

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:

Overall, the draft Code is a helpful document. It is well written and clearly set out with lots of cross-references, making it easily accessible. However there are areas which lack clarity and would benefit from greater detail, which are set out in response to Q2 below.

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?

There are various parts of the Code where we would like greater detail and further examples:

Marketing Communication/service communication p.19-20

We would ask for greater clarification on the distinction between a 'marketing communication' and a 'service communication'. The approach in the Code is not very clear and somewhat inconsistent.

The Code states: 'In order to determine whether a communication is a service message or a direct marketing message, a key factor is likely to be the phrasing, tone and context.' It then goes on to explain: 'If a message is actively promoting or encouraging an individual to make use of a particular service, special offer, or upgrade for example, then it is likely to be direct marketing. However if the message has a neutral tone and simply informs the individual for example of a benefit on their account then these are more likely to be viewed as a service message.'

The tone and whether it is 'neutral' seems to be of particular relevance, yet in the same passage, the Code then states: 'However, it is important to understand that you cannot avoid the direct marketing rules by simply using a neutral tone.' It goes on to make the example of a message from a supermarket chain sent to an individual saying 'Your local supermarket stocks carrots' and indicates that this is clearly still promotional despite the use of a neutral tone.

The extent to which tone is relevant and how firms can rely on a neutral tone is unclear. Greater clarity on this point with some additional examples would be helpful.

On p.20, the Code sets out an example of a mobile network provider text message advising customers that they are reaching their monthly limit. If the message also encourages customers to take up a special offer to buy more data, then it constitutes direct marketing.

Most customers would expect to have an easy link or information on buying more data if they were approaching their limit and arguably would regard this as a service message. A clearer example would be helpful to confirm that a message containing information how to buy more data would still be a service message.

Public Sector Communications p.23

The Code makes the example of a GP sending text messages to patients:

'Our flu clinic is now open. If you would like a flu vaccination please call the surgery on 12345678 to make an appointment.'

The Code states this is more likely to be considered to be direct marketing because it does not relate to the patient's specific care but rather to a general service that is available. We are of the view that most individuals would not regard as direct marketing the type of message in this example in the Code i.e. information messages from GPs about how to obtain a flu vaccination. Could this point be clarified?

Do we need to complete a DPIA? p.28

The Code sets out a list of processing operations where a DPIA is required as these are 'likely to result in high risk'. Many of these operations that require a DPIA are relevant to the direct marketing context:

- data matching e.g. for direct marketing
- invisible processing e.g. list brokering, online tracking by third parties, online advertising, re-use of publicly available data.

Article 35(3)(a) states a DPIA is required where there is a systematic and extensive evaluation of personal aspects of a natural person based on automated processing including profiling and on which decisions are made that produce legal effects concerning the natural person. The Code does not accurately reflect the dual requirement of decisions that produce legal effects on natural persons.

Legitimate interest p.34-36

To properly rely on legitimate interest, organisations need to undertake a careful balancing exercise (a 'legitimate interests assessment') to ensure that the rights of the individual do not override the aims pursued by the organisation. The Code makes clear that, central to such assessment, is whether people would expect the use of their data in this way. If the ICO means that the use must be in the reasonable expectations of the individual, then greater detail and examples of what amounts to reasonable expectations would be helpful.

Profiling p.58

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.' It is unclear what the ICO considers 'intrusive' profiling to be, especially since this term is not defined in the legislation. It would be more helpful to provide advice and objective criteria on how to conduct a LIA and a balancing test.

At page 58, the Code goes on to say 'Remember, if you want to engage in 'large-scale profiling' or 'wealth profiling' you are required to complete a DPIA before you start processing.' Setting this out as an absolute requirement goes further than Article 35. Requiring this level of documentation and analysis for the wider types of direct marketing suggested by the ICO is excessive and risks producing a counter-productive, box-ticking culture.

Incentivisation of consent p.33

The Code states: 'You should not coerce or unduly incentivise people to consent to direct marketing. However in the marketing context there is usually some inherent benefit to individuals if they consent to marketing, eg discounted products or access to special offers. But you must be careful not to cross the line and unfairly penalise those who refuse consent to your direct marketing.' We would appreciate more guidance and examples of what the red lines are and more advice to understand what the threshold is to distinguish incentives from unfairly penalising those who refuse consent.

Refresh of consent p.42

Greater clarification and detail on what is a reasonable timeframe to refresh consent where it has been collected directly would also be useful. If a firm continues to market, provides an unsubscribe each time, a client managed preference centre and has received no negative comments, what timeframe would the ICO deem reasonable then to refresh consent?

What do we need to tell people if we collect their data from other sources? P.48-49

Article 14(3) states you must provide privacy information to individuals at the earlier of:

- one month from date of collection
- when the data is used for communications with the individuals; and
- when the data is shared with other parties.

At page 49, the Code states 'you are unlikely to be able to rely on disproportionate effort in situations where you are collecting personal data from various sources to build an extensive profile of an individual's interests and characteristics for direct marketing purposes...If you do not actively tell people about your processing it results in 'invisible processing'.' This statement lacks clarity and may lead to ambiguity. It would be more helpful if the ICO provided objective criteria to consider the application of Article 14, including objective criteria as to when the exemptions to Article 14 may apply.

It was not anticipated that a statutory code of practice would introduce terms, such as 'invisible processing' on page 50, which are not defined in legislation.

What do we need to consider when buying or renting direct marketing lists? p.52

In the section on records of the consent, one of the questions is 'were you named?'

Requirement for end user brands to be named at point of collection of data would make it very difficult to aggregate any sizeable volumes of data. Some SME brands may not be recognised by individuals and therefore there is an argument that description of industry sectors is more informative and transparent.

Can we match or append data? p.60

The Code states 'In most instances, buying additional contact details for your existing customers or supporters is likely to be unfair, unless the individual has expressly agreed. This is because it removes people's choice about what channels you can contact them on for direct marketing purposes'.

We believe there should be a distinction whether the purpose for matched/appended data is direct marketing or service messages. We would like additional guidance and examples to clarify whether additional contact details used solely for service messages, would still need the individual's explicit consent, or whether the business selling the product/service could rely on legitimate interest.

Can we use data cleansing and tracing services? p.61

The Code states 'Tracing an individual for direct marketing purposes takes away control from people to be able to choose not to tell you their new details. Your commercial interests in continuing to market them do not outweigh this. Therefore you are unlikely to be able to justify this processing under legitimate interests.'

We would like further guidance and examples to clarify the due diligence companies should carry out to confirm what purposes their clients use data for, e.g. service messages only, or mixture of service messages and direct marketing.

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

Yes

No

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

Overall, we believe that the Code covers the right issues about direct marketing, however there are various points where we believe the Code goes beyond its remit.

The Code includes good practice recommendations around consent: at p.31 the draft states: '**Get consent for all your direct marketing regardless of whether PECR requires it or not.**'

However, Recital 47 of GDPR states: '**The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.**'

The Code seems to lean heavily towards consent. We are of the view that the Code should explain what the law is and provide recommendations on how to comply with the law not make recommendations of this nature, when relying on legitimate interest may be a valid position to take.

The emphasis in the draft Code on consent differs from the ICO's blog on 16/08/2017 that consent is not the silver bullet and all 6 lawful bases are equal. Rather than statements of good practice it would be helpful for the ICO to provide more information on what to include in a DPIA and how to carry out a good LIA and balancing test. National GDPR interpretations must not obstruct the fundamental freedom of movement of goods and services. Insisting on consent as the only legal ground for marketing is not supported by the wording of GDPR.

The Code contains a further good practice recommendation at p.42 stating:

'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'. This means that processes will need to be in place to periodically refresh such consents. The six month period is not required by law (no period for consent refresh is required under GDPR). Six months is an unduly short period of time for this and might be a particularly onerous compliance requirement, especially as there may be many legitimate reasons why contact may be delayed. In addition, asking individuals to refresh consent every 6 months could be more irritating and intrusive than the actual marketing communications.

It is also not clear whether the 6 month period is for all marketing e.g. postal as well as telephone? This is much tighter than current DMA guidance which recommends standard of lifetime of consent:

- for 3rd party data, 6 months for telephone and 24 months for postal
- for all 1st party data, maximum time consent can remain valid is 24 months

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:

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?

We like the plain English style and think that overall it is very well written and clear. We like the links and cross-references which make it an easy document to navigate.

Greater clarity and detail on the points mentioned above with some additional worked examples would be very useful.

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:

Personal Investment and Financial Advice Association (PIMFA)

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