

## **The Information Commissioner's response to Ofcom's consultation on end-of-contract and out-of-contract notifications**

### **About the ICO**

The Information Commissioner has responsibility for promoting and enforcing the EU General Data Protection Regulation ('GDPR'), the Data Protection Act 2018 ('DPA'), the Freedom of Information Act 2000 ('FOIA'), the Environmental Information Regulations 2004 ('EIR') and the Privacy and Electronic Communications Regulations 2003 ('PECR'). She is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where she can, and taking appropriate action where the law is broken.

The Commissioner welcomes the opportunity to respond to Ofcom's consultation on end-of-contract and out-of-contract notifications. The Commissioner's response to this consultation relates only to those questions that significantly interact with information rights issues.

### **Consultation Response**

#### **Question 2: Do you agree that providers should send both end-of-contract and out-of-contract notifications?**

The consultation identifies that, as a result of finding themselves out-of-contract, consumers may face automatic price increases, penalties or elements of their original deal becoming subject to change. The consultation document suggests that this, combined with a lack of notification from service providers, means consumers are likely to be unaware of the issue and the potential to access a better service package.

The proposal to send end-of-contract and out-of-contract notifications to customers and small businesses is highly likely to involve processing of personal data and data protection law will therefore be engaged. Article 5(1)(b) of the GDPR explains that personal data must be collected for specified, explicit and legitimate purposes.

Additionally, this principle states that further processing of personal data must not be incompatible with the initial purposes (also known as 'purpose limitation'). This means that, before the processing can occur (in this context, contacting the residential customer or small business), Ofcom and the service provider should be clear as to:

- what the identified and stated purposes for processing customers' personal data were from the initial point of collection;
- the need for these purposes to be recorded as part of the accountability obligations under the GDPR and for this information to be specified in privacy information provided to customers; and
- whether personal data is to be used for a new purpose (i.e. sending end-of-contract and out-of-contract notifications) and, if so, whether that purpose is compatible with the original purposes for processing.

Therefore, it is for Ofcom and the service providers to determine if both end-of-contract and out-of-contract customers require notification of new processing purposes. Having made this determination, subsequent processing of personal data for the purpose of sending end-of-contract and out-of-contract notifications should be undertaken in accordance with the broader requirements of the GDPR and PECR (considered in more detail below).

#### **Question 4: Do you agree with our proposals on the content of the end-of-contract notification?**

Part 4 of the consultation describes the approach to remedy design and the proposed content of both the end-of-contract and out-of-contract notifications.

The Commissioner's understanding of the proposals for end-of-contract notification is that the notification will include:

- the date on which the minimum contract period ends, including details of applicable notice periods;
- the services that the provider currently provides to the customer under the contract, including additional benefits that accompany the contract (e.g. free subscriptions to other services);
- the monthly subscription price paid currently and upon the minimum contract period ending; and
- the options available to the customer after the minimum contract period has ended, including a message that the customer may be able to make savings by exploring other options.

It is also noted that, at 4.40, the consultation explains that Ofcom does not "propose to prohibit providers from including offers in the end-of-contract notification".

At 4.47, in relation to proposals for the structure of the notification, the consultation explains that the end date of the minimum contract period and any resulting price change should appear “upfront” in the communication. The reasoning behind this is so the notification is not mistaken for “general marketing information”.

The Commissioner wishes to stress that, regardless of where the marketing material sits within the notification, the inclusion of an offer is likely to result in the communication falling within the definition of direct marketing. The DPA defines direct marketing as “the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals”. If a service provider incorporates offers into their end-of or out-of-contract material at any point, they will need to adhere to the specific requirements of the GDPR, DPA and PECR relating to this activity.

The ICO’s [direct marketing guidance](#) provides further clarification, explaining that direct marketing can also consist of the promotion of aims and ideals as well as the sale of products and services. In addition to considering the requirements of the GDPR, the requirements of PECR must also be met where direct marketing is to be sent by electronic means.

PECR explains that direct marketing material can only be sent by electronic mail if the consent of the recipient has been obtained, or via the ‘soft opt-in’ route (Regulations 22(3)(a) and (b) of PECR respectively). Where consent is relied upon, it must meet the standard established under GDPR Article 7.

The term ‘soft opt-in’ is used when describing marketing correspondence sent to existing customers without specific consent being obtained. Where contact details have been obtained during the course of a sale (or negotiations for a sale) of a product/service and the individual has not taken steps to opt out of marketing messages, the ‘soft opt-in’ approach to sending marketing materials is permissible.

The contact details must be obtained directly from the individual by the organisation who wishes to send the marketing and the marketing must be in relation to that organisation’s similar products and services.

Regulation 22(3)(c) of PECR explains that the recipients must also be given a means of refusing the use of their contact details for direct marketing, echoing the requirements of Article 21(2) of the GDPR. The right to object to the processing of personal data for direct marketing purposes set out under Article 21(2) is unqualified and applies to direct marketing sent by both electronic and physical means, including by post.

This right must be respected and direct marketing material should not be sent to any individual who has previously objected to the service provider sending them such material. The proposals set out in the consultation document should also build in the ability for individuals, upon receipt of communications falling within the definition of direct marketing, to exercise their right to object to any further processing for direct marketing purposes.

**Question 5: Do you agree with our proposals on the structure, method, timing and frequency of the end-of-contract notification?**

Please see response to Question 4.

**Question 6: Do you agree with our proposals on the content of the out-of-contract notification?**

Please see response to Question 4.

**Question 9: Do you agree with the impacts we identify, and the approach we take to quantify these impacts, in our assessment in Annex 6?**

Annex 8 of the consultation identifies the process to generate end-of-contract notifications. The consultation appears to identify the requirements of the GDPR and PECR, as outlined above, in acknowledging a customer's contact preferences.

The consultation acknowledges that, when considering a customer's preferred method of contact and determining whether the end-of-contract notification will be sent as a letter, SMS or email, the process will also need to identify whether a customer has opted into marketing. The consultation also appears to identify that that the provider will have to consider the lawfulness of including a marketing offer at the end of the contract notification.

In addition to the considerations outlined above, it is also important to recognise that, as part of the consultation process, it may be identified that that the level of processing of personal data to be undertaken is likely to result in a high risk to individuals. For example, the profiling of individuals on a large scale.

The Commissioner advises that undertaking a Data Protection Impact Assessment ('DPIA') can help identify and minimise the data protection risks of such a project. It is also seen as good practice to undertake a DPIA for any other major project which requires the processing of personal data.

If, during the DPIA process, the level of risk is identified as high and cannot be mitigated, the ICO must be consulted and the processing cannot begin until this has happened.

Finally, the Commissioner would welcome further consultation with Ofcom regarding the proposals put forward in this consultation. She is supportive of initiatives that allow personal data to be utilised in beneficial ways for individuals and has set out her commitment to increasing consumer trust in the processing of personal data.