

ICO's 2020 consultation on a draft Direct marketing code of practice

Summary of responses

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Introduction

We ran a public consultation from January 2020 to March 2020 on a draft direct marketing code of practice in order to seek stakeholder and public input into its development. The consultation closed shortly before the start of the Covid-19 pandemic and the work was paused during this period, before being restarted.

The Data Protection Act 2018 commits the ICO to producing a direct marketing code of practice. A factor in when a direct marketing code will be produced and laid with Parliament is whether any changes to the content will be required by data reform proposals ([The Data Protection and Digital Information Bill 2022-23 - House of Commons Library \(parliament.uk\)](#)). As this is not yet known, we don't currently have a confirmed timescale as to when any such code will be produced and laid with Parliament.

However, we have instead published detailed guidance on this topic because we know that organisations want help now ([Direct marketing guidance | ICO](#)). This guidance, and the suite of direct marketing products that we have published, were developed taking into account the valuable feedback received during the 2020 consultation. We will be formalising the most relevant content from our direct marketing guidance and resources into our statutory code in due course, taking into account any potential adjustments needed to respond to future reforms of the law.

The consultation

We asked a number of questions in our 2020 public consultation on a draft direct marketing code (“the draft”). This document summarises the key themes emerging from those who responded to the consultation.

We received 148 written responses to the public consultation. These came from across the private and public sectors, third sector organisations and trade associations, as well as responses from members of the public. We are grateful to everyone who took the time to comment and provide feedback. You can view [responses from organisations on our website](#).

We have carefully considered the views we received, and we have used these to inform our [direct marketing guidance](#) and our suite of [direct marketing products](#).

Key themes

A wide variety of issues were raised in response to the public consultation. Whilst it is not possible to cover in detail every point that was raised, we have summarised the key themes that emerged from the responses below along with our comments on these.

Clarity and ease of understanding

We asked respondents to the consultation if the draft was clear and easy to understand.

Respondents told us that the draft was an improvement on our previous direct marketing guidance. The majority of respondents felt that the draft was written in a way that was generally clear and easy to understand.

There was a difference in opinion from respondents in terms of the clarity of the draft. Some respondents commented that the draft was ambiguous in places and should be more definitive. However, others took the opposite view, saying that we should not make definitive statements as they felt it should be for organisations to decide how the law applies.

Some respondents said that expanding the glossary of terms would be useful and some asked for clarification on the meaning of specific terms. Other respondents referred to particular points within the draft that they felt could benefit from further explanation to make it easier to understand.

ICO’s response

We are pleased that the majority of respondents felt the draft was an improvement on our previous direct marketing guidance. Likewise, we are happy that respondents felt that it was generally clear and easy to

understand. However, we have sought to make the [direct marketing guidance](#) even clearer and easier to understand.

For example, the direct marketing guidance takes a 'must, should, could' approach. Where we use the word "must" in the guidance, this means that the law requires you to do something (so it is a legal requirement). Where we use the word "should" in the guidance, this isn't a legal requirement but is what we expect you do to comply effectively with the law. You should follow this unless you have a good reason not to (good practice). If you take a different approach, you must be able to demonstrate that this complies with the law. Where we use the word "could" in the guidance, this refers to an option(s) that you may want to consider to help you comply (good practice). We highlight these words throughout the guidance for ease of reference.

Whether an organisation has complied with data protection and PECR rules usually depends on the particular circumstances. This means that sometimes we are unable to provide the clarity in our guidance that you may be seeking as we can't predict all the possible variables and circumstances. Where we can be definitive and give a clear view on how the law applies we will do so, as we believe that this is important to help you to comply. However, if you find that you need help on a particular data protection or PECR issue not covered by our guidance there are ways that you can [contact us](#) directly for help.

We agree that the draft glossary was limited. We have therefore expanded it in the new guidance to include more descriptions of key terms. We have also provided further explanations on particular points within the main text of the guidance to help aid understanding.

Level of detail

We asked respondents if the draft contained the right level of detail and, if not, what changes or improvements would they like to see.

There was appetite for more guidance and detail on a number of areas within the draft, including on direct marketing as applied to the public sector. A number of respondents also wanted a greater focus in the draft on direct marketing in a business-to-business context.

Some respondents requested that certain specific paragraphs and points within the draft were given more explanation and expansion to aid their compliance (eg on PECR topics). There were also many requests for more guidance in the draft on topics such as the right to be informed, lawful bases, and cookies.

However some respondents felt the draft was too detailed and not useful as a quick reference guide. There was also concern that small organisations may find it challenging to read a detailed document. A small number of respondents mentioned that there was some repetition of concepts within the draft and queried if this was needed.

Some respondents were of the view that there was too much focus on consent in the draft. These respondents asked that more detail be given over to the legitimate interests lawful basis.

The majority of respondents appreciated the inclusion of examples and found these very useful. Some asked for clarification or more detail on particular examples.

ICO's response

We agree that the draft covered a lot of concepts and was lengthy. We have therefore made the [direct marketing guidance](#) shorter and more streamlined to focus on the key points.

We also agree that there were some areas where more guidance would be very useful. However, in some cases we felt it was not appropriate to lengthen the direct marketing guidance with detail that did not necessarily have wide application.

Instead we removed some sections from the draft to form separate products. For example, we now have separate guidance for public authorities on [direct marketing and the public sector](#) and separate guidance on [business-to-business marketing](#).

We appreciate that many organisations wanted more help with their PECR compliance. Therefore, to help you we have created new separate detailed guidance on the two main methods of sending direct marketing covered by PECR:

- [direct marketing using live calls](#); and
- [direct marketing using electronic mail](#) (includes emails and texts).

As more direct marketing products become available we will link to these from the "further reading" boxes in the [direct marketing guidance](#) (as appropriate). You will also be able to access any new products from our new [direct marketing guidance and resources](#) webpage.

Our guidance on direct marketing isn't intended to provide exhaustive coverage and discussion of all data protection and PECR concepts. We already have extensive guidance and practical tools covering key concepts on our [website](#) including on:

- [lawful bases](#);
- [the right to be informed](#); and
- [cookies and similar technologies](#).

These are designed to help you with any purpose or activity that you want to do, including direct marketing. We signpost to our guidance on key concepts within the “further reading” boxes of our direct marketing guidance so that you know where to go if you want to find out more about a particular topic.

The draft wasn’t designed to be a quick reference guide. Instead it was designed to be detailed guidance for those who want to do direct marketing in compliance with data protection law and PECR. However, in order to help you understand what the direct marketing guidance covers we have [summary](#) at the start to give you a quick overview.

We appreciate that detailed guidance can be overwhelming to small organisations. With this in mind we have produced a [direct marketing guide for SMEs](#). We also have a [dedicated area of our website for small organisations](#) that provides tailored advice and guidance. There are also other shorter direct marketing resources to help you comply on our [direct marketing guidance and resources](#) webpage.

As we now have a suite of direct marketing products, we have added a section to our direct marketing guidance and resources webpage to help you [find the right direct marketing product](#) for you.

Where possible we have reduced repetition in the direct marketing guidance. However, we are mindful that some readers may want to ‘dip’ into a particular section rather than read it from start to finish so some concepts may be mentioned more than once where this is necessary.

It is inevitable that the concept of consent will appear more frequently in direct marketing guidance because some provisions in PECR require consent. However, where possible there is more of a balance between discussion on consent and legitimate interests in the direct marketing guidance. We also have produced a separate product [to help you choose your lawful basis when sending direct marketing by methods covered by PECR](#). As previously mentioned, we already have separate detailed guidance on the data protection reason (“lawful basis”) of [legitimate interests](#), as well as on [consent](#). There are links to this guidance within the direct marketing guidance if you need further information on these topics.

We are pleased that respondents appreciated the examples within the draft. We have reviewed the examples and made changes to these in the direct marketing guidance where we felt improvements could be made.

The issues and areas covered

We asked respondents if the draft covered the right issues and if it addressed the areas that were having an impact on their direct marketing practices.

The majority of respondents felt that the draft was relevant and covered the right issues and areas of direct marketing. In general, respondents felt that the draft would be useful for their direct marketing activities and appreciated the advice provided.

Some respondents asked for the draft to have more of a focus on their sector or area of business. Others referred to particular issues that their organisation was having that they would like to see covered. Some asked for more coverage on topics that were touched upon in the draft. For example, some asked that more space be given to discussion of 'refer-a-friend' schemes.

The good practice recommendations in the draft were highlighted by many respondents. Some appreciated these but others queried why good practice recommendations were being given in the draft.

ICO's response

We are pleased that the majority of respondents found that the draft was relevant to them and covered the right issues.

We understand that many of you would like focus to be on your sector or a particular issue that you are dealing with. However, our aim with the draft and with the resulting [direct marketing guidance](#) was for it to be relevant for anyone considering engaging in direct marketing rather than focusing on limited sectors, or issues limited to a few organisations.

We want to give you as much help as we can with your direct marketing compliance and we are mindful of the tension between organisations wanting more guidance and keeping the length of guidance manageable. As advised earlier in this document, we have produced a [direct marketing guide for SMEs](#) and our [direct marketing guidance and resources](#) webpage has lots of other products and resources to help you to comply.

As mentioned earlier in this document, we have a [direct marketing guidance and resources](#) webpage that contains links to all our other direct marketing products. Some of these products are specific to a particular type of direct marketing activity or to a particular sector. Separately, we have a number of ways that you can [contact us](#) for assistance if you have

a direct marketing query that you can't find the answer to in our guidance and resources.

Part of our role is to promote good practice and we do this across all our guidance and resources. In the [direct marketing guidance](#) we no longer use the style of good practice recommendations that were present in the draft. Instead, as explained earlier in this document, we have taken a 'must, should, could' approach to the guidance to make clear what the law requires you to do and what is good practice.

We have made the topics within the direct marketing guidance clearer, and in some instances content has been removed into separate guidance in order to provide more detail. For example, although 'refer a friend' schemes are mentioned in the guidance, the main content on this topic is now in our detailed [guidance on direct marketing using electronic mail](#).

Ease of finding information

We asked respondents how easy it was to find information in the draft.

The majority of respondents said that the structure of the draft was helpful and easy to follow. Respondents found that the 'at a glance' summary boxes at the start of the main sections useful as an introduction. The cross referencing within the draft was appreciated by respondents, as were the links to separate guidance provided by the "further reading" boxes.

The length of the draft was viewed negatively by some respondents. These respondents felt that a long document made it harder to find the information that they were seeking.

Some respondents wanted a more extensive contents list or an index to help them find specific information within the draft. Others felt that it would be helpful to have numbered paragraphs within the draft. Having a way to search the draft was also suggested as a way to make it easier to find information quickly.

ICO's response

We are pleased that respondents liked the structure of the draft. However, we felt that more could be done to simplify the structure to make it easier to find information. Therefore, the [direct marketing guidance](#) has four main chapters covering the steps to take instead of the nine which the draft contained.

We are glad that the "at glance" sections and links to further reading are useful, and these have been retained in the direct marketing guidance.

When more direct marketing products become available we will update the “further reading” boxes so that you can find more information if you need it.

We appreciate that the length of the draft affected how easy it was to navigate. We have therefore significantly reduced the length of the direct marketing guidance when compared to the draft. This has been done by reducing the amount of content whilst retaining the important detail, and has been helped by creating separate products on particular direct marketing topics.

We have added a [navigating section](#) to the direct marketing guidance to help you find the information that you need. Where possible we have used bullet point headings within the sections of each chapter to help you easily find what you are looking for on that topic.

The direct marketing guidance has been produced as a series of webpages rather than a ‘document’. Although this format means that numbered paragraphs are not appropriate, it does mean that the guidance has a search function. This lets you search on a particular term or word which is then highlighted within the guidance to help you find the information that you’re looking for.

Our [direct marketing guidance and resources page](#) is also designed to make it easier for you to find the resource that you need. As previously explained, this includes having a section to help you find the right direct marketing product for you.

Other suggestions

We asked respondents if they had any other suggestions for the draft.

We had a wide variety of suggestions of what to include in addition to those covered earlier in this document. This included for example:

- having checklists;
- a one-page summary of the draft;
- help for organisations with limited resources;
- stating when sections and examples in the draft only apply to direct marketing; and
- coverage of guidance or rules issued by other regulators or industry bodies.

Some respondents also suggested that the draft should be framed more positively about the importance of direct marketing.

ICO's response

We have carefully considered the comments received. Although it's not possible for our direct marketing guidance and wider suite of products to cover all suggestions we received, we have covered the main points and issues.

We know how helpful organisations find our checklists and we had always planned to create a new direct marketing checklist to replace an old version that we had for several years. Therefore, we now have a new [direct marketing checklist](#) to help you to assess your compliance. This also signposts you to other checklists that you may find useful, such as those covering PECR concepts like direct marketing phone calls and cookies.

We agree that the summary for the draft was long. Instead the direct marketing guidance has a [one-page summary](#) covering the main chapters.

We appreciate that many organisations have limited resources which means they can't spend time reading more detailed guidance. As previously outlined, we have created [an introduction to direct marketing for small business](#) but this can also be used by those who want a quick overview of the rules around direct marketing. The checklist also gives a practical overview of the key requirements.

The whole of the draft was about direct marketing, and the same is true of the resulting direct marketing guidance. We didn't intend the content and examples to be applied in non-direct marketing situations. If you want to use people's information for non-marketing purposes we already have lots of [data protection guidance and tools](#) which can be applied to any situation to help you to comply.

The scope of the draft was to cover the laws affecting direct marketing that we oversee. Whilst we often work with other statutory regulators, it is outside our remit to provide guidance on rules issued by other regulators or industry bodies. But compliance with other regulation and industry standards may help you comply with data protection law and PECR. Information on the wider regulatory framework has been retained in an [annex to the direct marketing guidance](#) and this signposts you to external direct marketing resources.

We recognise the importance of direct marketing to businesses and to the wider economy. We also appreciate the value that direct marketing can bring to people. However, we are also mindful of the nuisance, anxiety or other harm it can cause to people when it is not done compliantly. The [direct marketing guidance](#) supports and empowers responsible direct

marketing. We have also considered the economic impact of issuing the direct marketing guidance and we have published an [impact assessment](#).

Next steps

Our [direct marketing guidance](#) has been published on our website.

We have also published a [direct marketing guidance and resources](#) webpage. This is home to lots of other direct marketing products to help you comply. This webpage will be a continuous source of information and tools on this topic. Our work on additional direct marketing resources will continue and further products are likely to be added in future.

Once the work on a direct marketing code of practice begins we will provide further opportunities for you to get involved and help shape the code.