
Market Arrangements Code Change Proposal – Ref CPM033

Modification proposal	Market Arrangements Code Change Proposal – CPM033 – Improved process for managing Data Subject Rights Requests
Decision	The Authority has decided to approve this Change Proposal with modifications
Publication date	9 March 2021
Implementation date	14 May 2021

Background

At the end of the Brexit transition period, the provisions of the General Data Protection Regulation¹ EU 2016/679 (GDPR), which came into force on 25 May 2018 were incorporated directly into UK law², with some technical amendments so that it works in a UK-only context. The ‘UK GDPR’, sits alongside the Data Protection Act 2018 (DPA 2018).

The Panel established the GDPR Issues Committee (the ‘Committee’) to assess the compatibility of the Wholesale Retail Code (WRC) and Market Arrangements Code (MAC)³ against the DPA 2018 and GDPR, in order to determine what changes would be needed to enable industry compliance⁴.

As part of its original recommendations to the Panel in 2018, the Committee noted that whilst the existing disputes processes in the WRC would apply to disputes regarding the then newly inserted data protection provisions, the timescales in those processes did not align with the timeframes imposed under

¹ GDPR Regulations: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>

² See the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019

³ The terms used in this document are those defined in the MAC

⁴ The Committee’s remit is unaffected by the implementation of the UK GDPR, which is incorporated into the MAC by reference to the definition of ‘Data Protection Laws’.

the GDPR, and as such the UK GDPR⁵. The Committee recommended a watching brief to review post-implementation of the GDPR.

The issue

Article 4(1) of the UK GDPR incorporates the definition of ‘Data Subject’ being ‘an identified or identifiable natural persons’. These individuals have the right to access and, within limits, control personal data upon request. Article 12(3) of the UK GDPR states that Data Controllers shall provide information to Data Subjects on the action arising from a request without undue delay and within one month of receipt of the request. This period may be extended by a further two months (to a total of three) where necessary, taking into account the complexity and number of requests.

The Committee acknowledged that the existing WRC disputes processes can run for longer periods than the time permitted for a response under the GDPR. Accordingly, if there was a dispute between parties on how a request should be processed, this could result in non-compliance with the GDPR timescales. The Committee considered that failure to observe these timescales could lead to referrals or complaints by Data Subjects to the Information Commissioners Office (“ICO”), and related disputes between Trading Parties and/or the Market Operator.

Section 15(2) of the MAC states that the Market Operator and each Trading Party who uploads or accesses Market Personal Data in Market Operator Systems or holds any Market Personal Data in their own systems are defined as Data Controllers. As such, the Market Operator and Trading Parties are legally jointly liable for managing a Data Subject Rights Request (‘DSRR’).

However, whilst a party may be a Data Controller of a Data Item, they may not be a Data Owner of the same data item. This means that they are not permitted to modify or erase data and fulfil their obligations under the GDPR independently of other Data Controllers. A Data Subject can send their request to any of the Data Controllers, and the timescales for responding would start from the first Business Day the DSRR is received. A delay with any party could therefore result in a complaint to the ICO, for which all the parties could be held liable. The MAC requires the Market Operator and Trading Parties to co-operate to fulfil the DSRR.

⁵ As the Final Report was submitted to Ofwat prior to the end of the Brexit transition period, references to the GDPR are used to cite the Committee’s findings and Trading Parties’ views.

The key purpose of data sharing agreements is to provide clarity between parties over their management of shared personal data. The provisions set out in section 15 and Schedule 13 of the MAC represent the data sharing agreement in this market.

The Committee reviewed the interactions between parties for dealing with DSRRs set out in Schedule 13/Part D of the MAC and determined that there are three risks in the current interactions which may compromise compliance and effective handling of a DSRR within the GDPR deadline. These are:

1. **Failing to pass on a DSRR in good time** – The DSRR Form has been created as a way for the initial recipient of a DSRR (who cannot deal with the request itself) to pass on the request to the party who can (i.e. the Data Owner), however no timescale is specified in which the initial recipient must do so. Failure on the part of the initial recipient to pass on a request uses up time the Data Owner would otherwise have to comply, and potentially jeopardises its ability to meet the GDPR deadline.
2. **Relevant parties being unaware that a request is a DSRR** – There is no clear mechanism for the initial recipient of a DSRR, where using a Standard Process, to signal to the Data Owner or other relevant party that the process has been triggered to deal with a DSRR, rather than for business-as-usual reasons. The Data Owner may therefore remain unaware (because, for example, a request to rectify or delete data is received via a Standard Process) that GDPR timelines and obligations apply and that interactions with a Data Subject are necessary.
3. **Standard Processes exceed GDPR timescales** – Timelines for Standard Processes described in the codes can exceed the one to three months maximum allowed for dealing with a DSRR under Article 12 GDPR.

CPM033 has been developed by the Committee to mitigate the above risks.

The Change Proposal⁶

The Committee proposed an amended process for handling DSRRs in Schedule 13 Part D of the MAC, and a new form to be known as the “DSRR Record” be created to replace the current DSRR Form.

⁶ The proposal and accompanying documentation is available on the MOSL website at <https://www.mosl.co.uk/market-codes/change#scroll-track-a-change>

Section 3 of the Panel's Final Report details the new process, including a process map. The key steps in the process have been summarised below:

- **Dealing with a request unilaterally** - Upon receipt of a DSRR, a Trading Party or the Market Operator will determine if it can deal with the DSRR in full without the assistance of any other party. If it can, that party should deal with the request in accordance with Data Protection Laws, using a Standard Process where one is applicable, or other suitable processes or transactions if not, and respond to the Data Subject accordingly.
- **Dealing with a request with the assistance of other parties** - If a Trading Party or the Market Operator (who first receives the DSRR from the Data Subject – i.e. the initial 'DSRR Recipient') determines it cannot deal with the DSRR in full by itself, and requires the assistance of other Trading Parties and/or the Market Operator, it should determine whether a Standard Process or Processes can be used to deal with the DSRR.
- **Standard Process is applicable** - As soon as is practicable but no later than 3 Business Days of receipt of the request, the initial DSRR Recipient ('DSRR Record Initiator') should (a) submit the request by initiating the relevant Standard Process (including standard Operational Forms) to commence action on the DSRR, and (b) create and issue a DSRR Record (via a secure method) to the other parties necessary to deal with the DSRR. Once the parties have dealt with the DSRR to completion under the Standard Process(es), the Data Subject should be informed accordingly.
- **Standard Process is not applicable** – The DSRR Record is the only means to deal with DSRRs which require multi-party involvement. The initial DSRR Recipient should, as soon as is practicable but no later than 3 Business Days of receipt of the request, create and issue a DSRR Record (via a secure method) to the other parties necessary to deal with the DSRR. Once the other parties have dealt with the DSRR to completion, the Data Subject should be informed accordingly.
- **Refusing a request** - If there are lawful grounds under Data Protection Laws to refuse to deal with all or parts of a DSRR, a party may choose to do so. The assessment of whether there are any grounds to refuse, and when in the process to determine this, is at the judgement of the party concerned. The ability of a party to refuse is allowed for in the current DSRR Form and is inherent in Section 15 of the MAC, which requires parties to act in accordance with Data Protection Laws. The new proposed DSRR Record maintains this possibility.

- **Who should handle the request** – The Committee considers that the persons best placed to deal with DSRRs should be the Data Protection Officer (DPO) and/or some other person with relevant data protection expertise and/or training. This is because of the determinations that will need to be made and the interactions between parties. This person may be a designated data protection contact (for smaller organisations without a DPO), or a contract manager if appropriately trained. Trading Parties and the Market Operator will be required to nominate at least two such qualified contacts for the handling of DSRRs.

The contact information for such nominated contacts will be added to a contact list held by the Market Operator, and Trading Parties will be expected to update the contact list as and when there is a change to their personnel so that the list remains current. This will enable the Market Operator and Trading Parties to interact as necessary, via their nominated contacts, in relation to DSRRs. As it is envisaged the DSRR Record will sit within Kissflow (the workflow management software currently used in the market), nominated contacts will receive automated notifications and will need access to Kissflow to handle the request.

- **Meeting the GDPR Deadline** – Parties should expedite their actions to deal with DSRRs without undue delay and within one month of receipt, or within a total of three months from receipt in a complex case. Where a party seeks to extend the time for responding from one month to three, it is required to inform the Data Subject within that first month following receipt and provide reasons for the delay. Since the timescales stipulated in the GDPR take precedence, the Committee proposed to introduce an obligation into Schedule 13 of the MAC for all parties to expedite actions, whether using a Standard Process or not, to deal with DSRRs by or within the GDPR deadline.

The “GDPR clock” stops when the Data Subject has received a substantive response (i.e. that the request has been completed or that it cannot be completed, and why). The party who provides this response does not have to be the party the Data Subject initially contacted, because – as per the MAC – the Market Operator and all Trading Parties are joint Data Controllers, and therefore any relevant Party can provide the substantive response.

- **Secure Transfer** – It is envisaged that the DSRR Record will be implemented as a digital form within Kissflow and it can be securely shared with the relevant parties by this means. However, the form itself has been designed to exist independently of Kissflow, or any software.

Industry consultation and assessment

An industry consultation was held in September 2020 and received 13 responses. This included eight from Wholesalers, four from Retailers, and one from the Consumer Council for Water (CCW).

The key themes from these responses are summarised below. The full consultation responses are set out in Attachment 5 of the Panel's Final Report.

Views on market-level risk or issue that DSRR managed between Trading Parties may not be completed within GDPR timescales

12 out of 13 respondents (seven Wholesalers, four Retailers and CCW) agreed that there is a market-level risk that DSRR's may not be completed within GDPR timescales. Those who agreed did not provide quantitative data to support their answer. Four respondents said they have not received any DSRRs which require multiple Trading Parties to respond, one respondent said they have not received any DSRR from Non-Household Customers.

One respondent stated that in the event that Trading Parties are considered to be a Data Controller in their own right, it is the responsibility of the Data Subject to direct their request to the correct Trading Party, as there is no legal basis for the Trading Party to process/share the DSRR with another organisation without the Data Subject's consent.

CCW noted that the absence of a defined timescale within the MAC for dealing with a DSRR and the fact that several standard processes exceed the GDPR deadline clearly leaves market participants at risk of non-compliance and needs to be addressed.

One respondent disagreed, stating that they are unaware of any risks currently but believe there may be risks for some Trading Parties.

Views on whether CPM033 will mitigate the risk or issue

12 out of 13 respondents (seven Wholesalers, four Retailers and CCW) agreed that CPM033 will mitigate the risk of non-compliance as there will be a formal process to follow and to hold Trading Parties to account. One respondent agreed that the solution helps to mitigate the risk but said that the solution adds more complexity and is uncertain if the solution is proportionate to the size of the risk.

CCW agreed that the solution of a DSRR Record to replace the existing forms is a measured and proportionate response to the issue. They noted that the DSRR

Record will allow tracking of a DSRR and expediting of any Standard Processes that might normally result in timescales above those allowed within the GDPR. They agreed that a process is needed to monitor GDPR requests that require input from two or more market participants.

One respondent disagreed and stated that organisations should inform the Data Subject to contact the other relevant organisation directly where a controller-controller relationship exists.

Views on whether the responsibility for deciding what constitutes a DSRR should rest with the recipient of the request

12 out of 13 respondents (seven Wholesalers, four Retailers and CCW) agreed that the recipient of the request should be responsible for deciding what constitutes a DSRR. One respondent said that the initial assessment should be completed by the recipient, but any concerns should be clarified with the relevant stakeholder. Another respondent welcomed further consideration of how parties receiving a DSRR Record could query the specifics or challenge their involvement, provided that this does not lead to significant delays to the process.

CCW believed putting the responsibility onto another body would add unnecessary complexity into the process. Raising the DSRR Record will allow the recipient to essentially transfer responsibility for dealing with the response to the relevant party if they are not the correct body, but will allow the process to proceed without further delay. They stated that the proposed approach will help get the answers to customers more quickly.

The respondent that disagreed stated that the decision should rest with the Data Controller. The original record should be subject to challenge by the Data Controller, where the request is deemed unsuitable in terms of authority or suitability. They suggested that any recipient should inform the relevant Trading Party to confirm the view of the Data Controller before a decision is made on whether to classify the request as DSRR.

Views on whose responsibility it is to handle DSRRs within an organisation

All respondents agreed that Data Protection Officer (DPO), a designated data protection contact, or some other person with relevant data protection expertise and/or training should be the one to handle the DSRRs. One respondent suggested the number of individuals involved could include anyone with a

customer-facing role. However, they further noted that the number of individuals that will process the DSRR and update the DSRR will be restricted.

A number of different suggestions were made by respondents, including one respondent who highlighted that they have an existing process for these requests, which include logging the request within their GDPR database, where their DPO will analyse the request and confirm it is a DSRR. Another respondent noted that other roles would include designates of the DPO. A different respondent said their Data Protection team is responsible for responding to Data Subject Access Requests, while their Customer Service and HR departments are responsible for actioning any other DSRRs.

Views on implementation and ongoing costs

10 out of 13 respondents (seven Wholesalers and three Retailers) stated that they do not expect to incur material costs for implementation of CPM033. Of the three remaining respondents one (Wholesaler) said their internal Retailer portal will have to be modified to handle the new form; another respondent (Retailer) cited costs for training needs; and CCW stated the question was not applicable to them.

Views on benefits of CPM033

11 out of 13 respondents (seven Wholesalers, three Retailers and CCW) agreed that CPM033 will deliver benefits, if implemented. The benefits highlighted include greater transparency and accountability for all Trading Parties, improving the ability to complete DSRRs within GDPR timescales, and strengthening the ability for parties to co-operate to meet GDPR obligations.

Two respondents (one Wholesaler and one Retailer) disagreed that CPM033 would deliver benefits but did not provide further explanation.

Views on whether benefits outweigh the costs of CPM033

11 out of 13 respondents (six Wholesalers, four Retailers and CCW) agreed that the benefits of CPM033 will outweigh the costs. Reasons cited included the costs associated with this change were minimal compared with the benefits of ensuring compliance with GDPR.

Of the two respondents that disagreed, one stated that additional costs will be incurred through a new form being made mandatory, but the proposed change will only benefit requests where controller-processor or joint controller relationships exist. The other respondent did not consider there was cost information included in the consultation document to allow comment on.

Views on whether CPM033 better facilitates the Objectives and Principles of the MAC

12 out of 13 respondents (seven Wholesalers, four Retailers and CCW) agreed that the implementation of CPM033 would better facilitate the Objectives and Principles of the MAC. Reasons cited included that the Change Proposal will increase transparency by clarifying the responsibilities of parties, provide improvements to the current process and improve customer participation by better management of timelines of requests. It was also noted that proportionality would also be achieved as internal processes will be subject to minimal change, and therefore the cost impact will be insignificant.

The respondent that disagreed (Wholesaler) stated that accountabilities could become blurred by using this approach. Each organisation should clearly explain what information they are responsible for and inform the Data Subject what other organisations they may need to contact in order to complete their DSRR.

Views on timescales needed to implement CPM003

12 out of 13 respondents (seven Wholesalers, four Retailers and CCW) agreed with the recommended implementation date set out in the Panel's Final Report. Three respondents stated they would need a month to implement the new process. One respondent stated that if this change was approved, it would require three months to implement it.

Committee views

The Committee noted the overall broad support for CPM033 amongst respondents to the consultation. The Committee considered specific wider points and/or issues raised by respondents to the consultation as set out in the Panel's Final Report. A summary has been provided below.

One respondent's view was that organisations should advise Data Subjects to contact the relevant organisation directly where a controller-controller relationship exists. The Committee considered that the solution in CPM033 was more effective at helping Data Subjects and aligns with the obligation under the GDPR to assist Data Subjects in exercising their rights. In addition, from a customers' perspective, having to ascertain who the Data Controller is when a number of Trading Parties are involved could introduce unnecessary delay into the process, and undermine the customer experience. The Committee believed that CPM033 would provide visibility as to all parties involved and certainty of responsibilities, thereby enabling data protection issues to be dealt with in the

timeframes stipulated by the GDPR.

A respondent was of the view that the party first receiving the DSRR from the Data Subject (i.e. the initial recipient) should have to confirm the classification of the request as a DSRR with the relevant Data Controller before issuing the DSRR Record. The Committee noted that this may introduce a risk of the request being passed back and forth between parties for prior agreement on status, introducing delay and jeopardising the customer experience. The Committee therefore did not agree with the suggestion and a DSRR Record could be delayed on this basis.

The Committee disagreed with a suggestion that accountabilities could become blurred by using the process in CPM033. The Committee considered that the DSRR Record and associated process clarified the responsibilities and timelines between parties and facilitated the ability of parties to hold each other to account, particularly in a data sharing context and where the Market Operator and Trading Parties are legally jointly liable for managing DSRRs.

The Committee noted that the majority of respondents indicated they could accommodate the implementation date and agreed that the change should be implemented six weeks after Ofwat's approval.

Finally, a respondent expressed that the solution in CPM033 was disproportionate to the scale of the issue. The Committee recognised that it is not possible to ascertain exactly the proportion of personal data in the business retail market, but because of the data sharing context and the risks identified, there needed to be a market-wide solution to protect personal data.

Panel recommendation

The Panel considered this Change Proposal at its meeting on 24 November 2020 and agreed unanimously to recommend CPM033 to Ofwat for approval, as well as the implementation dates as set out in the Panel's Final Report (12 votes in favour, with the Panel Chair electing to abstain). The Panel also approved the contents of the DSRR Record (Attachment 3 of the Panel's Final Report) should this change be implemented.

Panel Members noted that while the experience review conducted by the Committee in 2019 did not indicate there was an issue with DSRRs involving multiple parties, the industry is obliged to put processes in place to facilitate compliance with statutory requirements.

Panel Members noted the Committee had debated and decided not to create a standalone dispute resolution process for DSRR or to allow attachments to DSRR Records. However, the Panel accepted the Committee recommendations that this be revisited in future in light of experience of this change, if implemented, and the Unified Disputes Process implemented under CPW092/CPW029.

Our decision and reasons for decision

We have considered the issues raised by the Change Proposal and the supporting documentation provided in the Panel's Final Report, and have decided to approve the proposal with modifications. The modifications relate to minor drafting clarifications, which we set out in Appendix A. We acknowledge the points raised by the Panel, consultation respondents and the Committee and have concluded that the implementation of this Change Proposal will better facilitate the principles and objectives of the MAC in terms of **proportionality** and **transparency**.

We agree with the Committee that CPM033 will provide a proportionate and cost-effective solution for managing DSRRs across multiple parties, in a timely manner. The proposed solution also provides Trading Parties and the Market Operator with clarity of the process and responsibilities for managing DSRRs, furthering the principle of transparency. As such, we believe this Change Proposal will have a positive effect on Non-Household Customers as it strengthens the governance relating to compliance with UK GDPR in the MAC, by ensuring that there is a process in place to allow for DSRRs to be dealt with in the timescales set out in the UK GDPR.

We acknowledge the point discussed by the Panel and the Committee in relation to a stand-alone dispute resolution process for DSRRs. We agree with the recommendation that this may be an area revisited in the future, if necessary, based on practical experience of handling DSRRs via the new process.

Decision notice

In accordance with paragraph 7.2.9 of the Market Arrangements Code, the Authority accepts this Change Proposal.

Georgina Mills
Director, Business Retail Market

Appendix A: Modifications to the legal drafting for CPM033

Market Arrangements Code

Part A, paragraph 2.2(b):

2.2 Allocation of Responsibilities

(a) All Parties will provide the Market Operator with details of their nominated primary contact point for any data protection issues that may arise, in accordance with section A2.1 of this Schedule 13.

(b) All Parties must additionally provide the Market Operator with details of at least two nominated contact points for managing DSRRs, who will be the Party's contact points for any DSRR actions. These must be appropriate persons, which shall be the Data Protection Officer, or those with data protection expertise and/or training.

Part D, paragraph 1.3(b):

1.3 Interactions to deliver compliance

(a) The Market Operator shall give Trading Parties at least 10 Business Days' notice of the proposed wording and an opportunity to raise any queries or comments.

(b) The Market Operator shall notify the Trading Parties of any proposed changes to the wording on the Market Operator website about the exercise of Data Subject Rights and give Trading Parties 10 ~~B~~business ~~D~~days to comment.