

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
- No

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

As an industry, we agree that we all must do everything that we can to prevent spam messages which damages trust and confidence in the consumer and leads to non-commercial results and brand damage. Spam is by definition, material sent to the wrong person or profile. Thus good business practice is to improve targeting and we believe this extension in the draft code should absolutely not require consent as a lawful basis for each type of profiling or appending because the market place is currently using tick boxes galore; granular consent, first and third party, et al. To start to add a whole new raft of tick boxes as a method of gathering consent to profiling purposes (which vary considerably and are therefore difficult to describe in a short privacy notice) must surely not be regulated so prescriptively.

Responsible targeting is clearly a form of profiling which is carried out under Legitimate Interests. Transparency described in the Privacy Policy along with an opportunity for the individual to opt-out is surely enough, particularly when one considers the consumer experience.

3. Refer a friend.

In this method of direct marketing under PECR it is the instigator of the message who holds the prime role of communicating with individuals under the lawful basis of consent. We are aware that under current regulations, the previous method of asking the individual to recommend say 3 friends is already unlawful.

If the instigator encourages an individual to pass on to friends, or an individual decides to forward marketing content or a link to a friend, the draft code defers that responsibility to the individual doing the referring who now becomes the instigator and would not have gathered consent to the forwarding. Consent in this instance is impossible to obtain.

We cannot see that consent is necessary where an individual, acting in a personal capacity, can be held responsible as an instigator.

Do you mean that companies are not allowed to encourage their consented contacts to forward messages, but that it is ok for an individual to do so?

4. Social Media Targeting.

We find this section to be rather confusing. The draft code is rather generic on list-based targeting tools for social media. We understand that this is a complex area and you may not wish to cover all eventualities, but we give these examples as being in need of further clarification.

- Sometimes social media platforms act as Processors as well as acting as Controllers
- The pseudonymisation of personal data to find lookalikes from larger social media audiences. The draft code states that legitimate interests used in connection with such audiences is unlikely to pass the three part test, which may not be accurate in all circumstances.

Marketers, surely, would need to judge these and other circumstances and platforms and make an assessment of what they can and can't do rather than follow the draft code to get consent for everything? Our previous comment about the customer experience of more tick boxes is also a concern here.

5. The draft code and GDPR Article 14 requirements regarding third party data and consent.

GDPR Article 14 relating to the collection of data indirectly states that this information must be provided:

a) Within a reasonable period after obtaining the personal data, but at the latest within one month of obtaining their data

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 to be disclosed.

However, the draft code seems to limit this to GDPR Article 14 a) by saying only that:

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

This is overly restrictive, particularly where the product or service provided is actively promoted on a schedule that isn't monthly, i.e. financial services, especially insurance, publishing, wine clubs and other memberships, or a longer buying cycle such as white goods and the automotive sector.

This affects the B2B community seriously as it would often not be possible to achieve this within one month, especially where the data is collected from publicly available sources in one go and launched into marketing programmes over a longer, though not unreasonable, period. Individuals may have given consent, received communications and not withdrawn consent. This, like other areas on the code, provides database managers with an extremely challenging task.

If followed such advice would also be troublesome for individuals in business or as individual consumers. The edited electoral roll is an example and though examples also exist in the B2B world, the electoral roll is the largest third party source of personal data so is worthy of specific mention.

If a company were processing the data lawfully from the electoral roll (incidentally published only once a year and updated by companies by appending more recent data) it would seem to be a requirement under the draft code to contact all individuals to inform them that their data is being processed.

This would be difficult to address in practice and individuals could be inundated with such communications if this is repeated across the board. We can therefore see no real benefit in restricting this area under the draft code where we believe that an oversight may have occurred as this puts the draft code at odds with GDPR.

In addition, many companies rely on data brokers to provide information and customer lists, and within the code, albeit a good practice recommendation, it states that consent cannot be relied on if it was given more than six months ago. We believe that six months is too specific and would like to see the responsibility of deciding what is reasonable remain in the hands of controllers within the context of the products and services they offer. The needs, and hence 'expiry times' for preferences for data used by the manufacturer of a car can reasonably be expected to be different to those for a maker of cakes or crisps, a more frequently purchased product.

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?

The Worshipful Company of Marketors finds the draft code to be confusing between GDPR and PECR. Examples swap backwards and forwards between the two without making it transparent which piece of legislation is being interpreted in the examples. We find this particularly so where behavioural advertising and social media targeting is concerned. We suggest that more clarification is required.

We would also say that, as described in our comments above, an overly restrictive code of practice has the ability to damage responsible business and irritate consumers and would not necessarily stop irresponsible users of personal data from continuing poor practices where more efforts need to be made to prevent such actions which are damaging to all.

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

- Yes – partially

- No

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

We would like to see more coverage of digital marketing which is becoming more and more important to our members. We have discussed above, social media targeting, but "similar technologies", such as web beacons, and pixels in emails, plus in-app messaging, video on demand and other location based software need more explanation and further relevant examples, which will not need updating as technology based solutions develop.

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

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:

More clarity as to whether particular sections in the code are directly relevant to GDPR and PECR as there needs to be a lot of flicking backwards and forwards. Also see later comments on terminology – eg 'direct marketing' is not the best term to cover all the areas intended to be covered by this Code.

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

We are responding on behalf of an organisation.

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

We also note that the focus on code is on '*direct marketing*'. This is a phrase that is becoming fast outdated terminology. The ICO may intend it cover social media marketing and other more modern forms of marketing, but most will consider 'direct marketing' to be a more restricted range of techniques. This means that some may consider that what they do is not covered by the code, because they do not call it 'direct marketing' when in fact it is relevant and should be covered by the code. We suggest more consultation over terminology.

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:

The Worshipful Company of Marketors – a City of London Livery Company, composed of senior members of the marketing industry. Contact is clerk@marketors.org

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:

