

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:

The draft direct marketing Code extends the onus of responsibility for data protection between parties – the idea of dual joint controllers in most of the marketing activities, where in parties are in fact in the roles of independent controllers. The result is that counterparties have to effectively consider liability for the actions of their counterparty, whereas in fact they do not have power to do that, since the other party is completely and independently taking care about these activities. This leads to a lack of clarity on overall responsibility. This is exacerbated where there are two distinct segments in the marketing chain – such as social media platforms and the liability of companies using such platforms. Further cases such as where parties do not have access to the data of the other party, but are both liable for the activities of the other, create demands on each party which go against privacy policy (such as data minimization). The issue of ‘look-alike’ audiences is relevant in this area – i.e. social media platforms take on liability for this action currently and extending it to other parties who do not possess the data would be a considerable change.

There are other areas where direct interpretation of the text has led to different opinions – such as third party consent and market research. In this instance it is not clear why third parties should collect consent of data subjects who are not its customers (when the compliance obligations with respect to the data subjects are on the party who is their data controller).

Furthermore, there is a lack of clarity as to what would be a satisfactory check on whether a marketing partner was compliant with privacy policy. It does not stipulate what is proportionate in regards these checks leaving open the risk to the primary party of whether another party’s policies are compliant. It means the primary party becoming effectively the regulator of other party with no barometer on where the line of liability ends.

In all these situations we find it essential to first properly recognize roles of the parties. In situations where we have two independent controllers it has to be clear that each party is responsible for its compliance obligations, and they can not verify or influence other party compliance given that here we have completely independent activities and parties with equal power.

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?

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:

The definition of direct marketing remains the same as DPA 18, but the reference to "all processing activities that lead up to, enable or support sending those communications" leaves a spectrum of interpretation on what exactly constitutes those activities. Common practices such as data research, segmenting and CRM all underly customer analysis but that does not mean they are tied up in direct marketing. The result is that different activities may have different legal basis (consent versus legitimate interests) thus making it difficult to apply that legal basis to an underlying activity which might give rise to both forms.

This section needs further clarity to avoid trapping many underlying activities whose purpose would not be for direct marketing purposes but may give rise to it later, specifically very tangential activities would create grey areas under the reference above.

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

One of the areas where further work is required is the issue of regulatory purpose. The Code does make reference to direct marketing obligations being applied to regulatory communications. If someone has opted out of direct marketing communications can a company then not send a regulatory communication. This could lead to a breach of regulatory requirements.

There is also the cross over in Codes between regulators. The Code on Direct Marketing could affect how operators interpret their requirements under their sectorial Codes against this Code. The industry has certain customers for which it must meet regulatory obligations (self-excluded) for instance.

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?

There are a number of areas where the Code could use increased clarity or confirmation. These include:

1. Business Contacts data being treated as individual data. Where marketing is directed to a legal entity this is exempt under GDPR. Therefore, business marketing should be outside of the scope of the Code, with the right of course of business to opt out of such communications.
2. Definition of direct marketing should be revised given the practical and legal implications that suggested approach could have.
3. Data access requests – the Code seems to imply that the all areas where a subject has been categorized should be made available to the customer on a access request but this may involve areas where personal data was never produced (such as statistical data).
4. More clarity on whether certain ads require cookie or marketing consent would be helpful. “Presented ads”, done upon log-in, are one example.
5. The Code does not cover incentivization of consent other than stating consent must not be a pre-condition for service.
6. One area which operators conduct business is with affiliates. While comments have been made earlier on joint liability and due diligence, the nature of the requirements for this relationship could be better defined.
7. The sector uses profiling to identify and address customer who may be exhibiting a problem. This profiling is critical to the obligations of operators pursuant to the sectoral regulator’s LCCP Codes. If this requires consent then it could dilute the efforts of operators to perform their regulatory duties.

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:

Betting and Gaming Council

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