04 March 2020

Direct Marketing Code Consultation Team
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

By email only: directmarketingcode@ico.org.uk

Dear Sir or Madam,

We are writing to provide our feedback in connection with the ICO's consultation on its draft direct marketing code of practice.

With 24 million customers across seven countries, Sky is Europe's leading media and entertainment company and is proud to be part of the Comcast group. Our 32,000 employees help connect our customers to the very best entertainment, sports, news, arts and to our own local, original content.

We welcome the updates set out in the draft code and the ICO's efforts in expanding the guidance available to organisations to cover the regulatory and technological changes that have occurred since the previous direct marketing code of practice was published. Our feedback below covers the areas in the draft code where we would welcome further clarification from the ICO.

Direct marketing purposes

Beginning on page 3 and continuing throughout the draft code, the ICO introduces the concept of "*direct marketing purposes*" as covering all processing activities leading up to, enabling, or supporting the sending of direct marketing. Page 14 makes clear that this (non-exhaustively) includes activities such as lead generation, data enrichment, data cleansing, audience segmenting or other profiling, and contacting individuals to ask them for consent to direct marketing. The term "*direct marketing purposes*" is used in Article 21(2) GDPR but we consider that its meaning in that article relates solely to the sending of direct marketing, given the language that states that a data subject may object to processing of his or her personal data "for such marketing".

We therefore consider that the concept of "direct marketing purposes" covering any activities connected with direct marketing is a new one. Although we do not object to the concept, we are concerned by the statement on page 30 that if PECR requires consent for an organization to send direct marketing, then consent will also be required for other direct marketing purposes connected to the sending of that marketing. We do not understand the basis in law for expanding the consent requirement beyond the activity of sending direct marketing. Regulation 22 of PECR requires consent only for an organisation to "*transmit*" or "*instigate the transmission of*" direct marketing by electronic mail. It should remain a matter

for an individual data controller to determine its lawful basis of processing for activities connected to, but not actually involving, the transmission of direct marketing by electronic mail.

We cannot find any support for an expanded consent requirement for "direct marketing purposes" in the GDPR, DPA 2018, or PECR; indeed the draft code's approach appears to directly contradict Recital 47 GDPR, which states that "[*t]he processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest*". Alongside this, the code's interpretation could also result in a range of practical complications for processing activities which serve a dual purpose or where it is unreasonable or simply unnecessary to gain consent.

For example, organisations might, on the basis of their legitimate interests, choose to carry out profiling activities which analyse a customer's propensity to cancel a particular service, with the results of this analysis being used both to determine which customers to target with marketing communications and for financial planning purposes. It would undermine the very notion of the legitimate interests lawful basis to require organisations to seek consent for activities like this, particularly when the activity that the ICO is concerned with, namely the basis on which the actual transmission of unsolicited marketing takes place, is already separately regulated by the law.

Furthermore, the approach set out in the draft code arguably creates scenarios where it is necessary for an organisation to first obtain consent from a customer before it can take steps to ask for consent to market to that same customer (i.e., consent to ask for consent). This is implicit from the examples given in page 14 of the draft code. While we note that it is not the ICO's intention for this approach to result in illogical or impractical outcomes, we would highlight that a literal interpretation of the draft code would suggest that organisations would need prior consent in order to collect marketing consent during a website sign-up journey, by virtue of the fact that this consent collection would clearly be a "direct marketing purpose".

Overall, we consider that the draft code's approach to direct marketing purposes will result in confusion and consent fatigue on the part of the data subject and an unnecessary burden for data controllers. We therefore suggest that the final code is simplified or amended to explain that an organisation must ensure it has an appropriate lawful basis for all direct marketing purposes.

Finally, we note that in other contexts the ICO has taken the view that where consent is required under PECR, consent is also the appropriate legal basis under GDPR. For example, the ICO's guidance on the use of cookies and similar technologies states (page 20) *"If you have obtained consent in compliance with PECR, then in practice consent is also the most appropriate lawful basis under the GDPR"*. In the cookie context, we understand this approach – because the storage and access of cookies (regulated by PECR) is likely to be intimately entwined with the related data processing (regulated under GDPR). However, to extend this approach across the myriad of disparate processing activities that can contribute to a decision whether or not to send direct marketing to an individual significantly undermines the concept of legitimate interests in a manner that has no basis in law.

Profiling, tracing, and data enrichment

Pages 61-62 of the draft code make clear that tracing individuals following an address move is likely to be unreasonable. However, we would welcome clarification that this assessment of tracing applies only where an organisation traces someone in order to continue to market to them, but that it may be justifiable in other scenarios. For example, organisations may, via a third party, trace those customers who have opted-out of marketing in order that they can be excluded from any future prospect marketing sent to their new address. In such contexts, although the organisation would be processing details which were not expressly given to them by the customer, the tracing is carried to meet the customer's wish to be suppressed from marketing, and would therefore appear potentially justifiable in connection with the data controller's legitimate interests or even its legal obligations.

Furthermore, we would ask the ICO to consider further the practical implications of its approach to tracing. For example, if an organisation has consent to market to a customer at one address but that consent does not transfer to a new address, the organisation may end up sending generic non-personalised marketing

to the new address. The recipient (customer) of that generic mailing may well be confused that the communications they are receiving from an organisation with which they have an ongoing relationship has changed in tone from personalised to generic. To help address this we would welcome it if the code acknowledges that there is some leeway for organisations to send some form of personalised messaging to its customers who have moved home but who have neglected to inform their service provider.

Other comments

Special category data - pages 4 and 39 of the draft code states that in order to profile data subjects using special category data, an organisation must have their explicit consent. The code should clarify here that this refers to direct marketing scenarios only, rather than any other scenario.

Regulatory communications - on page 21, an example of when a regulatory communication might not constitute direct marketing includes a communication containing information that is "*against your interest and your only motivation is to comply with a regulatory requirement*". The phrase "*against your interest*" goes beyond the requirements set out in the service message section, is an unnecessary addition, and could result in uncertainty for affected organisations about the status of their regulatory communications.

Dual branding promotions - page 27 of the draft code states that "*if you are planning electronic communications as dual branding promotion with a third party, you still need to comply with PECR even if you do not have access to the data that is used.*" The draft code then sets out a worked example explaining that a supermarket sending out marketing which promoted a charity would need to ensure that its customers had given consent to receive such marketing promoting that charity. While we understand this approach in contexts where one party is sending marketing on behalf of another (i.e. "*instigating the transmission*" in PECR terms), we are unclear about the basis for this in other contexts. In scenarios other than where one party is 'instigating the transmission' on behalf of another, the only consideration should be whether the consent held by the party sending the message is sufficiently broad to permit the sending of the message, rather than whether the other party holds any consents to tell those customers .We would also question the statement that *"[b]oth you and the third party are responsible for complying with PECR*" in such contexts, as it is difficult to see how a party that is neither transmitting or instigating the transmission of marketing messages could be held responsible for doing so. We would appreciate further clarity on the circumstances in which this section applies.

Consent - page 33 of the draft code states that "*[y]ou should not coerce or unduly incentivise people to consent to direct marketing*". We fully support the position that individuals should not be coerced into receiving marketing, but we consider that the term "*unduly incentivise*" is ambiguous and creates the potential for uncertainty over the meaning of "*unduly*", particularly when the next sentence in the code highlights that marketing usually carries some inherent benefit. Additional clarity around what the ICO means by "unduly" in this context would be helpful.

Time limits for third party consents – page 42 of the draft code makes the good practice recommendation that organisations should not rely on consent obtained from third parties that was given more than six months ago. Sky considers that this recommendation is too general and overlooks the fact that organisations might, quite reasonably from a consumer's perspective, delay sending marketing communications until they are most timely for the relevant consumer or group of consumers. For example, where Sky had obtained consent to market to a consumer who held an 18 or 24 month contract with another provider, it would be well within that consumer's reasonable expectations that Sky would use that consent to market to them at the point they could legitimately engage with that marketing communication, rather than only within the first six months when they may be tied to another provider. It should be for organisations themselves to determine the appropriate time limits for consents they obtain, whether directly or via a third party.

Direct Marketing by 'live' calls – page 67 states that if a company wishes to market to a number registered with TPS it *"must have the subscriber's consent in order to override their general objection to direct marketing calls"*. The requirement in PECR 21(4) is not phrased in language of consent, but instead by reference to a notification by a subscriber to a caller that the subscriber *"does not, for the time being, object to such calls being made on that line by the caller."* The code should accurately reflect the provisions of PECR in this regard.

Consent and electronic mail - page 72 highlights the need for specific consent for different channels of marketing. While we recognise the importance of specific consent for email and SMS marketing, we consider that this could be read strictly as requiring a highly granular level of consent for similar but arguably separate channels, such as different kinds of in-app communications or social media messaging, which has the potential to create consent fatigue. We would welcome further clarity in the final code on the appropriate balance to apply here and whether it is truly necessary to get specific consent to each and every distinct type of electronic marketing beyond email and SMS. We would also suggest that the final code be more precise about exactly which activities are covered by the term "*in-app messaging*" on pages 16, 31, and 72, as not all types of in-app messaging will fall within the definition of "*electronic mail*" and be subject to Regulation 22 PECR. As such,, the present wording could result in confusion around whether organisations are required to obtain consent for activities which are not covered by Regulation 22 PECR.

Business to business marketing - on page 79, we would welcome clarity on whether a "*corporate subscriber*" email address is intended to cover personal work email addresses such as firstname.lastname@company.com or whether it must always be a generic mailbox such as info@company.com.

Connected devices - we consider that the statement on page 97 that "*Regulation 6 of PECR generally applies to connected devices as in most cases they meet the definition of 'terminal equipment'*" has the potential to create confusion, given that Regulation 6 also requires that the terminal equipment relates to a subscriber or user of an "*electronic communications service*" within the meaning of section 32 of the Communications Act 2003. We consider that more specific wording would be helpful here.

Suppression - on page 109, the draft code states that an organisation must stop marketing to an individual "*immediately or as soon as possible*" after they have withdrawn consent. We would welcome clarification in the final code that the one-month time period for actioning an objection to processing also applies here, as this will typically be the mechanism by which an individual opts out of direct marketing.

If you would like us to clarify or expand on any of the points above, we are at your disposal to discuss further and can be contacted via email at [redacted]@sky.uk.

Yours faithfully,

Data Protection Team

Sky Legal