

Information Commissioner's Office

# Consultation:

## Direct Marketing Code

Start date: 8 January 2020

End date: 4 March 2020

# Introduction

The Information Commissioner is producing a direct marketing code of practice, as required by the Data Protection Act 2018. A draft of the code is now out for public consultation.

The [draft code of practice](#) aims to provide practical guidance and promote good practice in regard to processing for direct marketing purposes in compliance with data protection and e-privacy rules. The draft code takes a life-cycle approach to direct marketing. It starts with a section looking at the definition of direct marketing to help you decide if the code applies to you, before moving on to cover areas such as planning your marketing, collecting data, delivering your marketing messages and individuals rights.

The public consultation on the draft code will remain open until **4 March 2020**. The Information Commissioner welcomes feedback on the specific questions set out below.

You can email your response to [directmarketingcode@ico.org.uk](mailto:directmarketingcode@ico.org.uk)

Or print and post to:

Direct Marketing Code Consultation Team  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire SK9 5AF

If you would like further information on the consultation, please email the [Direct Marketing Code team](#).

## Privacy statement

For this consultation we will publish all responses received from organisations except for those where the response indicates that they are an individual acting in a private capacity (eg a member of the public). All responses from organisations and individuals acting in a professional capacity (eg sole traders, academics etc) will be published but any personal data will be removed before publication (including email addresses and telephone numbers).

For more information about what we do with personal data please see our [privacy notice](#)

Q1 Is the draft code clear and easy to understand?

- Yes
- No

If no please explain why and how we could improve this:

The draft code is, in our view, clearer than the current code it is replacing. However, we would ask that the ICO revises the draft code to clarify a number of points.

**The disproportionate effort derogation (page 49)**

Could the ICO please provide examples of situations in which the Commissioner believes this derogation may apply.

**Refer a friend (pages 54 and 83)**

We strongly endorse the comments made by the Data Protection Network, made available [here](#), about the manner in which businesses might conduct refer a friend marketing that complies with the letter and the spirit of the data protection laws, adds value to consumers and allows business to grow based upon positive referrals.

**Example about joint marketing campaigns (page 27)**

The ICO suggests in the example that the supermarket needs to ensure that "there is appropriate consent from its customers to receive direct marketing promoting the charity." Can the ICO please clarify, in relation to this example, what would amount to 'appropriate consent' – does the supermarket in the example provided need separate opted in consent to send marketing about the charity?

**Can we target our customers or supporters on social media**

The ICO suggests that individuals will not expect to be targeted on social media. The draft further states that consent is likely to be the most appropriate legal basis for processing in this context. We disagree with this view and believe customers are very aware and used to seeing ads on social media. In the ICO's Report on Adtech and Real Time Bidding, it cites Article 29 Working Party ('A29WP') Guidance noting that behavioural targeting is unlikely to be justified on the basis of legitimate interest - such A29WP views however often relate to scenarios where there is wide volumes of data collection across sites with little consumer awareness. In contrast, standard custom audience targeting generally works very differently: it does not depend on building large profiles, but just allows a marketer to reach an individual they already know in a different (ad-supported) medium.

**Can we target people on social media who are similar to our customers or supporters? (page 91)**

The ICO suggests that we "need to be satisfied that the social media platform has taken all necessary steps to provide the appropriate transparency information to individuals." We consider the ICO's guidance on the use of advertising services provided by social media giants to be impractical. As the ICO undoubtedly understands, individual retailers have no capacity to affect the manner in which these platforms operate.

Q2 Does the draft code contain the right level of detail? (When answering please remember that the code does not seek to duplicate all our existing data protection and e-privacy guidance)

- Yes
- No

If no please explain what changes or improvements you would like to see?

Please note our comments elsewhere in this response.

Q3 Does the draft code cover the right issues about direct marketing?

- Yes
- No

On the whole, yes. However, we request the draft code covers additional issues.

**Time period for stopping sending direct marketing after a customer withdraws consent/objects to processing for direct marketing purposes**

The ICO has previously published time frames in which it expects companies to stop sending direct marketing communications after a customer withdraws consent or objects to processing for direct marketing purposes. These guidelines are a useful means of managing a customer's expectations, especially in the case of postal marketing where lead times for printing and mail sorts can be quite lengthy. Could the ICO please address this issue in the draft code.

If no please outline what additional areas you would like to see covered:

Q4 Does the draft code address the areas of data protection and e-privacy that are having an impact on your organisation's direct marketing practices?

- Yes
- No

If no please outline what additional areas you would like to see covered

Please note our comments elsewhere in this response.

**Q5 Is it easy to find information in the draft code?**

- Yes
- No

If no, please provide your suggestions on how the structure could be improved:

Fine.

**Q6 Do you have any examples of direct marketing in practice, good or bad, that you think it would be useful to include in the code**

- Yes
- No

If yes, please provide your direct marketing examples:

The GDPR and the ICO draft code are both clear as to what constitutes consent; in particular, the draft code delivers very helpful practical examples of how a customer might indicate his or her consent to direct marketing activities. Could the ICO please provide similar practical examples of how controllers might best comply with the soft opt-in under PECR and how they might offer customers the means of opting out of marketing communications when providing their details to controllers (assuming a controller seeks to rely on legitimate interest for, say, postal marketing).

**Please note the following examples are not from our own website but from the websites of other companies that conduct direct marketing. We have redacted the names of the companies from the screenshots below.**

**Example 1 – confusion over consent / legitimate interest style questions**

It is not clear to us whether the following permission questions are (i) non-compliant consent-based marketing permissions because the boxes are pre-ticked; or (ii) the ICO would consider that by un-ticking a box, an individual is opting out of certain direct marketing activities and therefore these amount to compliant legitimate interest based marketing permissions.

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We would love to stay in touch with you about the very best [REDACTED] deals and our fantastic [REDACTED]  
[REDACTED] Keep these boxes ticked to hear from us by:

Email     Phone     SMS     Post

By clicking continue you agree to receive communications from us, unless you have unticked the boxes above. You can change your preferences at any time. Your information will be used in line with our Privacy and Cookies policies. Terms and conditions apply.

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*Back to your basket*

(continued overleaf)

## (Response to question 6 continued)

### SECURE CHECKOUT

- I'm an existing customer  
 I'm a new customer (checkout as a guest)

Please enter your email address to stay updated with your order

Email Address Required

Please confirm how you would like to hear from us:

I'd like to keep up to date with new products, news and offers by email  Yes  No

I'd like to be inspired by brochures and promotions by post  Yes  No

I'd like to receive offers and promotions from selected partners of [REDACTED] post.  Yes  No

You can change your preferences at any time

PLEASE ENTER YOUR DETAILS

Treating your personal information with care is important to us. For more information about how your details will be used, please see our [Privacy Policy](#).

### Example 2 – opt out based questions are partially hidden

Some direct marketing companies do not display their marketing permission questions prominently in the new customer journey; the example below shows that customers must identify the “click here to opt out” (circled in red below) link which, if clicked, reveals the opt-out based questions. We are not sure if, in the ICO’s view, this is compliant with the GDPR.

Order now and your [REDACTED] will be with you on Monday, 17 February.

**1. Tell us about you...**

[Click here to login](#) if you already have an account \* All fields are required

Choose your title: Your password  
Your first name Your last name Confirm your password  
Your email address Your telephone number  
Confirm your email address  
(We will send you order confirmation here)  
Please confirm your date of birth  
14 February 2020

Your order - 1 item [+](#)  
[Add a voucher](#)

Cost of [REDACTED] £121.88  
Add delivery: £0.00

**Total to pay: £121.88**  
(exc. VAT + Delivery)

We'd like to notify you about free [REDACTED] sales and other special offers personalised just for you. In our [privacy policy](#) we explain how we'll use your data and keep it 100% safe.  
[Click here to opt out](#)

**Buy now**

By placing your order you agree to our [Terms and Conditions](#) & our use of [Cookies](#)

[Continue shopping](#)

Clicking the ‘click here to opt out’ reveals the following:

We'd like to notify you about free [REDACTED] sales and other special offers personalised just for you. In our [privacy policy](#) we explain how we'll use your data and keep it 100% safe.

Opt me out of my monthly free sample reminders

Opt me out of updates and other offers you think I'll love

Opt me out of community news

Q7 Do you have any other suggestions for the direct marketing code?

**Good practice recommendations**

We acknowledge that the Information Commissioner is required by section 122 of the Data Protection Act 2018 to prepare a code of practice which provides practical guidance in relation to the carrying out of direct marketing *in accordance with* data protection legislation (section 122(1)) and such other guidance as the Commissioner considers appropriate to promote good practice in direct marketing.

The Commissioner makes several good practice recommendations in the draft code; some are, in our view, reasonable and we have adopted them into our practices already.

However, we are concerned about the Commissioner's recommendation that controllers ought to "[g]et consent for all your direct marketing regardless of whether PECR requires it or not."

The Commissioner herself notes in the draft code that these recommendations "do not have the status of legal requirements but aim to help you adopt an effective approach to data protection compliance."

We do not believe that the recommendation to obtain consent for all direct marketing helps controllers adopt an effective approach to data protection compliance. In fact, the recommendation is at odds with data protection legislation and errs towards the creation of new law.

The GDPR identifies 6 lawful bases for the processing of personal data. Although the GDPR prescribes that controllers use one or other lawful basis in certain circumstances, and prescribes certain rules that controllers must comply with to rely on each lawful basis, it does not distinguish any hierarchy of lawful bases. Equally, as the Commissioner's recommendation applies, the PECR does not prescribe the use of consent for all direct marketing activities.

Moreover, recital 47 expressly states that the "processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest." It is for each controller to determine whether or not processing for direct marketing purposes *should* be carried out for a legitimate interest or whether consent is a more appropriate basis.

That is the ICO's view as stated here: <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/>. It is, we believe, the correct view. To recommend as good practice that controllers obtain consent for all direct marketing activities has no basis in law and takes away from controllers the need to consider carefully their relationship with the individual which is, we believe, a vital aspect of data protection compliance.

We believe the ICO's good practice recommendation is unhelpful and should be replaced with a recommendation that each controller carefully considers whether consent or legitimate interests is the most appropriate lawful basis based on the activity in question and the relationship with the individual.

(Response to question 7 continued)

### **Definition of direct marketing**

On page 3 of the draft code, the ICO states that “[d]irect marketing purposes include all processing activities that lead up to, enable or support the sending of direct marketing”. This is, we believe, a misstatement of the law. Section 122(5) of the Data Protection Act 2018 provides a statutory definition of direct marketing:

“the communication (by whatever means) of advertising or marketing material which is directed to particular individuals”.

The law is clear that it is the communication which amounts to direct marketing, not (necessarily) the steps leading up to that communication.

Not only do we consider that the ICO is misstating the law, we also believe that its definition of direct marketing would cause considerable confusion and detriment to consumers.

Take, as an example, a form of direct marketing communication which requires consent. The ICO’s view is that every processing activity up to and including the communication itself amounts to direct marketing and would therefore also require consent.

Consent must, amongst other matters, be unbundled and so companies would need separate tick boxes in the customer journey to obtain consent for each stage of the processing up to the sending of the communication (which would include storing the data, any profiling, sending it to any IT/marketing service provider). Surely this would not be to the benefit of consumers?

## About you

Q8 Are you answering as:

- An individual acting in a private capacity (eg someone providing their views as a member of the public)
- An individual acting in a professional capacity
- On behalf of an organisation
- Other

Please specify the name of your organisation:

Direct Wines Limited

If other please specify:

Q9 How did you find out about this survey?

- ICO Twitter account
- ICO Facebook account
- ICO LinkedIn account
- ICO website
- ICO newsletter
- ICO staff member
- Colleague
- Personal/work Twitter account
- Personal/work Facebook account
- Personal/work LinkedIn account
- Other

If other please specify:

Thank you for taking the time to complete the survey