DCMS: Call for views on the General Data Protection Regulation derogations

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, and thanks the Government for its hard work in Brussels during General Data Protection Regulation (GDPR) negotiations. The final Regulation achieved a better balance between the privacy rights of individuals on the one hand and supporting innovation and entrepreneurship in the digital economy on the other. The UK Government was instrumental to this success.

We aim to be Britain's most customer-focused business community. While we represent the full spectrum of organisations involved in digital and data-driven 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 Department of Culture, Media and Sport's (DCMS) consultation.

Consistency

Consistency should be guiding principle for the Government. The Great Repeal Bill is intended to minimise disruption for UK businesses by making EU law UK law after March 2019. The same logic applied here should be used for GDPR derogations. Where the UK can maintain current law in a derogation, then this minimises the impact of the GDPR.

Theme 1 – Supervisory Authority

The DMA believes that the Information Commissioner's Office (ICO) should be the supervisory authority for the UK under Article 51. It has played a pivotal role within the Article 29 Working Party during the debate and implementation period of the GDPR.

Wherever possible the Government should favour a policy of consistency. The ICO is a pragmatic regulator that regularly consults with businesses and consumers alike. This should continue under from May 2018. The ICO should continue to be pragmatic and offer advice where it is needed, and punish the worst offenders that flagrantly break data protection law. Therefore we suggest ICO governance should be consistent with the current system.

Theme 2 – Sanctions

Under Article 84 the UK should introduce a provision for custodial sentences for the most serious breaches of the GDPR. This is a policy that the DMA has called for in the past. Currently, the Justice Secretary has the power, under the Criminal Justice and Immigration Act 2008, to introduce a new statutory instrument. This requires a positive vote in both Houses of Parliament to allow custodial sentences for breaches of Section 55 of the Data Protection Act 1998.

Rogue companies that routinely ignore data protection law in order to unlawfully turn a profit tarnish the reputation of DMA members and the legitimate marketing industry. The introduction of custodial sentences is the next step in the campaign against nuisance calls, spam texts and the like. Rogue directors may think twice about breaking data protection law if there is a real threat that they will go to prison.

Theme 5 – Archiving and Research

The UK is an attractive research base and in order to enhance this position the UK should implement the derogation in Article 89 (3).

Theme 8 – Rights and Remedies

The GDPR gives companies an opportunity to modernise the way they collect consent and give a positive, non-disruptive user experience. Modern consent models should follow a set of core principles to protect privacy while promoting the free flow of information, innovation and economic growth. Companies should be able to obtain consent through a variety of means that are best suited to the nature of the service they provide and the needs of their customers. Consent models should be practical, manageable and straight forward to implement.

For example, profiling (Article 22) is essential to providing targeted, relevant advertising. The UK should make it clear that marketing and advertising can be carried out for a legitimate interest.

Direct marketing is recognised as a legitimate interest so there is no reason why advertising should not also be considered as a legitimate interest under Recital 47. The Government should clarify in broad terms what other activities could fall within Recital 47.

The DMA believes the Government should authorise in UK law decisions based on profiling for the purposes of direct marketing, including online advertising, in order that such decisions do not fall within the scope of Article 22 (1).

Theme 9 – Processing of Children's Personal Data by Online Services

Article 8 (1) says that: *"Processing of the personal data of a child shall be lawful where the child is at least 16 years old."* Before going on to say that Member States can vary the age of consent for children down to 13 years old but no lower than that.

Currently, there is no legal definition of the age consent for children for online services in the UK. However, the ICO recommends that consent is sought for children aged 12 years and under.

The UK Committee for Advertising Practice (CAP) supports this approach. It prohibits the industry from collecting personal data about children under the age of 12 without the consent of their parents or guardians.

For online behavioural advertising where the age of a child is not known, industry best practice is to not create segments that specifically target children under the age of 13.

As raised earlier in this consultation response, the DMA favours consistency with the status quo. Given our current stance, the UK should adopt 13 as the age of consent for the processing of personal data about children for online services. This will minimise disruption for businesses as 13 is the default common UK standard.

Theme 11 – Freedom of Expression in the Media

The DMA supports the exemption in Article 85 on the processing of data for journalistic purposes and the freedom of expression and information. Implementation of the exemptions in this article are vitally important to all media – print, online and broadcast.

Conclusion

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].

An over-strict interpretation of the GDPR will have a negative impact on consumers, have economic consequences for the marketing industry and have a negative impact on the UK economy more broadly.

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