Legal Paper

Direct marketing and children — How far can you go?

Received (in revised form): 27th September, 2004

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Abstract Too many companies steer clear of marketing to the under 18s because they are unsure of the extent to which they can do so, or even whether they can do so at all. There are so many codes and guidelines to take into account, yet no 'hard and fast' rules to follow. Avoiding this 'grey area' altogether to some may be the preferred option but it could mean losing out on a potentially lucrative market. This paper aims to consolidate various best practice guidelines, to clarify the current law on direct marketing and how it might be interpreted to apply to the under 18s and aims to give practical advice on the issues of which marketers should be aware and steps that can be taken to carry out effective yet responsible direct marketing of children.

CAN COMPANIES SEND DIRECT MARKETING TO CHILDREN?

There is no straight 'yes' or 'no' answer to this question. Unlike under US Federal law, which prohibits certain commercial websites from collecting, using or disclosing personal details of children under the age of 13 without parental consent, there is no UK legislation that has specific rules regarding direct marketing to children. Instead, there are a series of codes and guidelines aimed at developing a 'best practice' approach. Marketing to the under-18s, particularly by email or SMS text messaging, can be a lucrative business, so it is worth getting such strategies right. This paper explores the issues surrounding whether or not a child can give his/her informed consent to receive certain marketing materials and deals

with some of the additional considerations that apply when targeting children in marketing campaigns.

The 'Privacy Regulations'

It is pertinent to first consider the law on direct marketing to adults. The Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426) (the 'Privacy Regulations') state that individuals must have 'previously notified' the sender that they consent to receiving direct marketing via electronic communications. Electronic communication includes communication via e-mail, SMS text messaging, telephone calls (including automatic calling machines), fax and digital television. In other words, the Privacy

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Regulations provide that recipients of direct marketing via these means must actively indicate consent to receiving such material. This is a change from the 'opt-out' requirement that was acceptable before the Privacy Regulations came into force.

Can children 'opt-in' and if so, from what age?

The Privacy Regulations do not distinguish between an adult and a child, so provide no help in answering this question. Instead, the answer lies in whether or not a child can give its 'informed consent' to receive direct marketing. If he/she can, he/she can opt-in.

There are various different definitions of the age at which a young person ceases to be a 'child'. The Children and Young Persons Act defines a 'minor' as someone under 18, a 'child' as under 14 and a 'young person' as aged between 14 and 18. The Advertising Standards Association's (ASA) Code on Advertising Practice (the CAP Code) takes the view that a child is anyone under 16, whereas Ofcom regards a 'child' as being aged under 15 and a 'young person' as being between 16 and 17.¹ The Commission of the European Communities' draft Regulations concerning Sales Promotion in the Internal Market (2001/0227 [COD]) (the 'Draft EC Sales Promotion Regulations') define a child as being aged under 14 years.

The Information Commissioner (the Commissioner) (who is responsible for regulating data protection in the UK) has published some frequently asked questions (FAQs) in which he has considered whether or not children can give their consent to their personal details (such as name and address) being collected by companies.²

The Commissioner takes the view that

children over 12 years are capable of giving consent. This approach is based largely on the standards adopted by TrustUK, a non-profit making government-endorsed organisation committed to raising consumer confidence in buying online through the accreditation of online codes of practice. TrustUK states that its approved webtraders will never collect information from children under 12 'without the verifiable consent of a parent or guardian' nor will they market their products 'in any way that exploits children'. This is the approach the Commissioner adopts, as a general rule. The Commissioner 'does not consider it valid' to try to set a precise age from which a child can act in his/her own right. The Commissioner therefore doesn't rule out the possibility of a child aged under 12 giving his/her consent, provided that the child had sufficient understanding and capacity so to do. Likewise, another child aged 14 may have a low level of understanding for its age group and could lack sufficient understanding validly to give his/her informed consent. In practice, it is not possible to distinguish between the different levels of understanding of children in the same age group, so, when marketing strategies are being developed, best practice dictates that marketing to under-12-year-olds is a risky business and it may be preferable, therefore, to follow the Direct Marketing Association's (DMA's) approach.

What is considered best practice when marketing to children?

The 'best practice' model recommended in the DMA's Code of Practice distinguishes between children aged under 18 years and those who are aged under 14 years. Its view is that children over 14 can give their

informed consent, but that any child under this age should have its parent or guardian consent on its behalf. Although the DMA's Code of Practice only applies to members of the DMA, it offers a sensible and corporately responsible position that also recommends itself to non-members. The Draft EC Sales Promotion Regulations also support the view that children aged under 14 should not have their personal details collected without their parents' or guardians' consent. Some further considerations to be made when marketing to children are discussed in the penultimate section of this paper.

HOW CAN WE ENSURE A CHILD'S CONSENT IS 'INFORMED'?

Whether or not consent is 'informed' depends not only on the age of the child but also on:

- the information given to the child at the time its consent is requested; and
- the nature of the direct marketing that the child is to receive.

For example, if he/she is signing up to receive a bulletin then, when consent is requested, the child sees the form that the bulletin is to take and will know what to expect; the likelihood is that he/she is capable of giving his/her informed consent. Further, the data capture wording that requests consent should be in plain English and be easy to read and understand. The threshold of intelligibility for data capture wording aimed at children will be lower than that which applies to adults.

'Soft' opt-in

There are certain situations (laid out in Regulation 22 of the Privacy

Regulations), where an individual may not need to give active or explicit consent to receive direct marketing by electronic means. Broadly this is where:

- 1 the contact details of that person have been obtained through the sale or the negotiation for the sale of goods or services;
- 2 The direct marketing material relates to similar products and services to those previously provided; and
- 3 The individual has been given a simple means at the initial collection of data to 'opt-out' of receiving such material *and* each subsequent communication includes a further opportunity to 'opt-out' of receiving such communications.

The Commissioner believes that in order for an individual to enter into a 'negotiation for the sale' of goods or services (as above), the individual must have actively expressed an interest in purchasing a company's products and services.

At least two problems can be identified with this 'soft opt-in' approach. First, its use is limited because the details of a person who has opted in in this manner cannot be transferred from one company to another — not even to a company in the same group of companies as the transferor! Secondly, precautions should be taken when relying on the soft option applying to a child, because a child cannot legally enter into a contract (see also the Practical Difficulties section below) So, again, direct marketers should consider whether, when a child's personal details were obtained through a sale or a negotiation for the sale of goods or services, the child not only knew what they were purchasing but also knew that he/she could opt out of receiving information about similar goods or services.

What are 'similar products and services'?

The Commissioner's view is that a purposive approach should be taken when interpreting the meaning of this requirement. Therefore, before sending marketing material to a child (or an adult for that matter), the marketer should ask the question: 'Would the [child] reasonably expect to receive the promotional material we are about to send?' If the answer to this question is 'yes', it may be acceptable to send the material. If the answer is 'no', or is doubtful, then it is unlikely that such material would come within the 'soft opt-in' exception. Having said this, the Commissioner has indicated in his Guidance that, for the time being, attention will be focused particularly on failures to comply with opt-out requests and that he will 'monitor the extent to which marketers take the reasonable expectations of individual subscribers into consideration'. So, the primary focus for marketers is to ensure that requests not to receive marketing material are dealt with in an efficient and timely manner.

Data capture wording

Does the wording give you the permission you need? What details can you request? Can a 'tick box' be used? and other considerations ...

Marketers should ensure that the consent they obtain from a child covers the things they want to do. For example, if a marketer wishes to pass the child's personal details on to a third party for that third party to send marketing materials to the child, then state this. Unless a parent or guardian has consented and there is valid proof of this, however, marketers are advised not to pass on lists that are known to contain the details of children aged under 14

years. These issues are discussed further in the 'Practical Difficulties' section.

In order to comply with the Data Protection Act of 1998 (the 'DPA 1998'), when asking for permission to send information to an individual, direct marketers should request only the minimal amount of information required for the specific purpose. For example, a child's telephone number should not be requested unless a marketer intends to use SMS text messaging to market to that child and it has stated this and the child has given his/her informed consent to this being done, otherwise this could be seen as unfairly soliciting information. Further, questions about an individual's personal choices should be avoided. Don't ask a child to confirm his/her favourite hobby or interest unless this information is later anonymised or deleted and this is stated at the time the question is asked. This will limit the risk of holding information that may be classed as 'sensitive' personal data, which deserves more stringent protection under the DPA 1998 than non-sensitive personal data.

There is no specific requirement that an individual must actually tick a box in order for his/her explicit consent to be given, but some positive action must be taken. A complaint made against Carphone Warehouse to the ASA on the basis that a direct marketing text message was sent without an individual's consent was not upheld. In this case, text messages were sent to individuals who had given their mobile telephone numbers in a survey previously carried out by Carphone Warehouse. The survey had stated that its primary purpose was to collect respondents' opinions about the goods and services provided by Carphone Warehouse. The survey had also told respondents: 'Some reputable companies may prefer to communicate offers to your mobile phone'; next to this statement, respondents were asked for their mobile

phone numbers. The ASA held that those customers who had filled in their mobile number would be aware that in doing so they were likely to receive offers by text message and, therefore, their consent had effectively been given — despite the fact that no specific ‘opt-in’ box was included/ticked.

One should also consider the period of time during which consent might be deemed to be valid. The Commissioner has indicated that consent is likely to last either until the consent is specifically withdrawn or it is otherwise clear that the recipient no longer wishes to receive information.

At the time the individual gives his/her consent, marketers need to provide their identity and the purpose for which the personal details are required (for example, for the sending of marketing materials and whether or not details are being passed to group companies or other third parties for them to do the same). Direct marketers must also disclose the name and address to whom the individual should write if they wish communications to cease and a system should be put in place to comply with such requests. When marketing by SMS text messaging, the Commissioner has indicated that it may not be necessary for marketers to provide a full postal address for individuals to contact if they wish to cease receiving promotional material. Instead, the Commissioner has stated that a short code may be used as a valid address provided that the sender ensures that:

- 1 They *clearly* identify themselves in the message, eg ‘ABC3Ltd’;
- 2 The use of the shortcode does *not* incur a premium rate charge; and
- 3 The shortcode is valid.

The Commissioner suggests the format used when a shortcode is used as a valid address is

‘ABC3Ltd2STOPMSGSTXT’STOP’TO [marketer to add the 5 digit short code]’.

It should be noted that the ‘opt-in’ requirement only applies to direct marketing via electronic communication. For marketing by post, the ‘opt-out’ box still applies. To this end, consider using both ‘opt-in’ and ‘opt-out’ data capture wording, so as not to lose the opportunity to marketing to someone who fails to ‘opt-in’ by post.

Is it acceptable to send a text message or other communication to request consent?

Organisations often acquire databases without knowing whether or not the individuals on the list have consented to receive marketing materials. The marketer does not want to lose the ability to use the list, so acts in good faith and contacts the individuals to ask for their consent. Technically, this is unlikely to be acceptable because the sending of this message may be taken to be unapproved data processing in itself. Marketers may want to undertake a commercial risk/benefit assessment analysis if faced with a similar predicament, but one thing that is for certain is that where such a message is sent and the recipient does not respond, the recipient should not be contacted again, and, unless his/her details are required for another purpose, they should immediately be removed from the list.

PRACTICAL DIFFICULTIES:

Proof of child’s consent

How do you know the age of the child?

The most obvious thing to do (and perhaps the only way around this) is to ask the child to state his/her age on the consent form. If the child states on the

consent form that he/she is under 14, then the DMA's best practice code states that the consent should be discarded as invalid. It may be possible to write to the head of the household to request that the parent or guardian give their consent on the child's behalf, but in most commercial situations it will not be worth the time and the effort to do so, especially when the parent or guardian's consent may not be forthcoming.

How do you know whether the parent or guardian has agreed to the child to giving his/her consent?

The Commissioner has indicated that it will not be sufficient for children to confirm that their parents have agreed to them consenting by means of a mouse click or sending a short e-mail. His view is that parental consent ought to be posted in writing and checked on receipt. This could be a time-consuming process, however, and may not be worthwhile. The giving of consent via use of electronic signatures and/or pin or password protected e-mails is a much speedier method of getting the consent across. Such technology is not widely available amongst consumers at the moment, but will no doubt become more prevalent in the future.

Some organisations e-mail the parent or guardian to confirm their consent; however, in the UK this practice is not advised. An e-mail address such as joey.fairwhether@netco.com could be personally identifiable information under the DPA 1998 and, as such, obtaining such details from a third party without that person's consent could be unlawful under the DPA 1998. Therefore, care should be taken not to ask children for details about their parents, or guardians, (or any other third party for that matter) without that third party's consent.

How can companies enforce a contract against a child under the age of 18? What if children lie about their age?

UK law states that a contract cannot be enforced against a child under the age of 18 years. A supplier could, therefore, quite possibly find itself in the position where a child under the age of 18 pays monies to receive goods, takes the goods and then demands a refund (or refuses to pay for goods already received, as the case may be). The child could get away with this because there is no contract to enforce against the child. If the parent or guardian consented, it may be possible to take recourse against that parent or guardian but otherwise, there is nothing that can be done. Therefore, best practice dictates that any contract for the sale of goods/services would be targeted only to over-18s. Where payment is taken directly from the recipients' mobile phone bill, marketers are less likely to lose out from non-payment by under-18s.

Where an individual aged under 18 has lied about his/her age and breached a purported contract there is still not a lot that can be done. It is not possible to sue the individual for lying and companies would have little success in proving that a parent or guardian was responsible for the individual's actions. Again, the advice would be that, if in any doubt, seek parental consent and in doing so, follow the guidelines set out here.

WHAT ARE THE SPECIAL RULES GOVERNING MARKETING TO CHILDREN AGED UNDER 16 AS LAID OUT IN THE ASA'S CAP CODE?

Any non-broadcast direct marketing, sales promotion or advertising material must comply with the ASA's CAP Code.³ The

compulsory code of practice includes certain generalised principles such as the requirement that all material should be legal, decent, honest and truthful. There are also certain special rules, some of which apply for marketing addressed to, targeting and/or featuring children (ie those aged under 16). The specific rules that apply to children are contained in paragraphs 47.1 to 47.5 of the CAP Code. Two important rules that can be extracted from this section are that marketing communications addressed to, targeting or featuring children *should not*: (i) contain anything 'which is likely to result in their physical, mental or moral harm'; or (ii) 'exploit their credulity, loyalty, vulnerability or lack of experience'. Paragraph 47 of the CAP Code should be read in order to understand the types of marketing that may or may not be acceptable for children.

One of the specific rules states that adult permission should be obtained before a child is committed to purchasing 'complex and costly products'. Therefore, (provided that the child has consented to receiving direct marketing by electronic communication), it would be more acceptable for a child over 14 to be sent an SMS text asking him/her to buy a product worth £3 than a product worth £25, for example. Further, the section goes on to state that marketing to children should not make a direct appeal to purchase unless the product is one that would be likely to interest children and that they could reasonably afford.

In addition to the specific rules of the CAP Code, the general principles in the CAP Code also apply to marketing to children. One such rule states that marketers should be responsible towards consumers (including children). This is a very broad obligation — so when deciding what may be marketed to

children, a common-sense approach should be adopted.

The DMA's Code of Practice also provides some guidelines as to the additional considerations that need to be borne in mind when marketing to children.

When sales promotions are being run, care should be taken that the mechanism of such a promotion does not constitute an illegal lottery and/or an unlawful competition. Although the CAP Code gives guidance on competitions, sales promotions and prize draws, specific advice should be sought as to the legality of any sales promotions.

Additional considerations will apply when the Draft EC Sales Promotion Regulations are passed by the European Commission and are adopted into UK law. Watch this space!

HOW DO COMPANIES LEGALLY PROTECT THEMSELVES AND THE CHILD AUDIENCE THEY WISH TO TARGET?

Companies and marketers should be responsible when advertising to children. They should take particular care to comply with requests to remove persons from a mailing list, as this is one of the areas on which the Commissioner focuses. Care should be taken to market suitable material to children and to have particular data capture wording and privacy policies that are suited to the particular age group being addressed.

When buying databases, direct marketers should not always assume that individuals have consented to receiving direct marketing, because this is not always the case. For example, a complaint against The Training Guild, for sending an e-mail about training seminars, was upheld by the ASA on the ground, that The Training Guild had not obtained the consent of the targeted

individuals. The ASA acknowledged that The Training Guild had bought the e-mail addresses in good faith, believing that the people had opted to receive information. Nevertheless, the ASA considered that it was the advertiser/marketer's responsibility to ensure that the recipients on the list had given their explicit consent to receive such e-mails. In order to avoid the risk of complaints, direct marketers are advised to include in all contracts with sellers of databases a warranty that the purchaser may directly market to the persons listed on the database and that the persons listed have given their appropriate consent to do so in accordance with all applicable rules and regulations.

This is a topical area of law which is constantly changing. It is closely linked with the requirements of the DPA 1998 and similar legislation. It may, therefore, be worth having a dedicated person who is responsible for a comprehensive data protection strategy and for keeping up-to-date with advances in data protection law and guidance issued by the Commissioner.

CONCLUSION

So what conclusions can we draw from this analysis? There is no set legislation which deals specifically with marketing to children. Instead, we must interpret the law that applies to adults and follow best practice guidelines. When targeting under 18-year-olds, marketers must take into account additional considerations, such as the age group of the child being marketed to and the nature of the product or service in question. These considerations are additional to those needed to comply with the DPA 1998, the Privacy Regulations and other national and European Legislation on areas such as privacy, data protection,

e-commerce and sales promotions.

The wording of the marketing material and the data capture wording must be suitable, given the child's capacity and understanding. While the test to apply as to whether or not a child is able to give its informed consent to receiving marketing material is 'whether or not the particular child being marketed has the understanding to know the type of marketing it is going to receive', the application of such test is, in practice, of limited application.

It is generally accepted that children over 14 have the requisite understanding to be marketed to. The marketing to children between 12 and 14 years is not out of the question, but there are probably only occasional circumstances in which this would be acceptable and obtaining parental consent may not always be a practical solution. As such, marketers are wise to apply the principle that the younger the child, the more care should be taken with the marketing.

Even where marketers follow guidelines to the letter, there's still a risk that a child may lie about their age and, as a contract cannot be enforced against a child, there may be no recourse for a marketer where the child defaults on the terms of sale. That said, there are (under the CAP Code, the DMA Code and other similar guidelines) restrictions on the types of products and services that may be marketed to children, in any event. This limits the value of products and services that a child could default on. Further, for every child that does not pay for or fails to return its product, there are scores who won't breach the terms of sale and with the growing importance of the 'teen culture', a lot of money could be made from effective marketing to the under 18s. Marketers are required to make a commercial/risk benefit assessment and to this end, it may be worth ensuring someone is

up-to-speed on the area of compliance. Who knows — if the ‘teen culture’ continues to increase and the marketing to children becomes more common place — it may become recognised that a dedicated legislation dealing with marketing to children, like in the USA, is beneficial. In the meantime, it’s worth keeping an eye on any updates from the Commissioner, the DMA, CAP

adjudications⁴ and any relevant articles on the topic to see just how far you can go.

References

- 1 The ITC/Ofcom Programme Code, paragraph 1.2. Note that the code is currently under Ofcom consultation.
- 2 See the Information Commissioner’s website at www.informationcommissioner.gov.uk.
- 3 The Code can be found at www.cap.org.uk.
- 4 Published on their website www.asa.org.uk.