DIRECT MARKETING CODE OF PRACTICE

Response to consultation from Direct Select (192) Limited t/a ukchanges

ukchanges is a data specialist with over 28 years' experience in the marketing data sector. It would come within the category of direct marketing as a commercial data broker (as referenced within the draft code of practice). This response therefore is specifically from that commercial perspective. However, a major part of ukchanges' service offer is data cleansing / data hygiene, where we licence in third party suppression data to help our clients keep their data clean and up to date.

ukchanges also responded to the consultation on the draft Data Sharing Code of Practice which we understand has not yet been updated. We believe there is some overlap between the two codes, for example in relation to the transparency requirement and obligations to notify data subjects.

Industry Context

The direct marking industry has progressed over the years, increasing in sophistication. As a result, marketing is targeted to audiences who are more likely to find it relevant. This in turn has led to a reduction in irrelevant spam as it is no longer necessary to adopt a scatter gun approach in the hope that a few interested parties may be captured.

The impact on consumers can be seen from statistics and complaint numbers. Our assessment of the information available (see example below) shows that the number of people who complain about direct marketing is negligible when compared with the number that receive it. This would indicate that the vast majority are either (a) happy to receive it – for example, sales information and discount codes (which are generally positively received); or (b) perceive any negative impact as minimal.

We appreciate the ICO needs to safeguard the interests of consumers, but we feel that guidance should take account of the views of the silent majority proportionate to the small percentage that complain.

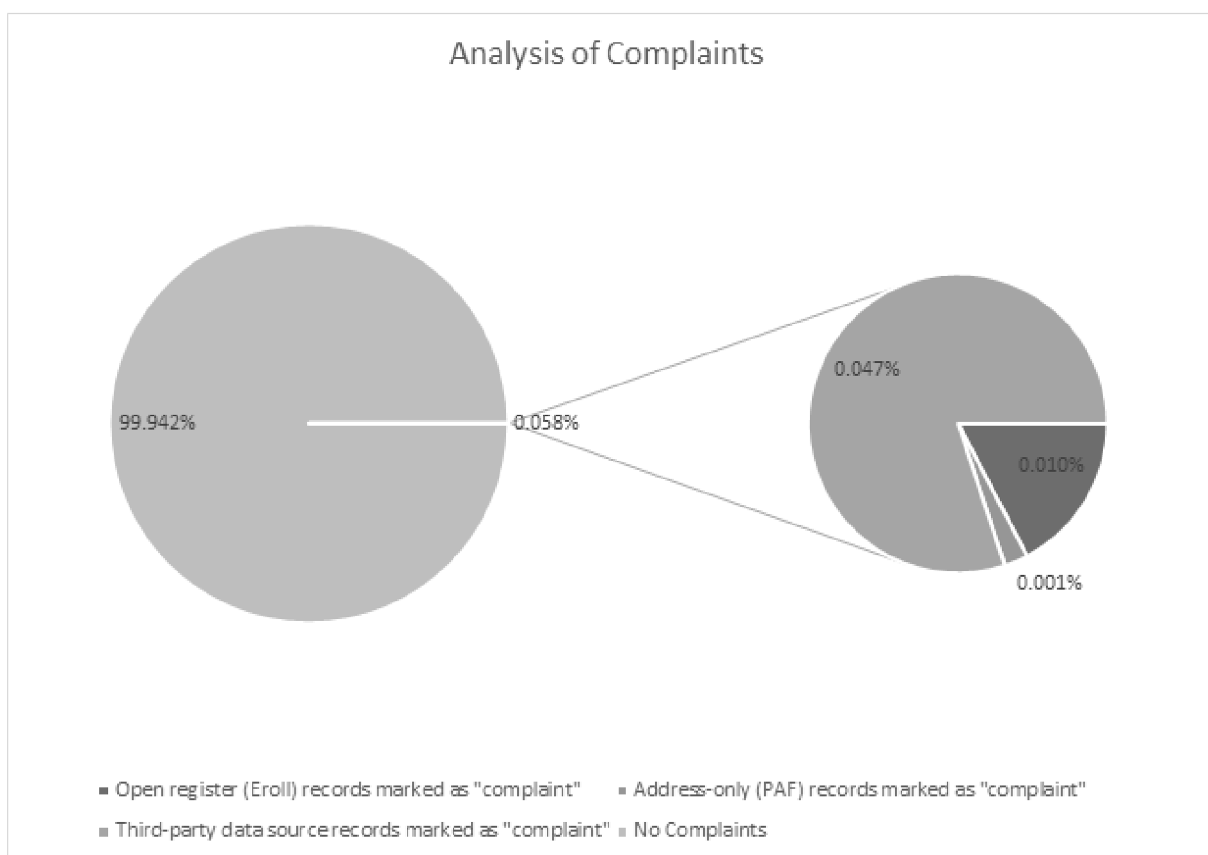
We also believe that an alternative way to safeguard consumer interests is to educate them about the ways direct marketing collects and uses their data and, importantly, how they can use the available tools to enforce their rights. We don't agree that a lack of understanding of a sophisticated industry is a reason to make it less sophisticated!

We are also extremely concerned that draconian guidelines that are contrary to current industry practice will have a serious negative impact on the direct marketing industry. In turn this will adversely affect the economy in the UK which will be a bad thing for everyone, including consumers.

Example of consumer complaints

UKChanges provided data for a sustained mailing campaign which took place over a couple of years (see figures below). The actual and relative complaint rates were extremely low.

Total records provided to client for mailing (includes re-mailing)	52,671,650	
Total records marked as "complaint"	30,696	0.06%
Open register (Eroll) records marked as "complaint"	5,321	0.01%
Address-only (PAF) records marked as "complaint"	786	0.001%
Third-party data source records marked as "complaint"	24,589	0.05%



The campaign itself resulted in many consumers receiving compensation. Over £155 million was paid out by our client to a total of approximately 60,000 consumers in the year to 29th September 2018 alone. This positive impact would seem to largely outweigh the relative negative impact on those who complained or those who were not sufficiently concerned to complain.

If the guidance in the current draft code applied at the time of the above campaign, then many of those consumers who ultimately received compensation would most likely have not done so.

Specifically:

Legal Basis

Whilst we agree that the most likely legal basis for processing personal data in the context of direct marketing will be legitimate interest or consent, we are concerned that the guidelines effectively rule out legitimate interest in the vast majority of cases.

On p.14 of the draft, it states that "direct marketing purposes" includes the processing of data. We believe that this is an over generalisation and has been applied far too widely.

PECR refers to the sending of unsolicited communications for the purpose of direct marketing. The important point to note here is that the requirements for consent apply to the sending of the communications and not the processing that may have taken place to compile datasets.

The collection and collation of personal data is governed by GDPR and the Data Protection Act of course. Recital 47 of the GDPR states that processing for direct marketing purposes may be regarded as carried out for a legitimate interest. It goes on to say:

> "Legitimate interest may be a legal basis provided the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller.
>
> Such legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller.
>
> At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place.
>
> The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing."

GDPR Article 6(1)(f) states processing shall be lawful where:

"(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."

There is a clear expectation that legitimate interest will have a valid role to play. What is less clear and therefore open to interpretation is what is meant by "the reasonable expectations of data subjects"; "the interests or fundamental rights and freedoms of the data subject"; and to what extent these may override the interests of the data controller.

We feel that there is a real danger of an overly subjective interpretation of these provisions that is applied in too generic a way. The example in Article 6(1)(f) refers to a data subject being a child. This would imply that the intention of the provision is to protect vulnerable data subjects in particular.

We would be very interested to see the research that has demonstrated what the reasonable expectations of the majority of data subjects are. Our view (drawn from information such as the example above) is that consumers are actually much more aware of there being sophisticated processes behind the scenes and much more accepting of this.

We also feel that if this is shown not to be the case then there is a strong argument for education of consumers. There are tools available for data subjects to access their data and withdraw consent for certain processing (such as direct marketing). These tools are not all based on an assumption that access to data is always based in consent. More realistically, they are there to balance the consumers interest with the legitimate interest use of their data.

The requirement to carry out a legitimate interest assessment acknowledges the infinite scenarios that may apply and the need to assess each on its merits. We feel the overly prescriptive comments in the guidance do not acknowledge this and perhaps attempt to over generalise in a way that is more of a hinderance than help.

Keeping data up to date

Whilst it is helpful for the guidelines to acknowledge that there is no requirement to go to extreme measures to keep personal data up to date, we think the document goes too far in asserting that data controllers should not go to such measures to keep data accurate. This is particularly true when there are effective commercial services available and in regular use by many companies who hold personal data which can correct errors in addresses, identify goneaways, deceased individuals and instances of duplicate entries on databases. Uncleansed personal data can cause many undesirable problems from just annoying a customer to identity fraud.

We recognise the ICO's view that contacting consumers by means other than the contact details originally given by the consumer may take away their control over their data. However, we do not feel that this overrides data subjects' rights and freedoms and we do not agree that it fails a balancing test.

The data subject still has the ability to request that their information is not used. There may be some annoyance at the initial contact, but we should acknowledge that there may also be appreciation that the organisation making contact is up to date. An example might include a reminder to renew car insurance.

We feel a more balanced assessment should be made of the potential minor annoyance to a data subject compared to, not only the direct marketing industry but organisations such as charities who rely heavily on the ability to keep in touch with supporters. By definition, charities act in the public interest.

Duty to notify

Page 49 of the draft code talks about disproportionate effort in the context of Article 14.

In our response to the draft Data Sharing Code we asked for clarification that disproportionate effort applies as an exception for data brokers, giving rationale in that response. However, this draft code appears to go against that view in stating that this cannot be relied on as an exception where personal data is collected from various sources to provide a profile. The reasoning for this seems to be based again on the lack of knowledge of the individual.

As mentioned above, there are alternative ways to address the understanding of consumers and to enable them to exercise their rights.

We very much doubt that most people would welcome the influx of notifications that would ensue if thousands of data controllers were obliged to notify the millions of subjects on a regular basis. We would be interested to review any research completed by the ICO which supports this conclusion.

Taking this a step further, is it not in fact disproportionate to the rights and freedoms of individuals to have this degree of transparency? Could regular, detailed notifications actually be seen as an intrusion in much the same way as the excess spam that GDPR was designed to avoid (worse even)?

We do appreciate and support that data subjects have a right to transparency and should be able to access information about who is controlling and processing their data, should they wish to do so. However, we are not convinced that that outcome is achieved by imposing the information on a data subject, potentially at frequent intervals.

We would propose that a solution is sought that enables data subjects to access this information relatively easily – and with the freedom to decide when and how often they wish to access it – but which also addresses the ability of controllers to make it available. For example, we feel there might be scope for creating a central resource for data subjects to search in order to find out who holds their information. Perhaps a kind of Data Trust. Something that cuts out duplication, streamlines and simplifies the process for all concerned, using available technologies to make this efficient.

In Summary

Finally, the code is quite complex and would mandate several measures which we believe would further increase confusion amongst consumers and generally detract from the quality of their experience when dealing with an organisation. Whilst there is always the possibility that direct marketing may occasionally create mild annoyance amongst a very small number of consumers (as already illustrated), we believe that this should be considered alongside the overall benefits that consumers enjoy as a result of direct marketing. Many of the proposed measures in the code would prevent consumers from receiving the offers which lead to such benefits, or at the very least make the process for them to receive those benefits disproportionately tortuous and we believe that this would be a retrograde step.