

Minutes of General Data Protection Regulation (GDPR) Issues Committee Meeting 08

10th November 2017 | 10:30 – 15:30

Held at MOSL Offices Monument, 16-18 Monument Street, EC3R 8AJ

Status of the Minutes: Final

MEMBERS PRESENT

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

OTHER ATTENDEES

Elliot Bird	EB	Meeting Secretary (MOSL)	Lynn Wan	LW	Observer (Thames Water)
Roland George	RG	Head of Legal (MOSL)			

APOLOGIES

James Gilbert	Committee Member (Wholesaler)
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1. Welcome and Introductions

Purpose: For Information

- 1.1. The Chair welcomed everyone to the eighth meeting of the GDPR Issues Committee and thanked everyone for the efforts so far in the process.
- 1.2. The Chair reminded the Committee to observe the contingency dates suggested, as it was likely further work would be required before a final recommendation could be made.

2. Minutes and Outstanding Actions

Purpose: For Decision

- 2.1. **Minutes**
- 2.2. Agreement of the minutes from the previous meeting was deferred, based on the limited time available in the meeting.

3. Summary of Consultation Responses and Suggested Amendment for the Legal Drafting

Purpose: For Decision

Joint Data Controllers/Data Controllers in Common and Joint and Several Liability

- 3.1. The Committee considered a concern raised in the consultation with the prescribed joint and several liability of the new MAC Schedule, which was based on an assumption of Trading Parties being Joint Data Controllers or Data Controllers in Common. A number of respondents disagreed with or requested clarity on the analysis behind these provisions.
- 3.2. A Committee Member requested clarity on terminology used in the drafting and documentation as Data Controllers in Common and Joint Data Controllers seemed to be used interchangeably. They also noted that this issue was raised in the consultation by a number of respondents. It was agreed that this would be taken to the legal review team at DLA Piper (DLA) in order to seek advice on this point.
- 3.3. It was also noted that, related to the previous point, a number of consultation respondents indicated disagreement with the clause that suggested parties are joint and severally liable for breaches of data protection laws.
- 3.4. The Committee agreed that clause D.10 (Claims Brought by Data Subjects) of the new MAC Schedule required review, recognising that legal advice has indicated it would be advisable to include at least a high-level description of how liability will be allocated. Based on this, the Committee agreed that the clause should indicate that Trading Parties will only be liable for Personal Data Breaches that have occurred due to their actions.
- 3.5. A Committee Member queried why it was necessary for Trading Parties to notify MOSL on the details of any claims, as they were unsure whether Trading Parties should be forced to share claims information. Other Committee Members agreed that this clause was too broad. It was agreed this would be referred to DLA who could provide feedback on why this clause had been included.

- 3.6. Another Committee Member queried whether Trading Parties would be able sue each other if harm is caused as a result of a breach by another party. It was highlighted that it should not be the intention of the drafting to remove companies' rights to claim against loss caused by other parties and seek legal advice, as might arise in law.
- 3.7. The Committee also requested that references to Trading Party and Party be reviewed throughout the schedule to ensure appropriate use when referencing Trading Parties and the Market Operator.

Clause 15.4.1 and Permitted Use of Market Personal Data

- 3.8. The summary of the consultation responses indicated that a number of Trading Parties were concerned with clause 15.4.1 (Use of Market Personal Data) which details that Market Personal Data can only be used as defined in the Purpose. This raised issues with Trading Parties as they felt there were a number of uses for Market Personal Data outside of the Purpose which were necessary for market operation, including marketing.
- 3.9. The Committee agreed that the status quo would be maintained in that no position on marketing would be stated in the drafting. To this end, the Committee further decided not to include any provisions specifically preventing the use of Market Personal Data for marketing. It was highlighted that the Committee's previous position was that Trading Parties would be required to determine their own legal grounds for processing if using data for anything outside of the Purpose defined in the Market Codes. This remained the case.
- 3.10. A Committee Member suggested that it would be useful to investigate the remedies of the Energy Market review by the CMA, in order to determine on what basis marketing is going to be allowed in the Energy Market.
- 3.11. The Committee agreed that the clause as it is currently drafted does not prevent the use of Personal Data for determining prices, but there were concerns on whether it could be considered a complete prohibition on marketing.
- 3.12. A Committee Member queried if this clause raised issues in the event where customer had been allocated through the system – i.e. whether would it prevent any use of that customers data outside of the Market Codes defined Purpose. It was agreed that the clause should not prevent Trading Parties using data relating to their own customers for any purpose consistent with how they had been operating previously, subject to Trading Parties complying with prevailing data protection laws in relation to use of such data.
- 3.13. The Committee noted the position on use of the data held in CMOS that was set out on the Open Water website (prior to market go-live in April 2017). In particular, that "...incumbent data held in the shadow market system was not to be used by other market participants for sales, marketing or any other business development purposes." The Committee also noted that Ofwat's view remained consistent with this position and that, while information in CMOS should support the provision of quotes for potential customers that make enquiries, consistent with the pre-market go live view noted above, CMOS should not be seen as a marketing database."

Data Subject Rights Processes Forms

- 3.14. The Committee considered the consultation responses on using forms to process Data Subject rights requests.
- 3.15. It was raised by a Committee Member that forms were not an efficient way to process Data Subject requests, given there is already a market mechanism for amending data in light of requests.
- 3.16. The Committee agreed to limit the content of the forms, as far as efficacious, to processes which are not currently serviced with existing market transactions. It was also agreed that the forms need to be transferred between parties through a secure method.
- 3.17. Committee Members noted that the forms would be useful and provide clarity, and should be considered a starting point in terms of simplicity to be built upon in the future. The Committee agreed it would be beneficial to review the process after a period to be determined following the implementation of GDPR.
- 3.18. It was suggested by a Committee Member that the large number of request forms was unnecessary and instead they could all be consolidated into a single Data Subject request form, that provided for all of the different Data Subject rights. The Committee agreed that this would be the preferred approach.
- 3.19. In the interests of minimising the use of forms the Committee agreed that the form should be required when the receiver of the request is not the Data Owner and therefore cannot make the change. It was therefore agreed that the provisions should make it clear that the process form is only required when the receiver of the request cannot action the request using standard industry processes itself.
- 3.20. The Committee also agreed that MOSL did not need act as a central point of contact in every instance. It was instead suggested that the process needs to be defined to ensure parties only send Data Subject Request forms to MOSL if they are not sure who the Data Owner is. MOSL agreed to provide a process diagram that would demonstrate how this would operate.

Definitions

- 3.21. It was identified that the defined term Data Owner is used regularly, but it currently has two different definitions across the WRC and the MAC. It was agreed that these two definitions would need to be made consistent as part of the overall code change.
- 3.22. It was also identified that within another definition the term Market Participants was used, which has been replaced by the defined term Trading Parties following Market Opening. It was agreed that this would be amended in the legal drafting.

List of Personal Data Items

- 3.23. The Committee discussed an issue raised in the consultation that some data items, such as SPID's were not labelled as Personal Data where those respondents believed they should be.
- 3.24. It was noted that previous legal advice had indicated that data items such as SPIDs were indirect Personal Data items. These had not previously been included on the understanding that GDPR does not make any provisions for 'indirect Personal Data'. However, the Committee acknowledged that under the GDPR the definition of Personal Data applied to both direct and indirect identifiers, and that

therefore certain data items which could indirectly identify a data subject, such as a SPID, would be regarded as a Personal Data.

- 3.25. Based on this it was recommended that the previous list of Personal Data items provided would be revised to include such items. This was seen as particularly necessary, as whatever is produced is likely to be used by Trading Parties to inform their position. MOSL agreed to provide this list in a red lined legal drafting format, given the larger amount of changes required. The Committee agreed to this course of action, recognising that this wider definition of Personal Data would likely include a majority of CMOS data items, and that further review would be necessary.

Data Protection Officers

- 3.26. Respondents suggested that the proposed requirement for Data Protection Officers or Trading Parties equivalent contact points to be contactable outside of business hours was overly prescriptive.
- 3.27. Committee Members felt that this requirement may cause Trading Parties (particularly smaller Trading Parties) to incur disproportionate costs.
- 3.28. The Committee agreed that this clause should be amended to remove the requirement of being contactable outside of business hours, and instead should just specify these persons should remain contactable within normal operational windows.

Alignment of Privacy Notices

- 3.29. Several respondents to the consultation raised concerns with the requirement for Trading Parties to create Privacy Notices that are consistent with the Market Privacy Notice, provided by the Market Operator. It was highlighted that no guidance is provided on what criteria would determine this consistency and to what degree Trading Parties are required to be consistent.
- 3.30. A Committee Member noted that because MOSL do not have the same data as the Trading Parties its Privacy Notice would not be covering all the data in Trading Party systems. Consequently, it could be expected that Privacy Notices would vary between parties.
- 3.31. A separate Issue was also raised that if there is no alignment between the Market Privacy Notices of Scotland and England then it would be difficult for Trading parties operating in both markets to be consistent with both Privacy Notices at the same time.
- 3.32. The Committee agreed to revisit the issue at its next meeting.

Data Protection Disputes Process

- 3.33. The Committee considered feedback provided by respondents that seemed to indicate disputes in respect of the data protection provisions should be resolved by the MAC Disputes Process rather than the Panel or a Committee of the Panel.
- 3.34. The Committee observed MOSL's recommendation that this review of the Disputes Process could be undertaken as a separate piece of work, in conjunction with the work of the Committee should it be felt this was needed in light of experience.

3.35. The Committee also agreed that this review should be referred to Trading Disputes Committee (TDC) given that its members have been nominated based on their knowledge and expertise in the area of disputes.

Controls on Sensitive Customer Data

3.36. The Committee discussed feedback from the industry consultation that suggested the need to define stricter controls for processing and storing Special Categories of Personal Data (sensitive Personal Data).

3.37. A Committee Member highlighted that this approach could potentially be detrimental to the market, as if data is restricted this can create data ghettos and those customers become less attractive to competition. They also suggested that if Trading Parties cannot explore a customer's details then they are not likely to be as desirable a customer.

3.38. It was highlighted that, in the event that this is required CMOS will be required to produce duplicate reports without the sensitive customer flag. In addition, access to CMOS will need to be further stratified in order to restrict access to this data item. To implement these changes would be a significant CMOS development and likely have a substantial cost associated.

3.39. MOSL explained the access controls currently in place around CMOS. It was noted that most organisations have a small number of staff that interact with CMOS. In addition, bilateral reports in a Trading Parties own environment are the responsibility of that Trading Party under GDPR.

3.40. A Committee Member highlighted that Trading Parties will need access to this data for the purposes of public health and they should have access to the data they require to operate. Currently individuals with access to CMOS require specific training and are authorised to interact with the system, therefore it would seem unnecessary to stratify this further.

3.41. It was agreed by the Committee that it should be the responsibility of Trading Parties to ensure those with access to CMOS are responsible and qualified to deal with these Special Categories of Personal Data.

3.42. In light of these considerations, the Committee agreed that further central system (CMOS) controls for sensitive Personal Data were not required.

Further Points of Clarification

3.43. The Committee considered a number of smaller issues raised in the consultation responses collectively which required less changes or where there was a considerable consensus.

3.44. The Committee agreed that no changes were required to accommodate the GDPR requirements related to automated processing.

3.45. It was discussed whether data mapping would be a useful exercise. The Committee recognised that the prescribed timescales and resource would not allow a separate piece of work to be undertaken, however, it was highlighted that the CSD's which identify specific data items, what transactions they appear in and what processes these transactions will be used in, represented data mapping which

could be utilised. The Committee requested some clarity from MOSL as to how this data mapping relationship is documented, for ease of reference.

ACTION 08_01

4. Any Other Business (AOB)

Purpose: For Information/Decision

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

Actions:

A08_01 MOSL to provide guidance on how data mapping is documented across the CSD's.

The next GDPR Issues Committee meeting is scheduled for: **Date, Time, at:**

Holborn Bars
138-142 High Holborn
London
EC1N 2NQ

The nearest tube stations are Chancery Lane, Farringdon and Holborn