

# Minutes of General Data Protection Regulation (GDPR) Issues Committee Meeting 09

14<sup>th</sup> November 2017 | 10:30 – 16:00 | Holborn Bars

Status of the Minutes: Final

## MEMBERS PRESENT

Helyn Mensah	HMe	Chair	Caroline Gould	CM	Committee Member (Wholesaler)
Hugh Laurie	HL	Committee Member (Wholesaler)	Maureen Wilkinson	MW	Committee Member (Retailer)
Nick Rutherford	NR	Committee Member (Wholesaler)	Trevor Nelson	TN	Panel Sponsor
Louise Fox	LF	Committee Member (Associated Retailer)	Gillian Hill	GH	Committee Member (Unassociated Retailer)

## OTHER ATTENDEES

Adam Richardson	AR	Market Design Director (MOSL)	Joanna Clark	JC	Legal Director (DLAPiper)
Lynn Wan	LW	Observer	Abu Rashid	ARa	Meeting Secretary

## APOLOGIES

James Gilbert	Committee Member (Wholesaler)
Sally Marshall	Committee Member (Retailer)

## 1. Minutes and Outstanding Actions

**Purpose: For Decision**

### 1.1 Minutes

1.2 The Committee agreed to ratify the minutes for meeting 7 via email.

## 2. Review of Table of Rationale and Required Changes

**Purpose: For Discussion**

- 2.1 MOSL stated that, following the meeting on Friday 10th November 2017, a table collating all comments from Committee members and responses to the GDPR consultation regarding drafting to the codes had been created. The purpose of this meeting was to go through the table of comments and for the Committee to sign off on the drafting.
- 2.2 MOSL further stated that it had communicated amendments that needed to be made to the drafting to DLA Piper in a call on Monday 13th November 2017, such as the consolidation of the Data Subject Request (DSR) forms into one form, as well as removal of certain parts of the code drafting.
- 2.3 Members discussed whether definitions included in legislation should be explicitly stated in the Market Arrangements Code (MAC) and Wholesale Retail Contract (WRC), or if cross-references to the legislation from the codes would be more appropriate. It was agreed that the appropriate solution would be to leave the definitions as they are and add in cross-references to the legislation for certain key terms; those terms being: Data Controller, Data Subject, European Protection Board, Information Commissioner, Personal Data and Personal Data Breach.
- 2.4 Members discussed the definition of Market Personal Data and whether it was too wide, as it seemed to capture the majority of data stated in the MAC and WRC. A member stated that most Data Items such as non-primary charges would not be identified as Market Personal Data. Data Items which make a direct reference to Personal Data were explicitly stated in Attachment 4 of the Recommendation Report being submitted to the Panel. MOSL stated that it had taken on a previous action to review all Data Items in CSD 0301 – Data Catalogue and identify those which may lead to the identification of Personal Data.
- 2.5 A Committee member suggested reviewing the bilateral forms that are part of the market codes and flagging areas in the forms which may lead to identification of Personal Data. MOSL stated that it would carry out this exercise in addition to the review of Data Items in CSD 0301.

### **ACTION 09\_01**

- 2.6 Members further discussed the distinction between Personal Data and Market Personal Data. It was suggested that the core difference between the two types of data is the location and manner in which it is stored. If data is stored in a Trading Party's system without being shared to another Trading Party or the Market Operator, this would classify as Personal Data. When this data is either shared with the Market Operator or made available to other Trading Parties in the market in accordance with the rules set out in the market codes, the Personal Data would be considered Market Personal Data. Committee members agreed that the definition of Market Personal Data needed no amending.

- 2.7 The Chair stated that DLA Piper would be asked to review all instances of Personal Data and Market Personal Data in the drafting, in order to ensure that the terms were being used in the correct manner.
- 2.8 A Committee member suggested that the Privacy Impact Assessment, as outlined in the drafting, should be part of the change process. This would mean that newly raised Change Proposals will be assessed to see whether they have any impact on data protection.
- 2.9 Members discussed whether there was a need to create an obligation in the WRC to comply with the MAC and an obligation in the Wholesale Contract to comply with the MAC. MOSL stated that it would request views from the lawyers with regards to this issue and potentially add this into the drafting.
- 2.10 Members discussed the difference between “mandatory guidance” and “statutory guidance” with regards to point 15.1 of the drafting for the MAC. Members discussed whether there was a preference to use one term over the other and agreed that the lawyers should be queried on which wording should be used. A comment was made that the drafting should include whichever term was used by the Independent Commissioner’s Office (ICO).
- 2.11 Committee members discussed whether any changes needed to be made to the drafting in relation to third-party Service Providers engaged by the Market Operator, in order to ensure GDPR compliance. A member stated that contractual obligations would exist between MOSL and its Service Provider, therefore it is the responsibility of the Market Operator to ensure GDPR compliance. Members agreed no changes needed to be made to the drafting for section 15.3.2.
- 2.12 The Committee discussed 15.4.1 of the MAC drafting. MOSL stated that, as requested by the Committee, the use of Market Personal Data for marketing purposes had been discussed with Ofwat and it was Ofwat’s view that the market codes should not prevent Trading Parties from marketing services directly to their own customers. Furthermore, Ofwat anticipated that Retailers would use CMOS data to provide quotes to customers upon request. However, the Ofwat did not feel it appropriate that the Purpose be amended to make explicit provision for CMOS data to be used for marketing.
- 2.13 This indication was in line with the Committee’s own view and Members agreed that the Purpose should not be reworded.
- 2.14 A member stated that there may be merit in looking at the use of Personal Data in marketing in other industries.
- 2.15 Members discussed point 15.4.4 of the MAC drafting, which obliges the Market Operator to monitor the accessing and downloading of reports from CMOS. A member queried whether the drafting had been written with the incorrect notion that reports are not pushed out by MOSL to Trading Parties, and whether this would have any effect on the drafting. It was agreed that DLA Piper would review point 15.4.4 of the drafting, consider any changes that may need to be made to address reports being pushed out and make the changes if necessary. The Committee agreed that the Market Operator should have controls in place to monitor the accessing and downloading of data from the Central Systems.

- 2.16 The Chair queried the usage of “Data Controllers in common” in the drafting. DLA Piper stated that this term had been included in the drafting as it was what had been used historically by DAC Beachcroft in their own drafting.
- 2.17 The Chair queried whether “Data Controllers in common” should be used in the MAC drafting if it is not a defined term in legislation. DLA agreed wording from the legislation should be used and the Committee accordingly decided to remove instances of “Data Controllers in common” in the drafting and replace the wording with “Joint Data Controllers”.
- 2.18 A Committee member mentioned that MOSL should be mindful of Change Proposals going forward with respect to how the change affects a data subject’s rights. The member suggested that a tick-box be added to the Change Proposal form, requiring the Trading Party raising the change to state whether it affects data subjects’ rights.
- 2.19 The Chair queried whether there was a legal obligation to have consistent privacy notices. DLA Piper stated that there is generally no need to, but that it will review this further and amend the drafting if necessary.
- 2.20 A member queried whether “privacy notices” should be replaced with “information notices” in section C of the drafting. DLA Piper stated that they would review the usage of both terms and make changes to the definitions section of the drafting if necessary.
- 2.21 MOSL stated that including an example of a privacy notice in the codes for Trading Parties to follow may not be appropriate as a Change Proposal would be required to amend aspects of the notice if it was required.
- 2.22 The Committee agreed to remove the requirement in the drafting to report disputes to the Panel and instead refer to the disputes process as already outlined in the MAC. The Committee recognised that there may be a separate piece of work to do to align the timetable of the MAC disputes process with the timeframes for compliance set out in the GDPR provisions.
- 2.23 The Committee agreed to remove sections of the drafting for D.10, as it was mentioned by DLA Piper that D.10.2 had only been included in the drafting as a general point of principle, but it may be perceived that undesirable outcomes may occur because of it; notably, the case where the actions of one Trading Party causes another Trading Party to be in breach of the codes.
- 2.24 Members also discussed whether it would be appropriate to introduce indemnities as part of the GDPR provisions to the code and came to the agreement that it was not. The matter of indemnities raised market issues which were far wider than those arising under the question of data protection and was outside the remit of the Committee.
- 2.25 The Committee agreed that proposed arrangements being suggested in the drafting regarding Market Personal Data held by an Environmental Information Regulation “public authority” is outside of the scope of the GDPR Issues Committee.
- 2.26 The Committee discussed the flow chart for Data Subjects Requests (DSRs) presented by MOSL and suggested amendments to it, specifically with regards to the level of communication that needs to take place between Trading Parties when a DSR is submitted and the type of DSR for which Trading Parties are allowed to share data. MOSL stated that it

will request the lawyers to consider which types of DSR allow for shareable data when it submits the flow chart for their review.

- 2.27 Members discussed whether drafting needed to be amended to take into account data portability. The Committee agreed that no changes were needed to be made to the drafting, noting that the arrangements had been devised to deliver a competitive market and hence support the transfer of data between Trading Parties. Any wider situations would require a case-by-case handling.
- 2.28 The Committee agreed that no changes needed to be made to point E.1.1 of the drafting, where consultation responses had stated it should include references to existing industry standards and frameworks.
- 2.29 The Committee agreed no changes needed to be made to point E.1.3 of the drafting, where a Trading Party had stated in a consultation response that it did not agree with obliging Trading Parties to submit evidence of their appropriate technical and organisational security measures to the Market Operator.
- 2.30 Members discussed whether MOSL would provide evidence of security measures it has in place for its data. It was stated that this would be highlighted in the market audit; but the legal drafting also required MOSL to provide this evidence on request.
- 2.31 The Committee agreed that no amendments needed to be made to the drafting with respect to sensitive customer data controls and automated data processing.
- 2.32 The Committee discussed the provision of a secure platform for DSR processing and agreed that, while requirement to use a secure mechanism for DSR processing should be set out in the codes, the method utilised should not be. The Committee further agreed that, to allow ease of amendment, the DSR form itself should not be included in the codes but a requirement for its existence and maintenance by the Panel should be. This would be similar to how the Change Proposal form is managed.
- 2.33 The Committee agreed no further changes needed to be made to the drafting of the codes for further prescription, addressing a consultation response where the Trading Party called for the drafting to be more prescriptive in nature.
- 2.34 The Chair stated that the Market Operator is subjected to the same level of requirements imposed on Trading Parties, addressing a consultation response where the Trading Party stated that it is unclear from the drafting whether requirements imposed on Trading Parties are also imposed on the Market Operator.
- 2.35 The Committee agreed to review the implementation of the GDPR provisions in the codes after a period of 6 months from implementation date.
- 2.36 The Committee agreed that no changes needed to be made to the timescales for Trading Parties to align their privacy notices. A member noted that there may be a challenge with regards to the timescales from some Trading Parties if it is not stated explicitly what they are aligning their privacy notices to.
- 2.37 The Committee agreed that there does not need to be a requirement in the codes for the Market Operator to appoint a Data Protection Officer.

2.38 The Committee discussed the issue of data mapping in CMOS and how bilateral forms and CSD 0301 will be redrafted to highlight Data Items which may lead to the identification of Personal Data. A member queried whether there would be any system changes due to the implementation of GDPR provisions in the codes. MOSL stated that it would assess this further with its Service Provider.

### 3. Panel Rationale and Recommendation Confirmation

**Purpose: For Decision**

3.1. MOSL stated that it will circulate a draft version of the rationale that will be submitted to the Panel with the paper, on Monday 20<sup>th</sup> November 2017.

### 4. AOB

**Purpose: For Information**

4.1 The Committee agreed that updated documentation should be sent out to members on Monday 20<sup>th</sup> November 2017, with responses back from the Committee by 27<sup>th</sup> November. The Committee agreed to hold a further meeting, on either 30<sup>th</sup> November or 1<sup>st</sup> December.

### Actions

**A09\_01** MOSL to review the bilateral forms that are part of the market codes to highlight areas which may lead to the identification of Personal Data.