

## Channel 4's response to the ICO Consultation on the Draft Direct Marketing Code of Practice

Channel 4 welcomes the opportunity to respond to the Information Commissioner's Office consultation on the draft Direct Marketing Code of Practice ("the draft Code").

### Channel 4

Channel 4 is a publicly-owned, commercially-funded public service broadcaster. Channel 4's not-for-profit status ensures that the maximum amount of its revenues is reinvested in the delivery of its public service remit. As such our commercial success is intrinsically linked to creative and public service impact.

Channel 4 has a remit to be innovative, diverse and distinctive. Channel 4's detailed statutory public service remit includes requirements to produce high quality news and current affairs; to support and stimulate well-informed debate on a wide range of issues, including by providing access to information and views from around the world; as well as requirements to challenge established views and promote alternative views and new perspectives.

Channel 4 is also required to cater for young audiences with specific remit requirements to appeal to older children and young adults. Our remit to be alternative and different manifests itself in content that speaks to young people about things and in a way that engages them with contemporary issues.

Public service broadcasting plays an integral part in UK's democratic and cultural life, as well as supporting UK's thriving creative economy.

At the heart of the PSB is trusted and impartial news and UK-originated content that speaks to the different communities and nations of the UK. These have become more, not less important, against the backdrop of deep division in the UK, concerns around the impact of globalisation and growing unease around fake news and disinformation.

Channel 4 and other UK PSBs continue to be significant investors in original UK content - £2.6 billion on first run UK originated content in 2016. Despite audience fragmentation, PSBs continue to play a key role in bringing the nation together through thought provoking dramas such as *Deadwater Fell*, *Kiri* and *Brexit: The Uncivil War*; comedy and entertainment such as the *Last Leg*, *Derry Girls* and *The Lateish Show with Mo Gilligan*; to the ground-breaking coverage of the *Paralympic Games*.

### **All 4 – Channel 4's Video on Demand Service**

Channel 4's Video on Demand (VOD) service All 4 is the digital home of Channel 4 content. All 4 provides access to content originally shown on our linear channels and bespoke online content in one place. As audiences watch more TV via on demand services, All 4 has become an increasingly important means for Channel 4 to reach audiences with public service content. This is particularly true of younger adults with whom Channel 4 has a particularly strong resonance.

Channel 4 has been at the forefront of digital innovation in UK broadcasting, both creatively and commercially. Channel 4 was the first broadcaster in the world to launch a long form VOD service – 4oD in 2006 – which 13 years later has evolved into All 4.

As well as being the first broadcaster in the UK to launch an on-demand service, Channel 4 was also the first free to air broadcaster in the UK to register viewers online, enabling us to tailor programme recommendations and deliver targeted advertising to viewers. All 4 is funded by advertising.

All 4 currently has nearly 20 million registered users including more than two-thirds of all 16-34s in the UK - demonstrating Channel 4's ability to reach audiences across different platforms and compete with other online services. All 4 continues to grow and generated £138 million a year in 2018<sup>1</sup> with 11% growth in our digital revenues in relation to 2017. These innovations are enabling us to adapt to behavioural shifts in viewing which help maintain our public service broadcasting contribution.

### **Channel 4 - Direct Marketing**

Channel 4 broadly welcomes the publication of the ICO's draft Marketing Code. We use direct marketing to ensure our audiences, particular younger adults, have greater awareness of our public service content. Channel 4's direct marketing is increasingly migrating towards online platforms as younger audiences spend increasing proportion of their time on social media platforms rather than watching live TV. This is highlighted by Ofcom's 2019 Communications Market Report which reports that declines in the amount of time spent watching live TV are more pronounced among younger audiences – in particular in the demographics 16-24 and 25-34.

We have focused our comments to the draft Marketing Code where we have significant concerns and would be grateful if the ICO could take these into account when revising the draft Code.

### **Lawful Basis for Processing - Legitimate Interest**

Channel 4 welcomes the ICO's recognition that generally the two lawful bases most likely to be applicable to direct marketing purposes are "consent" and "legitimate interests".

Channel 4 is one of many UK media organisations who rely on legitimate interest as a lawful basis for processing of data for carrying out targeted online advertising and list-based marketing. On the basis that online advertising targets broad audiences rather than particular individuals, we feel that online advertising should not therefore form part of the definition of "direct marketing".

Channel 4 believes that use of legitimate interest for list-based marketing and online advertising purposes should be permitted whether or not consent is required under PECR for the initial data capture. This is supported by Recital 47 of GDPR which

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<sup>1</sup> Latest published data

specifically states that *"the processing of personal data for direct marketing purposes may be regarded as carried out for legitimate interest"* Channel 4 believes its online direct marketing activities are in line with good practice - we are transparent with our audiences regarding our use of personal data by means of our privacy policy and our "Your Data" video; we provide an opportunity to opt-out from direct marketing activity and use Data Protection Impact Assessments (DPIA) to ensure any marketing activity has a minimal privacy impact.

Channel 4 would urge the ICO to reconsider its guidance in relation to legitimate interest as a lawful basis for processing - that it could be used *"only if you don't need consent under PECR"*.

We believe not allowing use of legitimate interest as a lawful basis for direct marketing would have a significant negative impact on advertising funded media in the UK as well as on media plurality. Channel 4 believes the ICO's guidance should be risk based as specified by GDPR and that the Marketing Code should take into account whether the profiling has a legal or similarly significant impact.

### **Importance of List Based Social Media Marketing**

The audiences Channel 4 must reach as part of its public service remit spend a significant proportion of their time on social media. This means that increasingly brands such as Channel 4 are using paid for advertising on social media platforms as a way to marketing to key audiences such as young adults.

These "list-based" or "audience" targeting tools offered by social media platforms such as Facebook, allow businesses such as Channel 4 to upload the proprietary first party data that it has collected on All 4 users to the social media platform, in a hashed format, to allow it to locate those users on its platform in order to target them with advertising. List-based targeting allows Channel 4 to reach self-defined audiences on social platforms with specific programme recommendations in the same way that is done on its own service All 4.

Without list-based targeting Channel 4 would not be able to communicate relevant programme recommendations to its viewers on social media platforms based on their viewing tastes and preferences.

### **Consent – List Based Targeting**

Channel 4 is concerned that the ICO's draft Code suggests in relation to list-based processing that *"it is likely that consent is the appropriate lawful basis for this processing as it is difficult to see how it would meet the three-part test of the legitimate interest basis"*.

It is unhelpful that the draft Code does not clarify why list-based processing would not meet the three-part test if organisations rely on legitimate interests to conduct this type of direct marketing activity. Channel 4 believes that as long as an organisation meets the transparency requirements regarding list-based marketing

and allows for users to opt-out from direct marketing, the use of legitimate interests should be permitted by the Marketing Code.

Channel 4 believes it meets the three-part legitimate interest test for the following reasons:

- Channel 4 provides fair and transparent information to viewers about the fact that it uses users' personal data to conduct list-based targeting on social media platforms – we refer to this under 'Promoting our own services on other platforms' in our Channel 4 Privacy Policy. We also allow viewers to opt out of our use of their data for this activity at any time via the user account settings.
- Channel 4 has completed a Data Protection Impact Assessment (DPIA) to identify and minimise any possible data protection risks involved in list-based targeting on Facebook. Channel 4 has concluded that the processing is not privacy intrusive given the data provided to the third party is hashed and therefore Facebook does not receive the data in readable format. It contains only enough information to be able to recognise a match with their users in order to serve them with targeted Channel 4 advertising. We believe this does not have a significant impact on the individual.
- Furthermore, Channel 4 is not providing any special category or children's data to Facebook as part of the processing.

As a public service broadcaster Channel 4 has a specific remit to reach diverse and niche audiences with innovative and alternative programming. List-based targeting helps Channel 4 identify audiences with niche tastes and preferences, appealing to them with more content they like or recommending alternatives public service content which they have not previously considered. A change from tailored recommendations to more generic recommendations would render Channel 4 less effective in relation to its direct marketing. Viewers will miss out on Channel 4 messaging that is more tailored to their viewing preferences, lifestyle choices and diverse interest.

### **Lookalike Audiences - Joint Controllers**

In relation to the creation of "lookalike" audiences on social media platforms, the ICO, whilst recognising the issue is complex, states that it is likely that both parties are acting as "joint controllers" in this situation. Whilst it is the social media platform that undertakes the majority of the processing activity, the organisation that instigated the process and provided the initial dataset to the social media platform would be regarded as a "joint controller" along with the social media platform. Channel 4 would dispute this interpretation because we do not, either contractually or in reality, have any control over the lookalike modelling or processing that occurs

on the social media platform. Therefore, we believe the instigating organisation should not be held jointly responsible for this stage of the targeting process.

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