DMA pushes back on ICO direct marketing guidance

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Journal of Direct, Data and Digital Marketing Practice (2014) **15**, 244–245.
doi:10.1057/dddmp.2013.73

Who: The DMA (UK) Ltd

Where: United Kingdom

When: November 2013

Law stated as at: September 2013

What happened

The DMA has written a letter to the UK ICO asking for clarification on certain parts of its Direct Marketing guidance published in September 2013.

Indirect/third-party consent

In the new guidance, the ICO has stated that, in its opinion, the general rule is that individuals cannot give consent via a third party to receive direct marketing via telephone, email and SMS. There are two exceptions to this general rule, ICO says:

- (1) where the third party is specifically named by the first party collecting the individual's details, or
- (2) where the third party falls into a sector, such as travel, which is specifically mentioned by the first party.

The ICO also has a new rule of thumb that the third party should use the contact information within 6 months of the date the first party collected the information. Organizations can use data more than 6 months after it was first collected, but they will have to justify to the ICO their reasons for doing so if the ICO follows up on a complaint.

Impact on list industry

This could have a large impact in the way the list industry collects consent for third-party marketing by email, SMS and telephone. The DMA is asking the ICO to clarify how this will work in practice and where the 6-month time limit came from.

Consent

The ICO quite rightly also believes that if a customer agrees to receive direct marketing, this will only last for a limited period. A significant change in circumstances could bring this agreement to an end. The DMA would like the ICO to clarify what it considers to be a significant change in circumstances. For example, a change of ownership of an organization may not always be a significant change in circumstances if the customer continues to receive marketing about the same products and services. The DMA would like to explore with the ICO how an agreement to receive direct marketing can be re-validated in the case of a change in circumstances.

Pre-ticked opt-in/opt-out boxes

The ICO makes reference to the use of pre-ticked opt-in/opt-out boxes in the Guidance. The DMA thinks that some practical examples of how they are used would help to clarify the Guidance.

Unsolicited/solicited marketing

The Guidance contains some very logical and legalistic statements as to what is solicited and unsolicited marketing. Again, this is an area where more examples would help to clarify the ICO's view. The DMA accepts that organizations need to have clear wording on their data collection statements, and therefore consumers know what they are signing up to.

Why this matters

So far, the ICO has responded positively to the DMA's comments. It is important that the Direct Marketing guidance is as clear as it can be so that organizations can understand the ICO's position.

James Milligan, legal and public affairs adviser, The Direct Marketing Association (UK)

Will cookie alternatives sidestep privacy laws?

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Journal of Direct, Data and Digital Marketing Practice (2014) **15**, 245–247.
doi:10.1057/dddmp.2013.74

Who: The UK's ICO

Where: London, UK

When: 6 November 2013

Law stated as at: December 2013

What happened

Over the past year, there has been increasing press and social media speculation that the 'tech giants' are developing technological alternatives to web browser cookies.

This is intended partly to improve user tracking across platforms — browser-based cookies do not help a marketer trying to follow behaviour across smart TV, games console, smartphone, app and tablet interactions where cookies are not king. However, equally, it is partly a direct consequence of the sometimes negative attention paid to cookie-based behavioural advertising and user-tracking techniques.

Privacy tools challenge profiling

Many in the technological and advertising industries understand that increased privacy education and awareness, together with more opt-out and privacy-monitoring tools, will increasingly interfere with the art of making behavioural inferences and building profiles based solely on the humble cookie. What is more, the future EU Data Protection Regulation looks likely to regulate the building of personal profiles potentially even if the data does not directly relate to an individual. Computer Weekly went as far as declaring cookie tracking an 'outdated approach' last month.

Why this matters

Of course, replacing the browser cookie with a proprietary tracking technology may also ring-fence advertising and behavioural tracking