

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](#).

Questions

Q1 Is the draft code clear and easy to understand?

☒ Yes

☐ No

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

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:

There could be more information linking the use of data, post insolvency or administration. Within GDPR there is provision for the further use of data or the sale of the data asset but in detail that is slightly at odds with what is covered within the code.

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:

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:

1. I applaud the recognition of loyalty programmes as a general form of consent but I have since publication, had a conversation with one of your advisory team who suggested that a loyalty programme would be launched with a consensual sign up and in my experience loyalty can't be effective that way as it takes too long to become established. The best way is to include all existing customers within a programme and ideally recognise their longer term loyalty and provide recognition from the outset. This would effectively mean processing before somebody accepts that they are happy with the programme. I had envisaged that worst case, the launch of the programme and to share individual 'earned' status or benefits, could at launch effectively be a 'notification' communication rather than a marketing one.

I appreciate that by definition a loyalty programme is a piece of marketing but I think we both agree that this is a better place than general direct emailing given a level of consent attached to loyalty and perhaps it could be treated differently to avoid the need for consent before any processing is done to determine the individual benefits of a loyalty programme?

2. Following an insolvency, business failure or data asset sale, GDPR allows for a 'phoenix' business to use data that was collected for the same purpose from a new DC or business. The problem exists that there is no recognition or understanding of the provenance of the data and so to let a newco simply use it unhindered will be an issue. I have for over 10 years and after consultation with the ICO first issued a notification with an opt-out to enable people to exercise their rights to object before then using the data for marketing. It is what I refer to as a 'permission pass' i.e. the new data controller acknowledges that they hold the data as a form of notification where there is no marketing or offer but a link to enable somebody to opt-out.

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

1. There needs to be greater clarity and consistency in line with what the ICO has been advising related to direct marketing to businesses. Within the code it suggests that business data is defined as that belonging to an incorporated entity i.e. that email data related to sole traders and some partnerships cannot be emailed as that data is considered personal. In my experience it is very difficult to identify and extract those email addresses from a list. What I had been led to believe was the case via interaction with web chat at the ICO and advisors there, that if an email address was associated with a business i.e. a business website so that the email address contained a business extension e.g. @abc then this could be emailed under the exemption within PECR. By contrast an email address that is clearly personal e.g. @hotmail.com would be removed. This is far simpler to administer and clearly individuals have the ability to maintain personal email addresses and business ones so that they don't then share their gmail or hotmail addresses for business reasons.
Undermining the ability of businesses to be able to easily determine business opportunities and share information will be costly for businesses. Failure to recognise this will probably mean that most businesses will have claimed the 'soft opt-in' rule for personal email addresses and it will be very difficult to enforce.
2. The suggestion that recommend a friend schemes via instigation would be invalid I think would be wrong. It is clear that asking somebody to share another's personal data without permission would clearly be wrong but to provide an incentive that is given to a valued customer to then share with someone of their choosing who is at liberty to take it up or not is perfectly fair and I would have thought reasonable and within the ethos of GDPR and PECR. The code goes on to suggest that by 'instigation' this would be outlawed is simply wrong and the very essence of viral marketing is consumer driven not business driven and always in the interest of the customer who is perfectly at liberty to not take up the offer if they so wish.

About you

Q8 Are you answering these questions as:

(Please select the one that is most appropriate)

- ☐ **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 the organisation you are representing:

The Marketing Innovation Group Ltd

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

Please specify:

**Thank you for responding to this consultation.
We value your input.**