

Response to the ICO's Direct Marketing Code consultation

Dentsu Aegis Network helps its clients win, keep and grow their best customers through best-in-class expertise and capabilities in media, data-driven digital and creative communications services. Headquartered in London, UK we employ 48,000 people worldwide who help to service 11,000 clients – including 85 of the world's top 100 advertisers.

We welcome the ICO's consultation on the draft Direct Marketing Code which provides important clarification on key data protection issues impacting our clients, our business and the industry more broadly.

We support the fact that the Code now provides a more stable basis upon which innovative data services may be developed in alignment with the Commissioner's regulatory expectations.

Whilst we clearly understand the Code provides guidance on the law as it stands today within the context of direct marketing, it adopts various legal and policy positions that may have a significant impact on existing business models and practices within the market, that may have been undertaken with good justification in the absence of specific guidance, by some parts of the industry today.

We note Section 122(4) of the DPA 2018 allows for transitional provisions to be adopted, and that a similar 12-month provision was adopted with regards to the recently published Age Appropriate Design Code. It would be helpful for a similar provision to be adopted in relation to this Code. Alternatively, the Commissioner may wish to consider the desirability of giving a measure of regulatory comfort to responsible businesses and advertisers whilst they adjust their practices to take account of the Code's provisions.

We've set out below a table that details specific responses to the questions posed in the consultation where we think it would be helpful for the Code to be amended or clarified prior to it being laid before Parliament.

We hope our suggestions are helpful in further shaping the Code to ensure it protects the rights and freedoms of individuals, whilst ensuring businesses clearly understand their regulatory obligations.

If there are any questions or clarification required in relation to our response, then please do not hesitate to contact us.

Dentsu Aegis Network
March 2020

Suggested amendments and clarifications

Part	Q4 Scope	Q5 Structure	Q6 Examples	Q7 Other	Detail
What does 'directed to' mean? (p16 – 17)			✓		This section explains that indiscriminate 'blanket marketing' does not fall within the definition of direct marketing, and the example given is of leaflets being delivered to every house in an area. This suggests that delivering advertising to geographical segments that have not been derived from personal data, for example "all households in postcode area AB1 2CD" would not be considered as marketing 'directed to' particular individuals. That being the case, it would be helpful for a specific example to be provided in this section. Further, it may be the case that an advertiser wishes to send postal marketing to select postcodes or postcode areas to send advertising based upon the modelling across of an anonymised dataset(s) (where the creation of the dataset itself is undertaken in compliance with the GDPR). Could it be clarified whether in such cases: • The advertising would still be considered indiscriminate 'blanket marketing' and outside the scope of the Code; and • Whether the processing would still be considered as having been undertaken for a marketing purpose.

How does consent apply to direct marketing? (p33)			✓	✓	The Code states: <i>"where possible you should provide granular consent options for each separate type of processing (eg consent to profiling to better target your marketing or different methods of sending the marketing), unless those activities are clearly interdependent – but as a minimum you must specifically cover all processing activities".</i> This suggests that consent would need to be unbundled, and that the data subject would need to give separate indications of consent for different processing operations such as: • Data matching • Data appending • Analytics and modelling • Merging datasets It would be helpful for the ICO to clarify whether it's the Commissioner's expectation that data subjects would need to provide a series of affirmative actions, such as checking separate boxes, for each of the purposes highlighted above – or whether she considers it may be appropriate, with sufficient transparency, for these purposes to be bundled together as a single consent option. Much of this processing is interrelated, and therefore grouping these types of similar processing into a single clearly explained choice, rather than a series of separate choices, would make more sense to the individual and prevent the collection of consent for types of processing activities that will not be undertaken on the data.
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				Whilst a high level of granularity would, on the surface, appear to be a good thing for individuals, in practice, it would most likely lead to consent fatigue which would most certainly disadvantage advertisers as well as consumers. The right to object, combined with transparency, should serve as an appropriate safety net if undertaken properly. It would be helpful to understand whether the Commissioner's view is a minimum legal requirement or a best practice recommendation in this regard.
How does consent apply to direct marketing? (p32-34)			☒	☒ Advertisers may form part of a group of companies or may form an arrangement with other businesses in a cooperative arrangement – for example in the case of a loyalty scheme. Does the ICO consider it would be possible for an individual to give a single positive affirmation consenting to all group companies or cooperative members (appropriately disclosed), for example by means of a "YES TO ALL" button, or does there need to be a separate unbundled consent for each group company/cooperative member, together with a separate consent for each purpose? Consumers are not disadvantaged if their service request is satisfied by numerous entities within the same group or cooperative members. This will particularly be the case where this is clearly explained in the consent language and through the privacy notice. It would be helpful for an example to be given demonstrating why the above is, or is not,

					depending on the Commissioner's view, considered acceptable.
How does consent apply to direct marketing? (p32-34)			✓	✓	In terms of data enrichment, it would be helpful if the Code could explain whether the ICO considers the merging of offline and online data from the same first party source, for example a customer purchase history and their logged-in online activity, should be subject to a specific consent. Likewise, would the same position apply in relation to data obtained from a third-party source? An example illustrating the specificity of consent for these activities would be helpful.
How does legitimate interests apply to direct marketing? (p34-37)			✓		The Code states that legitimate interests may be relied upon where consent is not required under PECR and <i>"...you can show the way you use people's personal data is proportionate, has a minimal privacy impact and is not a surprise to people or they are not likely to object to what you are doing."</i> Given that legitimate interests in the context of direct marketing appears to be an issue that's poorly understood, it would be especially helpful for there to be more examples in the Code of where the Commissioner considers the above criteria would or would not be met. For example, are there instances of profiling, or other types of processing, for example social listening for brand monitoring purposes, where likely harms to individuals are minimal, that the Commissioner considers may be undertaken based on legitimate interests - or will the ICO consider that in practice these types of activities must always be consent based?

				It would appear that the Code is attempting to distinguish between profiling that has a significant legal effect (must always consent based), intrusive profiling not having a significant effect (must consent based by virtue of not being able to pass the legitimate interests test/on fairness grounds) and less/not intrusive profiling (may be consent or legitimate interests based). It would be helpful for this to be explicitly stated with illustrative examples. Further, the Code refers to “invisible processing” but it does not always follow that the examples of invisible processing given in the Code are necessarily ‘invisible’ in practice provided sufficient transparency information is given. It would be helpful for further clarification to be given as to what constitutes “invisible processing”.
How does legitimate interests apply to direct marketing (p36)			☒	☒ The Code currently says that it will be very difficult to pass the balancing test when “<i>collecting and combining vast amounts of personal data from various different sources</i>”. Whilst we understand that it may be both context and fact-specific, it would be very helpful if the Code were to explain what’s considered to be “vast amounts” of personal data and “various sources” of personal data in this context. Is the ICO able to provide some broad quantification of “vast” and “various” in this context, or some specific examples? It would be helpful for the ICO to provide some recognition in the Code that the effective and efficient marketing of products and services by businesses is a legitimate interest for businesses, leading to broader economic and social benefits.

How long should we keep personal data for direct marketing purposes? (p42)			✓	✓	The Code gives a good practice recommendation to not rely on consent obtained by a third party for longer than 6 months. We do not think that a 6-month time limit is necessarily relevant in all circumstances. This is recognised in the current wording of the Code to some extent: <i>"...this may be different in very specific cases where the circumstances clearly indicate..."</i> It would, however, be helpful if the recommendation were to specifically recognise there may be cases when a 6-month period would not be appropriate - for example where a Price Comparison Website generates leads for an annually renewed insurance product, and the data subject specifically indicates they want to be contacted in advance of the next, or subsequent, renewals. It would assist if there was clarification as to whether the Commissioner considers this 6-month period should apply to all types of data processing with a marketing purpose, or whether she considers it should apply only to the instigation of the messaging and making first contact. It would be helpful if there were specific examples to illustrate the Commissioner's position included in this section.
Can we use profiling to better target our direct marketing? (p57-60)			✓	✓	The Code references 'intrusive profiling' in this section, but this is not a term that's defined.

				It would be very helpful to understand what factors the Commissioner considers would make a profiling activity either 'intrusive' or 'not intrusive' together with some specific examples to illustrate the point.
Can we use data cleansing and tracing services? (p61-63)			✓	Suppression files can be constructed from a business's "gone away" data or through comparing Edited Electoral Roll (ERR). It would be helpful if the ICO could reference this type of processing within this section and confirm the likely appropriateness (or otherwise) of undertaking checks to ensure proper suppression based on legitimate interests.
How does direct marketing through social media work? (p89-92)			✓	We note that when building lookalike audiences, the Code states that it's likely social media platforms and advertisers will be joint controllers. It would also be helpful to understand how the joint controller status applies in practice in this scenario and for further clarification as to the respective parties' obligations in relation to the part they typically play in relation to such activity - especially around, for example, the provision of transparency information.

What do we do if someone objects to our direct marketing? (p106)	✓			✓ Responsible advertisers want to ensure individuals are not targeted where they have opted-out of direct marketing. In such cases, advertisers are able to suppress advertising to those individuals on social media channels. This could involve uploading contact details to the social media platform in question, which are hashed and matched with the social media platform's data to exclude those individuals from a campaign. We understand this type of processing, the purpose of which is the suppression of direct marketing, constitutes a direct marketing activity for the purpose of the Code. Could the ICO clarify whether this type of processing should only ever be undertaken based on a specific consent for the sharing of contact details with the named social media platform? If so, this would mean that individuals who have given a general indication of their wishes not to be subject to direct marketing would not have their details shared with social media platforms, and therefore would not be excluded when the audience is created. It would be helpful if this specific point could be covered in the Code, with appropriate examples.
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