ICO Consultation - Direct Marketing Code of Practice

Response from Data Locator Group Ltd

March 2020

Overview:

Direct Marketing plays an important role in both society and the economy.

It helps shape the lives of consumers by providing access to a wide range of products and services that they would otherwise be prevented from seeing. Direct Marketing also enables small and medium size businesses to remain competitive, and indeed viable, by reducing wastage and targeting their marketing communication to a relevant audience.

We welcome the introduction of a statutory code. One that will help maintain the high standards and ensure a level playing field for responsible practitioners of direct marketing.

However, in its current form the code focuses only on the negative aspects of direct marketing. There are also certain aspects of the draft Code that are misleading and confusing. This creates a real threat to the industry.

A decline in direct marketing would see a move towards non-targeted above-the-line activity - activity which only large blue-chip organisations could afford. There would be an even greater dependency on the large media platforms such as Google and Facebook. Marketers would have to turn to non-targeted activities, often considered environmentally unfriendly junk mail. There could be a significant anti-competitive impact to SMEs who would be unable to access cost effective marketing or be unable to introduce new innovative products to market.

Direct marketing plays a crucial role and this could set the industry back over twenty years.

Responsible direct marketing practitioners have worked hard over recent years to meet the demands of the new regulations, which is illustrated by a 22% reduction in PECR complaints across the industry since 2017. Through collaboration and industry support this could reduce further. For example, 38% of all PECR complaints are from accident claims, an FCA regulated sector. Therefore, new sector-specific rules could be introduced which would make a material difference, rather than the industry-wide pressures that parts of the Code will undoubtedly bring. In short, the actions of a few shouldn't ruin the good work of the many.

We want direct marketing to continue to grow and be an important part of the economy. We need a Code to support the future of direct marketing, whilst protecting consumers from nuisance and harm.

The purpose of this document is to summarise our concerns surrounding the key issues from our perspective.

1. LEGAL BASIS FOR PROCESSING

The good practice recommendation on page 31 states '***Get consent regardless of whether PECR requires it or not***'. This has caused tremendous confusion. Some commentators have interpreted this to signal the end of legitimate interests. We believe this is extremely misleading and very damaging to the industry.

If as a result of this recommendation there was to be a move away from legitimate interests, access to data for direct marketing purposes would be severely impacted and databases would be destroyed. This could lead to the demise of the direct marketing industry, which we do not believe is the intention of the Code.

However, the good practice recommendation conflicts with GDPR and previous guidance. Recital 47 GDPR states "*The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest".* The ICO Guide to GDPR goes on to say *"There are six available lawful bases for processing. No single basis is 'better' or more important than the others – which basis is most appropriate to use will depend on your purpose and relationship with the individual."*

We believe this good practice recommendation should be removed from the Code.

2. PROVIDING PRIVACY INFORMATION

(a) Page 48 of the code states that '*You must provide privacy information to individuals within a reasonable period and at the latest within a month of obtaining their data…..the latest point at which you must provide the information is when you first communicate with the individual or disclose their data to someone else. However it is important to remember that the one month time limit still applies in these situations.'*

This will have significant implications, particularly for the postal industry. There are several important steps undertaken by reputable postal marketers to ensure data processing is fair and accurate. For example, they must firstly source data, check for accuracy, de-duplicate across multiple sources, clean against various industry suppression files, then print the marketing material, carry out quality checks, place into envelopes and then pass to a postal distributor for delivery. This process usually takes considerably longer than a month. Shortcutting the process to remain within the month time-period for notification would compromise accuracy and compliance.

Consideration should also be given to the Mailing Preference Service which states '*Companies prepare their mailings months in advance, therefore it can take up to four months for the service to become fully effective. Screening usually takes place early on in the mailing process, which can take several months. Upon registering with the MPS you should notice a gradual reduction of unsolicited mailings but please allow 4 months for the service to become fully effective.'*

If as a result, advertisers were to move away from postal marketing, there would be greater reliance on email, telephone and digital marketing – all of which are perceived to cause far greater nuisance to consumers.

The impact of this type of data processing on an individual is extremely small. As soon as they are communicated with the individuals are able to freely exercise their data subject rights.

We believe the code should reconsider the lead times involved within postal marketing in relation to Article 14 notifications.

(b) Page 50 of the code states that '*You need to clearly explain the purposes for which you want to process the individual's personal data for. Vague terms such as 'marketing purposes', 'marketing services' or 'marketing insights' are not sufficiently clear.'* This has caused confusion as to what information should be provided at the point of data collection compared to information that can be provided within a separate privacy notice.

The ICO's Guide to PECR states that *'You should make it clear upfront that you intend to use their details for marketing purposes'*. Marketing purposes is language that is understood by the consumer. Providing more granular explanation at the point of data collection would risk causing confusion and prevent the privacy information from being *'…concise, intelligible, in clear and plain language'.*

We believe the code should make a distinction between the information that should be provided at point of data collection (e.g. marketing purposes) compared to the information to be provided as part of a separate privacy notice (e.g. more detailed information).

3. PROFILING AND DATA ENRICHMENT

(a) Profiling and data enrichment are an essential part of the direct marketing industry. It protects individuals from receiving irrelevant and unnecessary marketing and helps marketers remove wastage – enabling SMEs to remain competitive against larger blue-chip organisations.

The Code explains that profiling and data enrichment can rely on consent or legitimate interests as long as the processing is transparent and fair. This can be managed via DPIAs and LIAs.

However, the Code has introduced new and undefined phrases of '*extensive'* and '*intrusive'* profiling, both of which are unlikely to be appropriate under legitimate interests. This has created considerable uncertainty and confusion.

It would suggest that some form of profiling and data enrichment may be acceptable under LI, whereas extensive or intrusive profiling will not. However, we do not have a clear understanding of what is meant by *extensive* or *intrusive*. In any event why should 'extensive' profiling not be appropriate?

We believe the Code should add relevant examples and good practice recommendations to explain what is meant by *extensive* and *intrusive*.

(b) Page 60 of the Code states '*Data matching or appending is where you match the data you already hold on individuals with other contact details that you did not already have'*.

We do not believe this is correct. In practice, '*matching'* and '*appending'* are two distinct processes.

From a practitioner's viewpoint, appending is where additional variables or contact details are added to an existing record, whereas matching may simply be used to identify whether an individual exists on two databases.

Whilst we agree that buying additional contact details for existing customers may be unfair (appending), it is highly unlikely that simply matching two databases would cause any harm.

We believe the Code should differentiate between these processes.

(c) The Code has caused confusion by suggesting two different standards for data matching.

In the *Profiling and Data Enrichment* section, it suggests that legitimate interests may be appropriate for data matching, subject to the appropriate DPIA and LIA. The section is marketing contact channel neutral.

However, page 90 the Code states that consent is likely to be required for data matching for social media audience targeting. This conflicts with the previous section.

Data matching (where databases are simply matched, rather than data being appended, see 3b) should be treated the same regardless of the eventual marketing communication channel.

We believe consistency and extra clarification is required for data matching activities.

4. DATA BROKING

Data broking services is defined as collecting data about individuals from a variety of sources, then combining it and selling it on to other organisations. The Code explains that both consent and legitimate interest may be appropriate, as long as the processing is transparent, fair and lawful.

However, the Code has caused confusion by including the *European Article 29 Working Party* example on page 103, which sets out an opinion from 2013 whereby data brokering requires consent.

Not only does this opinion conflict with the Code and GDPR, it would also put into question the entire data broking industry which typically relies on legitimate interests. We do not believe this is the intention of the Code.

We believe the code should remove the WP29 example from page 103.

About you

Q8 Are you answering as:

- ☐ 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 your organisation:

Data Locator Group Limited

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

If other please specify: