



BY E-MAIL

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Dear Sirs

DIRECT MARKETING CODE OF PRACTICE CONSULTATION RESPONSE

We welcome the opportunity to respond to the ICO's consultation on the Direct Marketing Code of Practice – draft code for consultation (the "**Draft Code**").

Pinsent Masons LLP is an international law firm with a dedicated privacy practice, including over 30 specialists in the UK alone and has worked closely with the ICO over many years. We have a range of clients across sectors, with many operating in highly regulated sectors, who deal with direct marketing issues.

The Draft Code covers many helpful issues and, as ever, is written in the ICO's trusted and renowned clear style. We have provided feedback based on our experience supporting clients in response to many of the questions raised in your survey form and hope they are helpful.

1. IS THE DRAFT CODE CLEAR AND EASY TO UNDERSTAND?

YES.

2. DOES THE DRAFT CODE CONTAIN THE RIGHT LEVEL OF DETAIL?

NO, in relation to the areas set out below.

2.1 Are regulatory communications direct marketing?

2.1.1 Many of our clients operate in highly regulated sectors and are cognisant of the need to meet both their data protection obligations in relation to direct marketing under the Data Protection Act 2018, the General Data Protection Regulation 2016/679 and the Privacy and Electronic Communications Regulation 2003 (together the "**Direct Marketing Rules**") and their regulatory obligations.

2.1.2 The question of regulatory communication v. direct marketing is a question that often arises. Many of our clients have become comfortable that

adopting a neutral and factual tone ensures that the communication is not considered to be direct marketing.

2.1.3 However, there is a general concern around the need to comply with the Direct Marketing Rules and we have experience of clients who are paralysed by the risk of a communication being deemed to be direct marketing.

2.1.4 Accordingly, clear guidance within the Draft Code on how to meet regulatory requirements as well as the Direct Marketing Rules is welcome. However, we are concerned that the additional detail provided in the Draft Code will create a conflict for many of our clients operating in highly regulated sectors.

2.1.5 The Draft Code suggests that regardless of regulatory obligations, Controllers should refrain from anything promotional in the content of the message. However, this puts many of our clients in a difficult position, as it will be very difficult to demonstrate how they have taken the required steps to meet their regulatory obligations if they have not conveyed the benefits of taking, or the risks associated with not taking the recommended course of action. Therefore, it may not be possible to meet a regulatory obligation without encouragement or promotion. In these circumstances, the regulatory obligation provides crucial context to the communication and our view is that it would be a welcomed clarification if the Draft Code explicitly recognises this point.

2.1.6 We welcome the guidance on page 21 setting out "*Examples of when a 'regulatory communication' might not constitute direct marketing...*" Our experience of working with clients in highly regulated sectors would indicate that many regulatory communications do adopt a neutral tone, as envisaged by the first bullet point, but not always. In the energy sector, for example, suppliers are required to provide information about different tariffs which may benefit them, including financially. These types of regulatory obligations are intended to address market failures, including those deriving from lack of engagement from certain customer groups. However the requirement for neutrality "*without any encouragement or promotion*" is likely to undermine the purpose of these regulatory obligations and our clients' ability to fulfil those obligations for the benefit of customers.

2.1.7 There is therefore a significant challenge for any Controller that operates in a highly regulated sector and, therefore, there is a real risk that despite their best intentions, they will fall foul of one or the other, with the result that the customer suffers. The addition of the word "unnecessary" to the first bullet point above so it reads "*without unnecessary encouragement or promotion*" might be more helpful and would require those who are subject to an obligation to demonstrate why any encouragement or promotion was necessary in the context of a particular regulatory requirement.

2.1.8 "*Is given solely for the benefit of the individual*" may be problematic. It may be the case that the communication benefits the wider public or inadvertently the regulated Controller itself (as a fortunate consequence of complying with its regulatory obligations). It would appear that what the Draft Code is trying to achieve here is to prevent Controllers from using regulatory communications as an opportunity to promote themselves unnecessarily which seems a fair and reasonable objective. Our view is that a clear statement would be "*not used to promote the Controller sending it, including by unnecessarily promoting its aims, ideals, products or services*".

2.1.9 The last bullet point may only be achievable in a small proportion of cases where a regulation specifically requires a Controller to act against its own best interests. The need to meet regulatory obligations will be equally necessary, regardless of whether those obligations are against the regulated body's interests or otherwise.

2.1.10 There are examples where compliance with an obligation requires regulated bodies to make multiple contacts with customers through a range of different channels. It would be helpful if the Draft Code addressed this issue, perhaps advising that the frequency and method of communication must be reasonably necessary in the context of compliance with the regulatory obligation.

2.1.11 The Draft Code states that it *"is important to remember that the direct marketing provisions of the GDPR and PECR may apply to communications that are sent to meet a regulatory objective, comply with a licence condition or meet a wider public policy initiative"* which suggests that it may be better for Controllers not to communicate with its customers at all rather than take the risk of breaching the Draft Code. Therefore, it would be beneficial to outline when it will be acceptable to send regulatory communications, particularly where there is an overriding public interest.

2.1.12 For example, *"the content and context of the message is likely to determine whether it is direct marketing, regardless of the wider public policy objective behind it"*, is attempting to provide helpful guidance. However, applying this statement in practice will often be problematic. For example, energy suppliers in fact have an obligation to take all reasonable steps to install a smart meter for all customers by the end of 2020. That reflects the Government's policy objective and energy suppliers face significant financial penalties if they cannot demonstrate adherence to this obligation.

2.1.13 We are also concerned by the example of the GP surgery informing patients about how to book an appointment for a flu vaccination. In the current climate of COVID-19, we would be concerned about GP surgeries not sending communications to patients to advise how they can be tested for COVID-19 if they are experiencing symptoms. Our view is that the "wider public policy objective" should be considered in the overall context when considering the tone of the message and any benefit to the instigator of the message (beyond complying with regulatory requirements), rather than an insignificant factor as the Draft Code suggests.

2.1.14 Finally, it would be beneficial if the Draft Code could provide some guidance on any hyperlinks in regulatory communications that direct the customer to websites or apps that contain generic marketing information. In particular, it would be very helpful if the Draft Code could set out the extent to which Controllers must warn customers that clicking on the link could lead to being exposed to marketing information and the extent to which good practice is that the Controller should provide hyperlinks to information only websites that do not expose the customer to generic marketing information. Given the ICO's recent enforcement action against EE, clarification on this point would be welcome.

2.2 'Tell a Friend'

2.2.1 The Draft Code states that "tell a friend" schemes will constitute direct marketing and that Controllers must comply with the Draft Code even if they do not send the messages to individuals directly.

2.2.2 When considering this part of the Draft Code, we are not able to reconcile this guidance with legal position under the Direct Marketing Rules.

2.2.3 In the first instance, it would be helpful if the Draft Code could explain why this would be considered to be "direct marketing" when it is not "directed at particular individuals". At the point of issuing the "tell a friend" initiative, the Controller has no control over who may ultimately receive the email or the coupon/ code. It is tantamount to conducting indiscriminate blanket marketing.

2.2.4 On page 83, the section entitled "*Can we ask individuals to send our direct marketing?*" concludes that it is likely that "tell a friend" campaigns by electronic mail will breach PECR.

2.2.5 The Draft Code also states that "*actively encouraging the individual to forward your direct marketing messages to their friends*" is instigating direct marketing by electronic mail. And therefore prohibited by PECR, as the instigator would not have the consent of the recipients.

2.2.6 We consider that this position will cause concern for many of our clients as it suggests that "tell a friend" schemes cannot be developed, implemented and operated in a manner which does not fall foul of the Direct Marketing Rules. Some "tell a friend" schemes leave the message to be provided and the method of communication to the choice of the customer - they could provide the friend with a written note of a code, share it on social media or indeed communicate it verbally. It will not necessarily involve the issuing of an email. It therefore raises the issue of the capacity in which the customer is acting when it does so – at this stage, the original Controller can no longer be said to be the controller of that information as it is not determining: (i) to whom the information is sent; (ii) how that information is sent; and (iii) what additional information personal data has been used to target the friend.

2.2.7 For example, if a customer logs in to his online account it has set up with a Controller, there may be a menu bar that includes "tell a friend". If the customer clicks on that item, it will present him with information on the particular "tell a friend" scheme. The customer may choose to find out more and may be presented with icons which give him the option to contact his friend in person, through Facebook or by email.

2.2.8 This provides him with the ability to communicate with his friend through electronic or non-electronic means. He can choose whatever suits him. Even if he chooses to communicate electronically, this may open up, for example, his personal email account. However, in this example, the email is not pre-populated with text. The customer may choose which friend to email, enter his own message and can copy and paste a link or provide a code which will enable the friend to apply for the service in question. It is easy for the customer to do nothing more. Information about "tell a friend" is readily available.

2.2.9 Further, how the customer shares the "tell a friend" information could depend upon the native functionality within devices and communication apps, ie "share buttons". This allows any user who may happen to be on a web page with a call to action or sales proposition to use the native functions of his device to share it either via a public post or direct messages through multiple communication apps and functions (email, SMS, WhatsApp, Facebook, Twitter etc). This process invariably pulls through key meta descriptions of the page which in most cases will be the main sales & marketing proposition

in the message or post the recipient sees. This is entirely outside of the Controller's control and but in essence is referral marketing.

2.2.10 The Controller meanwhile has no knowledge of any of this and has no control over whether the customer, or any referred friend, decides to progress further. It is also worth stressing that, at this stage, the Controller is not in possession or control of any personal data in respect of any potential referred friend. The Controller will only come into possession of the friend's personal data if the friend (freely and of his own volition) contacts the Controller to participate in the scheme.

2.2.11 A key point is that the customer is acting of his own free will and making his own choices. He can either choose to inform his friends or not – it is absolutely his decision. That strongly indicates that the individual is acting in a personal capacity, not on behalf of any Controller and it breaks the chain in terms of which party is the "instigator" of the message.

2.2.12 The above also substantiates the position that the Controller is not directly "causing" or "instigating" direct marketing. The Controller is not compelling the customer to communicate with his friends - the Controller is not giving instructions which must be followed, nor will it necessarily know what any message will say, who will receive it or if any messages will be sent at all. Nor does it control or restrict how the communication may be provided - the means of communication is determined by the customer. The customer is not forced to participate, nor disadvantaged by not participating, and he is not required to send a message by electronic mail.

2.2.13 There are different variations of "tell a friend". For example, some schemes may wish to provide the actual wording for the message being sent, some may strongly encourage the message to be passed on only by electronic mail and some may encourage their customers through direct marketing to take part in "tell a friend". It is arguable that doing none of these things may make a scheme compliant while doing all of them could be seen as a breach of the Direct Marketing Rules. However a key area of uncertainty is what constitutes "instigation" in this context? Is it the extent to which the company dictates the message and means of communication, or is it the incentive which is available should a friend be referred? It seems disproportionate that a mutually beneficial incentive should characterise the company's behavior as "instigation".

2.2.14 Our view is that overall good practice will be encouraged if the Draft Code recognises that "tell a friend" schemes can be developed, implemented and operated in a manner which is consistent with the Direct Marketing Rules. The key element is ensuring that privacy concerns are identified, considered and addressed at the design phase through the effective use of DPIAs. Therefore, it would be helpful if the Draft Code could provide guidance on how a Controller could conduct "tell a friend" schemes in a way that complies with the Direct Marketing Rules, for example, where a Controller is able to demonstrate its rationale and how it has safeguarded the rights of individuals, together with its plan to ensure ongoing compliance.

2.2.15 In our view, rather than a generalised approach to this type of scheme, it would be helpful for the ICO to provide further guidance on those aspects of "tell a friend" schemes which raise privacy concerns and provide guidance on facilitating compliant schemes. A proportionate and targeted approach would support our clients to ensure that their 'tell a friend' schemes are compliant with the Direct Marketing Rules.

3. DOES THE MARKETING CODE COVER THE RIGHT ISSUES ABOUT DIRECT MARKETING?

NO, in relation to the areas listed below.

3.1 Online behavioural advertising

3.1.1 Whilst the Draft Code is useful in containing a section on how ad-tech works, it could benefit from more explanation on real-time bidding, programmatic advertising and the use of demand/supply side platforms. Further explanation on how the matching of "offline" and "online" data works would also be useful i.e. the linking of cookie data with email addresses and use of match keys.

3.1.2 Page 86 refers to use of consent as the lawful basis for using cookies or similar technologies for marketing. It could be clearer on the position of PECR regulation 6 in so far as third party cookies are used to facilitate direct marketing. For example, social media advertising via platforms often uses cookies data. The Draft Code could be clearer on explaining that whilst PECR regulation 22 doesn't apply to social media advertising, regulation 6 PECR would still apply.

3.2 Due Diligence

3.2.1 The Draft Code could elaborate on the level of due diligence required by Controllers, where data sharing involves the use of third party data. How far up the chain do Controllers need to go in their due diligence and to what extent can they rely on any due diligence which may have already been carried out by data disclosers? This would be particularly useful in the context of data broking, where Controllers may be several levels removed from the data subject.

3.3 Data profiling

3.3.1 More practical examples of the use of profiling in marketing would be useful to assist understanding, such as "Joe Bloggs has a propensity to listen to classical music.

3.3.2 The Draft Code would benefit from further explanation on when data becomes so aggregated to become anonymous with examples, such as how many households within a postcode would be considered anonymous

3.3.3 In respect of insight data and probabilistic targeting, more explanation on how Controllers can satisfy their accountability requirements in respect of the principles of accuracy and how they should document their approach would be welcome.

3.3.4 The section on special category data would benefit with a reference to sentiment analysis processing techniques.

3.4 Relationship of parties

3.4.1 Given the complexity and various actors involved in the marketing ecosystem, the Draft Code would benefit from a section on how parties are to determine whether they are a sole or joint Controller or processor and the questions they need to consider. This would be particularly useful where analysis is being conducted by a service provider and/or where marketing agents are running digital marketing campaigns on behalf of clients.

4. DOES THE DRAFT CODE ADDRESS THE AREAS OF DATA PROTECTION AND E-PRIVACY THAT ARE HAVING AN IMPACT ON YOUR CONTROLLERS' DIRECT MARKETING PRACTICES?

YES

5. IS IT EASY TO FIND INFORMATION IN THE DRAFT CODE?

YES

6. DO YOU HAVE ANY EXAMPLES OF DIRECT MARKETING IN PRACTICE, GOOD OR BAD, THAT YOU THINK IT WOULD BE USEFUL TO INCLUDE IN THE DRAFT CODE

Examples of good and bad practice

6.1 Review time frames

6.1.1 Good practice recommendations on how regularly periodic reviews should take place of Controller's compliance documentation relevant to their marketing campaigns such as Article 30 records of processing, lawful bases, fair processing notices and/or consent mechanisms.

6.2 Article 30 records

6.2.1 Controllers may find it useful to include their relevant lawful bases and fair processing notices in their Article 30 records, to ensure they have the considered all their lawful grounds for each marketing channel under both GDPR and PECR 2003.

6.3 Auditing and due diligence

6.3.1 Good practice recommendations which recommend Controllers exercise any contractual auditing rights they have in respect of their joint Controllers and/or processors. This would be useful for Controllers to ensure they can comply with their accountability obligations in respect of the purpose and minimization principles.

6.3.2 Data brokers who sell large amounts of data for marketing purposes may benefit from good practice recommendations that they should carry out due diligence on any licensees and/or any end users of their data, to assist them in their accountability requirements.

6.4 Privacy notices

6.4.1 Good practice recommendations on how Controllers may satisfy their information obligations would be helpful. For example, recommendations on how joint Controllers must work together to update their privacy notices to cover their data sharing and Controllers conducting profiling should provide detailed explanations of how profiling works with reference to algorithms.

6.5 Refreshing direct marketing consents

6.5.1 Good practice recommendations on when a change of circumstances that would justify Controllers asking customers to revisit their marketing preferences and clarify on whether "opted-in" customers should also be asked to re-consent.

6.5.2 Good practice recommendations on the position regarding marketing consents following a corporate restructuring, particularly when the marketing consents and/ or the brand are split across the retained business and the divested business.

7. DO YOU HAVE ANY OTHER SUGGESTIONS FOR THE DIRECT MARKETING CODE?

The Draft Code makes a passing reference to "proactive audits". It would be useful if the Draft Code could expand on the ICO's approach to proactive audits in the context of direct marketing and how the ICO may decide to use this tool (for example, whether it would take a sector approach or would look at type of direct marketing that is of immediate concern).

If you have any queries in respect of this response, please do not hesitate to contact:

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Yours faithfully

Pinsent Masons LLP