

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](mailto: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](#)

A Submission made by PromoVeritas Ltd, specialists in promotional compliance



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Q1 Is the draft code clear and easy to understand?

- Yes
- No

If no please explain why and how we could improve this:

## 1. Using Social Media for Direct Marketing Purposes (ICO draft Code, Page 90)

In our opinion the most useful, but perhaps alarming, section relates to social media marketing: the draft code states that social media audiences and lookalikes require consent.

*“Individuals are unlikely to expect that this processing takes place, therefore you should not bury information about any list-based tools you use on social media within your privacy information.*

*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.”*

While we were pleased to see a detailed reference to social media marketing being made by the ICO, we were surprised by the ICO’s statement that that individuals are *unlikely* to expect custom audience targeting, and therefore consent is likely to be the most appropriate lawful basis for processing their data, and that information about such processing should be drawn to the attention of individuals outside of privacy policies.

This is a very ambitious perhaps futile goal, It is incredibly rare to see this ever done or likely to be done in practice. It is all the more unusual because elsewhere in the draft it is made relatively clear that such forms of marketing do not fall within the Privacy and Electronic Communications Regulations.

An additional aspect we found surprising – and object to - is the ICO’s advice that the use of personal data for lookalike audiences on social media platforms, another commonly used tool, is likely to make both brand and the platform joint controllers in relation to the data (and not just the use of pixels and plugins). This seems to make the platform owners to be publishers, not just conduits of information over which they have no control. It would be similar to making BT responsible for any indecent phone calls that occurred using their phone lines.

While individuals’ privacy should naturally be held in high regard, with the already intense requirements of GDPR, adding more onerous requirements may stifle entire industries.

## 2. Consent (ICO draft Code, Page 30)

How do we decide what our lawful basis is for direct marketing?

*“If PECR requires consent, then processing personal data for electronic direct marketing purposes is unlawful under the GDPR without consent.”*

We all know that you need consent to send an email (with the exception of the soft opt-in and business subscriber exemptions).

This section tells us that, while you need consent under PECR for sending an email, any other processing you do also requires consent under GDPR.

This would include profiling, segmentation, analysis etc.

And because sending an email and profiling are two different processes, according to GDPR we must assume you would need a **separate consent tick box** alongside the usual consent tick box to send email marketing.

**The added complexity to the data base structure and CRM selections would complicate UX and thus user experience.**

### 3. Indirect data collection (ICO draft Code, pg48)

What do we need to tell people if we collect their data from other sources? The ICO propose:

*“If you collect personal data indirectly - i.e. from sources other than the individual - you must still be transparent and comply with the right to be informed.*

*Other sources could include publicly available data or third-party suppliers such as data brokers.*

*Here you must provide privacy information to individuals within a reasonable period and at the latest within a month of obtaining their data.”*

We need to consider the case of data collected from various sources by brokers and aggregators and sold to third party brands for use in direct mail campaigns.

If the individual was not shown the brands’ privacy policy when the data was collected, it must be provided that information **within a month**.

According to the draft code, you can do this either with a dedicated privacy communication that includes that information, or by providing a link to it the first time you get in contact with the individual.

The issue here being that not many large direct mail campaigns are completed **within a month** from data gathering. It can take many months.

Additionally, what would happen if a brand gathers a lot of data from a list broker, but then upon review, decides not to mail some of them (they may not fit their profile, or be on a suppressed list etc). Does the brand still have to contact them to tell them that although the brand has their data, and has by definition, ‘processed’ it, they will not be contacted or used?

There are two exceptions to this requirement

- The individual already has the information
- Providing the information would involve **disproportionate effort**

The information required is slightly different for data collected directly than that obtained indirectly, so it’s unlikely you will be able to use the first exception.

Turning our attention to disproportionate effort, which is described on page 49.

*“If you want to rely on the disproportionate effort exception, you must assess and document whether there’s a proportionate balance between the effort involved for you to give privacy information and the effect of the processing on the individual.*

*If the processing has a minor effect on the individual, then your assessment might find that it’s not proportionate to put significant resources into informing individuals.*

*However, the more significant the effect the processing has on the individual then, the less likely you are to be able to rely on this exception.”*

Our view of this is that if a brand/company bought data directly from a publisher for their own marketing, it would be more likely that they could use the disproportionate effort exception.

But for larger data brokers and data services companies who combine data and who are unknown to the data subject **that would not be the case**.

**And yet if such companies had to contact each individual as described in this section, it could be unaffordable - putting the vast majority of the third-party data market and all its associated products and services at risk.**

This would obviously be bad news for data brokers and bad news for the users of their data products in both the B2C world and B2B.

#### 4. ICO and Consent

There appears to be a major contradiction between the view of the ICO and the intention behind GDPR. The latter states ( recital 47):

***“The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.”***

And yet this ICO draft Code says:

***“Get consent for all your direct marketing regardless of whether PECR requires it or not.”***

The draft Code also features a good practice recommendation about the use of third party data:

***“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.”***

We dispute the validity of the six months rule. Whilst it might be appropriate for a lot of industries with short lifecycles, eg food and drink, for others it is not long enough. Industries such as Electrical appliances, cars, insurance, holidays and more all have long gestation periods and only marketing to people who have given consent within the last six months would significantly affect their marketing abilities. In fact it might actually result in an increase in communications to consumers, as Ford, for example, maintain contact with consumers twice a year, just to ensure that at the three year re-buying point, they can claim to have consent to market their crucial marcomms messages about Buy Ford Now. Allowance for these type of industries must be made.

#### 5. Extinction of Introduce A Friend.

We are concerned that your interpretation of GDPR and PECR holds the instigator of the message responsible for obtaining lawful basis of consent. But what of the situation where a brand asks one of its users to send on a message, an advertising message, to that users' friends. The brand will have no idea who those friends are, so cannot seek consent, nor is likely that the user will formally seek or obtain, and certainly not retain evidence of consent from their friends, before sending on the brands' message. Consent in this instance is impossible to obtain and we have the basis for a breach.

We cannot see that consent is necessary where an individual, acting in a personal capacity, can be held responsible as an instigator, even if what they are sending on is a commercial message. They will be using their discretion to ensure they feel it

#### 6. ICO draft Code and the term 'Direct Marketing'

The draft Code constantly uses the term 'Direct Marketing'. This is defined as the *'business of selling products or services directly to the public, eg by mail order or phone selling, rather than through retailer'*.

However the ICO's intention is to cover far more than just mail shots and phone calls for example if a brand is using data to run adverts that drive consumers to their own shops or those of other retailers.

'Direct Marketing' is both a narrow and an old fashioned term, even the DMA, that used to be the Direct Marketing Association has changed its name to the Data & Marketing Association in order to reflect the need for more breadth.

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?

- Review of the term 'Direct Marketing' as indicated above
- Review of the impact of the proposed Code on techniques such as Member Get Member or Introduce A Friend, where consent from an unknown end recipient is impossible to obtain
- Review of making platform owners responsible for consent and messaging done via their services

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:

Would benefit from more specific coverage of digital marketing which is becoming the lead media for many brands. To include in-app messaging, video on demand and location based marketing.

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:

Found some of the references to GDPR and PECR confusing – not always in line. Also comments on terminology – eg 'direct marketing' is not the best term to cover all the areas intended to be covered by this Code.

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

We are responding on behalf of an organisation.

Q7 Do you have any other suggestions for the direct marketing code?

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## 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:

PromoVeritas Ltd – specialists in promotional compliance

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