

Minutes of General Data Protection Regulation (GDPR) Issues Committee Meeting 19

30 January 2020 | 10:00 – 14:30

Cavendish Venues, 22 Duchess Mews, London W1G 9DT

Status of the Minutes: Approved

MEMBERS PRESENT

Helyn Mensah	HM	Chair	Kulwinder Johal	KJ	Committee Member (Wholesaler)
Caroline Gould	CG	Committee Member (Wholesaler)	Abigail Morgan	AB	Committee Member (Abigail Morgan)
David Oliver-Sheppard	DO	Committee Member (Wholesaler)	Trevor Nelson	TN	Committee Member (Retailer)
Michelle Coglean	MC	Committee Member (Retailer)			

OTHER ATTENDEES

Stuart Boyle	SB	Observer (MOSL)	Amanda Hinde	AH	Secretariat (MOSL)
George Monea	GM	Secretariat (MOSL)	Andrew Johnson	AJ	Presenter (MOSL General Counsel)
Huw Comerford	HC	Secretariat (MOSL)	Julie Ferguson	JF	Observer (YWBS) T-Con

APOLOGIES

Emma Groves	EG	Committee Member (Retailer)
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1. Welcome and Introductions

- 1.1. The Committee Chair welcomed attendees to GDPR Issues Committee meeting 19.

2. Minutes and Outstanding Actions

- 2.1. The Committee approved the minutes for GDPR meeting 18 (19 December 2019).
- 2.2. The Committee agreed with the approach for the outstanding actions and to close actions:
 - G14_A01; G14_A07;
 - G16_A07; G16_A11; G16_A12;
 - G18_A02; G18_A03; G18_A04; G18_A05; G18_A06.

3. Data Sharing Code of Practice (CoP) Legal Advice

- 3.1. Andrew Johnson (AJ) presented on this agenda item.
- 3.2. The Committee noted that previous advice from DLA was not as clear as it could have been and that it was important to differentiate between the requirements in the General Data Protection Regulations (GDPR) and Data Protection Act 2018 and the advice in the Information Commissioner's Office's (ICO) draft Code of Practice (CoP). The former was a legal requirement, the latter was best practice guidance.
- 3.3. AJ explained that there were six lawful grounds available for processing Data Subject Requests (Consent; Contract; Legal Obligation; Vital Interests; Public Task and Legitimate Interest), and that the one identified by DLA Piper as most suitable for MOSL was 'Legitimate Interest'.
- 3.4. DLA's advice was to include a lawful basis for data sharing in the MAC based on the ICO draft CoP, however AJ asked the Committee to note that the ICO's CoP is still in the draft stage. Furthermore, DLA had advised to use 'Legitimate Interest' as it is the 'broadest and most flexible ground for MOSL', however this was not the only ground for processing and from reviewing a selection of privacy statements Trading Parties were relying on different grounds.
- 3.5. The MAC already defined the purpose for processing personal data as compliance with the MAC and WRC. Trading Parties required access to personal data to secure effective operation of the retail water market in accordance with the objectives set out in Part A of Part 1 of the Wholesale-Retail Code (Sections 1.2; 1.3 and 1.4) and made it clear that all Trading Parties must have the 'purpose' and a 'legal basis' for processing data in their Privacy Statements.
- 3.6. Based on the matters in paragraph 3.5 above, AJ raised a concern that if the Committee followed DLA's advice as it stood and updated the MAC to specify just one lawful ground ('Legitimate Interest'), it could create confusion for Trading Parties and their customers. The Market Privacy Notice had 3 legal bases (performance of a contract; legitimate interests and legal purpose).

- 3.7. The Committee discussed the legal and practical risk of not amending the MAC or adding 'legitimate interest' and concluded that the Non-Household Market is low risk. This is because, from a legal perspective, the ICO CoP represents best practice guidance not legal requirement and was currently only in draft form in any event. From a practical perspective, Trading Parties were processing minimal personal data with little or no special category data, in particular because the market was by nature a business market and therefore the number of individuals (as opposed to businesses) within it was limited. The Committee also considered that citing "legitimate interest" as a single static ground in the MAC was likely to introduce unnecessary ambiguity, and would not necessarily be, or remain, correct given the Market Operator and Trading Parties in fact rely upon various lawful grounds to share and process data, and the position could shift over time as the market developed. The current MAC wording required Trading Parties to identify their lawful grounds already and state this in their Privacy Notice. Therefore, taking into account all these considerations and the clarified legal advice, the Committee unanimously agreed not to include a lawful basis (namely 'Legitimate Interests') for data sharing in the MAC based on the ICO draft CoP.
- 3.8. The Committee also discussed the possibility of including a cross-reference to privacy notices in Schedule 13 of the MAC in order to identify within that schedule the lawful grounds being relied upon, the purpose for sharing personal data, and the types of data shared. The Committee, however, decided this was not necessary given that (a) Section C, paragraph 1.2 A and B of Schedule 13 of the MAC already requires the Market Operator to produce the Market Privacy Notice specifically identifying the purpose and legal basis for processing of Market Personal Data (which would include sharing of data), and for Trading Parties to then align with the Market Privacy Notice, and (b) the MAC already contains a definition of "Purpose" and section 15 requires that Market Personal Data may only be used for that Purpose.
- 3.9. Finally, the Committee debated the merits of introducing a list of the general data types in the MAC. However, again, in light of there being minimal and low risk personal data held within CMOS, and that a reference to data types/classes was already required to be included in the Market Privacy Notice, and required in the Trading Party Privacy Notices, the Committee determined that it was not necessary to make any changes at this time.
- 3.10. The Committee unanimously agreed to recommend the following watching briefs to the Panel:
- to review the data protection provisions in the Codes against the finalised ICO CoP - if and when it is published - in order to determine what, if any, changes are required for compliance;
 - to review the data protection provisions in the Codes once the types and categories of data being shared between parties bilaterally has been definitively ascertained by the Bilateral Project in order to determine what, if any, changes are required for compliance (including but not limited to reviewing the concept of, and arrangements for, 'Market Personal Data').

G19_A01

4. Review of Standard Processes for Data Subject Rights Requests

- 4.1. Amanda Hinde (AH) presented on this agenda item and how the Committee could take work forward to clarify in the market codes the handling of Data Subject Rights Requests (DSRRs) where the recipient of the DSRR may not have full control over the relevant data and may require the support of other Trading Parties.
- 4.2. AH and AJ clarified the legal requirements in GDPR Article 12. In summary, the concept of a 'data owner' was a construct of the MAC and CSD301 to signify who had responsibility for updating a field in CMOS, whereas the GDPR was based on the concept of data controllers and data processors. The Data Controller is the person or business who determines the purposes for which, and the way in which, personal data is processed. Section 5.2 of the MAC states that all parties (the Market Operator and each Trading Party) are data controllers of Market Personal Data, without reference to whether they are data owners' or not.
- 4.3. On this basis, all parties are legally jointly and severally liable for managing a DSRR, and the MAC requires the parties to cooperate with any requests. The data subject could legitimately send their request to any of the data controllers, and the 'clock' for responding would start at that point. A delay with any party could therefore result in a complaint to the ICO, for which all the parties could be held liable. Practically, however, if a party had done all it could to comply, the ICO would be highly likely to take this into account when considering any enforcement.
- 4.4. The Committee discussed and agreed that there was a need for clarity on what the first recipient of a DSRR should do and how to transfer the DSRR to the relevant party securely.
- 4.5. AJ explained that if there were genuine reasons for a company not completing the DSRR within one-month period (or the long-stop period of 3 months), for example because the processes involved were complex or because the standard processes took longer, the ICO would be highly likely to take into consideration the reasons for not meeting the timescale when considering whether to enforce penalties on a company.
- 4.6. The Committee also noted that there are possibilities in which an entity could refuse to comply with a DSRR based on legal and commercial reasons, for example not being able to erase all the data requested because there is a system restriction or because the data is required for a legal purpose, such as tax records.
- 4.7. The Committee discussed two options for dealing with a DSRR that straddles across multiple parties:
 - Option 1. Change all the existing Standard Processes in the market codes to impose GDPR timescales, to record when the 'clock' starts on the timescales and to enable identification of a DSRR as such; and
 - Option 2. Design a stand-alone mechanism using the DSRR Form that would allow parties to deal with a DSRR, in particular to identify it as such, to pass it on (where necessary), to track its progress, and to comply with GDPR timescales.

4.8. The Committee agreed to pursue Option 2 and to explore how best to impose timelines which ensure compliance with the GDPR (for example by including an overriding provision in Schedule 13). The Committee rejected Option 1 for the following reasons:

- There was a low number of DSRRs received in the market according to the Experience Review undertaken between March-July 2019.
- Option 1 would result in changes to the market systems and Trading Party systems, which would be disproportionate in cost and effort given the low number of DSRRs received.
- If the timescales in GDPR Article 12 changed, or there were any other applicable law changes, all market participants would have to update their systems again.
- It would be more straight-forward to introduce the additional matters listed in paragraph 4.9 below into a stand-alone process (Option 2), than into the Standard Processes (Option 1).

4.9. The Committee agreed that revisions to the Data Subject Rights Request Form (“DSRR Form”) would be necessary. In particular, the DSRR Form would need to capture:

- Date of receipt of the Data Subject Rights Request
- The type of Data Subject Rights Request (i.e. which data subject rights are being exercised)
- The deadline for completing the Data Subject Rights Request (i.e. one month (or three months) from the date of first receipt of the data subject request)
- Identities and contact details of all Trading Parties that would need to be involved (i.e. who received the data subject request, who would need to deal with it, and who was the Data Owner if it related to CMOS-data))
- Contact details of the data subject
- Contact details of the person(s) within the MO or Trading Party who has received and will be dealing with the Data Subject Rights Request
- A progress section to be updated with the actions which had been taken by each Trading Party in the chain and when.

4.10. The Committee agreed to explore whether each Data Subject Rights Request would need a unique identifier in the DSRR Form so that each party in the chain could identify the specific request they are dealing with in any given case. In this regard, the Committee queried whether the unique identifier populated by Kissflow would be the right one to use going forward; it also asked for a reminder as to what the ‘DSR reference’ meant in the original DSRR Form.

G19_A02

4.11. The Committee also agreed that there should be a guidance document with explanatory notes to assist parties on how to complete the DSRR Form.

G19_A03

4.12. The Chair actioned members to look at the DSRR Form offline and feedback any suggestions they may have for the content and order of the form to the secretariat within two (2) weeks.

G19_A04

4.13. The Chair noted that once the Committee had agreed the design and content of the form, then the Committee could progress to consider its other matters of concern:

- Where the DSRR Form should sit (as a paper or electronic form).
- How to transmit the DSRR Form from party to party.
- Whether the first recipient would only pass on the DSRR to the relevant party, who would then have to respond to the data subject, or whether the first recipient would act as the conduit and coordinate the actions of other relevant parties, and respond to the data subject accordingly.
- Whether there should be a communication to the other relevant data controllers (where it is not a CMOS change) upon resolution of the DSRR.

4.14. It was noted that if Kissflow became the only platform for using and the transmitting DSRR Forms then an access question would arise; currently only contract managers have access to Kissflow but a method would have to be agreed for Data Protection Officers (DPOs) or designated contacts to get access to Kissflow if the ultimate solution deemed that these persons were the most appropriate to handle DSRRs (ie – whether it would be for individual contract managers to grant access to their DPOs, or access could be given to DPOs as a market-wide solution). The Chair requested that this be captured in the actions for later Committee consideration .

G19_A05

4.15. The Committee also raised the following actions:

- MOSL Secretariat would upload the DSRR Form document to SharePoint to allow suggestions for change and feedback from the Committee to be provided; and

G19_A06

- MOSL Secretariat would send Michelle Coglan (MC) the link for Kissflow;

G19_A07

5. Market Privacy Notice Communications Review

5.1. Huw Comerford (HC) presented on this agenda item and explained that MOSL's Privacy Notice had been updated following a review by AJ, MOSL's General Counsel.

5.2. The Committee noted that the time period for Trading Parties to provide any comments before changes in the Market Privacy Notice are given effect is 15 Business Days.

5.3. The Committee asked for 'GDPR Compliance, **Market Privacy Notice: for action**' to be used as the title when issuing communications about updating the Market Privacy Notice, in order to increase the

likelihood of it being passed on to the relevant person or department, ie legal, DPOs or designated contacts. The Committee requested the Secretariat discuss with MOSL's Communications team how best to include the agreed wording in this communication.

G19_A08

- 5.4. The Committee discussed that the Market Privacy Notice actually served a dual purpose. It was MOSL's Privacy Notice (hence the references to sharing data with Diligent Board books) and it was also the Privacy Notice for the Market to which the Trading Parties needed to align their own Privacy Notices. After discussion, it was agreed that it would be preferable to retain the Market Privacy Notice as one document, but to create specific sections for ease of understanding and clarity, namely:
- a section dedicated to MOSL's Privacy Notice; and
 - a section which serves as the guidance document for Trading Parties.
- 5.5. The Committee noted that the Market Privacy Notice referred to sole traders only when it also needed to refer to unincorporated partnerships etc, as per the Natural Persons Guidance; that it needed to clarify the reference to special data categories; that it needed to clarify which data items are processed under which lawful basis and its purpose, along with other minor amendments for clarity.
- 5.6. The Committee requested AJ review the Market Privacy Notice in light of all its comments and update the MOSL's Privacy Notice accordingly, and circulate to the Committee for its information.

G19_A09

6. Natural Persons Guidance

- 6.1. George Monea (GM) presented on this agenda item.
- 6.2. The Committee discussed the content of the Natural Persons Guidance document and agreed to amend the word 'most customers' to 'customers' (Section 2.1, Natural Persons Guidance Document); subject to this change, the Committee unanimously voted to approve the Guidance Document for upload on the MOSL website.
- 6.3. The Committee actioned the MOSL Secretariat to circulate the Natural Persons Guidance document to the Panel members for information with the hyperlink included, and to ensure that a communication was sent to Trading Parties (contract managers and DPOs) to advise them it had been uploaded to the MOSL website.

G19_A010

7. Draft Committee Report

- 7.1. Committee members agreed to provide feedback on the Draft Committee Report offline via email/SharePoint.

G19_A11

8. AOB

8.1. The Committee agreed the next meeting would be on 5th (Thursday) March 2020.

Actions

- **G19_A01** – GDPR Committee to recommended the Panel to review the data protection provisions in the Codes against the finalised ICO CoP - if and when it is published - in order to determine what, if any, changes are required for compliance; and to review the data protection provisions in the Codes once the types and categories of data being shared between parties bilaterally has been definitively ascertained by the Bilateral Project in order to determine what, if any, changes are required for compliance (including but not limited to reviewing the concept of, and arrangements for, 'Market Personal Data').
- **G19_A02** – Secretariat to investigate whether Data Subject Rights Request would need a unique identifier in the DSRR Form so that each party in the chain could identify the specific request they are dealing with in any given case and if an unique identifier populated by Kissflow would be right to use going forward; and also to investigate what the 'DSR reference' meant in the original DSRR Form.
- **G19_A03** - MOSL Secretariat to create a guidance document with explanatory notes to assist parties on how to complete the DSRR Form.
- **G19_A04** – Committee members to look offline at the DSRR form and feedback any suggestions;
- **G19_A05** – Secretariat to explore what is the method for Data Protection Officers (DPOs) to get access to Kissflow – whether it is for individual contract managers to grant access to their DPOs, or it can be given as a market-wide solution.
- **G19_A06** – Secretariat to create a DSRR form document and upload it on SharePoint for Committee members to provide their feedback;
- **G19_A07** – Secretariat to send MC the link to Kissflow;
- **G19_A08** – Secretariat to liaise with MOSL's Communications team about how to include the agreed wording in future communications;
- **G19_A09** – AJ to review the current Market Privacy Notice to include two clear sections, one for MOSL and one for the Trading Parties and amend the draft to not refer to sole traders only (but also to unincorporated partnerships); remove the reference to special data categories; to clarify which data item is processed under which lawful basis and its purpose and other minor amendments for clarity;
- **G19_A10** - Secretariat to circulate the Natural Persons Guidance document to the Panel members for information with the hyperlink included; and
- **G19_A11** – Committee members to provide feedback for the Draft Committee Report offline.