

Introduction

As a leading UK price comparison website (“PCW”), comparethemarket.com (“CtM”) has a strong interest in ensuring that the UK maintains a world-class standard of regulation for data protection and online marketing. We welcome the Information Commissioner’s Office (“ICO”) work in this area and look forward to working constructively with all relevant bodies to ensure that the new Code of Conduct takes into account PCWs, the business model and the important work CtM undertakes to assist consumers secure a better deal across a range of products. Furthermore, we are also keen to ensure that any future regulatory framework for direct marketing sufficiently supports the ongoing work that is taking place to encourage innovation and data sharing.

Recognising that the proposed ICO Code of Practice encompasses a plethora of policy areas, we have structured our response based on key aspects in the guidelines which we would like to raise.

Customer Service Messaging

CtM recognises the importance of ensuring that the ICO creates a clear distinction between different forms of communication which organisations will have with their customers - particularly between those which are specifically designed to inform customers about key updates they need to be aware of (for example, issues with service provision or information on when a certain service is concluding) and those which seek to directly market a new product. We acknowledge that there are many instances in which this distinction should apply and that it is important for the consumer interest to always be protected.

However, we have concerns that the current distinction between service messages and marketing, as laid out in the proposed ICO guidelines, may be too strict and could prevent customers from receiving information which would benefit them. The examples provided by the ICO state that it would be acceptable to inform a customer they were running out of data on a mobile phone contract but not to make that customer aware that they could purchase further data at a cheaper cost. This could lead to customers taking a more expensive option as they have not been provided with all the facts relevant to their circumstances. Although we of course agree that service messages should not attempt to prompt further purchases by the customer, we believe that the result should not be that customers are disadvantaged by not receiving full information. The current wording of the Code of Practice may have the unintended and undesirable consequence of companies not being able to make customers fully aware of their options in order to make an informed decision. The fundamental objective of PCWs is to provide a better deal for consumers across a range of product areas and this is why customers use our website. The mission of all PCWs to save consumers money could be hampered if the definition of a service message is too strictly applied.

A central part of our business is ensuring we identify if our customers are currently over-paying for a certain product (for example, an insurance deal) but taking proactive steps helping them switch to better alternatives – through suggesting alternative, more cost effective/better value products they could switch to. This is vital to help consumers increase their engagement with a number of markets (energy, insurance, banking) and reducing the problems of inert customers overpaying for a number of products.

Indeed, to further strengthen our consumer proposition, CtM launched our Auto Check service in December 2018. The product allows CtM to inform consumers, who have signed up for automatic checks, of better offers in the market and encourages them to make the switch themselves. This has been a key innovation of ensuring our customers are regularly notified of alternative deals and remain

engaged in the market. Whilst we already have strong marketing standards in place for the Auto Check service - for example ensuring only customers who have opted in to getting information on alternative deals to switch receive our updates - this is an area where the proposed guideline distinction between marketing and service messaging will unnecessarily restrict customers from receiving relevant information about products or services that may save them money.

Further, if an existing customer became eligible for a free gift or a discount (e.g. a loyalty discount or a gift to thank the customer for using our services) the strict definition of service messages suggests that we would not be able to inform the customer of the availability of that free gift or discount unless they had signed up for marketing. We would urge the ICO to clarify in the Code that this is not the ICO's intention.

As such, we would welcome clarification from the ICO on the guidelines around service messaging, recognising the particular nature of PCWs and the interlinked function of both updating our customers and proactively providing them with cost-saving alternatives.

Regulator Driven Correspondence

The Code of Practice highlights that communications required by other regulators could be deemed direct marketing regardless of whether the regulators have the interests of customers in mind.

Although CtM agrees that the examples provided by the ICO in the Code of Practice in this section are helpful, we are concerned that this remains an area where conflict between the expectations of different regulators could arise. Clarification would be appreciated on when the direct marketing rules apply in such situations as otherwise it will be impossible for companies to satisfy their regulatory obligations. The Code states that a communication may not be deemed direct marketing if it contains information that is given solely for the benefit of the individual and the company's only motivation is to comply with a regulatory requirement. It is quite likely there could be a scenario where a regulator such as the FCA requests customers are made aware of additional information such as additional products that may be available to ensure the customer is able to make an informed choice as to their options. This may, naturally, however lead to the purchase of a product which may be deemed within a company's interests. Even if we consider the tone of the message alongside other recommendations within the guidance on delivery messages that are not considered direct marketing, it remains unclear which regulatory requirements take priority here.

Social Media Marketing

In its proposed Code of Practice on direct marketing, the ICO provides important new standards regarding the targeting of both existing and prospective customers on social media channels. We recognise this is an important issue in the current policy landscape on data protection and is an increasing priority for many policymakers, particularly given the dominance of a relatively small number of online companies. CtM is aware of the issues associated with companies such as Facebook and Google dominating a disproportionate amount of online data and agrees it is important to have strong customer protections.

CtM would challenge however the position that consent is the most appropriate legal basis here. This activity is carried out to provide relevant adverts to customers. It is important to always remember that individuals will see adverts anyway in this context but the use of their data can ensure that they

see adverts that are more relevant to them. The provision of these adverts is therefore not any more intrusive or disruptive to the customer as a result. Provided customers are able to opt out then this scenario would seem to be entirely appropriate to meet the legitimate interests test and collecting GDPR consent would not be proportionate or necessary. The recitals to the GDPR in fact call out direct marketing as an example of legitimate interests processing and so we would submit that provided all elements of the legitimate interests test are satisfied there should be nothing to prevent companies relying on this as the legal basis for such activity.

In addition to providing customers with targeted adverts, the use of data can also ensure that customers don't receive adverts. For example, if a customer has recently made a purchase, appropriate use of their data could ensure that they do not then receive adverts for the same product as this would no longer be relevant to them. In this scenario, customers are not actually receiving any direct marketing and we would suggest that the Code of Practice should make clear that for the purposes of avoiding targeting ads to customers, this is not direct marketing and legitimate interests would be an appropriate ground to rely on.

CtM also understands that, from a data protection perspective, building audiences based on characteristics of our original customer base – 'lookalike' audiences - is complex. However, this activity is not intrusive to customers and helps advertisers to ensure that the right adverts are reaching the right customers. CtM understand the need to be transparent with consumers regarding how their data is used and that if individuals have objected to the use of their personal data for marketing purposes we must not use their data for the creation of 'lookalike' audiences. We would submit again that this activity could be justified on the basis of legitimate interests and the Code of Practice should be clear on this point.

Additionally, we would urge the ICO to ensure future guidelines on the use of data for marketing on social media does not inhibit important innovation in 'lookalike' audiences. The ability of PCWs to use our customers' data as a basis to identify these audiences on social media is crucial to reaching out to inert consumers who could significantly benefit by switching products on our platform and subsequently save money. For example, if our existing customer data has highlighted a certain demographic which is more likely to be overpaying on their energy bills, or have identified certain areas of the country particularly in need of new flooding insurance, then the ability of a company like Facebook to identify individuals who match our existing customer profiles is crucial and benefits customers. Indeed, we note that policymakers are currently undertaking work to further encourage the use of data-driven solutions to support consumers – for example, encouraging the roll-out of Open Banking – something which CtM is fully supportive of.

Ad Tech

CtM understands that ad tech is increasingly important to how we communicate with customers, yet the evolving technology means the business needs to be clear and transparent with what it does with customer's data. CtM regularly provides training for its staff and reviews its approach to advertising and social media, cookies, GDPR and PECR.

The ICO's draft Code of Practice states that 'simply accepting a third party's assurances that the data they are supplying is compliant is not enough'. It implies that simple contractual requirements are insufficient, and that the advertiser must take responsibility for undertaking proportionate due diligence on third parties a business is placing its advertising activity in, to ensure they are ICO compliant. Although CtM strongly agrees that appropriate controls are required around personal data

in ad tech, we are concerned that requiring each individual advertiser to audit third parties to ensure they are ICO compliant, above and beyond existing data protection controls, places great onus on advertisers and may not be the most efficient way of ensuring compliance. There is a risk that advertisers will deem it unviable to use many ad networks and/or third parties, leading to greater dominance in the market of 'big tech' firms. Therefore, should fewer advertisers be able to provide services due to greater auditing required of third parties, this could put many out of business and lead to further consolidation in the industry of the few dominant players. This could be an area where an accreditation scheme may offer advertisers reassurance that the third party is meeting the ICO's expectations, alongside some minimum contractual standards to ensure an even playing field.

Conclusion

We hope that the above submission is informative, highlighting key areas of concern and where further clarification from the ICO would be welcome. We look forward to constructively working with the ICO on these important issues, to ensure an effective Code of Practice is implemented.