

NMA response to the ICO Draft Direct Marketing Code

The NMA is the voice of UK national, regional and local newspapers in all their print and digital forms. Our members publish around 1,000 news media titles read by 48 million adults – from the largest national dailies to the smallest rural weeklies. Collectively these publishers are by far the biggest investors in news, accounting for 58 per cent of the UK's total spend on news provision.

We have appreciated our dialogue with the ICO as the industry faces the challenge of ensuring a sustainable future for journalism, especially given the importance of digital advertising to finance such journalism produced by independent news publishers and the issues relating to the dominance of the major online platforms.

As you know, we support the work that the ICO is doing to ensure the AdTech market is functioning properly and that people's personal data is protected. Greater transparency is clearly needed to understand how the major online platforms control the ecosystem in relation to collecting, aggregating and selling personal data gathered from news publishers and others to drive the platforms' revenues. The NMA has outlined in discussions and recent papers how it considers these matters could be taken forward, without further detriment to the news media and its trusted journalism.

However, the industry is concerned that the draft Direct Marketing Code seeks to enshrine some contentious positions within a statutory code to which the courts and tribunals must have regard in deciding cases before them. Further problems are created when the draft Code advocates 'best practice' but embeds it within the statutory code.

These concerns chiefly arise from the draft Direct Marketing Code's extension to online advertising and the interpretation of GDPR and PECR. These are primarily contained in sections of the draft Code under the headings: *How do we decide our lawful basis for processing?* and *Online advertising and new technologies*. They include the ICO's stipulation of prime reliance upon consent as the lawful basis – or indeed recommendation that it be the only basis- and the ICO's stipulation that any application of legitimate interest as the lawful basis is very restricted; the interpretation and application of consent and in particular with respect to the use of cookies, including the ICO's interpretation of GDPR and PECR including the exemptions from PECR Reg 6. The ICO's suggested interpretations of PECR and GDPR are neither necessarily accepted nor even common interpretations –European Data Protection Authorities take differing views, as the CMA's interim report on online platforms and digital advertising noted. These would all result tight restrictions which would be deployed against responsible organisations and detrimental to them.

The NMA has already raised the most pertinent industry issues with the ICO and addressed them in more detail in the context of our discussions on ad tech matters. We therefore refer

you to these more detailed discussions and any accompanying NMA papers (including *ICO special category data -news publishers' approach* 11 November 2019 as sent by the NMA to [REDACTED] Digital Economy Team, but please note that this and any other such NMA papers are confidential and should not be published as part of the NMA response to this consultation).

The NMA would further comment that the following provisions of the draft Code appear over restrictive:

How do we decide our lawful basis for direct marketing: restriction to consent, explicit consent requirements and additional consent requirements appear over- restrictive.

Recommendation of consent for all direct marketing activity whether or not required by PECR and suggested invalidity of reliance on consent given more than six months ago also appears over restrictive.

Profiling and segmentation: The ICO 'recommendation' for consent across all direct marketing activities requires refinement. Consent is not the only legal basis which offers the user choice and transparent information and may not be legally required or appropriate in all use cases.

What do we need to tell people if we collect their data from other sources? The suggested disallowance of reliance on the exemption 'disproportionate effort' appears over prescriptive.

Notification of data from third parties (data enrichment, appending profiling, developing data products: The EDPB guidance recommends notification to individuals within one month or at the first point of communication. We request that the ICO remains consistent with this approach as the individual is often more likely to understand the notification in an actual use case.

'Refer a Friend' campaigns - "Refer a friend" is a long established business practice and, when carried out responsibly, is consistent with GDPR principles. We would be grateful for more guidance about what specific harms the ICO wishes to mitigate, which can be addressed in the code whilst also providing use cases where "refer a friend" can remain an industry tool which reflects a common-practice consumer behaviour.

In app marketing messages and social media marketing messages require consent: Further clarity from the ICO would help us understand how this applies. Are in-app messages caught under PECR's "electronically stored messages" because the message is stored in the device (which does not seem correct from a technical perspective), or because ICO view the message as being stored, as opposed to being merely transmitted, in the network?

Can we use third party emails to send our direct marketing? The draft Code ought to allow some hosted email campaigns which we understand may be used by publishers. Publishers have direct relationships with their readers, often fostered by specific interest groups such as travel or garden or other interest 'groups', where those subscribers have opted into relevant advertising and offers. Publishers should be able to offer relevant advertising and offers from known advertisers to their subscribers in such circumstances. Publishers believe there are cases (e.g. a newspaper charity appeal where a newspaper sends an email

advertising the newspaper's Christmas charities to readers) that they believe fall within their legitimate interests and would be grateful for clarification that they are able to do this. For example, would they need separate consent to do this, or can they continue to rely on legitimate interests.

Finally, NMA also asks that the ICO take the utmost care to avoid any possibility of any application of the Direct Marketing Code to news media editorial content and to guard against any possibility of misinterpretation and misapplication of the Direct Marketing Code to such.

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