

4 March 2020

Royal Mail Group

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Dear Sirs

Summary

Royal Mail is the United Kingdom's sole designated Universal Service Provider and is proud to deliver a 'one price goes anywhere' service on a range of letters and parcels to over 30 million addresses (including 1.3 million businesses) across the country, six days a week. We deliver over 12 billion letters a year, including addressed and unaddressed marketing mail, to consumers and businesses. This makes us one of the largest channels for marketing mail, which makes up a significant part of the overall mail bag, underpinning the sustainability of the universal postal service.

The ICO's draft Direct Marketing Code of Practice is of fundamental importance to Royal Mail, our customers and the universal service. In this context, we would like to raise the following four points arising from the Code, which we explain in detail, below, along with proposals for amendments:

1. The focus on PECR within the Code may cause marketers, incorrectly, to discount legitimate interests as a lawful basis for processing personal data in mail marketing.
2. The Code's absolute position on tracing takes no account that in some circumstances this may be a legitimate activity that brings benefits to individuals and businesses.
3. The Code takes insufficient account of the options afforded by GDPR for when individuals must be informed their personal data has been acquired by third parties, and lacks clear guidance for when the disproportionate efforts exemption to this obligation may apply.
4. The Code would better achieve its objective of providing practical guidance to marketers by including the ICO's specific guidance on the increasingly important adtech sector, particularly the salient points of the ICO's 'Update report into adtech and real-time bidding'.



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The advertising industry

Marketing and other advertising is important to the broader UK economy. It plays a crucial role in promoting competition, driving product innovation and providing consumers with choice. According to research by the Advertising Association, every £1 spent on advertising returns £6 pounds to the United Kingdom's GDP; advertising spend will be over £23.6 billion this year and will contribute over £142bn in GDP, supporting one million jobs across the United Kingdomⁱ.

Direct mail marketing is a subset of the overall marketing sector, providing tools, services and best practice advice for the advertising industry. Direct marketing, including by mail, delivers many benefits, including more targeted, relevant and timely advertisements for both individuals and advertisers. Research shows British consumers prefer targeted and relevant advertising: 66% of over 15-year olds agree they like receiving mail if its content is relevant to them, and 42% of consumers agree that mail is a useful way to get information about what's going on in their local areaⁱⁱ. Were marketing to be less targeted in response to the Code, this could adversely affect individuals' experiences as well as the sector's wider contribution to the economy.

Consultation on the ICO's draft Direct Marketing Code of Practice

It is clear that organisations involved in marketing are keen to ensure they comply with data protection laws. We support any measures that assist them in this. With that in mind, we are pleased with how the ICO's draft Code provides certainty and clarity on many points, which we know organisations involved in marketing will find helpful.

In particular, we welcome the clear statement on page 66 of the Code that marketing mail is not covered by PECR and that a mail drop addressed to the 'householder' or 'occupier' is unlikely to constitute direct marketing, although GDPR may still apply to any use of an individual's data to target them with this marketing.

However, there are a small number of points which, as currently drafted, could adversely impact organisations' confidence in sending mail marketing. This could have a significant impact on Royal Mail, our customers and consumers' experiences. We ask that you consider the following amendments, set out under the four broad headings mentioned above.

Observations

1. How do we decide what our lawful basis is for direct marketing?

Our observation: The focus on PECR within the Code may cause marketers, incorrectly, to discount legitimate interests as a lawful basis for processing personal data in mail marketing.

We welcome the acknowledgement on page 30 of the Code that:

“Generally speaking the two lawful bases that are most likely to be applicable to your direct marketing purposes are consent and legitimate interests.”

Mail marketing often relies on legitimate interests, both to existing and prospective customers, as the organisations undertaking that marketing find this gives them scope to carry on this important activity when it may not be practicable for them to obtain valid consent, while still respecting the rights of

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individuals. It is supported by the further commentary headed "*How does legitimate interests apply to direct marketing?*", starting on page 34 of the Code.

This acknowledgement is followed by an analysis of PECR, culminating in the good practice recommendation on page 31 to:

"Get consent for all your direct marketing regardless of whether PECR requires it or not. This gives you the benefit of only having to deal with one basis for your direct marketing as well as increasing individuals' trust and control."

The Code is clear that its good practice recommendations do not have legal status, and that there is no penalty for not adopting them. However, responsible advertisers will be influenced by them and will, in many cases, adhere to them as much as to the rest of the Code.

Therefore, the discrepancy between the acknowledgement that marketing may rely on legitimate interests (page 30), and the good practice recommendation always to obtain consent (page 31), risks confusion. It is unclear when organisations may rely on legitimate interests. This is particularly so where PECR is not relevant, namely for mail marketing. This important distinction may be lost to organisations planning to engage in mail marketing. They may conclude they cannot do so simply because it is not viable for them to obtain valid consents.

Confusion of this sort already exists, as demonstrated in ICO case RFA0901695, which was referred to Royal Mail, where a data subject raised a complaint about our own reliance on legitimate interests in marketing and the ICO supported our position. To quote from your response letter to Royal Mail of 21 January 2020:

"...an organisation does not always have to obtain people's consent to send them direct marketing communications...An organisation can rely on legitimate interests for marketing activities if it can show that how it uses people's data is proportionate, has a minimal privacy impact and people would not be surprised or likely to object – but only if it does not need consent under PECR."

To lessen the risk of further confusion, we suggest reflecting the message of that letter by revising the good practice recommendation along lines such as:

"So that you can comply with PECR, get consent for all your direct electronic marketing. See the section *How does consent apply to direct marketing?* for the requirements of consent. As PECR is not relevant to mail marketing this gives you more flexibility to consider legitimate interests as your lawful basis for GDPR compliance purposes. See the section *How does legitimate interests apply to direct marketing?* for further information."

This change would be consistent with the text immediately below the heading "*How does legitimate interests apply to direct marketing?*" on page 34 of the Code, which recognises the limited role of PECR. It would help organisations to be reminded at this point where PECR (and its requirement for consent) does not apply. We would suggest a further change (highlighted):

"If you do not need consent under PECR, such as when marketing by mail, then you might be able to rely on legitimate interests for your direct marketing purposes if you can show the way you use people's data is proportionate, has a minimal privacy impact and is not a surprise to people or they are not likely to object to what you are doing."

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2. Can we use data cleansing and tracing services?

Our observation: The Code's absolute position on tracing takes no account that in some circumstances this may be a legitimate activity that brings benefits to individuals and businesses.

In cases where marketing relies on consent, page 62 of the Code discusses whether consent for marketing at one address can permit marketing at another address to which the individuals has moved. It takes the position that this is not possible and states that:

"...this consent is not transferrable to a new address that [the data subjects] have not given you."

This does not take account of what consent the organisation has obtained. We contend that a data subject should be able to give a valid consent for marketing to their current and future addresses, even if they do not know what their future addresses will be when they give the consent.

An essential requirement of valid consent is that it is "*specific*" (per GDPR Article 4(11)) but we see no reason why an individual, perhaps one who anticipates moving address in the near future, cannot specify that they would like to receive marketing mail both before and after their move. To require otherwise would deny that person the freedom to make decisions about how their data is used which GDPR seeks to protect: the important point is that the "*unambiguous indication of the data subject's wishes*" (per Article 4(11)) is respected; they will always retain the right under Articles 7.3 and 21.2 to change their mind.

Therefore, we ask that you reconsider the relevant paragraphs on page 62 of the Code, perhaps along the lines (changes highlighted):

"You cannot assume that an individual has simply forgotten to tell you that they have changed their details. Even if they had previously consented to your direct marketing at their old address, this consent is not transferrable to a new address that they have not given you unless it was clear that you may continue to market to them after their move. Likewise, under PECR, consent is non transferrable – it is specific to receipt of calls or texts to a particular telephone number, or messages to a particular email address."

Subsequent paragraphs on page 63 of the Code address marketing which relies on legitimate interests. Again, these include statements such as:

"Tracing an individual for direct marketing purposes takes away control from people to be able to choose not to tell you their new details. Your commercial interests in continuing to market them do not outweigh this."

Because the circumstances of any marketing are so important to the balancing test needed to establish legitimate interests, we do not see that statements like these can be justified when those circumstances have not been considered. They could deter organisations from sending marketing which, in some circumstances, might have been permissible, and to undertake tracing to support that marketing where a legitimate interests assessment which takes all relevant factors into account might establish this as being lawful.

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Moreover, these paragraphs comment on the appropriateness of tracing in terms which could deter tracing in non-marketing contexts where it serves a useful and legitimate purpose. Page 40 of the Code describes tracing to keep contact details up-to-date as “extreme”, which in certain cases is inappropriate. For example, customers of our Redirection product have the option for details of their home move to be made available to organisations which already know them, which enables tracing by those organisations for diverse reasons including so that the individuals concerned continue to receive service communications for services or products they have already purchased; to facilitate safety and recall communications; to help reduce identity fraud; and to limit the sending of misaddressed mail (which allows us to provide a more efficient mail service).

Considering these benefits, and that this tracing only occurs where our Redirection customers have not opted out of it, we suggest you reconsider the relevant paragraphs of page 63 of the Code, as suggested below (changes highlighted):

“There may be good justifications for using suitable tracing services to locate ~~Tracing an individual in some circumstances, although to do so for direct marketing purposes may takes away control from people to be able to choose not to receive marketing after they move address tell you their new details.~~ Your commercial interests in continuing to market them do not outweigh that they should retain this control. Therefore, you need to take this into account in deciding if you are unlikely to be able to justify this processing under legitimate interests.

Whilst the GDPR requires you to keep personal data up to date ‘where necessary’, your processing must always be fair. The actions you take to update contact details must be reasonable and proportionate, especially when ~~It will be difficult to justify taking intrusive steps such as tracing to keep contact details used for direct marketing up to date.~~

It is not necessary to trace individuals ~~where, because it is more reasonable in a direct marketing context to rely on individuals to inform you of changes to their details.~~”

Likewise, the example on page 63 of the Code:

“A university sends fundraising newsletters by post to the last address that they held for their alumni. Some of the alumni graduated a number of years ago. A large number of the mailings are returned to the university because the address details are now incorrect.

The university decides to use a data broker to ‘cleanse’ its alumni database and provide up to date address details. The university then sends its newsletters to the new addresses.

The university has infringed the GDPR by taking this action. Because of the impact on them of fundraising newsletters it is unfair to trace individuals in these circumstances and it takes away their control. The university’s legitimate interest in raising money does not outweigh the rights of the alumni to choose not to share their new address. However, there may be other situations where an organisation could lawfully trace individuals.”

And the statement on page 40 of the Code:

“You must take reasonable steps to ensure that personal data you hold for direct marketing purposes is not factually incorrect or misleading. It is reasonable to rely on the individual to

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tell you when they change address or other contact details. It may be sensible to periodically ask individuals to update their own details, and in some cases to use tracing services, but you do not need to take extreme measures to ensure people's contact details are up to date such as using tracing services. See the section Can we use data cleansing and tracing services? for further information.

3. What do we need to tell people if we collect their data from other sources?

Our observation: The Code takes insufficient account of the options afforded by GDPR for when individuals must be informed their personal data has been acquired by third parties, and lacks clear guidance for when the disproportionate efforts exemption to this obligation may apply.

Page 48 of the Code makes an absolute claim that Article 14 requires data controllers to give individuals certain privacy information within one month of acquiring their personal data from a third party source:

“You must provide privacy information to individuals within a reasonable period and at the latest within a month of obtaining their data.”

This reiterates GDPR Article 14.3(a) and does not take account of the rest of Article 14.3, which includes three options linked by the disjunctive “or” (not the conjunctive “and”). This means the required privacy information must be provided as set out in any of the situations described in Articles 14.3(a), (b) or (c). In particular, the Code does not refer to the alternative timescale for providing this privacy information described in Article 14.3(b):

“The controller shall provide the [relevant privacy information] ...if the personal data are to be used for communication with the data subject, at the latest at the time of the first communication to that data subject.”

Unless the Code recognises this alternative, organisations may consider they are, in practice, unable to continue using personal data in marketing when GDPR does not preclude this: organisations often do not plan their marketing to make initial contact with individuals within one month of acquiring their contact details and sending an additional, earlier communication just to provide privacy information could be a significant burden (if we assume an average mailing cost of 50p per item, the additional cost could be £500,000 for every million sets of contact details).

Even were organisations required to provide this privacy information within one month, page 49 of the Code addresses an important exemption to this obligation:

“If the processing has a minor effect on the individual then your assessment might find that it's not proportionate to put significant resources into informing individuals.”

An organisation will likely send its first mail marketing, containing the required privacy information, relatively soon after acquiring individuals' contact details (before they become out-of-date). The impact on those individuals of not receiving that information sooner will be limited to their contact details being used to send that single piece of marketing. Requiring the organisation to incur the additional costs mentioned above is, therefore, disproportionate.

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This is especially the case where that first marketing communication (and any sent subsequently) include a clear opt-out option – the individual will retain control of the use of their data. Moreover, our experience of mail marketing is that few people opt-out of their data being used for this purpose, which reinforces the low risk of adverse consequences from relying on the disproportionate effort exemption. Research shows individuals do not see this use of their data as harmful: 74% of people have not opted out of receiving addressed or unaddressed mail in the past 12 months via any methodⁱⁱⁱ.

Therefore, we ask that you reconsider this section of the Code to accommodate GDPR Article 14.3(b) and provide clearer guidance. This should explain that it would be disproportionate for an organisation to make additional contact with an individual whose details they acquire from a third party for use in the limited way described above, provided necessary privacy information is included in their first marketing communication along with a clear opt-out option. Without this, the Code could adversely impact organisations' confidence in sending marketing, including by mail, with a significant impact our business, and that of our customers, and the wider economy, but without discernible benefit to individuals.

This clarity is even more important considering the dependence of geodemographic tools on third party data sources. These enable organisations to target mail marketing without using personal data but may be created using personal data, without that data being disclosed in the tools themselves. However, were the providers of geodemographic tools to conclude it was uneconomical to supply them because they had to send privacy information to numerous individuals then those tools might no longer be produced. Clear guidance, which considers Article 14.3 in full and how disproportionate it would be for those providers to send privacy information to numerous individuals is important.

4. Update report into adtech and real-time bidding

Our observation: The Code would better achieve its objective of providing practical guidance to marketers by including the ICO's specific guidance on the increasingly important adtech sector, particularly the salient points of the ICO's 'Update report into adtech and real-time bidding'.

We ask the ICO to ensure the Code is aligned with the ICO's existing guidance on adtech marketing. As drafted, the Code is not explicit that it also refers to the use of personal data in adtech marketing, nor does it make any reference to any guidance on the use of adtech in marketing (other than a single link to the ICO's 'Update report into adtech and real-time bidding' as further reading).

Considering the growing importance of adtech, the challenges it presents to data protection and the potential for organisations to take the Code as their primary source of guidance, it would be better if the Code were explicit that it applies to the use of personal data in adtech and expressly reiterated salient points from that update report, especially in relation to real-time bidding (RTB). These might include, without limitation:

- identifying a lawful basis for the processing of personal data in RTB remains challenging and it is impossible to establish legitimate interests;
- transparency is difficult to achieve: the privacy notices provided to individuals often lack clarity and do not give them full visibility of what happens to their data;

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- the scale of the creation and sharing of personal data profiles in RTB appears to the ICO to be disproportionate, intrusive and unfair, particularly when in many cases individuals are unaware that this processing is taking place; and
- the processing operations involved in RTB likely mean data protection impact assessments are mandatory.

We are concerned that without being reminded of these points within the Code, organisations may not fully appreciate the compliance challenges presented by adtech as a marketing channel. This means they may be less well placed to make informed decisions about how best to undertake their marketing.

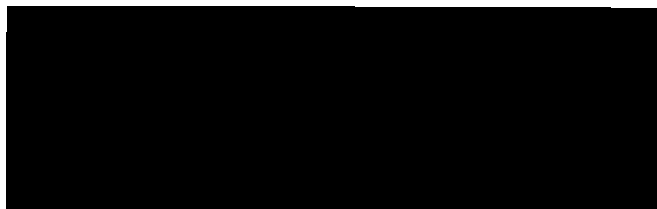
Conclusion

We would be delighted to discuss these matters raised in this letter further with you and would be particularly keen to involve industry trade associations representing professional practitioners, to establish practical and workable solutions.

Collaboration between the ICO and the advertising industry may have a useful role in educating organisations and individuals about the issues covered in the Code. We are also aware of the advertising industry's Media Smart education programme and the ICO may consider this as a suitable forum through which to promote the Code.

In the meantime, if we can be of assistance, please get in touch.

Yours faithfully



ⁱ Advertising Association Annual Report 2019

ⁱⁱ IPA TouchPoints 2019

ⁱⁱⁱ Ibid