

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

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 – in many places
- No – but not clear in others

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

Detailed below are specific areas of the draft code, where we believe clarity would be welcomed to ensure the code is easier to digest.

1) Direct Marketing Purposes & PECR/Consent

The draft code covers in detail that direct marketing is not limited to the actual sending of direct marketing communications but also that any activity which leads up to, enables, supports the ultimate sending of a direct marketing communication would also fall under the definition of “direct marketing purposes” (Page 14). On Page 30 the draft code states:

“PECR requires consent for some methods of sending direct marketing. If PECR requires consent, then processing personal data for electronic direct marketing purposes is unlawful under the GDPR without consent. If you have not got the necessary consent, you cannot rely on legitimate interests instead. You are not able to use legitimate interests to legitimise processing that is unlawful under other legislation.”

This is similar to guidance previously published by the ICO on Legitimate Interests which states:

“If e-privacy laws require consent, then processing personal data for electronic direct marketing purposes is unlawful under the GDPR without consent. If you have not got the necessary consent, you cannot rely on legitimate interests instead. You are not able to use legitimate interests to legitimise processing that is unlawful under other legislation.”

However, the context has now been altered by the draft Code’s clear definition of “direct marketing purposes”.

Many Compliance teams, Data Protection Officers and Marketing teams would not have anticipated that, when the ultimate aim is to send an electronic marketing communication (such as a marketing email to consumers) all activities enabling this send would also require consent as their lawful basis.

It is vital for responsible businesses to target their marketing messages effectively, ensuring these messages are sent only to those whom the message is relevant. Otherwise they become spam, which we must do all we can to prevent. Message targeting activity is clearly a form of profiling which is in the interests of both the recipients and businesses. To that end, most message targeting for marketing purposes is carried out under legitimate interests, rather than consent.

If the ICO would expect Consent to be the lawful basis for message targeting, it could be very difficult for organisations to adhere to and is likely to have a significant negative impact on consumer experience. Furthermore, it is stressed in the draft code that:

“where possible you should provide granular consent options for each separate type of processing (e.g. consent to profiling to better target your marketing or different methods of sending the marketing), unless those activities are clearly interdependent – but as a minimum you must specifically cover all processing activities”.

On a practical level, how would the ICO expect businesses to comply with the requirement for consent to be granular?

a) Would it be sufficient to mention targeting (or words to that effect) in the same consent request as for sending marketing communications? If so, can you provide an example?

b) Or would ICO require separate consent for i) message targeting and for ii) sending of marketing communications?

If so, we strongly believe consumers will be confused or overwhelmed by the number consent statements/tick boxes they're presented with. We will damage the consumer's experience when engaging with companies. There is already evidence that consumers do not fully understand cookie consent pop-ups, and this confusion would be exacerbated.

To look at the wider context, profiling is often conducted for a variety of different reasons, including direct marketing & essential service messages to customers. To 'unpick' profiling, i.e. to restrict profiling to consent when it's carried out for marketing purposes (which require consent under PECR), would be incredibly complex to do and it could cost millions in operational change to adapt this.

2) The emphasis on Consent

Many people's understanding of GDPR is that the 6 lawful bases are equally valid and that organisations should select the most appropriate for the processing activity. This has been reiterated in much of the ICO's previous guidance.

Back in August 2017 the Information Commissioner stressed this in a widely circulated blog. She highlighted, "Consent is one way to comply with the GDPR, but it's not the only way."

We believe the draft code's emphasis on consent is contrary and confusing in light of previous guidance. In a direct marketing context, the GDPR makes it clear that *"The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest."*

There's a wealth of guidance to support organisations in ensuring they balance their legitimate interests. Furthermore, PECR makes the rules very clear where legally consent is a requirement and where it is not. The draft code has a 'good practice recommendation';

"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."

This is given far more prominence than other wording in the code that states;

"It also contains some optional good practice recommendations, which do not have the status of legal requirements but aim to help you adopt an effective approach to data protection compliance."

We do not understand why, if PECR does not legally require consent, that organisations should avoid reliance on legitimate interests. In certain situations, legitimate interests may actually be a more

appropriate lawful basis than consent.

We do not believe, especially if consent is required for all processing leading up to the sending of a communication (e.g. email in B2C context) that this would necessarily increase trust and control. If interests are legitimate and meet the transparency requirements, then individuals should always have a clear method of objecting.

3) Cookies

The draft code is not clear which sections of the guidance applies to cookies (used for marketing purposes) and which applies electronic communications (such as email). We believe it would be helpful to disentangle the two and give examples.

4) Intrusive Profiling

The draft code introduces the concept of “intrusive” profiling. GDPR itself focuses on profiling that could result in a ‘legal or similarly significant effect’. We believe this needs some clarification within the code as the language used is unclear. The code states:

“It is unlikely that you will be able to apply legitimate interests for intrusive profiling for direct marketing purposes. This type of profiling is not generally in an individual’s reasonable expectations and is rarely transparent enough.”

If an organisation has for example conducted an LIA for profiling activities, this would need to include assessing whether such activities were in the reasonable expectations of the individual and that there was appropriate transparency. If the conclusion of the LIA was that it was not in the reasonable expectations of the individual and there was insufficient transparency, the assessment would fail.

Is the ICO just reiterating this, i.e. profiling that is not transparent and not a reasonable expectation would fail an LIA as it would be ‘intrusive’? Or are you suggesting that certain types of profiling would by their very nature be more ‘intrusive’ than others? If so, please guide us on types of profiling the ICO believes are likely to be intrusive? Clarification would be welcomed.

5) Intersection between GDPR and PECR

There’s a lack of clarity in the draft code at present between where GDPR and PECR intersect, especially regarding which parts of the code’s guidance is directly applicable / relevant to behavioral advertising, social media targeting and in-app messaging.

6) ‘Refer a Friend’ viral marketing

For email and SMS messages, the draft code considers that the company sending a ‘Refer a friend’ email to their customer is the ‘instigator’ of this communication. Therefore, if the email is forwarded on by the recipient to a friend, the company as the ‘instigator’ would not have consent for this message. The conclusion is this is impossible to obtain, and therefore such messages would breach the rules.

We do not understand why the company in question would need consent for the “forwarding” of an email by an individual, who would surely be acting in their personal ‘household’ capacity. Furthermore, the code does not differentiate between a customer being encouraged to forward “marketing content” or being encouraged to forward a link. Would you make a distinction between

these?

Email recipients are in complete control as to whether they chose to forward a 'Refer a friend' message or not. They do this in their own personal capacity. Both the customer and the 'friend' may benefit by receiving a reward. This message from an organisation is not forcing a customer to do anything, they always have a choice. It puts them in control and customers are most likely to forward when they trust and respect the brand in question.

7) Third Party Data & Article 14 requirements

The draft code states, in relation to personal data collected indirectly, that;

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

Clarity on this point would be welcomed, as there are clearly different interpretations of GDPR at play. GDPR (Article 14) states this information must be provided:

- a) *within a reasonable period after obtaining the personal data, but at the latest within one month, having regard to the specific circumstances in which the personal data are processed;*
- b) *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; or*
- c) *if a disclosure to another recipient is envisaged, at the latest when the personal data are first disclosed.*

This text has been widely interpreted to mean either a) **OR** b) **OR** c) and certainly not that only a) applies in all circumstances. This seems to be at odds with GDPR, or an oversight of the flexibility which GDPR affords.

In reality, most communication cycles don't make contact within 30 days. GDPR would appear to allow for a longer period provided the information is provided at the time of the first communication. In our view GDPR's flexibility should be maintained, particularly for businesses whose marketing of products and services reflects customer's annual renewal cycle (such as insurance, publishing models) or a longer buying cycle (such as automotive for instance).

For publicly available data (e.g. edited electoral roll) the draft code is suggesting organisations must contact every consumer gathered via such sources. This is simply impractical and could have the detrimental effect of consumers being inundated with communications to inform them their data is being processed. The 'benefit' of this is questionable.

The exemption for 'disproportionate effort' as described in the draft code, would appear to be difficult to meet, especially for data brokers.

8) Third Party Data & Consent

The draft code includes the following 'good practice recommendation':

"When sending direct marketing to new customers on the basis of consent collected by a third party we recommend that you do not rely on consent that was given more than six months ago."

Although the draft code references “very specific cases”, for example seasonal products or annually renewal insurance services, the clear emphasis is on the ‘good practice recommendation’ of six months.

There’s concern this misses the point that for many businesses, for similar reasons as stated above, six months is too short. For example, in the insurance industry one might make contact on the month prior to the insurance expiring.

Setting a very specific period for consent like this as a ‘good practice recommendation’ could cause more harm than good. Would it not be better to reinforce existing positive principles regarding the controller’s accountability to set their own period for consent, which best fits their customers - within the context of the products and services they provide?

9) Social Media Targeting

There is some confusion in the section relating to list-based targeting tools for social media. The definitions and descriptions of the different tools are generic and unclear. There are situations where social media platforms act as Processors as well as situations where they act as Controllers. There are also situations where one is able to pseudonymise customer data to effectively create cohorts of audiences to match against the social media audience base. It would be useful to highlight clearly the need for marketers to examine each of the tools available on each of the platforms and carry out an assessment of what is and is not possible rather than generically assume that a marketer always requires consent to use these tools.

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?

We have identified the following areas where it would be helpful to have more detail:

1) Social Media Targeting

The example provided in the draft code in relation to “Custom Audiences” is quite specific and relates to the uploading of contact details onto a social media platform. The draft code says it is likely this would require consent. We would agree, however this fails to address the different types of targeting services provided by social media platforms. We suggest that you either provide a greater level of granularity to illustrate the range of solutions available or provide guidance on how to investigate the different platforms, enabling marketers to make an informed decision about what lawful basis can be used.

2) Third party content within emails

The draft code provides detailed guidance on 'hosted' emails. In our experience marketers are often confused regarding third party content within an email. The draft code provides guidance on 'hosted emails' is not new and organisations should be aware of.

However, there are many circumstances in which an email from one organisation may include promotional content relating to various different organisations.

For example, an individual signs up to receive holiday offers by email from a named organisation. This named organisation which provides this service varies the content and works in partnership with other brands to provide a variety of different offers to its audience.

The partners often change rapidly over time, and the content of each marketing email will not necessarily relate to just one brand - therefore it's not a 'hosted' email as described in the code. In such circumstances it would not be practical or indeed possible to gain consent from individuals for all third parties whose content might be included in the email message. However, it would be completely within the reasonable expectations, and to the benefit of individuals to receive different holiday offers. Clarity on this type of scenario would be welcomed.

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

- Yes - to an extent
- No

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

To an extent yes. The traditional direct marketing activities are covered well and in some detail. However, given the growth in digital marketing and the rapid adoption of "similar technologies" such as web beacons etc. it would be helpful to have more detailed guidance on how these can be used, with more examples that cover apps, OOH advertising, Video on Demand, other location-based solutions and so on.

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

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:

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 DPN would be happy to provide examples, if there are specific areas we've highlighted in this feedback where the ICO would like to provide an example.

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

Although the ICO indicates that this code needs to be named 'Direct Marketing Code of Practice', this terminology is confusing for the marketing community. The definition of Direct Marketing as set out by ICO in the draft code is a world away from the definition as understood by the marketing industry. "Direct Marketing" as understood by the marketing community is outdated terminology and is therefore discounted as irrelevant.

If you wish the digital and brand marketers to pay attention to the content of this very useful Code it will be necessary to carry out some significant communications to highlight that "Direct Marketing" actually applies to all marketing. Or maybe change the name?

The glossary appears to be incomplete with a very limited list of terms. For instance, the lawful basis "Consent" is included but not "Legitimate Interest". "Intrusive Profiling" is referenced in the document without a definition.

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:

Data Protection Network

If other please specify:

The Data Protection Network provides opinion, analysis and resources to both experts and those new to data protection. It was founded by the data protection consultancy Opt-4 Ltd. The DPN also works on industry-led initiatives and runs regular events/webinars.

Our advisory board met to discuss the draft code. We also conducted a survey of our subscribers to elicit their feedback, which has been included in our response.

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