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# / Virtual: Legal and Policy Update

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# / Welcome

Chris Combemale, CEO, DMA

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# / The Key Objectives of The DUA Bill and Opportunities for the Tech Sector

Neil Ross, Associate Director, Policy, Tech UK

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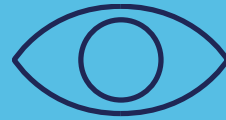
# / Data Protection Reform for Economic Growth, The Data Use and Access Bill

Chris Combemale, CEO, DMA

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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.**

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force of intelligent  
marketing

# / The Data Use and Access Bill

1. Issues DMA campaigned on which have been carried forward from the DPDI Bill
2. Elements from DPDI which have been removed from DUA
3. The campaign for email soft-opt in for non-commercial organisations, particularly charities (Reg 22 PECR)
4. The campaign for transparency for publicly available data sets (Article 14 GDPR)
5. Timeline and next steps

# Reforms that have been carried forward from DPDI

## Issues that are important to DMA members which have been retained

1. The definition of direct marketing in GDPR and PECR
2. Reforms that establish greater certainty for legitimate Interests as a lawful basis, particularly attracting and retaining customers and donors
3. Reforms that clarify how data can be better use to support scientific research and technology development
4. Reforms that reduce the consent requirements for non-intrusive cookies
5. Reforms that update the law to enable beneficial, low risk automated decision-making while maintaining strong safeguards
6. Reforms that create a more flexible international data transfer regime
7. Reforms that modernise the structure of the ICO and ensure it considers the impact on innovation and competition
8. Reforms that establish Codes of Conduct in PECR and may be contained in the same document as a GDPR Code of Conduct.

# / **Direct Marketing and economic growth**

The definition in DPA 2018 has been added to GDPR and PECR

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



# / Legitimate Interests

## 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.

## DUA 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 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: 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 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**

# / Consistency with EUCJ Case Law

The European Court of Justice has consistently ruled:

1. That any interest that is legal may be a legitimate interest
2. That no member state may limit the scope of legitimate interests
3. That the processing must be necessary to pursue the legitimate interest
4. That the processing proportionate and is balanced with any risk to the individual

A particularly powerful opinion was issued on 19 December 2018 by Advocate General Bobek in the Fashion ID case. In paragraphs 122 and 123 Bobek concludes “I would agree that marketing or advertising can, as such, constitute such a legitimate interest.”

In its judgement of 4 October 2024, the CJEU recognized that a wide range of interests can be considered a ‘legitimate interest’ under the GDPR

1. there is no requirement that the interests of the controller are laid down by law.
2. the CJEU is clear: “legitimate interests” can serve purely commercial interests

Data Protection Authorities in Austria and Italy have approved GDPR Codes of Conduct that base the processing of third-party data for print channels and B2B data on legitimate interests.

# / Cookies exemptions in Schedule 12

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

The schedule in DUA has greater clarity and detail than the similar clauses in DPDI

- \* Strictly necessary
- \* 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

# / Market Research Provisions

Research provisions provide greater clarity to enable scientific research in academic and commercial setting. Covers product development and market research

- processing for the purposes of any research that can reasonably be described as scientific, whether publicly or privately funded and whether carried out as a commercial or non-commercial activity...
- ...includes processing for the purposes of technological development or demonstration, fundamental research or applied research, so far as those activities can reasonably be described as scientific...
- ...processing of personal data for statistical purposes are references to processing for statistical surveys or for the production of statistical results where— (a) the information that results from the processing is aggregate data that is not personal data, and (b) the controller does not use the personal data processed, or the information that results from the processing, in support of measures or decisions with respect to a particular data subject to whom the personal data relates....”

# / Automated Decision Making

“

DUA makes it easier to use automated decision making for beneficial, low risk processing and limits the strongest restrictions to special categories of data.

Any significant decisions based on solely automated processing may be made so long as the following safeguards are in place:

1. the individual is provided with information about the decision
2. the individual is able to make representations about the decision
3. the individual is able to obtain human intervention
4. the individual is able to contest the decision

A significant decision involving special category data may not be taken by a controller by solely automated processing unless:

1. it is based on an individual's explicit consent, or
2. the decision is necessary for the performance of a contract or required by law, and the processing is necessary for employment/social security or for substantial public interest

“Solely automated decision making” and “significant effects” are now defined within GDPR with the same meaning as in DPA2018



# / 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

The Commissioner must regard other wider public interest factors such as

- 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
- e. the fact that children may be less aware of the risks and consequences associated with processing of personal data and of their rights in relation to such processing.

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

# / Codes of Conduct in PECCR

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”

PECCR must be amended to enable Industry Codes of Conduct and Monitoring Bodies. A PECCR 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 PECCR

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

# / Enforcement and Fines

Fines for breaches of PECR amended to match GDPR

Applies to nuisance calls, texts and emails.

Up to 4% of global turnover or £17.5 million (previously up to £500,000)

# **Reforms from DPDI that have been removed in DUA**

## **Issues that DMA members did not support or were neutral in DPDI**

1. Reforms to the accountability framework
2. Reforms to Subject Access Requests (vexatious thresholds)
3. Exemptions to PECR for democratic engagement
4. Benefit fraud provisions
5. Centralised browser solutions for managing cookie consent

## **Issues that DMA members supported which have been removed from DUA**

1. Extension of soft opt-in for email marketing to non-commercial organisations such as charities and trade associations
2. Exemptions to Records of Processing Activities and other administrative burdens from small organisations

# / The Campaign for Soft Opt-in for email marketing

Support for tabling an amendment in the Lords to reinstate DPDI clause 115 (four signatures maximum)

1. Viscount Camrose (leader of the opposition on the DUA Bill)
2. Lord Clement Jones (leader of Liberal Democrats in the Lords)
3. Baroness Harding
- 4 Lord Guy Black
5. Additional engagement with Lord Kamall, Lord Arbuthnot, Lord McNally, Baroness Stowell, Lord Bassam, Lord Knight and Lord Stephenson

Letter to Secretary of State Kyle with copy to Baroness Jones and Minister Bryant

Engagement with DSIT officials: Owen Rowland (Director of Domestic Data) and Simon Weakley (Bill Manager)

Seeking supporting statement from all charities in DMA membership and more widely



The RT Hon. Peter Kyle MP  
Secretary of State for Science, Innovation and Technology  
100 Parliament Street  
Westminster

18 November 2024

Dear Secretary of State,

**Re: Extending the soft opt-in for email to charities (Regulation 22 of PECR)**

The Data and Marketing Association is extremely supportive of the Data Use and Access Bill and the opportunities it creates for growth, improved public services and improving lives.

In our capacity as representatives of businesses across different industries, I want to make you aware of a significant remaining concern of the charity sector that, if addressed in the Bill, would be a significant opportunity for the government to help these vital organisations.

Clause 115 of the previous DPDI Bill included extending the 'soft opt-in' for email marketing for charities and other non-commercial organisations such as trade associations. At present, the DUA Bill proposals remove this. The omission of the soft opt-in from will prevent charities from being able to communicate to donors in the same way as businesses can. As representatives of both corporate entities and charitable organisations, it is unclear to the DMA why charities should be at a disadvantage in this regard.

Donors and volunteers to a charity have an extremely emotional connection to the cause they are supporting, whether that be saving children, animals, cancer research or a myriad of good causes. In 2023 the British Public donated £13.8 billion to charity. However, the cost-of-living crisis has made it significantly more expensive to deliver the services charities provide, and the recently announced increase in employer's national insurance is expected to cost charities £1.4 billion, making it an imperative for many charities to increase donations if they are to survive.

We understand the government has had to take tough decisions about the economy, including the rise in National Insurance for employers. While not a silver bullet, including the soft opt-in for email marketing for charities will help facilitate greater fundraising and go some way to mitigating the additional burden while demonstrating that the government understands the important work they do for society.

Many charities have written to the DMA seeking support for reinstating clause 115 of DPDI into the DUA Bill. Attached to this letter please find supporting statements from many charities. An amendment will be tabled in the Lords to reinstate what had been clause 115 in DPDI and we hope that the government will support this amendment.

Best regards,

Christopher P Combemale  
Chief Executive Officer  
Copy to: Baroness Jones, Chris Bryant MP, Owen Rowland, Simon Weakley



**Supporting statements from DMA charity members**

**Johny Gray, Individual Engagement Director, Oxfam:** "The inclusion of the soft opt-in for charities in the Data (Use and Access) Bill would be of significant benefit to the UK charity sector, which has suffered a series of financial challenges post Covid-19. The commercial sector has benefited from soft opt-in since the implementation of the Privacy and Electronic Communications in 2003. It's now time to finally level the playing field for charities too and to allow them to similarly engage their passionate and committed audiences. This will correct the imbalance and will finally turn the tide; empowering them to generate increasing levels support for the causes they represent, at a time that their work has never been more needed."

**Leah Mates, Director of Customer Transformation and Retention, British Heart Foundation:** "It would help to generate significant income for the sector and increase levels of public engagement with UK charities. Government has acknowledged the value of the charity sector in delivery of its five missions, which is welcome. The sector makes vital contributions to UK society, from delivery of services for some of the most vulnerable groups to funding lifesaving research and providing much-valued information and support."

# / Amendment to DUA matching DPDI 115

## Clause 115 DPDI: Use of electronic mail for direct marketing purposes

(1) Regulation 22 of the PEC Regulations (use of electronic mail for direct marketing purposes) is amended as follows.

(2) In paragraph (2), after “paragraph (3)” insert “or (3A)”.

(3) After paragraph (3) insert— “(3A) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—

(a) the direct marketing is solely for the purpose of furthering a **charitable, political or other non-commercial** objective of that person;

(b) that person obtained the contact details of the recipient of the electronic mail in the course of the recipient **expressing an interest in or offering or providing support for the furtherance of that objective or a similar objective**; and

(c) 35 the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of their contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where the recipient did not initially refuse the use of the details, at the time of each subsequent communication.”

# / Article 14 GDPR and the Open Electoral Register

## **Amendments to be tabled in the Lords identical to amendments tabled in the Lords to DPDI**

Clause 77 (2), page 91, line 16, leave out “to the extent that” and insert “when any one or more of the following is true”

Clause 77, page 91, line 15, at end insert— “(ai) after point (a), insert— “(aa) the data is from the Open Electoral Register;”

Clause 77, page 91, line 22, after “effort” insert “in particular where providing the information is not warranted by the impact on the individuals”

Clause 77 (2), page 91, line 30, after “things,” insert “the effort and cost of compliance,”

Clause 77 (2), page 91, line 30, after “subjects,” insert “the damage and distress to the data subjects,”

Clause 77 (2), page 91, line 30, after “subjects,” insert “the reasonable expectation of the data subjects,”

Clause 77 (2), page 91, line 32, at end insert “and whether the information has been collected and made publicly available by a public body.”

Clause 77 (2), page 91, line 36, at end insert— “8. An appropriate safeguard might be a risk assessment, including limiting the extent and purpose of the processing for which the data might be used.”



# / Transparency 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;

# / Timeline

**14 November:** deadline for charities to submit a supporting paragraph to DMA for inclusion in the letter to Secretary of State

**15 November:** DMA letter sent to Secretary of State

**19 November:** Second Reading in the House of Lords

**3,10,16 and 18 December:** Committee Stage House of Lords, DMA amendments tabled

**January:** Report Stage House of Lords

**February/March/April TBD:** House of Commons

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# / Questions and Answers

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# / Closing comments

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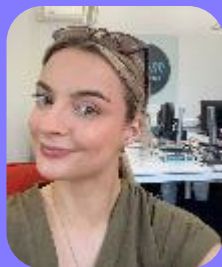
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Content Marketing Assistant

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