

Minutes of General Data Protection Regulation (GDPR) Issues Committee Meeting 07

06th October 2017 | 10:30 – 15:30
Held at ETC Venues, 51-53 Hatton Garden, London, EC1N 8HN

Status of the Minutes: Final

MEMBERS PRESENT

Helyn Mensah	HM	Chair	Gillian Hill	GH	Committee Member (Retailer)
Caroline Gould	CG	Committee Member (Wholesaler)	Sally Marshall	SM	Committee Member (Retailer)
Nick Rutherford	NR	Committee Member (Wholesaler)	Maureen Wilkinson	MW	Committee Member (Retailer)
Hugh Laurie	HL	Committee Member (Wholesaler)	Trevor Nelson	TN	Panel Sponsor
Louise Fox	LF	Committee Member (Retailer)			

OTHER ATTENDEES

Elliot Bird	EB	Meeting Secretary (MOSL)	Adam Richardson	AR	Director of Market Design (MOSL)
Roland George	RG	Head of Legal (MOSL)	Pam Nash	PN	Observer (MOSL)

APOLOGIES

James Gilbert	Committee Member (Wholesaler)
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1. Minutes and Actions

Purpose: For Decision

- 1.1. The Committee agreed to publish three (3) sets of minutes outstanding for the previous meetings GDPR03, GDPR04 and GDPR06 on the MOSL website.
- 1.2. The Committee agreed for MOSL to close all outstanding actions except Action **A04_06** for MOSL seek legal review and guidance for use of data on marketing from the Authority.

2. Review of Market Arrangements Code Schedule

Purpose: For Information

- 2.1. The Committee discussed the provided legal drafting for the new MAC Schedule, and reviewed its appropriateness. The following minutes are divide by sections of the document for ease of reading.

SECTION A:

- 2.2. The Committee began by discussing the suggested provision for a new Disputes Process for GDPR disputes, both process and interpretation disputes. This suggested process would be managed by the Panel or a new Panel Committee.
- 2.3. The Committee requested clarity on why the provision had been drafted in this way, given that there is already a process for dealing with disputes with the MAC which would cover the data protection provisions. The Committee understood the need for specialist knowledge when dealing with this kind of dispute, but did not think the relevant expertise would be provided by the Panel. The Committee did agree that the MAC Disputes Process was possibly too slow to deal with these issues, which the new process may assist with.
- 2.4. The Committee was unsure of moving to a new process outside the existing governance when there is already an available process, their preference was to make use of the current processes and potentially amend them in some way to allow for resolution of these specific issues. It was agreed that this needed to be fed back to the Panel for their consideration, and that a question should be included in the consultation to cover this issue.
- 2.5. Committee Members were unsure of the summary of arrangements described in clause 1.1 and whether this would be a proposed inclusion for Trading Party Privacy Notices, or a separate document? MOSL clarified that it interpreted the provision to mean a separate piece was required, but this could be a simple paragraph made available on the Trading Party's website which described the market arrangements of data controllers in common.
- 2.6. The Committee also raised concerns with clause 2.3, which seemed to imply that the nominated contact points of Trading Parties would need to be contactable all hours of the day and outside of the working week. MOSL agreed with this interpretation of the drafting and agreed to review the necessity of this requirement. The Committee also recognised that it would need to revisit this if it was found that it was necessary for compliance with GDPR. It was agreed that the drafting should not specify that the nominated contact point of Trading Parties had to be their Data Protection Officers, assuming they have appointed one.

SECTION B:

- 2.7. The Committee discussed the need to conduct an annual review on the Market Personal Data the Market holds, whether they still require it for processing and on what legal grounds they hold that data. The Committee agreed that the Market Operator did not need to lead this and that Trading Parties could instead provide evidence of this review to the Market Operator, and the Market Operator should ensure Trading Parties have the correct governance in place. The Committee also discussed the requirement for any unnecessary items to be referred to be referred to the Panel for its agreement, and suggested that it also should be referred to Trading Parties.
- 2.8. It was suggested that to facilitate this review of Market Personal Data it would need some form of flag to be created for data items that could be considered personal data. The Market Operator agreed to circulate a list of data items, from the CMOS Data Catalogue, that would be considered personal data and flag them in the Data Catalogue as such.

ACTION 07_01

- 2.9. The Committee requested clarity whether under the suggested provisions the current Change Proposal CPW010 on Emergency Contact Details should have a Privacy Assessment, as the Schedule suggests any changes that will result in data processing that is of considerable risk to data subjects. MOSL agreed that this would likely be the case.
- 2.10. Furthermore, it was questioned whether all code changes should have these routine privacy impact assessments. The Committee agreed that suggested code change protocol should apply for any changes going forward from this point, and thus current changes should also be receiving Privacy Impact Assessments where relevant.
- 2.11. Committee Members indicated they were unsure why clause 2.3 had been included, as it seemed to introduce further unnecessary requirements. The Chair and MOSL clarified that it was to cover the GDPR requirement that required organisations to be able to demonstrate their compliance in a transparent way.
- 2.12. Committee Members asked for clarification on clause 4.1, which requested data controllers would have to maintain a Formal Written Record of Processing. They were unsure what this Record of Processing would include and whether there would be an example of the required record provided. MOSL clarified that they interpreted this clause to mean that the Transaction History for data items in CMOS would be sufficient to form a Formal Written Record of Processing.
- 2.13. A Committee Member suggested that the monitoring of compliance of Trading Parties should be extended to New Entrant Retailers going through the Market Entry Assurance Process. This should prevent new Trading Parties from processing data before they can confirm they are compliant with GDPR. The Committee did not fully agree with this suggestion, as it felt the current Market Entry Assurance Process would be sufficient, given that it would require compliance with the MAC which the GDPR provisions are included in.

SECTION C:

- 2.14. The Committee agreed that the proposal to make Trading Party Privacy Notices consistent with the Market Operator was the best approach.
- 2.15. The Committee was asked to provide a view on the use of Market Personal Data for Marketing, which raised several queries from the Committee. The Committee was unsure what the definition of marketing was in this context, as it did not agree that Trading Parties should not be able to market their own products to their own customers that they hold in their central databases, that also happen to exist in the market dataset. It was also unsure of exactly what was captured by a Third Party, as currently a lot of necessary processing of data is carried out by Third Parties. An example was provided of a Third-Party Provider that processes customer data to provide them with billing information, which is not covered by the purpose of the codes but necessary for market operation.
- 2.16. MOSL recognised the Committees view that the issue was unclear in its current state, especially without guidance from the Authority providing a position on the use of data for marketing.
- 2.17. The Committee agreed that it could not have a complete prohibition on the use of data for marketing or outside the purpose as this had potentially large implications for restricting market operations. It was agreed that the GDPR legislation that requires organisations to justify their processing of data should be sufficient for ensuring Trading Party compliance with GDPR.
- 2.18. MOSL suggested that the clause should be amended to highlight that Trading Parties need to explain their legal justification for their marketing, under the principles of GDPR, and that consent will likely not be sufficient justification.

SECTION D:

- 2.19. The Committee agreed to consider this Section clause by clause, to separate the different clauses and provide comments on them.
- 2.20. **Guidance** - The Committee had no comments on this Clause.
- 2.21. **Data Subjects Access Request** – The Committee agreed that the two (2) Business Days to pass on the request and confirmation was too short a period, and felt that five (5) Business Days would be more appropriate. Following this, a Member of the Committee requested these provisions be reviewed, as it was unsure if the request is put to a Trading Party whether they are liable to deal with the request and unable to delegate it legally. The Committee then requested that the legal review team provide rationale for this drafting.
- 2.22. **Objections to Processing**- There was concern from the Committee that the MOSL would be required to assess each request individually and determine whether they are possible and necessary, potentially leaving Trading Parties liable if they make the wrong assessment. Based on this the Committee suggested the MOSL provide rationale for refusal of requests to avoid this issue, which it agreed to consider in its review of the legal drafting.
- 2.23. **Request for Correction/Rectification** – The Committee highlighted that the provision that allowed 1-2 months for processing a request depending on their complexity would comply with previously agreed

Service Level Agreements on timeframes to correct incorrect meter reads. MOSL agreed this needed to be considered and would be fed back to the legal review team.

- 2.24. Another point was raised by Committee Members relating to correction and rectification, that it will be difficult to determine whether a data subject's request should be considered a formal GDPR request or just a business as usual amendment. There is already a process in place to make amendments through the CSD processes and this is therefore a duplicated process. It was agreed that this issue of understanding whether a request was formal was a concern, and that it would be included in the consultation to get view from the industry on whether they agree it is an issue. There will also be an attempt to consolidate duplicated processes wherever possible.
- 2.25. Following this, a general point was raised by Committee Members that refers to all the data subject Right Processes as there seems to be an inefficiency in the processes. Customers should be contacting retailers, so therefore Retailers should forward it to the relevant wholesaler rather than adding another step in the process by sending them to MOSL. This was eventually refuted by other members of the Committee who recognised this would create an issue when Trading Parties are not aware of who is holding the details that they need to contact. For example, if a Wholesaler receives a request they will not know all the Retailers in their area.
- 2.26. **Requests for Erasure** – The Committee had no substantial amendments for the clause, and only suggested a few minor changes.
- 2.27. **Request to Restrict Processing** – The Committee had no comments on this clause.
- 2.28. **Duties to notify** – The Committee considered the process set out in the duties for notification of breaches and was unclear why this process was led by Trading Parties rather than the Market Operator, as was the case in all the other processes. MOSL clarified that it was not clear why this clause has been drafted in this way, but it is likely to do with the requirement to contact all Trading Parties within a short time as a requirement of GDPR. It was also agreed that the unprescribed timeframes in the clause, that required Committee input, should be set to be consistent with the rest of the processes.
- 2.29. **Right to Data Portability** – A Committee Member highlighted that this data subject Right would likely not be relevant to the processing of Market Data because it only applies where customer data is processed based on consent. Consent has been advised against in the documentation, so it still can be used at the Trading Parties discretion. The Committee agreed that it should indicate that this clause only applies if the justification for processing is data subject consent.
- 2.30. **Complaints for Data Subjects** - The Committee had no comments on this clause.
- 2.31. **Claims Brought by Data Subjects** – The Committee agreed with the MOSL approach that each claim will be different and should be judged on its own merits.
- 2.32. The Committee also discussed a separate issue on data subject claims and indemnity and whether parties should indemnify the Market Operator in all claims. The Committee agreed to seek legal advice on the subject and that indemnity should be covered off at another time, as a separate piece of work.

SECTION E:

- 2.33. The Committee was concerned with the prescribed frameworks that were provided to be compliant with, as they contradict the flexible light touch approach that had been endorsed up to this point. The Committee agreed to remove references to specific standards and frameworks. The Committee also agreed to include a question in the consultation asking respondents how useful it would be to make some reference to existing standards and frameworks.
- 2.34. The Committee was also concerned with the annual requirement to review data security measures of Trading Parties and how that would be completed in practice. MOSL confirmed that their recommendation would be to include them in the annual Market Audit, but that the issue would be raised in the consultation to collect industry views.
- 2.35. There was an additional question from the Committee requesting clarity on the described personal data breach register, as it is not a defined term and it is not clear what it is covered by it.
- 2.36. The Committee agreed to remove clause 2.3d because of the discussion earlier that concluded the Panel should not be making determinations for data protection.

3. Review of Market Arrangements Code Section 15

Purpose: For Information

- 3.1. The Committee discussed the newly drafted provisions contained within the MAC Section 15, which define the high-level requirements of GDPR and the relevant market arrangements.
- 3.2. The Chair highlighted that the drafting suggests that Trading Parties should comply with all guidance provided by the ICO, which was not what the Committee previously agreed. Instead it should read that they are required to comply with ICO Statutory Guidance, which was agreed by the Committee and MOSL.¹
- 3.3. Committee Members were concerned with clause 15.4.1 which seemed to indicate that Market Data could only be used for the code, which is potentially drastically effecting the operation of the market unintentionally. It was highlighted that it is not clear anywhere in the code whether account management is the purpose of the data set out in the code, which includes meter management. Obviously functions like data management are important for operation of the market, so the Committee agreed this clause needed reviewing. MOSL agreed to include a specific consultation question covering this issue, to determine whether the industry believed this clause could lead to unforeseen consequences such as those described above.

¹ Post-meeting amendment: Since receiving legal advice, this clause has been re-introduced. This is because statutory guidance is a legal contradiction, and it is all likely to be viewed as mandatory by the ICO when considering legal cases.

4. Review of Consultation Documents

Purpose: For Decision

Committee Cover Paper

- 4.1. The Committee first considered a cover paper provided to them that defined questions it would be required to provide a view on, based on requests from the legal review. The intention being for the Committee to include in the consultation any questions it fails to provide a view on.
- 4.2. The Committee recognised MOSL's view and recommendation that erasing data in CMOS would be unnecessarily costly and currently impossible, but questioned whether we needed to provide evidence to demonstrate this. MOSL agreed that it would be important to provide some justification and that there were plans to include this functionality into CMOS in future, but that this would require a considerable time and monetary investment.
- 4.3. It was also highlighted that some items cannot be removed because they are necessary, so it would make sense providing information on what can be erased in terms of possibility for running the market. The example was given of SPID's, which obviously cannot be deleted as they would hinder the operation of the market.
- 4.4. A separate question was raised on what additional controls would need to be put in place to manage what the GDPR refers to as Special Categories of personal data, which does exist in the CMOS system. MOSL's recommendation was that no further provisions would be required, as the current security measures in place in CMOS were already substantial enough to protect sensitive data. The Committee agreed with this in part, but requested that the issue be raised in the Industry Consultation.
- 4.5. The Committee discussed the issues of transmission of sensitive information that is required by the code, giving the specific example of the Code Change Proposal CPW010 *Emergency Contact Details* which requires Retailers to provide Wholesalers with contact details of their customers for contact purposes in an emergency. It was highlighted this could potentially lead to a breach of the GDPR if these details were transmitted insecurely, such as by email. The Committee agreed that to facilitate this there needed to be consideration of a secure platform that could be used to facilitate these requirements, which was agreed to be included as a consultation question.
- 4.6. In addition, an action was raised for a future meeting with the Working Group for CPW010 *Emergency Contact Details* and the GDPR Issues Committee to be arranged, to discuss the data protection implications of the Change Proposal.

ACTION 07_02

- 4.7. The Committee discussed Automated Decision Making and whether it features in Trading Party systems, as the GDPR would require them to be able to operate the same process manually at a data subjects request. The Committee identified the Interim Supply Process, which automatically estimates a customer's meter reading and assigns them a random retailer based on this. However, these processes were not seen as issues because either could be operated manually by either the customer choosing a Retailer and submitting their own meter read instead of the estimation.

Consultation Briefing Document

- 4.8. The Committee discussed the Consultation Document that would be issued alongside the industry consultation to inform respondents of the rationale and work that have gone behind the Committees proposal.
- 4.9. The Committee suggested several additional elements it wanted to include in the Considerations Section and agreed for them to be added following the meeting. These elements were:
- Disputes handling and the rationale behind why it is not in the legal drafting;
 - A Discussion of the protections for sensitive personal data (Special Categories of personal data), including secure data transmission of forms supporting the processes;
 - A Discussion of whether the Market Audit is the best method to monitor GDPR compliance;
 - Reference to potential unintended consequences of the restrictions on use of Market Personal Data;
 - A List of Market Data items that are considered Market Personal Data;
 - Reference to Automated Processing, and how the Interim Supply Process will comply with the requirements of Automated Processing;
 - Reference to expected changes to the Data Catalogue CSD 0301;
 - Reference defining the formal written record of processing; and
 - Introduction of an implementation period.
- 4.10. The Committee suggested that the rationale behind the data subject rights processes should be included in the Consultation Briefing Document, as to indicate why the prescribed processes are efficient.
- 4.11. The Committee agreed not to ask questions or include provisions in the drafting around indemnities and liabilities for breach claims in the Consultation Briefing Document. It felt that this function of claims was already well supported by the legal framework around these claims, which will allow third parties to be identified if they are responsible for the breach in discussion.²
- 4.12. It was highlighted by the Committee that, the proposed example form provided with the legal drafting was excessive and required too much detailed information. The Committee suggested several possible amendments and agreed to pose the question in the consultation whether the data subject right process forms were overly detailed and whether they should be governed outside the code to allow for greater flexibility.

² Post-meeting amendment: This clause we reintroduced into the drafting, following legal advice that suggested there would be a substantial gap in the framework if the clause was removed.

4.13. The Committee reviewed the questions currently set out by the documentation for industry consultation. It agreed to remove several questions, and introduced questions that were highlighted as issues requiring comment previously in the meeting.

4.14. The Committee:

- **NOTED** the contents of the paper;
- **AGREED** the contents of the Consultation Report;
- **AGREED** the recommended consultation questions; and
- **AGREED** to submit the issue for Industry Consultation.

5. Any Other Business (AOB)

Purpose: For Information/Decision

5.1. There was no further business and the Chair closed the meeting.

Actions:

- A07_01** MOSL agreed to circulate a list of data items, from the CMOS Data Catalogue, that would be considered personal data and flag them in the Data Catalogue as such.
- A07_02** The Secretariat agreed to organise a joint session between the GDPR Issues Committee and the CPW010 Working Group, to discuss the data protection issues around the change.

The next GDPR Issues Committee meeting is scheduled for:

01st November 2017

10:30 – 15:30

at:

ETC Venues

51 – 53 Hatton Garden

Clerkenwell

London

EC1N 8HN

The nearest tube stations are Chancery Lane, Farringdon and Holborn