' capacity to process requests*
- b. Threshold for responding to a request*

188. To address the issues outlined above, the government is considering whether to introduce a fee regime (similar to that in the Freedom of Information Act 2000, which provides for access to information held by public bodies) for access to personal data held by all data controllers (not just public bodies).

11:45 – 11:55

The Impact on Adequacy Agreement with the EU

1. Is the Adequacy Agreement with the EU important to your organisation? Why is/ isn't this the case?

2. Do you believe any of the areas we have covered, and proposals put forward today would pose a risk to the current Adequacy Agreement?

11.55- 12.00

Closing Comments and Next Steps

/ About the Responsible Marketing Campaign

Working responsibly means putting your customer-first at each and every touchpoint, in each and every interaction.

It is inherent to how the DMA works – and how we encourage the UK’s data and marketing community to work.

That means growing an appreciation of, adhering to and ultimately implementing best practice in marketing approaches, especially in light of the arrival GDPR.

These changes to the governance of data have far-reaching consequences for your business, and are still making waves.

At the DMA we aim to demystify this new regulatory environment so you and your customers can benefit. Access our [GDPR guidance series](#) - developed in accordance with the ICO - to help you on your journey to GDPR compliance.

Our suite of [best practice guides](#) tackles a range of key marketing challenges, and are infused with the real-world knowledge of experts and leaders from around the UK data and marketing industry.

The DMA’s [events calendar](#) is packed with legal update sessions, morning briefings and webinars that harness the expertise of our Public Affairs, Legal and Compliance teams.

Through our world-renowned Institute (IDM) we offer on and offline learning across responsible marketing themes, at individual and corporate levels. And through learning initiatives run by [DMA Talent](#) we ensure the next generation of marketing leaders emerge into the industry fully aware of how to work with a genuine customer-first ethos. Responsible marketing is in everything we do well.

Head to our [campaign hub](#) to learn more, and get involved.

/ About the DMA

The Data & Marketing Association (DMA) comprises the DMA, Institute of Data & Marketing (IDM) and DMA Talent.

We seek to guide and inspire industry leaders; to advance careers; and to nurture the next generation of aspiring marketers.

We champion the way things should be done, through a rich fusion of technology, diverse talent, creativity, insight – underpinned by our customer-focused principles.

We set the standards marketers must meet in order to thrive, representing over 1,000 members drawn from the UK's data and marketing landscape.

By working responsibly, sustainably and creatively, together we will drive the data and marketing industry forward to meet the needs of people today and tomorrow.

www.dma.org.uk