



Internet Association – Comments On The ICO Consultation On The Draft Direct Marketing Code Of Practice

1. Introduction

Internet Association (“IA”) welcomes the opportunity to comment on the ICO’s draft Direct Marketing Code Of Practice (the “Draft Code”).

IA represents over 40 of the world’s leading internet companies¹ and is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA’s mission is to foster innovation, promote economic growth, and empower people through the free and open internet. In 2018, IA established a London office to constructively engage in the internet public policy debate in the UK.

We are firm believers in the benefits that technology brings to everyday life and the economy, and for the potential that internet innovation has to transform society for the better. IA economic analysis shows that the internet sector contributes £45 billion to the UK economy each year, and is responsible for nearly 80,000 businesses and around 400,000 jobs.² IA polling found that 82 percent of British people believe that the internet had “made their lives easier and more enjoyable.”³

IA believes that the internet sector needs a balanced policy and regulatory environment to continue, and grow, its contribution to the UK economy, consumers, and society in the future. The internet will drive 21st century prosperity, and we believe that policymakers should focus on enabling the internet sector to: 1) drive UK economic growth; 2) provide services that people value highly; and 3) make a positive contribution to society.

In this paper we make a number of suggestions that we believe will help the Draft Code better fulfil its goal of providing practical guidance and promoting good practice in regard to processing for direct marketing purposes in compliance with data protection and e-privacy rules.

2. Comments On The Draft Code

2.1 The Draft Code’s Definition Of “Direct Marketing” Is Likely To Cause Confusion

IA notes that the Draft Code applies if an organisation processes personal data for direct marketing purposes, and that in defining “direct marketing” the Draft Code states that this “includes the promotion of aims and ideals as well as advertising goods or services”; that “any method of communication which is directed to particular individuals could constitute direct marketing”; and that “direct marketing purposes include all processing activities that lead up to, enable or support the sending of direct marketing”.

¹ IA Member Company List: <https://uk.internetassociation.org/our-members/>

² <https://uk.internetassociation.org/publications/measuring-the-uk-internet-sector/>

³ <https://uk.internetassociation.org/internet-association-launches-uk-presence-with-poll-showing-overwhelming-public-backing/>



IA assumes that the ICO's intent in defining "direct marketing" in this way is to helpfully combine into a single definition the requirements in the Privacy and Electronic Communications Regulations 2003 (PECR) in relation to direct marketing, and the requirements under the General Data Protection Regulation 2016 (GDPR) in relation to the processing of personal data. Indeed, the Draft Code notes the benefits of having one lawful basis (consent) for direct marketing purposes, in terms of organisations only having to deal with one basis for processing and for increasing individuals' trust and control.

However, IA is concerned that this approach could cause confusion in relation to which legal bases are available in relation to processing of data and, by requiring consent for all direct marketing purposes, that the Draft Code unnecessarily restricts the lawful bases available to organisations to process data.

- For example, in relation to social media marketing, specifically custom audience initiatives, the Draft Code states that "it is likely that consent is the appropriate lawful basis for this processing as it is difficult to see how it would meet the three-part test of the legitimate interests basis." (Page 90). However, Recital 47 of GDPR states that legitimate interest may provide a legal basis for processing provided that the interests or the fundamental rights and freedoms of the data subject are not overridden taking into account the reasonable expectations of data subjects based on their relationship with the data subject. In IA's view, this test is met in relation to custom audience initiatives, suggesting that legitimate interests is an appropriate basis for processing in this context.

Further, the purpose of the direct marketing requirements in PECR is to protect people from unsolicited communications. Many types of online advertising are not "communications" in that sense because they are not sent over interactive channels, and individuals do not "respond" to banner or display advertising, in the way an individual has to engage with phone or email marketing. Internet companies that offer advertising-funded, free services – for example social media services – do so on the basis that consumers are making a choice to use these services on the understanding that they will see the advertising that funds those services (i.e. advertising is not an unsolicited communication). Advertising is therefore a necessary part of the service, and IA believes that advertising closely linked to the requested free service should not be classified as direct marketing and therefore should not be subject to the same regulatory requirements as direct marketing.

IA believes that an unintended consequence of requiring consent as the one lawful basis for processing data is that this approach would also undermine the value of obtaining consent. If individuals are continually asked for consent, in particular for advertising-funded, free services, this could lead to "consent fatigue" and the related problem of individuals not engaging effectively on questions of consent when special attention is in fact required.

2.2 The Draft Code Unnecessarily Restricts The Lawful Bases For Processing Data In Relation To Advertising

The Draft Code states that "generally speaking the two lawful bases most likely to be applicable to your direct marketing purposes are consent and legitimate interests. However if PECR requires consent then in practice consent will be your lawful basis under the GDPR." (Page 3). Further, the Draft Code contains a "good practice recommendation" that organisations should "get consent for all your direct marketing regardless of whether PECR requires it or not. This gives you the benefit of only having to deal with one



basis for your direct marketing as well as increasing individuals' trust and control." (Page 31).

IA believes that these provisions in the Draft Code unnecessarily restrict the legal bases available to organisations for processing data and serving advertisements. In Section 2.1 above, we discussed how legitimate interests should be available as a basis for processing in relation to social media marketing, and this section further outlines why the Draft Code should allow bases other than consent for direct marketing.

Under GDPR, it is the responsibility of the controller to determine the appropriate legal basis (or bases) on which they are processing data. IA considers that the Draft Code, by recommending that consent is the single appropriate legal basis for processing for direct marketing, restricts the number of legal bases available to the controller under the GDPR. This is important because the legal bases available under the GDPR seek to balance the objective of protecting individuals' data with the need to also promote legitimate business operations.

IA considers that legal bases beyond consent should be allowed in relation to direct marketing. As noted in Section 2.1 above, Recital 47 of GDPR notes that: "The processing of personal data for direct marketing purposes may be regarded as carried out for a *legitimate interest*". Further, IA believes that in cases where content personalisation, including advertising content, is a core part of a contracted service it may be appropriate for a controller to rely on the *contractual necessity* basis in the GDPR to process data for the purpose of direct marketing or online advertising.

In relation to the ICO's stated objective – which is shared by internet companies – of increasing individuals' trust and control, IA notes that the other legal bases for processing under GDPR also include safeguards for enhancing individuals' trust and control. For example, Article 21(2) states that "where personal data are processed for direct marketing purposes, the data subject shall have the right to object at any time to processing of personal data concerning him or her for such marketing". The GDPR also contains various transparency requirements, for example in the principles in Article 5, or the rights of the data subject in Articles 13 and 14. In relation to the contractual necessity basis, individuals are able to exercise choice in the services they use by reading a service's terms, and deciding what they are willing to accept in exchange for using that service.

3.3 Concerns Related To Potentially "Joint" Activities

IA has two concerns related to the concept of potentially "joint" activities. First, in relation to "lookalike audiences"; and second, in relation to using third parties to send direct marketing.

In relation to "lookalike audiences", where social media platforms offer advertisers the ability to build other audiences based on the characteristics of an original audience, the Draft Code notes that "from a data protection perspective, these activities are complex" and concludes it is "likely that both you [the advertiser] and the platform are joint controllers for this activity". IA respectfully submits that advertisers and social media platforms are not "joint controllers" in relation to "lookalike audiences" as both parties are not jointly determining the purposes and means of processing. IA believes that in relation to this practice, social media platforms act as independent data controllers when processing users' personal data.

In relation to using third parties to send direct marketing, the Draft Code notes that both "you [the advertiser] and the third party are responsible for complying with PECR" and that "both companies



require consent from the individual under PECR”. IA believes that, in some circumstances, requiring consent from both companies should not be required. For example, if an app store sent a marketing email to opted-in individuals promoting a number of individual apps available within the app store, a further requirement for the provider of each individual app to also get an opt-in would be excessive and unworkable. IA encourages the ICO to update the Draft Code to provide further clarity on this point.

3. Conclusion

IA welcomes the opportunity to comment on the ICO’s Draft Code. In this paper we make a number of suggestions that we believe will help the Draft Code better fulfil its goal of providing practical guidance and promoting good practice in regard to processing for direct marketing purposes in compliance with data protection and e-privacy rules. IA and its members will continue to work with the ICO and other policymakers on these issues as we seek to both protect individuals’ data and also promote legitimate business operations which will enable the internet industry to grow its already substantial contribution to UK consumers, the economy and society.

Internet Association

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