



UK Finance response to ICO Call for Views on Direct Marketing Code

24 December 2018

Please find below the response from UK Finance to the [ICO's call for views on a direct marketing code of practice](#).

Questions

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?

Basis for processing: The interaction between the GDPR's basis for processing provisions and the PECR requirement for 'consent' with 'soft opt in' option should be explained in a structured way. What types of marketing processing can be based on legitimate interests (particularly given the mention of marketing in the Recital 47), and what must be based on consent due to PECR, and how best can the overlap be managed? Data processing occurs in different ways, and is potentially conducted by different controllers, at different phases of the marketing process (collection, profile creation, sending of direct marketing material, etc); it would be helpful to have guidance on some example end to end processes. See also comments below under question three.

Right to object and right to erasure: The Code should cover the right to object in GDPR Article 21(3) and the interaction with the right to opt out of direct marketing under PECR. In particular:

- The Code should also cover the resulting right to erasure; the Code should confirm that firms can retain enough data on a suppression list to ensure they do not accidentally send marketing later to a person who has opted out/ objected.
- The Code should confirm that where an individual applies for a new product, or opts-in (eg: consents via reconfiguration of online marketing preferences), this overrides a previous unsubscribe/objection request.
- Examples of acceptable opt-out mechanisms should be provided. For example, simple unsubscribe links as well as links to a page where marketing preferences can be easily reconfigured. In our view, a flexible approach that allows different mechanisms is appropriate.
- The extent to which a firm can try to 'win back' a customer who has objected/ unsubscribed. We note that the current ICO guidance does allow an immediate final contact to advise that the opt out has been received and advising of how to opt back in (paragraph 194).

Avoid duplication: We note that the ICO and EDPB have already produced considerable guidance on consent. The new Code should focus on supplementing this guidance with marketing-specific content and examples, rather than duplicating existing guidance (though cross-referral could be useful).

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

Q3 If yes please specify

Online marketing and third parties: Since the PECR were drafted, the online marketing environment has become significantly more complex, with greater use of cookies, analytics, third parties in different roles and more sharing of personal and anonymised data. It would be helpful for the ICO to provide guidance on these more complex arrangements.

Recent court cases: It would be useful for the ICO to factor into the Code the outcome of the recent Xerpla case. Though it predates GDPR rules, it is relevant to the design of compliant consent requests in the marketing context.

Growth in regulatory demands to contact customers: The FCA is increasingly expecting our members to proactively contact customers to advise them of products that could be more beneficial to them than products they currently hold (eg: alternative savings products with a higher interest rate). Given the regulatory driver behind these notifications, it is currently unclear whether they should be considered 'marketing'. It is therefore unclear whether firms should contact individuals that have opted out of marketing. *We recommend:*

- *The ICO confirm in its guidance that such notifications are not considered direct marketing and are not subject to PECR rules.*
- *The ICO discuss this issue with the FCA to ensure alignment. Firms need to be able to satisfy all of their regulatory obligations simultaneously and should not need to choose between them.*

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

Q5 If no please explain why you disagree

(Given the likely timeframes for finalising the ePR, we agree that it makes sense to start developing the Code now.)

Q6 Is the content of the ICO's existing direct marketing guidance relevant to the marketing that your organisation is involved in?

Yes

No

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

On the whole: The guidance is on the whole relevant to our members but would benefit from some updates, as outlined in our submission.

Definition of 'direct marketing', in particular the border with 'servicing': It would be useful for the Code to discuss various other kinds of communications material that do not obviously fall within scope of the promotion of products, services, aims or ideals, but are also not strictly necessary communications and clarify the boundaries of regulated marketing. For example, although the current guidance refers to promotional material of not-for-profit firms, it does not discuss other types of material that is not sent with the intention to sell a service or product. For example, in financial services it would be helpful to have clarity that the following are not considered direct marketing:

- Notifications to a customer that the firm is withdrawing the customer's current product, with an explanation of how to shift to a comparable product that is still available.
- Information about preferential products / products which could save the customer money (see also comments above about communications required by regulators).

We also note that there are other unclear cases:

- Communications to customers to remind them of the channels through which they can engage with their provider / bank, eg: mobile banking and online banking.
- Law firms send out emails relating to legal developments.

Such messages do not intuitively seem like marketing, but it is likely that many people would expect to have the option to unsubscribe.

Strictly necessary cookies: This concept could helpfully be explored further in the Code. We support the treatment of cookies and similar tools necessary for security as 'strictly necessary' under PECR.

Use of non-customer data for marketing purposes: When and how a business can lawfully collect data about people they don't have a direct relationship with for direct marketing purposes, for example by post. There is a misconception among some in the public that marketing to non-customers became illegal under GDPR.

Future proofing of marketing permissions: Consents for marketing need to be specific and clear but sometimes a firm's marketing approach will evolve. New channels can be contemplated, for example as technology evolves with new and unanticipated channels potentially appearing. Guidance as to an appropriate means to seek and explain marketing consent in a future proof way would be helpful.

B2B communications: It would be helpful for the Code to expand the section on B2B texts and emails in the current guidance, in particular how GDPR, DPA and PECR apply to:

- Emails sent to an individual's professional email address in relation to professional matters, eg: sales to the company where that individual works, not to that individual, or notifications of free events and training for client firms. (We understand that this can be based on legitimate interests, as per ICO guidance, and would be subject to the right to object under GDPR).¹
- Different types of firm, such as partnerships, limited partnerships, limited liability companies and sole traders; at present this is only covered very briefly in the guidance.

Q8 Is it easy to find information in our existing direct marketing guidance?

Yes

No

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

Broadly, yes, the current guidance is easy to navigate. It would, however, be helpful for the discussion of the basis for processing, consent, and 'soft opt-in' to be located in one place rather than spread across several sections.

Also, in addition to scenarios and examples, the Code should provide clear statements about what is permitted, when the ICO has a concrete view, and should clearly distinguish between legal requirements and ICO recommendations for good practice. This provides a clear steer to firms, whereas scenarios require analysis and comparison to their own plans to determine relevance and applicability.

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

As highlighted above, marketing online using third party arrangements would be a helpful case study, including expectations around terms of use and need for a controller-processor contract.

¹ See table under *Can we use legitimate interests for our marketing activities?* in ICO guidance at: https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/legitimate-interests/when-can-we-rely-on-legitimate-interests/#marketing_activities

See also page 44 of the updated ICO Direct Marketing Guidance available here: <https://ico.org.uk/media/for-organisations/documents/1555/direct-marketing-guidance.pdf>

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

No.

About you

Q12 Are you answering these questions as?

A public sector worker

A private sector worker

A third or voluntary sector worker

A member of the public

A representative of a trade association

A data subject

An ICO employee

Other

If you answered 'other' please specify:

NA

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

UK Finance

About UK Finance:

UK Finance represents more than 250 of the leading firms providing finance, banking, markets and payments related services in or from the UK. UK Finance was created by combining most of the activities of the Asset Based Finance Association, the British Bankers' Association, the Council of Mortgage Lenders, Financial Fraud Action UK, Payments UK and the UK Cards Association. Our members are large and small, national and regional, domestic and international, corporate and mutual, retail and wholesale, physical and virtual, banks and non-banks. Our members' customers are individuals, corporates, charities, clubs, associations and government bodies, served domestically and cross-border. These customers access a wide range of financial and advisory products and services, essential to their day-to-day activities. The interests of our members' customers are at the heart of our work.

Q14 We may want to contact you about some of the points you have raised. If you are happy for us to do this please provide your email address:

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ENDS