

Tuesday 2 July
@DMA_UK #dmaevents

/ Virtual: Fundraising Forum – The case for Legitimate Interest



/ Welcome

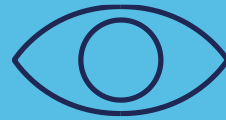
Liz Curry, DPO, Wood Green, The Animals Charity and Data and Information Governance Consultant



/ Proportionality in GDPR and Case Law: Establishing Legal Certainty for Legitimate Interests

Chris Combemale, CEO, DMA





Respect privacy



Be honest
and fair

100101
001011
101001

Be diligent with
data



Take
responsibility

Our code of conduct advocates for a customer centric approach to build trust and deliver marketing effectiveness.



The demise of DPDI

- Report stage scheduled in House of Lords for 10 and 12 June
 - 3 and a half years of consultation
 - DMA chaired Business Advisory group for Secretary of State
 - Key reforms to GDPR, PECR and DPA2018 that were important to marketers
 - Last minute additions at report stage in Commons created controversy
- Election called 22 May
- Opportunity to pass the bill during wash-up failed
 - Main issue benefits fraud provisions that were last minute additions at report stage in Commons
- Other Bills passed during wash-up
 - Digital Markets and Consumer Bill (DMCC)
 - Media Bill
 - Contaminated blood compensation Bill
 - Post Office compensation Bill
 - Leasehold and freehold reform Bill

DMA's 10-point election manifesto

Reforming data protection legislation

1. Maintain high standards of data protection to build trust and confidence in the future of the economy and government services.
2. Provide certainty to legitimate interests as a lawful basis to ensure the right to conduct a business is balanced with the right to privacy
3. Take a principles-based, ethical approach to AI regulation.
4. Give legal certainty to the recitals in GDPR to ensure the legislation is correctly interpreted by the ICO, the courts, lawyers and DPOs
5. Maintain adequacy with the EU to ensure free flow of trade.
6. Promote scientific research in academic and commercial settings to promote innovation and growth.
7. Enhance the role of the Department of Science innovation and technology, making it faster to respond to opportunities and risks.
8. Reform the organisation structure and governance of the ICO.

Skills

9. Develop skills in data, AI and digital marketing that are essential to growth and productivity.
10. Transfer responsibility for in career re-skilling, lifelong learning, and apprenticeships from the DfE to the Department for Business and Trade.

The new government

- Election 4 July
- King's Speech 17 July
- An AI and Data Protection Bill??
- A Data for Growth Bill??

/ **Key opportunities for marketers**

- Legal certainty for GDPR recitals
- Definition of Direct Marketing
- Lawful basis: greater certainty for Legitimate Interests
- Soft opt-in for email
- Cookies
- Market research provisions
- Transparency in publicly available data sources
- ICO Objectives and organisation
- Industry Codes of Conduct in PECR
- EU Adequacy

Labour Policy Forum on Data Protection

- Ensure our world-class researchers and businesses have the data and computing infrastructure they need to compete internationally
- Harness data for the public good and introduce robust regulation that opens up data while enshrining consumer rights
- Maintain Britain's data adequacy status meaning our data protection rules are deemed equivalent to those in the EU
- Make it easier for public services to adopt innovative technologies by removing barriers to data-sharing and smart procurement.
- Use new capabilities in data analysis and AI to deliver better public services and improve people's quality of life, and ensure society is fairly rewarded for the data it generates, built on frameworks and institutions that build public trust and uphold the privacy and security rights of UK citizens, including in the workplace
- Ensure we have cyber resilience and security against rogue states and other hostile actors
- Harness technology for public good, ensuring the UK is the best place in the world for safe and responsible technology, building the world's most competent regulatory environment for AI and automation and supporting a thriving and effective AI and automation assurance ecosystem
- Ensure that the regulatory environment appropriately and proportionally mitigates the potential harms that AI could cause by taking a principles-based approach to tech and AI
- Explore whether the companies developing the underlying 'foundation models' that power specific AI tools and applications should also be subject to regulation
- Act quickly to set the standards for safe and responsible AI

DMA Engagement with new government

- Open letter published 2 July 2024
- Media and PR support
- Letters to incoming Ministers
- Letters to DSIT official



STRICTLY EMBARGOED

1 July 2024

Open letter sent to:
The Conservative Party
The Labour Party
Scottish National Party
Liberal Democrats

Leading business groups and industry leaders call for modern forward-looking approach to data

Ahead of the UK's general election on 4 July, we are writing as leading business associations, industry leaders and experts to call the next Government to seize the opportunity to modernise the UK's data protection framework.

A progressive and innovation-friendly regulatory environment that maintains strong privacy protection standards while delivering digital trust and legal certainty, will encourage economic growth, more innovative and effective public services, the easier use of data for research and public good, and greater flexibility in a more complex global environment for data transfers. This will in turn support the UK's ambition to achieve global leadership in trusted and responsible data-driven innovation and artificial intelligence.

This is why the plans to reform the UK's data regulation framework, developed over a period of three years, and in consultation with almost 3,000 stakeholders (including the undersigned organisations who contributed to the policy development through the Government's Business Advisory Group), have garnered wide support.

The next Government therefore has an opportunity to enact positive reform that strikes the right balance between encouraging innovation for economic and societal growth, while maintaining the high standards of personal data protection needed to build trust in the new digital age, so that the UK retains its adequacy determination with the European Union, which remains of utmost importance to businesses across all sectors.

Building on the momentum to reform the UK's data regulatory framework is an excellent opportunity to demonstrate the government's recognition of the importance of a regulatory environment that supports responsible innovation. This will give businesses the confidence to invest in the UK, positioning the country ahead of other jurisdictions.

/ Proportionality: Recital 4 GDPR

“The processing of personal data should be designed to serve mankind.

The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.

This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, **freedom to conduct a business**, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.

/ Proportionality: Legitimate Interest in DPDI

Article 6.1.f

Processing shall be lawful only if and to the extent that at least one of the following applies

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

DPDI Amendment:

For the purposes of paragraph 1(f), examples of types of processing that may be processing that is necessary for the purposes of a legitimate interest include—

- (a) processing that is necessary for the purposes of **direct marketing**,
- (b) intra-group transmission of personal data (whether relating to clients, employees or other individuals) where that is necessary for internal administrative purposes, and
- (c) processing that is necessary for the purposes of ensuring the security of network and information systems.

/ Proportionality: Recital 47 GDPR

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. **Such legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller** in situations such as where the data subject is a client or in the service of the controller. At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing. Given that it is for the legislator to provide by law for the legal basis for public authorities to process personal data, that legal basis should not apply to the processing by public authorities in the performance of their tasks. The processing of personal data strictly necessary for the purposes of preventing fraud also constitutes a legitimate interest of the data controller concerned. **The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.**

/ Proportionality: Recital 48 GDPR

Controllers that are part of a group of undertakings or institutions affiliated to a central body may have a legitimate interest in transmitting personal data within the group of undertakings for internal administrative purposes, including the processing of clients' or employees' personal data. The general principles for the transfer of personal data, within a group of undertakings, to an undertaking located in a third country remain unaffected.

/ Proportionality: Recital 49

The processing of personal data to the extent strictly necessary and proportionate for the purposes of ensuring network and information security, i.e. the ability of a network or an information system to resist, at a given level of confidence, accidental events or unlawful or malicious actions that compromise the availability, authenticity, integrity and confidentiality of stored or transmitted personal data, and the security of the related services offered by, or accessible via, those networks and systems, by public authorities, by computer emergency response teams (CERTs), computer security incident response teams (CSIRTs), by providers of electronic communications networks and services and by providers of security technologies and services, constitutes a legitimate interest of the data controller concerned. This could, for example, include preventing unauthorised access to electronic communications networks and malicious code distribution and stopping 'denial of service' attacks and damage to computer and electronic communication systems.

/ Proportionality in Case Law: Experian

Upper Tier Tribunal Paragraph 95J

in these areas, where the GDPR is not prescriptive, the answer to what transparency requires will be context specific and **underpinned by considerations of proportionality**. It will be a matter for evaluative judgement, based on all the relevant facts and circumstances, including:

- i. what kind of personal data are being processed? Some personal data are more “sensitive”, such that data subjects are more in need of “protection” during their processing, than others. This, we believe, is the point made in the FTT’s decision at [121] that “what is or is not transparent will be fact-specific and context related. The level of transparency required, for example, when sharing intimate health details will not be the same as people consenting to the processing of, for example, data about their preferred supermarket”. We agree with this;
- ii. what kind of processing is the personal data being subject to and for what purpose?
- iii. the consequences of the processing, including the nature and **degree of harm (or benefit)** to data subjects that may result;
- iv. the degree of connection between the personal data being processed and a particular GDPR right, **including an “absolute” right to object to the processing**, such as that under Article 21(2)-3);
- v. the **costs for the controller** of taking additional steps to ensure the desired outcomes summarised at d. above;

/ Proportionality in case law: Experian

“Turning next to a detailed consideration of the law, we observe that at recital 47, the GDPR recognises that direct marketing may (our emphasis) be regarded as a legitimate interest”.

“With respect to the requirements of transparency, we find that (ICO witness) Mr Hulme’s evidence on this makes little sense. Given how it is defined, what is or is not transparent will be fact-specific and context related. The level of transparency required, for example, **when sharing intimate health details will not be the same as people consenting to the processing of, for example, data about their preferred supermarket**

In addition, in his cross-examination **Mr Hulme accepted that the scenarios set out in his witness statement as to how people would be distressed by the data processing were incorrect** to the extent that he accepted his evidence in his witness statement was “completely wrong, completely misleading and perverse”.

“Mr Hulme accepted also that the report that the Information Commissioner had compiled in respect to data broking, not specifically Experian, failed to present a balanced account of Experian’s processing and **he accepted it did not include any of the benefits of its processing for data subjects in wider society**”

“We accept also that in reaching a decision, the Commissioner and this panel must have regard to the regulatory decisions in **respect of the economy, the environmental impact and positive benefits for the consumers of processing** (which appear from Mr Hulme’s evidence not to have been taken into account in the enforcement notice).”

We are satisfied that the Information Commissioner got the balance wrong in terms of proportionality in exercising her discretion because the Information Commissioner had fundamentally misunderstood the actual outcomes of Experian’s processing

/ DPDI: Definition of Direct Marketing

Amendment to GDPR and PECR to ensure definition of Direct Marketing in DPA2018 is consistent across all UK data protection legislation

“The communication (by whatever means) of advertising or marketing material which is directed to particular individuals”

/ DPDI: The Soft Opt-in for email marketing

Non-commercial organisations will be treated the same as commercial organisations

Non-commercial organisations can send emails and texts to a person without consent if:

- You've collected the individual's information directly
- You're selling or negotiating to sell one of your own products or services
- You're sending marketing to offer your similar goods or services
- You give the customer a chance to opt-out at the time you collect their data and in every subsequent communication

The contact details of the recipient *must have been obtained from the individual in the course of that person expressing an interest or providing support for the objectives of the organisation*

/ DPDI: Cookies

The government's objectives were to reduce the number of cookies consent banners as they have effectively become meaningless.

Clause 79(2)a-d of the DPDI Bill would have extended the circumstances under which cookies or other technologies could be used to store or access information on people's devices without their express consent

- * Statistical purposes for own use
- * Enhance website functionality
- * Security and software updates
- * Emergency assistance

The net effect of these exemptions is that websites who use cookies for first party relationships only and do not take advertising should be exempt from cookie banners, especially B2B websites and pure ecommerce sites

/ DPDI: Codes of Conduct in PECR

Articles 40 and 41 of GDPR establish collaborative regulation on data protection for the first time and delegate authority to industry trade associations and monitoring bodies

“The Commissioner shall encourage the drawing up of codes of conduct intended to contribute to the proper application of this Regulation, taking account of the specific features of the various processing sectors and the specific needs of micro, small and medium-sized enterprises. Associations and other bodies representing categories of controllers or processors may prepare codes of conduct, or amend or extend such codes, for the purpose of specifying the application of this Regulation”

PECR must be amended to enable Industry Codes of Conduct and Monitoring Bodies. A PECR Code of Conduct must be contained in the same document as a GDPR Code of Conduct

DMA is working with ICO on a Code of Conduct for Direct Marketing contingent on amendment to PECR

The Data and Marketing Commission will be appointed the Independent Monitoring Body to investigate and adjudicate complaints against Code Signatories

/ DPDI: New objectives for ICO

The primary objectives of the ICO are to secure an appropriate level of data protection and to promote public trust and confidence in the processing of data

In doing so, the ICO must consider:

- a. the desirability of promoting innovation**
- b. the desirability of promoting competition**
- c. the importance of preventing investigating detecting and prosecuting criminal offences
- d. the need to safeguard the public and national security

Change from corporation sole to a corporate body called Information Commission. Chair and non-executive members appoint and scrutinise CEO and executive members.

Panels of industry experts to review ICO Codes of Practice

/ DMA's LIA template and how to use it

Chanelle Evans, Senior Legal and Compliance Manager, DMA



/ Legitimate Interests Assessment

- Recital 47

“[A legitimate interest] 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.”

“At any rate the existence of a legitimate interest would **need careful assessment** including whether a data subject can reasonably expect **at the time and in the context of the collection** of the personal data that processing for that purpose may take place.”

- A three-part balancing test
 - Purpose
 - Necessity
 - Balancing

/ DMA tools and resources



Legal Advice Helpdesk



Legitimate Interests Assessment (LIA) template



DMA Qualifications

/ Get in touch

If you're a DMA member:



<https://dma.org.uk/articles/legal-helpdesk>



legaladvice@dma.org.uk

/ Closing Comments

Liz Curry, DPO, Wood Green, The Animals Charity and Data and Information Governance Consultant



Level Up Your Digital Marketing Skills

Scan the QR code for more information



Master the art of crafting top-notch, omnichannel campaigns on our **Digital Marketing Strategy Skills Bootcamp**.

100 hours of learning led by a **seasoned marketing professional**, who is joined by **subject matter expert** guest speakers.

You'll learn how to plan campaigns that meet strategic objectives, set budgets, analyse & measure results, and optimise the performance of each digital channel.

On successful completion of the course, you'll be awarded a certificate in Digital Marketing Strategy accredited by the IDM.

Government funded up to **90%**



From only **£296**



The original cost of the course is £2969 before government funding. SMEs with less than 250 employees get 90% funding; Larger organisations get 70%

DMA member benefits summary

Strengthen your team, shape your industry, and put your customers first, by joining Europe's biggest data and marketing association.

Resources

- Exclusive member only content with learning content endorsed by our institute, the IDM
- Access over 250 bite-sized learning modules, available online 24/7.
- Subsidised training programmes
- Enjoy member-only discounts on all training options, including accredited diplomas and masterclasses.
- Legal and compliance support
- Get one-to-one advice from our in-house experts.
- Cutting-edge data insights
- Stay ahead of industry trends, with guidelines, benchmarks, frameworks industry reports, and data from over 1,200 DMA award-nominated campaigns.

Relationships

- **Join a thriving community**
Connect with over 27,000 members, from marketing leaders to next-gen innovators from brands, agencies, and service partner companies.
- **Network with industry experts**
Make valuable connections with professionals, from small businesses to large enterprises.
- **Lead industry changes**
Help shape the future of data and marketing through our councils, committees, and taskforces.
- **Set industry standards**
Contribute to a community that promotes ethical, diverse, and responsible industry standards we can all be proud of.

Representation

- **Put your customer first**
We know you respect your customers' privacy. We'll support and enable you to be diligent with data.
- **Shape data protection laws**
Join us in our work with UK and EU authorities, to protect and advance the data and marketing industry.
- **Build an inclusive industry**
Support our work with organisations like PurpleGoat and Outvertising, to foster diversity and unbiased representation in marketing.

/ Feedback Link

