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“I’m fully expecting someone to call me up and start shouting when they read this article”

Olivia clears up the confusion around direct marketing, including what is and isn’t possible when it comes to keeping in contact with customers

There are those in the marketing world who seem quite irritated at the need to seek someone’s consent before bombarding them with unwanted emails. Or, rather, the need to check that the emails are not actually unwanted. On the other hand, there are those who have fully bought in to consent-seeking, and remain unconvinced when I suggest that, in a lot of cases, there are alternatives to consent for sending marketing communications.

Before the GDPR came into effect in May 2018, there was widespread panic about new requirements to get consent for marketing activities. This was confusing for someone like me who had actually read the GDPR, and was also familiar with marketing rules under PECR (Privacy and Electronic Communications (EC Directive) Regulations 2003), which remained largely unchanged. New rules on the ways in which consent (where needed) could be obtained were being warped into a blanket consent obligation.

I recall one heated discussion with someone who had read an article online – from what he considered a highly credible source – saying that consent was now always required before any sort of communication. He didn’t like me disagreeing with him.

So I’m fully expecting someone to call me up and start shouting when they read this article, as it’s on the contentious topic of direct marketing.

What is direct marketing?

In the legal world, direct marketing means communicating advertising or marketing materials to particular individuals. The Data Protection and Digital Information (No. 2) Bill (DPDI 2), currently going through Parliament, inserts such a definition into data protection law.



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“Not all marketing activities are necessarily harmful”

BELOW Direct marketing even by fax machine is covered by data protection laws

Direct marketing often involves the use of personal data, so is subject to UK GDPR rules. As well as use of contact details (such as email addresses), substantial personal details are often analysed to decide what particular marketing materials to send. There are also specific rules about unsolicited direct marketing communications under PECR. These cover marketing by email, SMS, social media, telephone and – everyone’s favourite medium – fax.

Direct marketing rules also capture behavioural advertising, as adverts are directed at particular individuals based on their behaviour. This may involve the use of cookies, on which PECR also has rules.

Lawful basis and consent

Organisations must identify a lawful basis to use any personal data for direct marketing purposes (as well as for any other purpose). One option is obtaining the freely given consent of the recipient. To rely on this, the recipient must have a genuine choice, and must give a clear affirmative action to indicate consent.

Various tactics used to nudge people towards consenting fall short of meeting these requirements. A recent publication of the Information Commissioner’s Office (ICO) and the Competition and Markets Authority

(“Harmful design in digital markets”) discusses these, including “confirmshaming”, where the wording of a request is designed to make people feel guilty or embarrassed if they don’t consent.

These practices are often driven by a fear that if receiving marketing communications were truly an option, or if the option were presented in a clearer way, people wouldn’t want to consent. As well as not being a valid consent, this also suggests that the company may be doing something adverse to the interests and expectations of recipients. It may therefore fail to meet other rules for fair and transparent processing, too.

But not all marketing activities are necessarily harmful. Over the summer I was speaking with a client who, every few months, sends its existing customers an email about improvements to its services and special offers. It wanted to obtain consent for this, but was concerned that customers are in too much of a hurry to respond to a specific request. So it had the idea to put a consent within its standard terms of service, which everyone signs up to anyway. Deep within these terms was a clause which outlined the emails it may send, and said: “By agreeing to these terms, you are consenting to contact by us.”

Unfortunately, if consent is bundled in with other terms of service, it is unlikely to be “freely given” (and therefore likely to be invalid), as sending marketing emails is usually not necessary as part of a service.

Legitimate interests

I discussed with my client an alternative lawful basis to consent, which is known as “legitimate interests”. This is often a good basis for essential business use of personal data, such as keeping accounts and records. But this basis can be stretched

to other useful but potentially non-essential uses, including direct marketing. Indeed, DPDI 2 provides specific examples of activities that may be necessary for a legitimate interest, including “processing that is necessary for the purposes of direct marketing”. This embeds into the body of the UK GDPR what is already within Recital 47.

Contrary to some opinions I have seen, I don’t think this suddenly makes it lawful to carry out unfettered direct marketing without ever needing consent. Direct



marketing may be a legitimate interest (as it always could be), but you still need to look at other requirements of this lawful basis (as also highlighted in the Explanatory Notes to DPDI 2): the processing must be necessary for the legitimate interests, and the basis won't apply where such interests are overridden by the interests or rights of the individual. This requires a balancing test. If you send a one-off marketing email on topics linked to a recipient's interests, maybe you'll pass the test. But if you want to flood someone's inbox with emails about wildly left field or overly sensitive topics, then you'll probably fail.

My client intended only to send infrequent emails to existing customers about its own services, and using legitimate interests was a realistic option. This then solved the problem of needing to request consent.

It's worth adding that, whether or not consent is sought, individuals have a right to object to use of their data for direct marketing purposes. They may also withdraw consent and object to processing that relies on legitimate interests. So there are a lot of reasons (before we even get to PECR, discussed below) that you need to give people a clear way to stop you using their data for marketing activities.

Behavioural advertising

I was speaking with another company who wanted to analyse the personal details of their customers, including demographics and behaviours, and use the results to send targeted advertisements over social media.

It was reluctant to seek consent of its customers. It needed a sufficiently broad set of confirmations to conduct good analysis, and considered it likely that lots of customers would either say "no" or wouldn't respond to a request.

So we moved on to considering legitimate interests. From our early discussion there were already some red flags, tipping the balance away from using this basis. Key concerns were the potential impact on privacy, and the potential inconsistency with customer expectations. So we considered how the proposed plan could be adapted. One idea was to analyse anonymous data (rather than personal data), which I'll come back to later in this article.

PECR

PECR adds a layer of rules for marketing communications and behavioural advertising. If you've just done your legitimate interests balancing test and have gleefully

started to remove consent requests from your new customer forms, I apologise. Consent may yet be needed!

If you want to send unsolicited marketing emails or texts to consumers (and some small businesses), you need to obtain consent. But don't rip up your new forms yet. There is an exception for marketing your own goods and services to existing customers (as my first client was doing). These customers must be given a way to refuse marketing when their contact details are collected and each time such a marketing email is sent. DPDI 2 expands this exception to enable use by charities and political parties as well as commercial organisations.

For my second client, as well as considering its use of personal data, it needed to assess its use of cookies to facilitate the behavioural advertising. Consent of the user is currently needed in relation to most cookies. That's why we have those awful pop-ups every time we visit a new website that block our entire view of what we actually want to see. I loudly shout "Go away!" while wildly clicking on any button I can to get them to do just that. Often this button is the "Accept cookies" option, as the ability to reject cookies is hidden at the other end of an "Other settings" link. This is known as a "nudge and sludge" technique; making it easy for me to consent, and difficult to decline. The website may not therefore have achieved a valid consent.

DPDI 2 may provide some relief, as it seeks to relax rules on when consent is needed for cookies. Though these are intended for where there is a low risk to users' privacy. It's therefore likely that consent will still be needed to



ABOVE Consent of the user is currently needed in relation to most cookies

"DPDI 2 seeks to relax rules on when consent is needed for cookies"

BELOW The ICO has taken action against lots of organisations for direct marketing breaches

use cookies in the context of many behavioural advertising activities.

Purpose limitation

Another key requirement is that personal data not be used in a way that is incompatible with (specified and legitimate) purposes for which it was collected. This was another concern for my second client, as the customer data was originally collected for providing a service, and arguably the proposed data analysis was incompatible with this.

The use of data for statistical purposes, however, can be considered compatible. This needs to be aggregated non-personal data that is not used in support of measures or decisions regarding individuals. An interesting tweak in DPDI 2 clarifies that the data shouldn't be used to support measures or decisions with respect to individuals "to whom the personal data relates". On the face of it, this doesn't appear to rule out use of anonymised statistical data for activities affecting other individuals (such as behavioural advertising to others).

To consent or not to consent?

You don't always need consent to carry out direct marketing activities. But you do need to review what you're doing in consideration of the intended recipients' interests and expectations. In some cases, this may lead to consent being needed, or being preferable to maintain a good customer relationship. Unfairly trying to get round or force a consent may fall foul of a variety of data protection and privacy rules. And the ICO's enforcement page of its website is packed full of actions it has taken against organisations for direct marketing breaches.

Now, I'm going to take the phone off the hook for a few days to let things settle down. Then we can debate.

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