



**BBC Response to ICO's consultation on the draft
direct marketing code of practice**

6 March 2020

Introduction

1. The BBC welcomes the clarity the ICO's draft Code brings on direct marketing activities, especially the incorporation of guidance that was previously set out in several ICO publications such as its guidance on PECR and the GDPR. We also welcome the inclusion of practical examples and further clarity on the ICO's approach to specific direct marketing activities, such as loyalty schemes.
2. We are pleased to comment on elements of the Code which fall within our areas of marketing activity. As a public service broadcaster, the BBC has a specific obligation, as per our Mission, to act in the public interest and serve all audiences through the provision of impartial, high-quality and distinctive output and services which inform, educate and entertain. Marketing plays a crucial role in our ability to reach our audiences, in that it allows us to communicate with them outside of BBC-owned media (e.g. BBC One, Radio 2, BBC iPlayer), and on third party platforms where they may spend more time (e.g. Facebook, Instagram, Google, YouTube, Twitter, Snapchat). Marketing is a particularly important tool to reach younger audiences, given shifts in viewing and listening habits¹.
3. In our response below, we have set out details of those parts of the draft Code where we would ask the ICO to either: (i) provide further clarity; (ii) reconsider its approach; or (iii) highlight the availability of a proportionate and risk based approach.

¹ For example, Ofcom found that the most-watched platform in 2018 for 16-24s was YouTube. Source: Ofcom Media Nations, 2019.

The relationship between PECR and the GDPR

4. The Code contains several references to the ICO's view that if direct marketing activities require consent under PECR (i.e. the direct marketing activities involve the use of cookies and/or email marketing) then consent should be, or is likely to be, the lawful basis under the GDPR where personal data (not Special Category Data) is processed in connection with such activities, such as segmentation/profiling. In particular we refer to pages 24, 30 and 34 of the Code. Whilst there may be circumstances where consent may be the appropriate lawful basis, such as the profiling described under Article 22 of the GDPR, that Article also recognises the availability of contractual necessity as an equally appropriate lawful basis.
5. Whilst it is accepted that legitimate interests cannot be used to "...legitimise processing that is unlawful under other legislation" (as stated on page 30 of the draft Code), the BBC believes that using legitimate interests to process personal data derived from a cookie where consent has been given under PECR for that cookie to be deployed would not infringe the principle quoted. Similarly, whilst it is also accepted that consent is generally a PECR requirement to send unsolicited email, the processing of personal data comprised within that communication under the legitimate interest basis would not infringe the principle quoted, where a PECR consent has been validly obtained.
6. We therefore believe that ICO should reconsider its conclusions on the interrelationship between PECR based consent and the requirement for a GDPR based consent.

Joint Controllers

7. A passage at page 27 of the draft Code suggests that joint controllers must put in place a "transparency agreement". It would be helpful if the ICO clarified that its reference to an "agreement" is not intended to suggest that an agreement is required in place of the Article 26 requirement for an "arrangement" between joint controllers.

Indirect Consent

8. Page 42 of the draft Code states that consent obtained via a third party (indirect consent) does not last as long as consent obtained directly from the individual. We invite the ICO to reconsider this view: provided that the indirect consent meets the GDPR standard of consent (i.e. amongst other things the entity relying on consent is named), we consider that there should be no difference in the longevity of consent obtained directly or indirectly.

Invisible Processing

9. Page 50 of the draft Code states that if an entity does not “actively” tell people about processing then that processing is invisible, resulting in the requirement to conduct a DPIA. The BBC believes that the publication of a GDPR compliant privacy policy that, in turn, complies with the guidance on transparency, does constitute an active means of communication.

Legitimate Interests and Profiling

10. On page 58 the ICO states that it is unlikely that a controller can use legitimate interest as its lawful basis for “intrusive” profiling. It would be helpful if the ICO could provide further clarification of what is intended by the reference to the word “intrusive”. In particular, whether this refers to the profiling described in Article 22 of the GDPR which has a significant or legal impact on the data subject or to intrusion in a wider sense.
11. Page 95 of the draft Code states that it is likely consent will be the appropriate lawful basis under GDPR for any behavioural advertising or profiling. However the BBC would like to reiterate the point made under the section where we discuss the interrelationship between GDPR and PECR consent: namely that Articles 21 and 22 of the GDPR contemplate two profiling regimes. Article 22 profiling may require consent and Article 21 profiling which is subject to the right to object. Neither Article expressly removes the ability for a controller to use legitimate interest subject to the fulfilment of the balancing test.

Instigation and Sending

12. Page 83 of the draft Code states that if Company A is encouraged by Company B to “send its emails” then both companies require the individual’s consent to send the email. It would be helpful if the ICO provided further clarity on this point. In particular, is the reference to “its” a reference to Company A’s or Company B’s emails? In addition it would be helpful for the ICO to clarify that references to Company A are not intended to cover a service provider engaged by Company B to send Company B’s marketing messages.

Social Media Targeting

13. Page 90 of the draft Code states that it is likely that consent, and not legitimate interest, is the appropriate lawful basis for a controller if it elects to use Custom Audiences. Whilst it is helpful that the Code does not suggest that legitimate interest can never be used for such activity, we believe the Code should adopt a more balanced approach to the balancing test. In particular, whilst the Code states that individuals are unlikely to expect this type of processing (a view which the BBC does not believe applies to all individuals), we suggest that the Code also provides an example of where the Controller’s legitimate interest takes precedence. Social media is an important element of the BBC’s marketing inventory, especially with younger audiences (16-34s). One of the most effective ways of reaching the younger (16-34) audience demographic with marketing is via social media, and as a publicly funded organisation, the BBC needs to bring audiences to its services and platforms that they help pay for.

Cookie Walls

14. It would be helpful if the ICO could provide further clarification on the lawfulness or otherwise of “cookie walls”, especially in the context of where a user is given the choice of a paid for route as an alternative to a cookie based ad funded model.

Direct Marketing by Email

15. The draft Code provides guidance on the application of PECR on the use of tracking pixels within direct marketing emails. Given the technical limitations for obtaining consent via an email, it would be helpful if the ICO could provide some guidance as to how this might be achieved. For example, is this something that can be addressed in the marketing permission or can consent be obtained in the usual way when the individual visits the webpage that contains the marketing permission? What if this is on a third party website? Some examples in this area would be useful.