

ICO call for views on a direct marketing code of practice

The Information Commissioner is calling for views on a direct marketing code of practice.

The Data Protection Act 2018 requires the Commissioner to produce a code of practice that provides practical guidance and promotes good practice in regard to direct marketing.

While direct marketing is an important and useful tool to help organisations engage with people in order to grow their business or to publicise and gain support for their causes, it can also be intrusive and have a negative impact on people if done badly. This can cause reputational damage to organisations and, in some cases, result in fines or other regulatory action for breaking data protection laws.

So it is important that organisations ensure their marketing activities are compliant with data protection legislation (the General Data Protection Regulation and Data Protection Act 2018) and, where necessary, the Privacy and Electronic Communications Regulations 2003 (PECR).

We have previously published detailed [direct marketing guidance](#). The new code will build on that guidance and address the aspects of the new legislation relevant to direct marketing such as transparency and lawful bases for processing, as well as covering the rules on electronic marketing (for example emails, text messages, phone calls) under PECR.

The European Union is in the process of replacing the current e-privacy law (and therefore PECR) with a new ePrivacy Regulation (ePR). However the new ePR is yet to be agreed and there is no certainty about what the final rules will be. Because of this we intend for the direct marketing code to only cover the current PECR rules until the ePR is agreed. Once the ePR is finalised and the UK position in relation to it is clear we will produce an updated version of the code which takes this into account as appropriate.

This call for views is the first stage of the consultation process. The Commissioner is seeking input from relevant stakeholders, including trade associations, data subjects and those representing the

interests of data subjects. We will use the responses we receive to inform our work in developing the code.

You can email your response to directmarketingcode@ico.org.uk

Or print and post to:

Direct Marketing Code Call for Views
Engagement Department
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

If you would like further information on the call for views, please email the [Direct Marketing Code team](#).

Please send us your views by **24 December 2018**.

Privacy statement

For this call for views we will publish responses received from organisations but will remove any personal data before publication. We will not publish responses from individuals. For more information about what we do with personal data please see our [privacy notice](#).

Questions

Q1 The code will address the changes in data protection legislation and the implications for direct marketing. What changes to the data protection legislation do you think we should focus on in the direct marketing code?

MRS welcomes the opportunity to respond to the Call for Views on the proposed Direct Marketing Code of Practice.

We have found the existing direct marketing guidance to be a useful reference tool. However in building on this we suggest that the new Direct Marketing Statutory Code focuses on:

- clarification of the interplay between a legal ground for processing personal data under the DPA 2018 and a legal basis for undertaking electronic direct marketing under PECR. There is significant confusion on the appropriate approach in this context and the standard of consent required.
- setting out the requirements for lawful profiling of individuals as part of the approach to direct marketing (clarifying that there are higher restrictions /prohibitions relating to actual decisions on individuals) and setting out level of documentation that marketers required to hold as a result.
- explaining the data protection implications of Brexit and the UK becoming a third country in the event of a no-deal withdrawal or at the end of the withdrawal transition period. It will be important to highlight the implications for the UK becoming a third country in relation to EU Member States. Steps that businesses based in UK will need to take in that respect e.g. GDPR compliance by appointment of representative in EU Member State if systematically targeting or monitoring data subjects in EU Member States should also be referenced.

Q2 Apart from the recent changes to data protection legislation are there other developments that are having an impact on your organisation's direct marketing practices that you think we should address in the code?

Yes

No

Q3 If yes please specify

Poor marketing practices that impact on market research such as sugging (selling under the guise of market research) should be addressed in the Code.

Sugging continues to be problematic for genuine market research. This practice occurs across all channels (telephone, email and postal). In addition to reiterating that this is prohibited it would also be useful if the explanation and examples are extended to demonstrate the applicability of legislation to practices in the charitable sector.

Example: A charity as part of a campaign sends out communications that includes a "survey" with questions that are likely to mislead data subjects into thinking that they are a genuine research exercise. Data collection exercises by charities such as these that use leading or biased questions that are intended to persuade the consumer to donate money rather than to gain insight on issues should be explicitly prohibited under the new statutory Code.

Additionally it would be useful if the Code highlights the impact of the DPA 2018 on postal marketing. Greater focus is often placed on electronic marketing but the postal channel is still important for marketing and guidance on the applicability of fundamental rules on transparency of processing and processing for the specified purposes would be helpful.

Q4 We are planning to produce the code before the draft ePrivacy Regulation (ePR) is agreed. We will then produce a revised code once the ePR becomes law. Do you agree with this approach?

Yes

No

Q5 If no please explain why you disagree

In light of the expected lengthy timeframe for agreement of the ePrivacy Regulation and the uncertainty on UK adoption of this, it would be preferable to produce the Code and update as necessary to reflect changes in domestic legislation.

Q6 Is the content of the ICO's existing direct marketing guidance relevant to the marketing that your organisation is involved in?

Yes

No

Q7 If no what additional areas would you like to see covered?

Use of branded promotional items as incentives in research projects could also be covered to reiterate that this is not research. This position is reflected in MRS Guidance in which we advise that the use of own brand incentives such as products, gift cards or discount voucher cannot be used as incentives in a research project. If these are used then the project must be characterised as a non-research project. Reiteration of this in the Code would help to underline the distinction between research and marketing activities.

Please see further MRS Guidance

Research and Non Research

<https://www.mrs.org.uk/pdf/MRS%20Regulations%20for%20Non%20Research%20Purposes.pdf>

Incentives in Market Research

<https://www.mrs.org.uk/pdf/Regulations%20for%20Incentives%20and%20Prize%20Draws%20July%202015.pdf>

Q8 Is it easy to find information in our existing direct marketing guidance?

Yes

No

Q9 If no, do you have any suggestions on how we should structure the direct marketing code?

Q10 Please provide details of any case studies or marketing scenarios that you would like to see included in the direct marketing code.

MRS has always highlighted the differences between direct marketing and research. In line with developing practices and to provide greater assistance to organisations undertaking this work, it would be useful to provide more direct guidance on some types of customer service research.

For example Net Promoter Score (NPS). This is a tool that is used to understand level of brand loyalty by customers. It is a simple tool that requires customers provide a score on a range of 1 to 10 (6 or below as detractors) (7-8 as passives) and 9 or 10 (as promoters). For example "In order to improve our service, we would like to know if you think we did a good job and how you are now feeling about XXXXXBrand. How likely are you to recommend XXXXXBrand to someone else?" These types of questions are not marketing and fall within research as they are not promotional of the brand, no targeting will be done as a result and aim is to improve insight. However if a the client also wishes to use this as basis to engage in additional contact with customers who rate their experience as excellent or quite satisfied by asking them to refer a friend to XXXXXBrand as they offer great service etc. then this would cross the line and not be categorised as a research project.

Q11 Do you have any other suggestions for the direct marketing code?

About you

Q12 Are you answering these questions as?

A public sector worker

A private sector worker

A third or voluntary sector worker

- A member of the public
- A representative of a trade association
- A data subject
- An ICO employee
- Other

If you answered 'other' please specify:



Q13 Please provide the name of the organisation that you are representing.

Market Research Society (MRS)

MRS is the world's largest research association. MRS represents both large businesses and SMEs and we have a range of research suppliers included in our membership. MRS supports best practice in the research industry by setting and enforcing industry standards. The MRS adopted its first self-regulatory Code in 1954 and the latest fully revised version of the MRS Code of Conduct came into effect on 1 September 2014.

The commitment to uphold the MRS Code of Conduct is supported by the MRS Codeline service and a range of specialist guidelines. ICO publications are also extensively used both within MRS and by our accredited members for guidance and information on data protection obligations.

Q14 We may want to contact you about some of the points you have raised. If you are happy for us to do this please provide your email address:

michelle.goddard@mrs.org.uk

Thank you for taking the time to share your views and experience.