ISBA ONE VOICE

Response to the ICO:
Direct Marketing Code of Practice

March 2020

About ISBA

1. ISBA is the only body representing leading UK advertisers. Speaking with one voice on behalf of over 3,000 brands, we champion an advertising environment that is transparent, responsible and accountable; one that can be trusted by the public, by advertisers and by legislators. Our network of senior marketing professionals works together with ISBA to help members make better decisions for the future.

2. ISBA is one of the tripartite stakeholders that make up the Advertising Association (AA), which represents advertisers, agencies and media owners. We play a unique advocacy role, ensuring our members' interests are clearly understood and are reflected in the decision-making of media owners and platforms, media agencies, regulators and Government.

3. ISBA will:

   - **lead our members** in creating an advertising environment that delivers positive social and economic impact;
   - **champion media, agency and digital supply chain relationships that deliver value** for advertisers; and
   - **work with our community** of members and with partners to deliver thought leadership, learning, advice and guidance.

4. Our priorities fall into the following areas:

   To **lead** the creation an advertising environment that delivers positive social and economic impact, ISBA will:
   - develop and champion a **leadership position on the legal and ethical use of consumer data**, putting choice and control in the hands of the consumer;
   - play a leading role in **advocating and shaping regulation** of Online Harms;
   - **shape future self- and co-regulation** of advertising to be sustainable and fit for purpose; and
   - with the AA, **better understand the drivers of public trust and champion improvement**, through the promotion of advertiser best practice, through advocacy for better industry standards and through encouraging the prioritisation of user experience by platforms and publishers

   To **champion** a media, agency and digital supply chain relationships that deliver value for advertisers, ISBA will:
   - lead global efforts to accelerate delivery of accountable **cross-media measurement** of video and digital formats, with stakeholder support;
   - lead advertisers in the pursuit of transparency and efficiency in the **digital supply chain** to engender trust;
   - publish **new media contract advice** and drive wider industry adoption of ISBA's contract frameworks;
   - champion closer **agency/client alignment** based on sustainable commercial arrangements;

- advocate for a regulatory environment that fosters **competition and addresses market failures**;
- actively support the **WFA Media Charter**, particularly in relation to **advertising and influencer fraud**; and
- support the **Global Alliance for Responsible Media** in delivering improved measurement and tools to keep communities and brands safe.

To **work with our community** to deliver thought leadership, learning, advice and guidance, ISBA will:

- drive **wider active engagement** with ISBA through membership growth and greater participation in ISBA's working groups and governance bodies; and
- deliver an enhanced online **knowledge base**, working selectively with partners to create high quality, relevant content.

5. ISBA represents advertisers on the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) – the sister organisations of the Advertising Standards Authority which are responsible for writing the Advertising Codes. We are also members of the World Federation of Advertisers (WFA) and use our leadership role in such bodies to set and promote high industry standards as well as a robust, independent co-regulatory regime.

Response

6. ISBA welcomes the publication of the Draft Marketing Code of Practice and the opportunity to respond as part of this consultation. We support the key points being made by both the Advertising Association and the Data & Marketing Association in their submissions. We believe that there is work to do to ensure that the final Code is more nuanced, that there is a greater recognition of the different forms of direct marketing, and that legitimate interest is recognised as an acceptable reason for processing data.

7. We agree with the Advertising Association that a distinction should be drawn between the processing of data which comes under the General Data Protection Regulations (GDPR), and direct marketing covered by the Privacy and Electronic Communications Regulations (PECR). In the draft Code, the ICO sets out a proposed definition of "direct marketing purposes" which includes the processing of data in order to send direct marketing communications. Given that there are two different regulations involved, including all data processing under one definition could conceivably lead to confusion.

8. We are also concerned about the narrowness of the proposed legal basis for data processing. On page 30, the draft Code says that if PECR requires consent, then the processing of personal data for electronic direct marketing purposes is unlawful, under GDPR, without consent; and that 'legitimate interests' cannot be used as a legal basis for processing data if GDPR considers it unlawful. However, we would question whether consent is or should be the only legal basis which can be used. If a company were to get consent to send marketing e-mails to its customers, the draft Code as drafted suggests that further consent would be needed for processing which captures profiling or segmentation. However, if the profiling does not have a legal or similarly significant impact – which most profiling for marketing purposes does not – then going back to the consumer to ask for further consent feels onerous and, potentially, could lead to consent fatigue.

9. Companies use profiling so that their marketers can serve relevant advertising to the consumer while cutting down on irrelevant ads – dealing directly with issues which have been identified as key to trust in the advertising industry. If, because of the Code, additional consent boxes become required alongside the existing, first consent boxes, this will

increase uncertainty both for the consumer and for data management by companies, requiring the logging of consent at each and every step in the process, to the detriment of all.

10. This approach does not seem consistent with the text of the GDPR itself, which at recital 47 says that "the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest".

11. In the draft Code, the ICO seems to acknowledge that custom audience targeting is not caught by PECR. If this is the case, then we would question why consent is highlighted as the only possible legal basis and would seek clarity on this point.

12. ISBA members have highlighted that consumers who consent to receive marketing are used to build custom audiences, based on the fact of their e-mail opt-ins. As they have actively consented to receive marketing, they therefore can reasonably expect to receive targeted advertising. They would not find it unfair – or unexpected – to receive such marketing; in fact, many would find it helpful to receive targeted, relevant ads, rather than irrelevant, generic ones. However, the draft Code is unclear on whether building lookalike audiences in this way requires consent. For example, if a company uses a list of existing customers to build a lookalike audience, does the company need the consent of the people in its existing customer list to use their data to create a lookalike audience – even though the existing customer list would not be specifically targeted? The draft Code seems to suggest that the consent of existing customers would indeed be required; a narrow interpretation which conflicts with the idea that direct marketing can be considered a legitimate interest.

13. Further to the point about lookalike audiences, members have raised the need for further clarity when it comes to joint controllers. It is hard to understand how a brand and Facebook can be joint controllers for all elements of the lookalike audience process. Reviewing the GDPR definitions and clauses on controllers and joint controllers, it is clear that a brand and Facebook are independent controllers for their respective roles. If the position is now to be that they are, in fact, joint controllers then, in effect, this requires that Facebook give the brand more personal data than they in fact require. This is because the brand would need to inform the data subjects of their privacy notice, and so forth. This seems to go against the principles of privacy by design and data minimisation.

14. When it comes to platforms such as Facebook or others which use direct or in-app messaging, members have raised the need for further clarity as to the ICO's position when a consumer comments on a brand's post, or when a consumer tags a brand in a conversation. The consultation calls for consumer's consent, but it is not clear whether this only applies to direct messages sent to a consumer's inbox.

15. There are, of course, multiple ways to interact with consumers, and for consumers to interact with brands. If consent becomes a constant requirement for all of this interaction, we would argue that that is not a positive user experience. If consent management becomes a laborious task for consumers then, once again, we risk consent fatigue – in the same way we currently see for cookies, where consumers just click 'accept' with no real clarity on what they are agreeing to.

16. As well as difficulties around repeated consent, members have raised with us the need for further clarity on the 'incentivisation' of the granting of consent. They look to the ICO for a better definition of what "unduly incentivising" consent might look like in practice; at present, the draft Code advises companies not to "cross the line", but it would be useful to have examples of what this might look like in practice.

17. Further, the ICO says that some level of incentivisation is acceptable, but does not define what "some" means. Companies may be left unsure whether they can offer consumers small advantages, such as a discount – and if so, how much is too much; a free product – but unsure whether it can be sample size only, or a full product; or some other free element as a 'thank you' for subscribing … or whether any incentive of this kind invalidates consent.

18. Members have also raised with us the need for clarity on 'refer a friend' marketing – for instance, if a consumer wishes to send a 'hint' or wish list to a friend, say for their birthday. If the brand provides a function or tool for a consumer to be able to share a list of this kind via social media or e-mail, would the ICO consider this 'refer a friend' – and, therefore, marketing? Would the consent of the consumer's friend be required and, if so, how; and what if there is no encouragement to share, just an explanation that the feature is available? Would the presence of a 'share this' button be an instigation?

19. Members have also raised the issue of pixel tracking in e-mails. E-mail service providers do not offer the technology to manage this consent. CRM strategies use these pixels to manage interaction with consumers – for example, if a consumer has opened an e-mail, companies can manage how many future e-mails are sent, so as not to overwhelm the recipient. Requiring consent adds another consent box, which further increases the risk of fatigue. In addition, members feel that this is unnecessary given the greater benefits for the consumer (i.e. they will not receive similar e-mails in the future to those which they have not opened).

20. As well as online issues, members have also raised questions relating to print direct marketing and mailing, and matters pertaining to consent. For instance, delivery services have raised with us the possibility that they may legitimately seek to trace a consumer to a new address, depending on the circumstances; they may hold an asset of the consumer's, for example, and need to reach them in order to deliver it. The need to trace to a new address would be dependent on circumstances, and be the consumer may be ill-served by a blanket ban on tracing details.

21. Another concern is the onerousness of some proposed requirements to continually inform consumers that a third party required their data. There is a concern that the draft Code does not adequately reflect the effort involved in sending repeated additional communications, and how this might be disproportionate.

22. The DMA in their submission have highlighted this issue in the following way, and we would support their point:

Article 14 notification
Page 48 – What do we need to tell people if we collect their data from other sources? Article 14 of GDPR says that if one obtains personal data from somewhere other than directly from the data subject, one is obliged to provide privacy information to that person within a month. For companies that collect data from such sources as Companies House, Edited Electoral Roll or third-party data providers, this will have a major impact. Until now these companies have been relying on the 'disproportionate effort' exemption. However, the draft code says:

"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. Individuals will not reasonably expect organisations to collect and use large volumes of data in this way, especially if they do not have any direct relationship with them. If individuals do not know about such extensive processing of their data they are unable to exercise their rights over it."

For some reason, the draft code omits the other exemptions 14 (5)(a) and 14 (5)(c) both of which are very relevant to data collected for marketing purposes.

This was identified as a risk when it was first spotted in the EDPB's guidance on transparency, at which point companies who relied on collecting data indirectly decided that the disproportionate effort exception would be appropriate. If the 'disproportionate effort' exemption is not considered acceptable for companies that collect and aggregate data for re-sale and the development of additional data services, it could put the data business units at many of the UK's big data companies out of business. It is the view of the DMA that if the effects of complying with a requirement were to bankrupt a business, it would be disproportionate …

This has a potentially huge impact on data services companies that aggregate data from various, including public, sources and then resell this data (data enrichment, appending profiling, developing data products).

If this is no longer a viable business, it would also have a knock-on effect to all the organisations that use this data for customer acquisition campaigns or use the various data products.

The DMA believes that the disproportionate effort exception should be available. Consumers do not want to be contacted multiple times to be informed that companies hold their data. The impact on the individual is negligible until the data is used for marketing at which point, they become informed and can choose to opt-out.

23. The ICO gave detailed guidance in June 2019 on adtech, highlighting concerns about the obtaining of valid consent and giving consumers information about how their data has been used. Some members feel that there is the potential for companies to look at the draft Code and disregard the points highlighted last June, unless more explicit reference is made to them in this new document.

24. Members have also raised the issue of database buys and acquisitions, where they believe that further detail is required – not least because previous guidance included this subject and should be reflected here. Previous guidance stated that in the case of the sale of merger of a business, re-consent was not necessary. Members are seeking the ICO's view on this, and whether, assuming that consent was obtained appropriately in the first instance, upon sale or acquisition of a business the company is permitted to continue marketing in the same fashion without seeking re-consent.

25. Finally, we are concerned on behalf of our members who are charities about the impact of the draft Code on their operations. The Code states that the "soft opt-in" for e-mail only applies to the commercial marketing of products and services and not to the "promotion of aims and ideals"; nevertheless, we agree with the AA that this could exclude charities, and have a detrimental impact on their ability to fundraise and promote their activities.