

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:

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?

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

Energy UK notes the certain circumstances in which retail energy suppliers are required under regulation to make contact with customers in a manner that could be classified as direct marketing, and requests that additional engagement work previously undertaken by retail energy suppliers, the ICO and Ofgem be taken into account when assessing the guidelines for regulatory communications.

While we note that there is some brief guidance on whether regulatory communications are classified as 'direct marketing', communications about Smart Meter availability do not appear to be covered by the caveats within the guidance.

In particular, we draw attention to the following caveat in the guidance:

Examples of when a 'regulatory communication' might not constitute direct marketing includes information that you have been asked to inform customers about that is:

- *in a neutral tone, without any encouragement or promotion;*
- *is given solely for the benefit of the individual; and*
- *is against your interests and your only motivation is to comply with a regulatory requirement (eg the regulator is requiring you to tell people that they should consider using your competitors' services).*

Communications to customers regarding the availability of Smart Meters cannot necessarily be defined as solely for the benefit of the individual or against the interest of a retail energy supplier. In the case of Smart Meters, benefits to suppliers and customers are blended (e.g. they reduce supplier costs which are then passed through to the customer).

We note that there are currently significant penalties for an energy supplier who contacts a customer who has previously opted out of direct marketing, should the communication constitute direct marketing as determined by the ICO. However, the same energy supplier will also face significant regulatory penalties should Ofgem determine that they have not taken 'all reasonable steps' to install a Smart Meter – with consideration of reasonableness likely to take account of the energy suppliers' customer contact strategies. Retail energy suppliers note that in previous engagement with Ofgem on this issue, Ofgem have stated that *"Suppliers should be communicating with all customers to offer smart meter installations. However, communication through channels where a customer has exercised their right to opt out, or has not provided consent where required by the law, should not amount to direct marketing. This means that suppliers should: look at the content of communications, maintaining a neutral tone and focusing on factual information."* Energy UK note that it is their understanding that the guidance provided by the ICO in this draft response appears to contradict this statement.

The installation of Smart Meters is a government policy programme delivered by energy suppliers, and a key part of government's strategy to ensure it is able to meet our Net Zero ambitions. The successful and cost-efficient market-wide delivery of Smart Meters is contingent on energy suppliers' ability to drive and maintain demand for Smart Meters. Therefore, it is essential that all government agencies support the programme and that regulatory conflict is avoided.

Energy suppliers have already undertaken significant engagement with the ICO and Ofgem, and have attempted to draw up principles to use when communicating with customers that are not able to be marketed to due to the customer opting out of receiving direct marketing communications. These principles are that any communications:

- enable customers to make an informed choice highlighting the benefits of Smart Meters to customers and to broader society, consistent with government policy;
- be objective, containing only verifiable information;
- be relevant to the individual customer and to the specific interaction; and
- adapt and respond to customer feedback, which will be constantly monitored.

We believe that these principles are a suitable guide to allow an energy supplier to comply with their licence obligations as part of the Smart Meter delivery programme whilst also ensuring that a customer's direct marketing preferences are respected. We therefore request that the ICO ensure that their treatment of regulatory communications is reflective of these principles; Energy UK also note that there are a number of other regulatory obligations that energy suppliers have, such as the requirement to provide a customer with information about the best tariff that is available at the end of their current tariff period, that are also affected by this guidance, and as such we encourage the ICO to reflect this in their guidance.

Yes

No

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

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

Please see the response to Q3: We ask that the definitions of Regulatory Communications are reflective of the Principles produced by Energy UK members.

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 :

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

Energy UK welcomes further clarification within the final version of the code that the interpretations of GDPR set out in the Draft Code of Practice solely relate to their application to direct marketing. We note that there are a number of situations where an energy supplier is required to undertake a data cleanse as part of a regulatory-led programme, of which, data cleanse activities are not carried out for the purposes of direct marketing (for instance, the Ofgem led "Faster Switching" program and the Central Switching Database), but are instead carried out to deliver accuracies to premise and address data in order to improve customer service when a customer chooses to change their supplier. As such further clarity on the scope of this guidance would be appreciated.

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:

Energy UK

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:

Thank you for taking the time to complete the survey