opencorporates

Consultation Response:

ICO draft direct marketing code of practice

About OpenCorporates

This submission is made on behalf of OpenCorporates, the largest open database of companies in the world, and an essential resource for business, governments and society at large. It is also a social enterprise with an innovative corporate structure to protect its public benefit mission[1] – to create a global archive of publicly available records about companies for wider public benefit, including countering money laundering, corruption, fraud and organised crime.

OpenCorporates' data has been central to a number of groundbreaking investigations, including the ICIJ's Panama and Paradise Papers, Thomson Reuters and Transparency International's investigation into money laundering in the London property market, and Global Witness' investigations into Trump Ocean Club in Panama and into the Myanmar Jade industry. Among OpenCorporates' commercial clients are blue-chip companies such as Mastercard, Capital One, PWC, and the US and UK governments, as well as leading FinTech companies such Stripe, Transferwise and Exiger.

We are making this submission as we believe the wording of the code of practice has significant flaws, such that those not engaged in direct marketing would be inadvertently brought within scope and in so doing damage their ability to conduct their operations – in OpenCorporates' case our ability to deliver it's important public benefit mission.

Response:

Definition of direct marketing

In our view the definition of "direct marketing" in s122 of the Data Protection Act 1988 – "the communication (by whatever means) of advertising or marketing material which is directed to particular individuals" – is reasonably clear. It covers acts of communication. It does not cover other data processing activities that might enable or facilitate that communication.

Processing for "direct marketing purposes" – terminology used in the GDPR, PECD and PECR – therefore includes any processing where the purpose of that processing is direct marketing (whether or not by a third party).

[1] https://blog.opencorporates.com/2018/06/11/announcing-the-opencorporates-trust/

What it does not include is processing by a controller for other purposes where the controller is unable to rule out the use of data by a third party for direct marketing purposes. Any such idea would create serious problems for any organisation involved in supplying data. How much due diligence would it have to carry out to ensure that data it supplies is not or cannot be used for direct marketing further down the line – and would vastly increase the scope of the term. Arguably any one of the over 12,000 registered users of the Companies House API, or over hundreds of thousands of downloaders of their bulk files would be in scope if they were to supply the data, or part of it to a third party.

Application to Open Corporates

For example, OpenCorporates collects and publishes data to further the aims set out in its mission statement. What is more:

- The names and address of company officers etc, are made available as an essential part of its transparency mission – so that the fact that two individuals are the same can be seen by anyone using OpenCorporates' website – it does not try to make that data useful to a third party who wished to use it for direct marketing.
- When it combines this data with other data that is also data from official public sources – for example from other countries' company registers, or trademark data or gambling licences – all in furtherance of its public benefit mission.

There are an increasing number of organisations that, in various ways, try to make publicly available data easier to use for the general public in the interests of transparency. Therefore applicability of the code to transparency activities has wider implications.

The problem posed by the draft guidance

Unfortunately the draft guidance fails to clarify what the boundaries of "direct marketing purposes" might be.

On page 7 (echoing a similar statement made earlier in the summary), the code says that it applies to "anyone that operates within the broader direct marketing ecosystem", where that "ecosystem" is not further described.

On page 11 the draft code says that direct marketing purposes include "disclosing the data to third parties for them to use for their own direct marketing also constitutes direct marketing purposes." It is not clear whether "for them to use" requires any intention on behalf of the person doing the sharing. Is it intended that the mere possibility of the data being used that way, renders making it available "direct marketing"?

On the same page a list of "examples" includes "data enrichment" and "data cleansing". Both of these are very general kinds of activities which may have nothing to do with direct marketing. We assume that the intention is that these are activities that could potentially be

direct marketing if carried out with a direct marketing purpose. But again this is not made clear.

On page 102, the code states that "Data broking services involve collecting data about individuals from a variety of sources, then combining it and selling it on to other organisations." At first sight this looks as if it is intended as a definition of a "data brokering service", which in turn might illuminate various other references to that phrase in the code.

However, it is clear on further reading that this is not intended as a definition – for example activities such as "selling copies of the open electoral register" or "data cleansing" are listed, which do necessarily include any combination of data from multiple sources. In the end what a data broker is, is not really properly explained, but yet it is said "If you operate as a data broker … the majority of the processing that you undertake is likely to be for direct marketing purposes."

We appreciate that the code is not intended as a legal text and will inevitably include general remarks and have to provide rather broad guidance, however on a point as important as this we would hope that somewhere in the case there was some clear guidance on where the line is to be drawn between selling data for "direct marketing purposes" and other forms of supply or sale of data.

As an additional point, there are many many organisations that operate as data brokers that have no direct connection with direct marketing – in fact the whole of the Anti-Money Laundering/Know Your Customer/Due Diligence ecosystem depends on such data brokers.

Overall, there is an unjustified assumption that essentially all supply of data is done for "direct marketing purposes" which in turn has resulted in a failure to give helpful guidance to organisations (such as OpenCorporates) on where the line is to be drawn.

What needs to be done

In our view, the code:

- Should contain a section with specific guidance on whether a supplier of data does or does not fall into the definition of "direct marketing purposes". Furthermore, that guidance should be cross-referenced in other places (perhaps by more careful use of the term "data broker").
- Should not apply to a controller that processes data that might be used for direct marketing purposes, but where that is not the controller's own purpose.

Contact

We would be happy to answer any follow-up questions the ICO might have in respect of this response or the proposed code. Please contact consultations@opencorporates.com