



Direct Marketing Code of Practice

ICO – Call for Views

Response from the Data Protection Network

20.12.18

Please note this response to your call for view represents a collaborative approach from DPN founders, board members and the editorial team.

Q1 The code will address the changes in data protection legislation and the implications for direct marketing. What changes to the data protection legislation do you think we should focus on in the direct marketing code?

Legitimate Interests & PECR

Despite clear published guidance from the ICO on Legitimate Interests, there are still misconceptions amongst the public and marketers themselves about when LI may be appropriate for direct marketing activities. It would be helpful for the Code to focus on how to comply with both GDPR and PECR. Many are still stuck in the mindset of opt-out/opt-in “consent”. Clarity on when LI may be an acceptable lawful basis for different marketing channels and in different contexts (e.g. B2B or B2C) would be helpful.

Requirements for lawful bases

The ICO has published detailed guidance on the requirements consent and LI. It may prove helpful to focus on how organisations meet these requirements in a direct marketing context.

Third party data - Legitimate Interests / Consent

There is some concern about the compliance of third-party lists for marketing. An explanation of when consent would be a requirement (to comply with PECR) and when LI may be appropriate may be helpful.

Right to be Informed

It could provide helpful to provide examples of compliant marketing permission statements (based perhaps on both LI and consent) and how the right to be informed can be met.

The ‘soft opt-in’ under PECR & Legitimate Interests

There is misunderstanding surrounding this concept and it is being approached in differing ways in light of GDPR. It may be helpful to provide clarification that when relying on the soft opt-in this is not just an exemption to consent, but now under GDPR is in fact an alternative to consent, with organisations needing to meet the requirement of LI.

Contractual/Service messages

Organisations may benefit from understanding what constitutes a service message as part of a contract and what constitutes a direct marketing message. The ICO has issued fines recently in this area but there remains some misunderstanding.

Recital 32

Some clarity would be helpful regarding regulatory interpretation of Recital 32 when applied to online identifiers and pre-checked/asymmetric approaches to consent collection. The overlap of GDPR and PECR is not clearly understood here. Providing clarity on browser fingerprinting and its position within personal data may help to head off future malpractice.

We believe the marketing communications sector would benefit from some definitive words and use cases on the application of pseudonymisation.

Q2 Apart from the recent changes to data protection legislation are there other developments that are having an impact on your organisation's direct marketing practices that you think we should address in the code? Yes/No

Yes

Q3 If yes please specify

We believe there is a lack of understanding that directly targeting individuals with online advertisements using personal data may constitute direct marketing.

Targeted advertising via social media using email address or other tracking techniques has become very common practice – both for targeting existing customers and 'lookalikes'. It would be helpful for organisations to understand how to do this compliantly.

Q4 We are planning to produce the code before the draft ePrivacy Regulation (ePR) is agreed. We will then produce a revised code once the ePR becomes law. Do you agree with this approach? Yes/No

Yes

Q5 If no please explain why you disagree

n/a

Q6 Is the content of the ICO's existing direct marketing guidance relevant to the marketing that your organisation is involved in? Yes/No

No

Q7 If no what additional areas would you like to see covered?

While much of the existing guidance is relevant, our answer would be "in part" rather than a yes/no.

We believe organisations would benefit from clarification concerning:

- 1) when marketing online becomes direct marketing.
- 2) what constitutes B2B marketing activities and when this falls out of scope for PECR.

We believe there is misunderstanding surrounding compliant B2B data collection and marketing activities. For example, often at business events and conferences personal data is collected in a much more informal manner (e.g. business card exchange, scanning barcodes etc.) and might be shared with exhibitors for their own marketing purposes. Examples of how to compliantly collect

and use data, when collected directly or via a third party (e.g. event organiser) for direct marketing us may prove helpful.

Q8 Is it easy to find information in our existing direct marketing guidance? Yes/No

No

Q9 If no, do you have any suggestions on how we should structure the direct marketing code?

We believe the current guidance is relatively easy to navigate so our answer would again be “in part” rather than a yes/no.

We believe organisations would appreciate a code that is easily digestible for marketers who may not have a specialist knowledge in data protection. It may benefit from a positive tone, while also highlighting the risks of non-compliance. We anticipate it will be clear how this code differs in status from previous DM guidance.

We believe it will be particularly important to clearly set out that organisations need to be compliant with GDPR and PECR, and how these regulations work together. We believe the structure should try to clearly set out:

- The appropriate lawful bases under GDPR for direct marketing
- What constitutes direct marketing (vs a contractual/service message)
- For what activities consent is a requirement under PECR
- For what activities Legitimate Interests may be appropriate

With clear sections for:

- Each traditional marketing channel
- Online marketing
- B2C
- B2B

We believe it is critical for there to be version control, for the Code to be clearly dated and clear promotion of any significant changes in future.

Q10 Please provide details of any case studies or marketing scenarios that you would like to see included in the direct marketing code.

Using a number of case studies and marketing scenarios would bring the code to life and make it easier for marketers to apply in practice. For examples, scenarios such as:

- **B2C** demonstrating where consent is required
- **B2C** where soft opt-in may be appropriate
- **B2C** where LI may be appropriate for different channels (e.g. post or telemarketing)
- **B2B** how LI may be appropriate for all channels
- **Third party data** use for direct marketing purposes (both B2B and B2C)
- **Online targeting** of adverts to existing customers and lookalikes (via tracking tags or hashed email address)

The DPN would be happy to assist the ICO by providing draft examples of marketing scenarios.

Q11 Do you have any other suggestions for the direct marketing code?

No

Q12 Are you answering these questions as:

Answer: Other – The Data Protection network is dedicated to providing expert opinion, quality resources and learning materials, to both experts and non-experts in the field of data protection. We provide regular webinars and live events. Our founders, board members and editorial team are all data protection specialists. In 2017 the DPN published Guidance on Legitimate Interests (industry-led guidance produced in partnership with privacy specialists and trade groups). The DPN was founded by the data protection consultancy Opt-4.

Q13 Please provide the name of the organisation that you are representing:

The Data Protection Network (dpnetwork.org.uk)

Q14 Contact:

████████████████████ the Data Protection Network email; ██████████@[opt-4.co.uk](mailto:██████████@opt-4.co.uk)